INSTITUT ZA UPOREDNO PRAVO

INSTITUTE OF COMPARATIVE LAW

STRANI PRAVNI ŽIVOT

FOREIGN LEGAL LIFE

ISSN 0039 2138
UDK 34
Beograd, 2022/ Broj 4/ Godina LXVI

INSTITUT ZA UPOREDNO PRAVO

UDK 34

ISSN 0039 2138

ISSN (online) 2620 1127

STRANI PRAVNI ŽIVOT

Beograd, 2022/ Broj 4/ Godina LXVI

Izdavač/ Publisher
INSTITUT ZA UPOREDNO PRAVO/ INSTITUTE OF COMPARATIVE LAW
Terazije 41, 11000 Beograd, Srbija, tel. + 381 11 32 33 213

Za izdavača/ For the Publisher
Prof. dr VLADIMIR ČOLOVIĆ

Štampa/ Print
Tri O doo, Aranđelovac

Tiraž/ Circulation
100 primeraka/ 100 copies

Prilozi objavljeni u časopisu referisani su u bazama/ Abstracted and indexed in
Directory of Open Access Journals (DOAJ), Central and Eastern European Online Library (CEEOL), European Reference Index for Humanities and Social Sciences (ERIHplus), HeinOnline Law Journal Library, Srpski citatni indeks (SCIndeks), Kooperativni online bibliografski sistem i servisi (COBISS).

Adresa uredništva/ Address of the Editorial Board
Terazije 41, 11000 Beograd, Srbija; tel. + 381 11 32 33 213; e-mail: redakcijaspz@gmail.com
Časopis se objavljuje tromesečno uz podršku Ministarstva prosvete, nauke i tehnološkog razvoja Republike Srbije.

UDK 34 ISSN 0039 2138
ISSN (online) 2620 1127

INSTITUT ZA UPOREDNO PRAVO
STRANI PRAVNI ŽIVOT

Broj 4 *Godina LXVI* *oktobar-decembar 2022.*

SADRŽAJ/TABLE OF CONTENTS

ČLANCI/ARTICLES

Boris Đ. Krivokapić*
Jugoslav Lj. Vukadinović**

Original scientific paper
UDK: 323(729.1)"1961/1962":323 (477)"2022"
doi: https://doi.org/10.56461/SPZ_22401KJ

CUBAN (1962) AND UKRAINIAN CRISIS (2022) – THE WORLD ON THE VERGE OF NUCLEAR WAR, 60 YEARS LATER

Abstract

The paper deals with the comparison of two cases when humanity was closest to the outbreak of a world nuclear war - the Cuban missile crisis (1962) and the Ukrainian crisis (2022). First, the basic elements of the term "international crisis" were given, and then, based on selected criteria, the Cuban crisis and the reality that arose from the invasion of the Russian armed forces into Ukraine were analyzed. The international legal aspects of these problems were specially addressed, with the fact that it was pointed out that, unlike the American naval blockade of Cuba, there was nothing illegal in the deployment of Soviet missiles on that island, yet the USA was still ready for war just to remove the threat. In the case of the Ukrainian crisis (2022), everything is much more complicated. Although at first glance, this is a classic case of aggression, Russia invoked the favorite arguments and concepts of the USA, such as humanitarian intervention and preventive self-defense. In the concluding remarks, the authors point out that, according to current international law, all international disputes and crises must be resolved exclusively by peaceful means, that the Ukrainian crisis should not be an exception in this respect, and that, after all, a good example is the Cuban Missile Crisis, which ended with a kind of agreement.

Keywords: *Cuban Missile Crisis, International Crisis, International Law, International Relations, Ukrainian Crisis.*

* PhD, Full Professor, Faculty of Business and Law, "MB" University, Belgrade, Serbia.
E-mail: *krivokapicboris@yahoo.com*
ORCID: *https://orcid.org/0000-0001-6534-9965*

** M. Sc., Faculty of Business and Law, "MB" University, Belgrade, Serbia.
E-mail: *jugoslav.vukadinovic@outlook.com*

We are living in the time of one of the biggest world crises in history. Never before have such powerful forces opposed each other, with the real chance that if the resulting contradictions are not resolved peacefully, they will destroy the entire planet. Many agree, with reason, that this is the biggest crisis since the Cuban Missile Crisis of 1962 (Ignatius, 2022; Ralston, 2022; Morrison, 2022).

It is interesting that it broke out exactly 60 years later (2022), but that it also brought the world to the brink of nuclear war. In this regard, after a brief overview of what an international crisis is, we will point out the similarities and differences between the Cuban and Ukrainian crises, emphasize some problems from the point of view of international law, and draw the most important conclusions based on all of this.

1. International Crisis

In a broader sense, an international crisis refers to any serious problem that affects the entire world, a large part of the world, a certain region, or even affects the interests and relations of two or more countries. Examples are the economic crisis, environmental crisis, etc., in which cases there is no aggravation of relations and no disputes between states. On the contrary, states often cooperate closely to overcome the crisis. As a recent example, we could mention the crisis caused by the Covid-19 pandemic, which has been going on since November 17, 2019.

In the narrower meaning, which we will use in this paper, an international crisis is the name for a serious dispute, tightening of relations, and confrontation between two or more states in connection with a specific political, military, economic, religious, ideological or similar problem. Many such crises were resolved by peaceful means, but there are also a large number of those that were followed by armed conflicts. The most striking example is the Sarajevo crisis (1914), which arose after the assassination in Sarajevo of the Austro-Hungarian heir to the throne and was the first step towards the outbreak of World War I.

A crisis usually has its own background, which is reflected in the fact that there is a disputed situation, and then one or both parties lead to a worsening of the circumstances with their actions and thus create tension in mutual relations. In this sense, many crises could be described as disputes that got out of control. And yet, a crisis can occur without any dispute, at the initiative of only one actor, and in some cases, even spontaneously.

If it does arise, it is necessary to resolve an international crisis without delay and not to allow its development in the sense of essence (prevent it developing into an open conflict), as well as in scope (preventing the expansion of the circle of countries affected by it). According to present international law, international crises and disputes can only be resolved by peaceful means.

Here we are particularly interested in the Ukrainian crisis (2022) and its comparison with the famous Cuban Missile Crisis (1962), which broke out exactly 60 years earlier.

Although we will explain it in another place, here we have to immediately note that when we talk about the Ukrainian crisis, we mean that crisis in a narrower sense, i.e., the harshest and most dangerous part of it, which began with Russia's invasion of Ukraine on February 24, 2022.

2. A Comparison of the Cuban and Ukrainian crises

Between what happened with missiles in Cuba in 1962, and what is happening in Ukraine in 2022, there are a number of similarities and differences. They can be considered with regard to various criteria, such as the background of the crisis, the main actors in the crisis, its duration, its nature, etc.

2.1. The Background of the Crisis

The common thing between the Cuban (1962) and Ukrainian (2022) crises is that they both had their own background. They did not appear suddenly, as something that could not be expected.

The Cuban missile crisis, which is also known by other names (for the Russians it is the Caribbean, and for the Cubans it is the October Crisis), began when the Soviet Union installed medium-range ballistic missiles armed with thermonuclear warheads in Cuba.[1] This was in response to the deployment of American medium-range nuclear missiles *PGM-19 Jupiter* near Apulia in southern Italy and near Izmir in Turkey, along the southern flank of the USSR, which, due to their relative proximity, could hit Moscow and other large Soviet cities. Although relatively short-lived, the crisis was remembered as the period of the Cold War when humanity came closest to a new world war (Chayes, 1974; Kahan & Long, 1972, pp. 564-590; White, 1996; Allison & Zelikow, 1999; Sherwin, 2012; Scott & Hughes, 2015). Even though it can be said that it was one event that was a consequence of another, it was actually the culmination of tension that had been growing for a number of years, since the very beginning of the Cold War, which

[1] The Soviets secretly delivered a total of 42 missiles to Cuba, of which they deployed at 6 locations R12 "Dvina" missiles with a blast yield of 2.4 megatons and a range of 2,080 km, and at 3 locations R-14 "Chusovaya" missiles with a blast yield of 2.3 megatons and a range of 4,500 km.

practically means since 1947, when the USA adopted the so-called Truman Doctrine, proclaiming that in the fight against the communist danger they would provide military and financial aid to all, even geographically distant countries.

The international crisis that broke out with the invasion of the armed forces of Russia into Ukraine on February 24, 2022, also has its own background. In fact, it is only the most difficult and intense part of the Ukrainian crisis in a broader sense, which started much earlier. Namely, the term "Ukrainian crisis" has been used for years as a name for the political and armed conflicts on the soil of Ukraine that began on February 7, 2014, with the unconstitutional overthrow of President Viktor Yanukovych, the formation of a new pro-Western parliamentary majority, the removal of all high state officials, etc. This led to a sharp division within society and, what is particularly interesting here, the prohibition of the Russian language and violence against the Russian population.[2] Contrary to the West, which called the coup d'état in Kiev the Ukrainian Revolution and marked it as a democratic change, Moscow claimed that the US was behind everything, with the aim of taking control of Ukraine and bringing NATO forces to the very border with Russia. As a consequence of the mentioned events, on April 7, 2014, a civil war broke out in the southeast of the country, with the covert participation of foreign powers - Russia in favor of the rebellious pro-Russian population and the USA and its allies on the side of the new government in Kiev. Estimates vary, but it is generally believed that in those 8 years (February 7, 2014 - February 24, 2022), about 14,500 people lost their lives. About 3,500 civilians and 5,800 soldiers died on the Donbas side (the common name for the rebel regions of Lugansk and Donetsk), and about 4,700 soldiers died on the side of the government in Kiev. To this should be added about 15,000 wounded among the civilians and soldiers of Donbas and about 13,000 wounded Ukrainian soldiers.

According to what has been stated, both events had their roots in deep contradictions that accumulated over a number of years - in the case of the Cuban Missile Crisis, practically since the end of the Second World War, and in the case of the Ukrainian Crisis, at least since the collapse of the USSR in 1991, and especially since the coup in 2014.

[2] Part of the Ukrainian crisis in a broader sense (2014-2022) was the Crimean crisis, which broke out in February 2014, with mass protests by the Russian population of Crimea, after which the local parliament passed a declaration on the separation of Crimea from Ukraine, and a referendum was held, in which 96, 77% of voters voted for the annexation of Crimea to Russia. On that basis, on March 18, 2014, the highest representatives of Russia and Crimea signed an agreement on the admission of the Republic of Crimea to the Russian Federation.

2.2. The Duration of the Crisis

Understood in the narrowest sense, the Cuban Missile Crisis lasted only 13 days - from October 16, when US President John F. Kennedy and his closest associates studied the situation and possible options, to October 28, 1962, when Soviet leader Nikita S. Khrushchev accepted Kennedy's proposal and declared that the USSR would withdraw its missiles from Cuba.[3]

The crisis ended peacefully, with a kind of compromise. As both sides realized that things had gone too far, an agreement was reached based on an exchange of messages between Kennedy and Khrushchev. Kennedy offered to resolve the situation by the Soviets withdrawing missiles from Cuba and the Americans ending the military naval blockade of Cuba and pledging not to attack the island. Khrushchev replied that he accepted the proposal but that he understood it as American consent to the withdrawal of disputed missiles from Turkey. And indeed, soon these solutions were consistently implemented.[4]

The Ukrainian crisis, understood in a narrower sense as an armed conflict that began with the Russian invasion on February 24, 2022, has been going on for more than 7 months as we write this, and still it is not yet clear when and how it will end. Both sides declared that nothing but their victory was out of the question. However, we should expect that at some point, an agreement will be reached, which will most likely be some kind of compromise. The other options are either a complete victory for Russia, with the most likely erasure of Ukraine from the world map (its division between neighboring countries) or a new world war.

2.3. The Main Actors

The Cuban crisis, of course, also concerned Cuba, but it actually represented a conflict between two superpowers - the USA and the USSR. For various reasons, including the short duration of the crisis, the rest of the world was basically in the position of an observer.

---

[3] Sometimes this crisis is understood somewhat more broadly, so it is considered that it began on October 14, when the American spy plane U-2 recorded Soviet missiles in Cuba, and lasted until November 20, 1962, when US President Kennedy, having made sure that the Soviets withdrew their missiles, ordered an end to the naval blockade of Cuba. However, even in such a case, the crisis was rather short since it lasted only 38 days.

[4] The Americans did not publicly commit to removing their missiles. However, just five months after the agreement was reached, as part of *Operation Pot Pie*, lasting from April 1 to April 24, 1963, they removed their *Jupiter missiles* from Turkey and Italy, arguing that they were obsolete. The conclusion that it was not a matter of obsolescence but of the fulfillment of the agreement stems from the simple fact that those rockets were installed only two years before.

At first glance, the Ukrainian crisis (2022) is an armed conflict between only two states - Ukraine and Russia. However, it is only at first glance. Many things indicate that the war is essentially between the NATO alliance led by the USA and Russia, which, however, also has its own allies. One of the interesting things is reflected in the fact that now, on the side of the USA, there are some countries that were members of the Warsaw Pact at the time of the Cuban Missile Crisis (and as such, allies of the USSR), and some were even part of the USSR as its federal republics (after all, Ukraine itself is a former Soviet republic), while now Russia is more or less openly supported by some countries that in the past were traditionally against the Soviet Union, i.e. Russia.

2.4. Geographical Location

There are interesting similarities in terms of geographic location. Both the territories in question (Cuba and Ukraine) have significant strategic importance because they are located in the immediate vicinity of one of the opposing great powers, while at the same time, they are far from the other great power. Cuba is very close to the coast of the USA and on the other side of the world with respect to the former USSR. On the contrary, Ukraine borders Russia but is far from the territory of the USA, which is essentially Russia's main rival.

2.5. The Reason for the Outbreak of the Crisis

In both cases, the reason is the same - the deployment of medium-range missiles (those with a range of 1,000 to 5,500 km) in positions from which they can hit strategic targets on the territory of another great power in a very short time interval.

This moment was key to the outbreak of the Cuban Missile Crisis. Because the Soviet launchers were in the immediate vicinity of the USA, American President John F. Kennedy reacted harshly, declaring that, if necessary, his country would go to war in order to remove the threat in the immediate vicinity of its borders.

In the case of the Ukrainian crisis (2022), there were several reasons at work, including the fact that if Ukraine joins NATO, American medium-range missiles will come to the very border of Russia, with the possibility of hitting Moscow in just a few minutes. Everything was further burdened by the fact that the President of Ukraine, Volodymyr Zelensky, just 4 days before the beginning of the Russian invasion, declared that Ukraine would renew its nuclear weapons program, and the fact is that it has the personnel and all other necessary potential for this.

One of the similarities is that in both cases, the crises began when Moscow, concerned about its security, asked the US for certain concessions, and when it did not receive them, it took certain steps on its own. Thus, before deploying its missiles in Cuba, the USSR unsuccessfully requested the withdrawal of American missiles from Turkey and Italy. When it comes to the Ukrainian crisis (2022), on December 17, 2021, 2 months before the outbreak of the conflict, Russia asked the USA and NATO to reach an agreement that would mean legal guarantees for its security. The proposal published by the Russian Ministry of Foreign Affairs stipulated, among other things, a ban on NATO's further expansion to the East, the abandonment of the creation of military bases on the territories of countries that were formerly part of the USSR and are not members of the Alliance, a ban on Ukraine's entry into NATO, and a limitation of the deployment of troops and weapons on NATO's eastern wing, with the return of NATO forces to where they were stationed in 1997, when the Basic Act between Russia and NATO was signed (May 27, 1997). Although Russia underlined that the solution of these issues is of fundamental importance to it, the USA rejected the proposals stating, among other things, that Ukraine, as a sovereign country, is free to join all alliances, including NATO. After the US Ambassador in Moksva handed over to the Ministry of Foreign Affairs of Russia on January 26, 2022, the response of the US and NATO to Russia's request, on February 17, 2022 (a week before the invasion of Russian forces into Ukraine), he was handed a document in which the Kremlin stated that the American side did not give a constructive response to the basic elements of the agreement proposal prepared by Russia, and that due to ignoring its request, Russia would be forced to react, including measures of a military-technical nature.

Thus, in both cases, the reason essentially came down to the determination of a great power (in the first case, the USA, in the second case, Russia) to eliminate challenges to its security. In addition, Russia motivated its action in Ukraine with some other arguments, including the need to protect the Russian population of Ukraine from violence and persecution.

2.6. The Nature of the Crisis

The Cuban missile crisis remained within the framework of what is meant by the term "international crisis". Regardless of several military incidents, it did not develop into an armed conflict and did not result in any casualties or destruction. There was a lot of tension, but no weapons were used in principle, and (apart from the death of the pilot of the American spy plane) there were no casualties.

On the contrary, the Ukrainian crisis (2022) is a real armed conflict from the very beginning. Some estimates suggest that between the beginning of Russia's invasion of Ukraine and the beginning of October 2022, between 22,000 and 81,000 people died - more than 6,100 civilians and 6,000-15,000 soldiers on the Russian side, and 10,000-60,000 soldiers on the Ukrainian side. Aviation, artillery, rocket systems, tanks, etc. were massively used. This clearly shows that it is a real war, with great sacrifices and great destruction. What is specific to that event is the large involvement of a number of other countries led by the USA, a whole series of measures (sanctions) by the West against Russia and *vice versa*, the polarization of the world towards those who are on the side of Ukraine, the USA, and NATO on the one hand, and those who openly or silently support Russia, on the other hand.

2.7. The Danger of Nuclear War

The Cuban missile crisis (1962) and the Ukrainian crisis (2022) are the events that most threatened a new world war after 1945. And that's probably what ties those events together the most. After all, US President Joe Biden also stated that the Ukrainian Crisis (2022) is the biggest nuclear risk after the Cuban Missile Crisis (Rogers & Sanger, 2022).

And indeed, in both cases, the leaders of the leading countries facing each other publicly threatened that they would not shrink from open conflict with each other. If in 1962 Kennedy declared that America was ready to go to war if the missiles were not withdrawn from Cuba, in 2022 Putin publicly said that if Russia considered itself threatened, it would respond with all available means and that if the US crossed certain red lines (interfere more intensively) it would consider that the USA was a participant in the conflict.

In order to better understand how the world was on the edge of the abyss in 1962, we will remind you of four serious incidents that are not well known to the general public and which were such that each of them could have led to the start of a nuclear war between the USA and Russia. To make matters more interesting, practically everything took place within less than 48 hours, and each incident was much more dangerous than the previous one.

First, on October 27, 1962, an American U-2 spy plane was shot down over Cuba, killing the pilot. Just 71 minutes later, over the Soviet Chukotka Peninsula, another US spy plane, the U-2, entered deep into USSR airspace due to an alleged navigation error, causing the Soviets to send MIGs to intercept it, to which the Americans sent fighters F-102, armed with nuclear missiles. Fortunately, the U-2 changed course on time and left Soviet airspace. The third incident happened at the end of that same day and was much more serious. At sea near Cuba, 12 American warships surrounded the Soviet submarine *B-59* and started dropping signaling depth charges, not knowing that the submarine was armed with nuclear torpedoes. Having not been in radio contact with Moscow for days, the captain thought a war had begun and wanted to respond by firing nuclear missiles. Fortunately, on board the submarine was the Chief of Staff of the Submarine Flotilla, Vasily A. Arkhipov, whose opposition prevented the disaster. The submarine sent the message "Stop the provocation" and surfaced, after which the situation calmed down and the American ships let the submarine sail peacefully (Krivokapić, 2017, pp. 125, 275-276).

The most dramatic was the fourth incident that happened the next day. It was only in 2015, when the US government allowed it to be made public, that it became known that on October 28, 1962, a nuclear world war almost started. On that day, William Bassett, the commander of the American base in Okinawa, was ordered to immediately launch a nuclear attack on targets in the USSR, China, and North Korea with all 32 missiles that were in the base.[5] Bassett thought it must be a mistake, especially since the threat level listed in the order was DEFCON 2, and the stated condition for the launch was to raise combat readiness to the maximum level (DEFCON 1).[6] He asked the command to repeat the order, and when he got the same message again, he demanded that either the readiness level be raised to DEFCON 1 or the order be withdrawn. Only then was it discovered that it was a mistake (some major put in the wrong string of codes) and the order for the nuclear attack was immediately withdrawn (Tovish, 2015). Bassett died in 2011 without receiving any recognition for saving the world, and we are left to wonder what would have happened in an atmosphere of extremely strained US-Soviet relations if instead of Bassett there had been an officer who would have followed orders without thinking.

The danger of an outbreak of nuclear war is still present today. Not only is it a matter of great tension in relations between Russia and the US and the NATO alliance, but at the same time, the possibility of using tactical (small-caliber) nuclear weapons is being mentioned more and more often. Although it is claimed that this means is not a weapon of mass destruction, that it has a similar effect to a conventional weapon of similar power, and in particular that it can be directed at military targets only and does not cause much radiation, the fact is that if this weapon were to be used, the existing border would be erased, which

5 The total blast yield of all 32 missiles was 35.2 megatons, or about 1,000 times the blast yield of the atomic bombs dropped on Hiroshima and Nagasaki, taken together.

6 DEFCON (short for *Defense Readiness Condition*) indicates the degree of combat readiness of the US armed forces, starting from 5 (peacetime state) to 1 (the highest degree of combat readiness, due to the assessment that the USA is on the verge of a major armed conflict with the possible use of weapons of mass destruction).

would lead to the use of increasingly powerful nuclear weapons and a constant escalation of the conflict with unforeseeable consequences.

After all, the dangers are far greater today than they were in 1962, when the USA had over 25,500 nuclear warheads, and the USSR "only" about 3,350. It is believed that there are a total of about 13,080 nuclear warheads in the world today, and they are distributed as follows: Russia - 6,255, USA - 5,550, China - 350, France - 290, United Kingdom - 225, Pakistan - 165, India - 156, Israel - 90, North Korea - 40 to 50 (Global nuclear arsenals grow as states continue to modernize, 2021, p. 14). However, it should be borne in mind that the data on the number of nuclear warheads does not show their individual or total power, and in both cases it has increased a lot in the meantime. They do not show that in our time, missiles and other means (carriers) have been perfected. The accuracy with which nuclear warheads are delivered to the targets has increased, which allows it to be done much faster and much more precisely than before. In particular, it should be borne in mind that if a nuclear war were to break out, all the states that possess them would rely on nuclear weapons, and it is considered that only a third of the existing world arsenal of nuclear weapons is sufficient to wipe out civilization on our planet.

In short, if things were to get out of control, the danger of total destruction is far greater today than it was in 1962 (Korb & Cimbala, 2022).

2.8. The Role of the United Nations

Although created with the primary task of safeguarding world peace and security, the United Nations has shown its impotence in both crises discussed here. Not only did they not manage to prevent the worsening of relations in time or contribute to easing the tension, but they also did not contribute to finding a solution. Among other things, paralyzed by the veto of the permanent members, the Security Council proved incapable of taking any substantial steps, except that it turned into a place for mutual accusations. Of course, when it comes to the Ukrainian crisis, the above assessment refers to what has happened so far, which does not exclude a possible successful role of the UN in the future, although at the moment it seems unlikely.

The Cuban missile crisis was resolved in an agreement between its main actors (the USA and the USSR). There is every chance that a way out of the existing Ukrainian crisis (2022) will be found in this way, with the fact that substantive negotiations will be conducted between Russia and the USA. However, considering that various new plot twists and turns are possible, it remains to be seen how the events will unfold. Among the ways to overcome the current situation is the possible organization of a special international conference, with the participation of major powers and other interested countries, which for now seems to be too early.

2.9. The Reaction of the World Public

One of the common features of the Cuban (1962) and the Ukrainian crisis (2022) is that the world public was divided. By the nature of things, during the Cuban Missile Crisis, the members of the respective part of the divided by the Cold War world, sided with their hegemon - the USA or the USSR, despite the fact that this support was only verbal. Today, the division rests on different foundations, with the fact that one part of the countries is firmly with Ukraine, the USA and NATO, while other countries, and they are the majority at the moment, more or less openly support Russia or at least do not condemn it.

We will return to the reaction of other countries at the place where we analyze the Ukrainian crisis (2022) from the point of view of international law.

2.10. Consenquences

The Cuban crisis basically meant competition between the two hegemons of the bipolar world. Fortunately, the tensions were overcome, and the Cold War continued to take place in all fields - political, economic, ideological, informative, sports, etc. but not military (at least not in the sense of direct clashes between the main protagonists).

In the case of the Ukrainian crisis (2022), the political, economic, and every other stake is obviously much higher because in the background of everything is the struggle for what the world order will be. It is a conflict between the efforts of the US to preserve a unipolar world in which it will be the only and undisputed world leader, and the struggle of Russia, but also of some other countries (China, India, etc.), to create a multipolar world, with several equally important centers. It is too early to judge what the world will look like when the conflict in Ukraine ends and whether everything will end only with that conflict. For now, the undoubted consequences are that the biggest loser is the Ukrainian people, over whose backs the spear is breaking in the clash of great powers. The loser is also Western Europe, which brought itself to the brink of the destruction of industry, lack of energy, and even hunger through the unreasonable policy of sanctions against Russia.

3. A View from the Point of International Law

The issue of the qualification of what is happening in Ukraine from the point of view of international law is very complex and requires special attention. This implies adequate space, which we do not have in this paper. Therefore, we will be satisfied here with only basic comparisons and conclusions.

When it comes to the installation of Soviet missiles in Cuba in 1962, from the point of view of international law, the USSR did nothing illegal since the government in Havana voluntarily allowed it to deploy its missiles on Cuban soil. Moreover, Cubans welcomed such a development, considering that it strengthens the position of their independence and provides a guarantee that the US will not attack the island. After all, at that time, the USA itself in a number of countries had its nuclear missiles aimed at the USSR, so no one considered it illegal.

On the contrary, by carrying out the naval blockade of Cuba, the USA violated one of the basic principles of modern international law, which prohibits not only the use of force but also the threat of force in international relations. In addition, the USA disputed the right of Cuba, a sovereign state, to enter into military alliances with other states (specifically, with the USSR). Finally, the USA violated international law every time it violated Cuba's airspace with military aircraft, or in the described case with the spy plane *U-2*, the airspace of the USSR.

When it comes to the action that Russia started against Ukraine on February 24, 2022, it is called and qualified in various ways. The Moscow government and those who support it use the term "special military operation". This should not be surprising, because in our time, when the UN Charter expressly prohibit force in international relations, states tend to use various euphemisms for their armed actions against other countries, such as "military action", "campaign", "intervention", "engagement" and similar, avoiding the words "war" and "armed conflict". They do this in order not to brand themselves as aggressors and to reduce the importance of what is happening in the eyes of the public.

On the other hand, part of the world's public labeled Russia's attack on Ukraine as aggression. Indeed, it can be *prima facie* concluded that Russia violated international law and committed aggression by invading the territory of another state. The basis for such a qualification can be the definition of aggression given in Resolution 3314 (1974) of the UN General Assembly and in the Rome Statute of the International Criminal Court, after its amendments from Kampala (2010).

In this light, it should not be surprising that on March 2, 2022, just a little more than a week after the beginning of the Russian invasion, the UN General Assembly by Resolution No. ES-11/1 (Aggression against Ukraine, 2022) qualified

Russia's action as aggression, demanded that Russia immediately stop the use of force against Ukraine and withdraw its armed forces. 141 countries voted for the resolution, i.e., 73% of UN members, 5 members declared against, 35 abstained, and 12 were not present.

However, a closer look shows that things are not as simple as they seem. Russia invoked its right to, if necessary, protect its compatriots by armed means, which is not in accordance with the prohibition of force from the UN Charter, but is also something that is difficult to deny in light of the fact that the USA has given itself the same right by imposing the concept of the right and even the obligation of humanitarian intervention in the event of a serious violation of human rights anywhere in the world (the concept of Responsibility to Protect). Russia also referred to the right of preventive self-defense, which is really represented by the institute of international law, which was once confirmed by UN Secretary-General Kofi Annan in his report (Annan, 2004, par. 188, p. 54). That argument gained even more strength in light of the fact that the United States, based on its so-called Bush doctrine, has empowered itself to use force whenever necessary to protect its security (Krivokapić, 2017, 497). And what is particularly important here, the international community did not have the means and strength to prevent Washington from using force against other countries.

Returning to Resolution No. ES-11/1 dated March 2, 2022, it is interesting to note that only 6 months later, a similar attempt to condemn Russia failed. The new resolution against Russia did not receive sufficient support and was not adopted. It all came down to a joint statement signed by 55 members on August 24, 2022. But the signatory parties compose only 28.5% of the UN membership, or almost 3 times less than the number of those who voted for Resolution ES-11/1 (Joint Statement on Six Months of Russia's Full-Scale Invasion of Ukraine, 2022). At the same time, out of 55 signatories, 1 was directly involved in the conflict (Ukraine), 30 were NATO members opposed to Russia, 2 were candidates for NATO membership (Finland and Sweden), 4 were close military and political allies of the USA (Australia, Japan, New Zealand, and South Korea), while of the remaining 17 countries, only 2 were from Latin America (Guatemala and Colombia) and none from Africa. In other words, after half a year of the conflict, when a more complete picture of everything was gained, 138 out of 193 UN members were not ready to vote against Russia. This means that by not supporting the resolution against it, Russia was supported in a certain way by as many as 71.5% of UN members, led by such important countries as China, India, Pakistan, Brazil, Mexico, Saudi Arabia, Indonesia, etc. It becomes all the more interesting when it is known that many of these countries cannot be considered allies or sympathizers of Russia or countries that Russia could strongly influence.

What exactly is happening in Ukraine, whether it is aggression or preventive self-defense, etc., are very important issues that require a special review, and we will try to give it in a separate paper (new article) dedicated to those problems. Here we have to content ourselves with the statement that, for now, there is no agreement in the international community on how to qualify what is happening in Ukraine. This is especially since it all has a long and complex history, while at the same time, it is easy to understand that we are facing the so-called proxy war between NATO and Russia on the territory of Ukraine. What is indisputable is the fact that the intense tightening of relations between the USA and NATO, on the one hand, and Russia, on the other, followed by the Western sanctions against Russia, fundamentally shook relations in the international community and caused the biggest international crisis in recent history, for which at this moment it is not known when and how it will be resolved.

Regardless of everything that has been said, it can be noted that in connection with the Ukrainian crisis, international law was violated by many states that formally have not been involved in the conflict. Russia also carried out an armed incursion into Ukraine from the territory of Belarus, which puts that country in the position of a participant in the conflict. On the other hand, the extensive measures taken by the USA and other NATO members, which included the massive arming of Ukraine with the most modern weapons, the provision of important intelligence data to the government in Kiev (in particular, data collected by spy satellites), the sending of military instructors, and even the direct participation of military personnel from those countries in the armed conflict on the side of Ukraine (it is covered up in various ways, but it is unquestionable), are incompatible with the status of neutral states in terms of the international law of armed conflicts. Although Russia in principle has the right to treat the mentioned states as participants in the conflict, which means as its enemies, it has not done so so far, aware that this would cause an uncontrolled escalation of the conflict, which, it seems, no one wants.

To all this, we should add the secession and admission to the Russian Federation of parts of Ukraine - Luhansk, Donetsk, and Zaporizhzhia, and Luhansk Oblasts. This was done after referendums were held in which the residents of the mentioned areas overwhelmingly voted for secession from Ukraine and belonging to Russia. However, this added fuel to another problem - the conflict between two basic principles of international law, one of which guarantees the sovereignty and territorial integrity of states and the other recognizes the right of peoples to self-determination (Krivokapić, 2020, pp. 203-256).

The Ukrainian crisis also raised a number of other problems related to international law, such as 1) individual criminal responsibility for war crimes; 2) the production of several million Ukrainian refugees; 3) enormous damage to nature due to fierce combat operations with the most modern weapons; 4) the problem of hunger in the world (in connection with the export of Ukrainian grain); 5) the problem of supplying a number of countries, especially Western Europe, with gas and other energy products (due to the disastrous backlash of the sanctions introduced against Russia); 6) responsibility for specific illegal acts (mining of gas pipelines Nord Stream 1 and 2); 7) the possibility of the dissolution of the United Nations, etc.

4. Conclusion

According to what has been presented, there are many similarities, but also differences, between the Cuban Missile Crisis (1962) and the Ukrainian Crisis (2022). Still, the dominant impression is that they are united by the fact that these are the two situations in which the world faced the danger of the outbreak of a new world war and one in which nuclear weapons would most likely be used.

On the other hand, although we have compared it here with the events of 1962, the Ukrainian crisis (2022) has a number of similarities with some other important events, such as The Crimean War (1853-1856), in which everything began with Russia's victories over Turkey, only for the Western powers to intervene on the side of the latter, causing a bloody war; The Spanish Civil War (1936-1939), in which a number of countries participated in various ways, etc.

Returning to our time, we must underline the fact that, according to current international law, all international disputes and crises must be resolved without delay and exclusively by peaceful means. The Ukrainian crisis should not be an exception in this respect. After all, even the Cuban Missile Crisis ended, as we know, with a kind of agreement.

At the moment, it seems that we are far from a solution, which is due in large part to the fact that the stakes are extremely high for all parties. The one who manages to win will have the opportunity to preserve the existing or build a new world order, which also means preserving and improving or, on the contrary, changing the current international law.

In the hope that the conflict in Ukraine will be resolved peacefully as soon as possible, we can only conclude that, as always, the only real judge is time. We can analyze, criticize, suggest, etc., but we have no power to influence events. We can only hope that reason will prevail.

References

Allison, G. & Zelikow, P. 1999. *Essence of Decision: Explaining the Cuban Missile Crisis*. Longman.

Chayes, A. 1974. *The Cuban Missile Crisis*. Oxford: Oxford University Press.

Global Nuclear Arsenals Grow as States Continue to Modernize – New SIPRI Yearbook out Now, *SIPRI*, 14 June 2021. Available at: *www.sipri.org/media/press-release/2021/global-nuclear-arsenals-grow-states-continue-modernize-new-sipri-yearbook-out-now* (7. 10. 2022).

Ignatius, D. 2022. To Confront Putin, Byden Should Study Cuban Missile Crisis. *Washington Post,* September 22, 2022, Available at: *www.washingtonpost.com/opinions/2022/09/22/putin-ukraine-threats-biden-cuban-missile-crisis/* (7. 10. 2022).

Kahan, J.H. & Long, A.K. 1972. The Cuban Missile Crisis: The Study of Its Strategic Context. *Political Science Quarterly*, 4, pp. 564-590. https://doi.org/10.2307/2148197

Korb, L. & Cimbal, S. 2022. Why the War in Ukraine Poses a Greater Nuclear Risk than the Cuban Missile Crisis. *Just Security*, April 12 2022. Available at: *www.justsecurity.org/81040/why-the-war-in-ukraine-poses-a-greater-nuclear-risk-than-the-cuban-missile-crisis/* (7. 10. 2022).

Krivokapić, B. 2017. *Mir i rat u međunarodnim odnosima i pravu*. Beograd: Institut za uporedno pravo : Poslovni i pravni fakultet Univerziteta „Union - Nikola Tesla“.

Krivokapić, B. 2020. Pravo naroda na samoopredeljenje i slučaj Kosova. U: Čavoški, K. (ur.), *Secesija sa stanovišta unutrašnjeg i međunarodnog prava i njene političke posledice*. Beograd, SANU, pp. 203-256.

Morrison, R. 2020. A Cuban Missile Lessons for the Russia-Ukraine War. *Providence*, April 8, 2022. Available at: *https://providencemag.com/2022/04/cuban-missile-crisis-lesson-russia-ukraine-war-john-f-kennedy-joe-biden/* (7. 10. 2022).

Ralston, S.J. 2022. Are the Russia-Ukraine Conflict and the Cuban Missile Crisis Comparable?. *Statecraft and Global Affairs,* April 27. Available at: *https://medium.com/statecraft-and-global-affairs/are-the-russia-ukraine-conflict-and-the-cuban-missile-crisis-comparable-74bd540b5400* (7. 10. 2022).

Rogers, K. & Sanger, D.E. 2022. Biden calls the ‘prospect of Armageddon’ the highest since the Cuban missile crisis. *New York Times,* 6 October 2022. Available at: *www.nytimes.com/2022/10/06/world/europe/biden-armageddon-nuclear-war-risk.html* (7. 10. 2022).

Scott, L. & Hughes, G.R. 2015. *The Cuban Missile Crisis: A Critical Reappraisal.* Teylor & Francis. https://doi.org/10.1002/9780470670590.wbeog615

Sherwin, M.J. 2012. The Cuban Missile Crisis at 50: In Search of Historical Perspective. *Prologue Magazine*, 2. Available at: *www.archives.gov/publications/prologue/2012/fall/cuban-missiles.html* (7. 10. 2022).

Tovish, A. 2015. The Okinawa Missiles of October. *Bulletin of the Atomic Scientist*, October 25, 2015. Available at: *https://thebulletin.org/2015/10/the-okinawa-missiles-of-october/* (7. 10. 2022).

White Mark, J. 1995. *The Cuban Missile Crisis.* Palgrave Macmillan. https://doi.org/10.1057/9780230374508.

Documents

Aggression against Ukraine, Resolution adopted by the General Assembly on 2 March 2022, A/RES/ES- 11/1. Available at: *https://digitallibrary.un.org/record/3965290* (7. 10. 2022).

Annan, K. 2004. A More Secure World: Our Shared Responsibility. *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, UN doc. A/59/565.

Joint Statement on Six Months of Russia's Full-Scale Invasion of Ukraine, Delegation of the European Union to the United Nations in New York, 24. 8. 2022. Available at: *www.eeas.europa.eu/delegations/un-new-york/joint-statement-six-months-russia%E2%80%99s-full-scale-invasion-ukraine_en?s=63* (7. 10. 2022).

Boris Đ. Krivokapić
Redovni profesor, Poslovni i pravni fakultet, Univerzitet „MB“, Beograd, Srbija
E-mail: *krivokapicboris@yahoo.com*
ORCID: *https://orcid.org/0000-0001-6534-9965*
Jugoslav Lj. Vukadinović
Master, Poslovni i pravni fakultet, Univerzitet „MB“, Beograd, Srbija
E-mail: *jugoslav.vukadinovic@outlook.com*

KUBANSKA (1962) I UKRAJINSKA KRIZA (2022) – SVET NA IVICI NUKLEARNOG RATA, 60 GODINA KASNIJE

Sažetak

Rad se bavi poređenjem Kubanske raketne krize (1962) i Ukrajinske krize (2022) kao slučajevima u kojima je čovečanstvo bilo najbliže izbijanju svetskog nuklearnog rata. Prvo je dat osvrt na pojam međunarodne krize, a zatim su sa osloncem na odabrane kriterijume analizirani Kubansku kriza i stvarnost koja je nastala invazijom ruskih oružanih snaga na Ukrajinu 24. 2. 2022. Posebno su obrađeni međunarodnopravni aspekti ovih problema, s tim da je ukazano da za razliku od američke vojnopomorske blokade Kube, u razmeštaju sovjetskih raketa na tom ostrvu nije bilo ničeg protivpravnog, pa su SAD ipak bile spremne da ratuju samo da bi otklonile pretnju. U slučaju Ukrajinske krize (2022) sve je daleko komplikovanije. Premda se na prvi pogled tu radi o agresiji, Rusija se pozvala na omiljene argumente i koncepcije SAD, kao što su humanitarna intervencija i preventivna samoodbrana. U zaključnim razmatranjima istaknuto je da prema važećem međunarodnom pravu svi međunarodni sporovi i krize moraju se rešavati isključivo mirnim sredstvima, da Ukrajinska kriza ne bi smela biti u tom pogledu nikakav izuzetak, te da je, uostalom, dobar primer Kubanska raketna kriza koja je okončana jednom vrstom sporazuma.

Ključne reči: Kubanska raketna kriza, međunarodna kriza, međunarodni odnosi, međunarodno pravo, Ukrajinska kriza.

Primljeno: 10. 11. 2022.
Prihvaćeno: 30. 12. 2022.

Lidija O. Živković*

Original scientific paper
UDK: 336.241.4:341.174(4-672EU)
doi: https://doi.org/10.56461/SPZ_22402KJ

THE UNSHELL DIRECTIVE PROPOSAL IN A NUTSHELL: OPEN QUESTIONS**

Abstract

The paper analyses the recent European Commission's Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, commonly referred to as the Unshell Directive Proposal. The author firstly identifies the features of the existing EU legislative framework contributing to the widespread utilization of shell entities for tax avoidance purposes and clarifies the policy context in which the Unshell Directive Proposal was drafted. She further provides a detailed analysis of the anti-avoidance mechanism introduced thereby and discusses a number of questions which the said mechanism raises. In addition, the author assesses its effects on Serbian corporate taxpayers. She concludes that the envisaged anti-avoidance mechanism deserves further refinement, not least in regards to its interaction with Member States' general anti-avoidance measures, as well as with respect to the economic substance indicators on which it is based.

Keywords: *Unshell Directive, Misuse of Shell Entities, Economic Substance, Tax Avoidance, Wholly Artificial Arrangements.*

1. Introduction

During the last decade, the legislative activity of the European Union (hereinafter: EU) in the field of direct taxation has been predominantly focused on the introduction of measures directed at the prevention of tax avoidance – the so-called anti-tax avoidance measures. Two main factors contributing to such a state of affairs can be identified.

* MA, Assistant, Faculty of Law, University of Belgrade, Serbia
E-mail: *lidija.zivkovic@ius.bg.ac.rs*
ORCID: *https://orcid.org/0000-0003-2113-2566*

** This paper is the result of a research conducted as part of the project of the Institute for legal and social sciences of the University of Belgrade, Faculty of Law, under the title "Contemporary issues of the Serbian legal system".

Firstly, the Union's legislative competences in the field of direct taxation are fairly limited. Art. 115 of the Treaty on the Functioning of the EU (hereinafter: TFEU) – being the only provision of the founding treaties that provides a legal basis for legislating in the domain of direct taxation – presupposes the application of a special legislative procedure and enables issuance of directives only, under condition that they are needed for the approximation of Member States' laws directly affecting the establishment or functioning of the internal market. As the special legislative procedure requires that all the Member States agree unanimously on the relevant proposal, the enlargement of the Union has made it increasingly difficult to go forward with positive integration in matters relating to direct taxation. As a result, in the field of direct taxation there are only a handful of directives, which are confined to regulating rather narrow aspects of predominantly corporate income taxation.[1]

Secondly, the 2008 economic crisis instigated a change in the public's perception of tax avoidance. Encouraged by the public outcry to curb tax avoidance practices and in an attempt to collect revenues needed to remedy the economic consequences of the crisis, policy makers around the globe began on strengthening the existing legislative framework against tax avoidance. In that sense, the introduction of numerous anti-avoidance measures in secondary EU law was a manifestation of a global trend, which was initiated and promoted primarily by the Organisation for Economic Co-operation and Development.

The last one in the series of European Commission's initiatives directed against tax avoidance practices is the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, commonly referred to as the Unshell Directive Proposal.[2] The Proposal was published on 22 December 2021. Its provisions are expected

---

1 Direct tax matters that are covered by Union secondary law are the following: 1) cross-border distribution of dividends (Council Directive (EU) 2011/96, known as *the Parent-Subsidiary Directive*, 2) tax treatment of cross-border reorganizations (Council Directive (EC) 2009/133, known as *the Merger Directive*), 3) cross-border interest and royalties payments between associated enterprises (Council Directive 2003/49/EC, known as *the Interest and Royalties Directive*), 4) exchange of information between the competent authorities of Member States (Council Directive 2011/16/EU, known as the *Directive on Administrative Cooperation – DAC 1*, and the subsequent amendments), 5) mutual assistance in the recovery of tax claims (Council Directive (EU) 2010/24, known as *the Recovery Assistance Directive*), 6) measures directed at the prevention of tax avoidance and aggressive tax planning (Council Directive (EU) 2016/1164, known as *the Anti-Tax Avoidance Directive – ATAD1*; Council Directive (EU) 2017/952 amending Directive (EU) 2016/1164, known as *the ATAD2*), as well as 7) resolution of tax treaty disputes (Council Directive (EU) 2017/1852, known as *the Dispute Resolution Mechanisms Directive*).

2 The proposed Directive is also referred to as the ATAD 3, as it represents the third EU hard law instrument which is entirely dedicated to the fight against tax avoidance practices.

to be transposed into Member States' national tax legislation until 30 June 2023, provided that the Proposal is unanimously agreed upon. In this paper, the author firstly identifies the issue that the Unshell Directive Proposal is intended to address and clarifies the policy context within which the Proposal was drafted. She then provides an in-depth analysis of the provisions of the Proposal and assesses whether the anti-avoidance mechanism established thereby is capable of addressing the issue of shell entity abuse within the internal market. After setting forth the crucial shortcomings of the said mechanism, the author addresses the relevance of the said Proposal for Serbia.

2. The Misuse of Shell Entities within the Internal Market

2.1. Shell Entity as a Tool for Tax Avoidance

Terms "shell entity" and "shell company" generally have a negative connotation, regardless of the context in which they are used. It should, however, be kept in mind that the stated terms tend to be used in several different contexts, for which reason their meaning may accordingly differ to a certain degree. Regardless of the context in which the term is used, a common feature of entities which are referred to as "shell entities" is the absence of real economic activity in the jurisdiction in which they are established. In other words, the entities in question have no employees, assets or physical presence in the jurisdiction in which they are established (Krišto, Thirion, 2018, p. 12). Shell entities may serve various purposes, some of which are straight up illegal (such as tax evasion, money laundering or terrorism financing), while some are, strictly speaking, legal, but illegitimate (such as tax avoidance). The focus of this paper is the utilization of shell entities for tax avoidance purposes.

2.2. Existing Legislative Framework Facilitating the Misuse of Shell Entities for Tax Purposes

On the one hand, intra-EU payments of passive income (*e.g.* dividends, interest, royalties) are not subject to withholding tax (hereinafter: WHT), owing to the provisions of EU secondary law, more precisely: the Parent Subsidiary Directive (hereinafter: PSD) and the Interest and Royalties Directive (hereinafter: IRD). As a result, intra-EU flow of passive income is tax free. On the other hand, passive income payments "exiting" the internal market are generally taxable. More importantly, WHT rates charged on payments to residents of third (non-EU) countries are not harmonized at the level of the EU. Member States are therefore free to decide what rate of WHT to charge on passive income payments, and whether to levy WHT at all. Consequently, several Member States provide for very low or no WHT on payments of passive income to residents of third-countries.[3]

The interplay between the two described groups of provisions provides fertile ground for the misuse of shell entities for tax purposes. The basic example of the said practice is the following. Instead of passive income being paid out directly by a payor resident of a Member State A to a recipient (shareholder) resident in a third-country, a shell entity is interposed in Member State B, whose national legislation provides for low or no WHT on payments of passive income to residents of non-EU countries. In this way, the payment of passive income is split in two parts: (1) the first one is the payment made by the initial payor resident of Member State A to the shell entity resident in Member State B, (2) the second one is the payment made by the shell entity resident in Member State B to the recipient resident in the third-country. Having been paid out by a resident of one Member State to a resident of another Member State, the first payment will benefit from the provisions of EU directives (provided that all the preconditions stipulated therein are fulfilled) and will accordingly be freed from WHT. The second payment will be subject to low or no WHT, in line with the national tax legislation of Member State B, in which the shell entity is resident. The described practice is generally referred to as directive shopping. The result is tax free or low taxed repatriation of profits from the EU to a third-country.

The described legislative framework has resulted in several EU Member States becoming notorious as cash-flow hubs. According to a study of the expert committee established by the Dutch Ministry of Finance, in 2019 there were more than 12 thousand shell companies in the Netherlands, with a balance sheet total more than five times larger than the Dutch gross domestic product. At the same time, the inbound and outbound flow of passive income were virtually of the same magnitude, implying that the investment did not actually remain in the country, but was mostly channelled out of it, in the majority of cases – to tax havens (Commissie Doorstroomvennootschappen, 2021, p. 10). Similar patterns with respect to the extent of shell entity misuse have been identified in several other Member States as well, *e.g.* Luxembourg, Ireland, Malta and Cyprus (Krišto, Thirion, 2018, p. 13-26).

---

[3] *E.g.* Luxembourg does not levy WHT in the case of interest and royalty payments to residents of third- countries (IBFD Tax Research Platform, 2022, para. 7.3.4.2 and 7.3.4.3). Similarly, the Netherlands applies no WHT on the payments of interest and royalties to residents of third-countries, provided that the country in question is not considered to be a tax haven (IBFD Tax Research Platform, 2022, para. 7.3.3.3.).

3. The Unshell Directive Proposal

3.1. The Goal and Scope

The Unshell Directive Proposal is intended to remedy the described issue by introducing a measure specifically targeted against legal entities without substance (European Commission, 2021a, p. 1). The supposed added value of the anti-avoidance mechanism introduced by the Proposal is its preventative character, as opposed to the existing anti-avoidance measures, both legislative and judicial, that are curative in nature. The introduced anti-avoidance mechanism represents a minimum standard. Therefore, the Member States are free to adopt measures that are more stringent (but not more lenient) towards taxpayers.

The introduction of a common set of rules establishing minimum substance for tax purposes within the internal market can be said to build upon the case law of the Court of Justice of the EU (hereinafter: CJEU). The seminal case in this respect is the *Cadbury Schweppes* case, which set the basis for the doctrine on the prohibition of abuse of law in the field of direct taxation (Vanistendael, 2006, p. 194). According to the reasoning of the CJEU in the said case, the interposition of a wholly artificial entity with the aim of obtaining tax benefits in a cross-border scenario is abusive. Whether an entity can be regarded as wholly artificial is to be assessed on the basis of objective factors ascertainable by third parties, in particular: whether it has staff, premises and equipment in the jurisdiction in which it is established (Cadbury Schweppes, 2006, paras. 67, 75). Wholly artificial entity is, by nature, not involved in the pursuit of genuine economic activity and cannot, as a result, contribute to the fulfilment of the aims of the EU fundamental freedoms (Cadbury Schweppes, 2006, paras. 53-54).

The personal scope of the Proposal is quite wide. Pursuant to its Arts. 2 and 3, it encompasses all undertakings, regardless of their legal form, provided that they can be considered to be tax residents of a Member State and are eligible to receive a tax residency certificate in that Member State. As for the territorial scope, the Proposal applies only to undertakings operating cross-border.

In short, the Proposal identifies undertakings that are considered to be "at risk" from being misused for tax purposes. It does so by stipulating the so-called gateway criteria, which are based on features commonly present in undertakings that lack economic substance and that are involved in tax avoidance (and evasion) practices. Undertakings that have the specified features are regarded as being "at risk" and are required to report on their economic substance. Undertakings that fail to document the presence of the so-called substance indicators are presumed to be shell entitles. Unless they succeed in rebutting this presumption, or manage to benefit from an exemption, such entities are subjected to severe tax consequences. The following paragraphs provide an in-depth analysis of each of these steps.

3.2. The Gateway Criteria

Art. 6 of the Proposal stipulates three gateway criteria, *i.e.* preconditions on the basis of which the risk posed by a specific undertaking is to be assessed.[4] The first criterion deals with the question of how the revenue was generated. This precondition is fulfilled if more than 75% of the undertaking's revenue consists of so-called relevant income. The term "relevant income" is specifically defined in Art. 4 of the Proposal to include several categories of passive income, such as interest, royalties, dividends, income from the disposal of shares, income from financial leasing, etc. The second criterion is based on the cross-border nature of the undertaking's activity. An undertaking is considered to be engaged in cross-border activity provided that: (a) more than 60% of the book value of its assets is situated in a jurisdiction other than its Member State of residence, or (b) at least 60% of its relevant income stems from or is paid out through cross-border transactions. The third criterion questions whether the undertaking relies on other entities for its own administration. More specifically, the precondition is that the undertaking outsources the administration of its day-to-day operations, as well as the decision-making on significant functions. The time frame within which each of the three criteria is to be assessed is two tax years preceding the moment in which the tax return is to be filed.

3.3. Carve-outs

The Proposal excludes from its scope certain categories of undertakings, which are *prima facie* considered not to be "at risk" from being misused for tax purposes. Consequently, these entities are not subject to reporting obligations, even if they meet all the described gateway criteria. The carve-out applies to listed undertakings, as well as specifically enumerated regulated financial undertakings, such as credit institutions, investment firms, alternative investment fund managers, insurance undertakings, etc. The reasoning behind the exclusion of such entities from the scope is that they are already subjected to stringent regulatory requirements and are, as a result, considered to be sufficiently transparent (Hoor, O'Donnell & Schmitz, 2022, p. 233). Moreover, the carve-out also covers undertakings which would anyway not meet the gateway criteria, *e.g.*

[4] Assessment is conducted by the undertaking itself.

undertakings whose beneficial owners and operational businesses are located in the same Member State in which they are resident, or undertakings that have at least five full-time employees or staff members exclusively carrying out the activities generating the relevant income. Although it may be questionable whether the latter group of exclusions is actually needed, the justification for their stipulation, as per the Explanatory Memorandum, is to ensure tax certainty (European Commission 2021a, p. 9).

3.4. Reporting on Substance Indicators

Undertakings that fulfil all of the described gateway criteria are considered to be "at risk" and are subject to stringent reporting obligations. Pursuant to Art. 7 of the Proposal, they are required to declare in their annual tax return whether they meet the so-called "indicators of minimum substance" and to provide documentary evidence for their claims. The Proposal specifies the following indicators of minimum substance, which are subject to reporting. Firstly, the undertaking is expected to has its own premises, or premises for its exclusive use, in the Member State where it is considered to be tax resident. Secondly, the undertaking is expected to own at least one active bank account in the EU. The last substance indicator is related to the staff of the undertaking – its directors or employees. It is required that the substance indicator is met in respect to either only directors or only employees. Namely, at least one director needs to: (a) be a tax resident of the same Member State in which the undertaking is resident, or a resident in another jurisdiction, provided that the distance from the Member State of the undertaking is compatible with the proper performance of his/her duties, (b) possess qualifications and authorisation needed to make decisions in relation to the activities that result in relevant income for the undertaking, (c) exercise such authorisation actively and independently. Additionally, the respective director must not be an employee of another, non-associated undertaking, nor can he/she act as a director thereof. Alternatively, the same preconditions relating to tax residence and qualifications need to be fulfilled in the case of the majority of undertaking's employees.

3.5. Presumption of Abuse and the Right to a Rebuttal

Art. 8, para. 2 of the Proposal stipulates that if an undertaking fails to provide sufficient documentary evidence that it meets the described substance indicators, it will be presumed to be a shell. The presumption introduced by the Proposal is, however, rebuttable. The Member State of undertaking's residence is required, pursuant to Art. 9 of the Proposal, to allow the presumed shell entity to rebut this presumption by providing additional (explicitly specified) supporting evidence that it does have substance, or is not misused for tax purposes. In an attempt to minimize the compliance burden for taxpayers, the Proposal allows Member States to consider the rebuttal of the presumption valid for a period of five years, provided that the factual and legal circumstances of the case remain unchanged.

3.6. Exemption

The Proposal contains an exemption from obligations introduced thereby for undertakings that were presumed to be shells, even if the rebuttal of this presumption was unsuccessful. The exemption, contained in Art. 10 of the Proposal, acknowledges the fact that the establishment of entities with low economic substance could, in certain cases, be motivated by legitimate commercial reasons (Popa, 2022, p. 167). In order to benefit from the exemption, the undertaking needs to provide evidence that its interposition does not lead to a reduction of the tax liability of its beneficial owner or of the group of which it is a member. In particular, the evidence provided should enable a comparison between the overall level of taxation without the interposition of the presumed shell and the level of taxation with the presumed shell interposed. As with the rebuttal of the presumption, the Proposal allows Member States to extend the granting of the exemption for a period of five years, provided that the factual and legal circumstances of the undertaking, as well as of the beneficial owner and the group as a whole, remain unchanged.

3.7. Tax Consequences for Shell Entities

An undertaking that fails to rebut the presumption and is not able to benefit from the aforementioned exemption will be subject to tax consequences, as stipulated in Arts. 11-12 of the Proposal. Tax consequences differ viewed from the perspective of (a) the Member State of shell entity’s residence, and (b) the Member States where the payer of income and the shareholder (*i.e.* the final recipient of income) are residents.

On the one hand, shell entity will be subject to tax obligations in line with the national law of its Member State of residence. In other words, no “look through” approach will be applied. On the other hand, the same Member State is required to either not issue a tax residence certificate to the shell entity, or issue a tax residence certificate explicitly specifying that the undertaking is not entitled to the benefits of double tax treaties and the PSD and the IRD. Tax residence certificate represents evidence that a certain taxpayer is a resident of a specific tax jurisdiction. As such, it is a formal precondition for a taxpayer to be able to enjoy benefits contained in double tax treaties, as well as in directives applicable to the case in question. Without being able to obtain a tax residence certificate, the shell entity is effectively prevented from benefitting in other jurisdictions from preferential tax treatment stipulated in the directives and double tax treaties (*e.g.* exemption from WHT, or low WHT rates).

As for the tax consequences in the other two jurisdictions involved (the non-shell jurisdictions), income passing through the shell entity will be regarded as having been paid directly by the payer to the shareholder, and any applicable double tax treaties, as well as the PSD and IRD will be disregarded.[5] In other words, the look-through approach is applied. More specifically, for outbound payments (payments exiting the EU): the Member State of the payor is obliged to apply WHT to the payment that is channelled through the shell entity to a third-country shareholder/final income recipient. For inbound payments (payments entering the EU): the Member State of the shareholder is required to tax the payment channelled through the shell in line with its national tax legislation, as if it were directly paid to it by the third-country resident payor. Finally, the real estate owned by the shell entity will be taxed in the jurisdiction where it is located, as if it were owned directly and not via the shell entity.

3.8. Enforcement

The Proposal envisages in its Arts. 14-16 several mechanisms intended to facilitate the enforcement of the anti-avoidance measure introduced thereby. Firstly, it imposes an administrative pecuniary sanction on shell entities that fail to assess whether they pass the gateway criteria or make false declaration in their tax returns. The penalty amounts to 5% of the entity's turnover for the relevant tax year. Secondly, any Member State that suspects that an undertaking of another Member State is not compliant with the requirements introduced by the Proposal, may request that Member State to conduct an audit of the undertaking in question. The requested Member State is obliged to initiate the audit within one month after request is received, as well as to provide feedback to the requesting Member State within one month after the outcome of the audit is known. Finally, Member States are required to report on a regular basis to the European Commission information explicitly specified in the Proposal, so as to enable adequate monitoring of its implementation and enforcement, as well as to provide solid basis for a better understanding of the phenomenon of shell entities utilized for tax purposes (European Commission, 2021a, p. 7).

5 Naturally, since the Directive can introduce obligations only for EU Member States, the provisions of double taxation treaties concluded by third-countries will need to be honoured.

Finally, the Proposal presupposes an amendment of the Directive on Administrative Cooperation, by introducing an obligation for Member States' competent authorities to automatically exchange a rather comprehensive set of information regarding the shell entity. The automatic exchange of information is supposed to take place every time an undertaking passes the gateway criteria, as well as in each case in which the tax authorities accept the rebuttal of the presumption or allow for an exemption. The time span within which the exchange must take place is 30 days, counting from the moment tax return was received, or from the moment the rebuttal/exemption was certified by the tax authorities.

4. Issues and Open Questions

The first question to be raised in regards to the proposed Directive is whether there is actually a need for yet another anti-avoidance mechanism in EU law. Not long ago, the Anti-Tax Avoidance Directive (hereinafter: ATAD) introduced in its Art. 6 an obligation for Member States to adopt in their national tax legislation a general anti-avoidance rule (hereinafter: GAAR).[6] As an anti-avoidance measure of a general scope, the said provision is intended to address any form of corporate tax avoidance potentially arising in the future in a particular jurisdiction. As such, it is supposed to complement the existing specific anti-avoidance rules (hereinafter: SAARs), whose narrow scope of application targets only the widespread, *ex ante* identified, tax avoidance practices. The Preamble of the ATAD confirms this position in para. 11 by clarifying that GAARs "feature in tax systems to tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions" and as such have a "function aimed to fill in gaps" in the existing legislative framework against tax avoidance. Therefore, GAARs transposed into Member States' national laws should, by definition, be capable of addressing the misuse of shell entities for tax purposes. After all, the wording of the GAAR itself specifies that it is directed at non-genuine arrangements, *i.e.* arrangements that "are not put into place for valid commercial reasons which reflect economic reality".

One of the crucial supposed benefits of the introduction of a GAAR is that it eliminates or, at the very least, diminishes the need for the subsequent adoption of SAARs (Athanasaki, 2021, p. 20) and thus keeps the complexity of the tax legislation in check (Duff, 2020, p. 588). It could, nevertheless, be argued that there is a justification for the introduction of a new SAAR in a particular tax system which

[6] The Member States were required to transpose the provision in question into their national legislation by 31 December 2018.

already presupposes a GAAR, to the extent that the GAAR is not successful in addressing a specific widespread form of tax avoidance. However, the stated justification does not seem to be valid in the case of the specific anti-avoidance mechanism devised by the Unshell Directive Proposal. As the European Commission itself admitted, the impact of the exiting anti-avoidance measures, most importantly Member States' GAARs, on the utilization of shell entities for tax purposes has not yet been assessed (Hoor, O'Donnell & Schmitz, 2022, p. 246). Consequently, the question on the necessity of the newly introduced specific anti-avoidance mechanism remains open.

Even if we were to accept the position put forward by the European Commission, according to which the existing anti-avoidance framework is not sufficient to adequately address the misuse of shell entities within the Union, the question of interaction between national GAARs and the newly presented anti-shell mechanism remains. At the core of this question is the interaction between a GAAR and various SAARs applicable in a particular jurisdiction. Generally speaking, this question is not unequivocally resolved across jurisdictions (Arnold, 2017, p. 726). Whereas in some tax systems the fact that there is a SAAR applicable to the relevant case precludes the subsequent application of a GAAR to the same set of facts, there are also tax systems in which the GAAR could apply to a specific case, even if the said case potentially falls within the scope of an existing SAAR (Drüen, 2008, pp. 33-34). In this sense, it remains unclear whether taxpayers who are able to prove the existence of an adequate level of economic substance or that they are not misused for tax purposes, will be safe from the subsequent application of a GAAR.

According to the preamble of the Proposal, the fact that the undertaking was found to have sufficient substance on the basis of the anti-avoidance mechanism contained in the Proposal "should not prevent the Member States from continuing to operate anti-tax avoidance and evasion rules, provided that these are consistent with Union law" (European Commission, 2021, p. 17). On the other hand, the ATAD in para. 11 of its preamble only notes that, being a provision whose function is "to fill in gaps", a GAAR "should not affect the applicability of SAARs". Apart from the fact that the latter clarification says very little (if anything) about the interaction between the two types of anti-avoidance rules, it refers only to the anti-avoidance rules (the GAAR and four SAARs, *i.e.* interest limitation rule, exit taxation, controlled foreign company rule and hybrid mismatch rule) introduced by the ATAD. Consequently, it could very well be expected that taxpayers would face differing approaches of various Member States *vis-à-vis* the potential applicability of a GAAR on top of the anti-avoidance mechanism introduced by the Proposal.

Another issue relating to the compatibility of the proposed anti-avoidance mechanism with the established EU tax law framework is the presumption of abuse which it introduces. According to the long-settled case law of the CJEU, when determining whether the principal objective (or one of the principal objectives) of a taxpayer's operation is tax evasion or tax avoidance, national tax authorities are not allowed to rely solely on "predetermined general criteria but must subject each particular case to a general examination" (*Leur-Bloem* 1997, para. 41-42; *Euro Park Service* 2017, para. 55). As a result, a general tax measure which automatically excludes certain categories of taxpayers from the tax advantage is considered disproportionate. As the CJEU underlined in *Eqiom and Enka* (2017, para. 36) and a little later in *Deister Holding* (2017, para. 61), anti-avoidance measures that do not require tax authorities to provide at least *prima facie* evidence of abuse would go further than is necessary for preventing abuse. However, the Proposal shifts the burden of proof to the taxpayer before the tax authorities have provided any evidence on the abusiveness of the taxpayer's arrangement. The fact that the abusiveness of the taxpayer's arrangement (*i.e.* the lack of involvement in genuine economic activity) is presumed on the basis of general criteria laid down in the Proposal seems to be in direct contradiction to the case law of the CJEU.

Moreover, the period of time that would need to pass between the moment the presumption of abuse arises and the moment in which the tax authorities accept (or reject) the taxpayer's rebuttal will normally be quite substantial. First of all, the presumption arises on the basis of information declared in a corporate income tax return, which is usually required to be filed months (often as late as six months, or more) after the end of the relevant tax year.[7] Furthermore, the taxpayer may actually attempt to rebut the presumption only after the tax authorities provide feedback that the evidence submitted does not suffice to satisfy the substance requirements, for which reason the taxpayer is presumed to be a shell. It may also be expected that the assessment of the taxpayer's rebuttal by the tax authorities will take quite some time, not least because the Proposal fails to prescribe a deadline for them.[8] Finally, the Proposal does not presuppose suspending the legal consequences of the presumption during the review of the rebuttal. As a result, the described dynamic would lead not only to taxpayers being faced with prolonged legal uncertainty, but would also result in them suffering adverse tax consequences before the tax authorities' decision on rebuttal is finalized (Tolman & Molenaars, 2022, p. 102).

[7] *E.g.* the deadline for the submission of a corporate income tax return is: 31st July in Germany (*Abgabenordnung*, Art. 149), 25th July in Spain (*Ley del Impuesto sobre Sociedades*, Art. 124), 30th June in Austria (*Bundesabgabenordnung*, Art. 134).

[8] The same is the case in respect to tax authorities' assessment of whether the taxpayer can benefit from the exemption, as stipulated under Art. 10 of the Proposal.

Finally, the criteria used by the Proposal to identify shell entities raise a myriad of questions. It is questionable whether it is reasonable to utilize the same set of criteria for the identification of shell entities regardless of the industry in which they operate. After all, the level of substance an entity is supposed to have in order to be considered as conducting genuine economic activity within the internal market should depend on the type of economic activity supposedly performed in each specific case. CJEU case law, which insists on a case-by-case analysis in each specific case, supports this view. Moreover, the choice of substance indicators seems to suggest that the Proposal adheres to a perception of business reality which is already outdated. Namely, it makes little sense to require that the entity's employees/directors reside close enough to the entity so as to be able to adequately perform their duties. The effects of the pandemic have taught us that a vast array of employee/director's functions can actually be performed remotely. Analogous reasoning could apply to the requirement that the shell owns or exclusively uses premises in its Member State of residence. In addition, having in mind that the free movement of capital contained in Art. 63 of TFEU applies *vis-à-vis* third-countries as well, requiring an undertaking to have a bank account within the EU could easily amount to a breach thereof.

5. The Unshell Directive Proposal from the Perspective of Serbia

For the time being, shell entities having their tax residence in Serbia will be safe from tax consequences stipulated by the Proposal, since its personal scope does not cover undertakings resident in non-EU jurisdictions. Considering the share of foreign investment in Serbia originating from the EU (Radenković, 2016, pp. 58-59; Vržina, 2017, p. 95), Serbia will, in the majority of transactions involving the use of EU-resident shell entities, assume the role of the source jurisdiction of the so-called relevant income.

Assuming that the payment of relevant income was made by a Serbian resident entity, *via* a shell entity resident in Member State A, to a shareholder/final recipient of income resident in Member State B, the tax consequences would be as follows. Being a non-EU country, Serbia would be free to apply its domestic WHT rate on the outbound payment of relevant income. As it is not obliged to treat the payment as being paid directly to the shareholder/final recipient, Serbia is not required to grant benefits of the double tax treaty which it has with the Member State B (residence country of the shareholder/final recipient).[9] On the other hand, in line with Art. 12 of the Proposal, the competent authorities of Member State A would refuse to issue a tax residence certificate for the shell entity, for which

[9] The only EU Member State with which Serbia does not have a double tax treaty is Portugal.

reason the entity in question would not be able to obtain preferential WHT rate under the double tax treaty concluded between Serbia and Member State A, nor would it be able to benefit from a WHT exemption under EU directives on payments channelled to the shareholder resident in Member State B. At the same time, shell entity would be subject to the national tax law of the Member State A and would bear the tax burden accordingly. Finally, Member State B would apply the look-through approach and tax the payment received by the shareholder/final recipient as if it were paid directly by the payor resident in Serbia. Member State B would, however, grant a deduction for the tax paid by the shell entity in Member State A, in accordance with Art. 11, para. 2 of the Proposal.

Nevertheless, it should be noted that, at the same time with the publication of the Unshell Directive Proposal, the European Commission announced that by the end of 2022 it will present a new initiative to address the challenges posed by non-EU shell entities (European Commission, 2021b, p. 2). This would imply introducing substance requirements *vis-à-vis* third-country resident undertakings. In this context, it might be worrisome that, according to some estimates (Brakočević, 2021), 29.7% of all undertakings registered at the Serbian Business Registry Agency have no employees. Although this does not necessarily mean that all such entities would fall within the scope of the European Commission's future initiative (*e.g.* because a substantial share thereof is not involved in cross-border transactions), it underlines the relevance of the issue of economic substance for Serbian corporate taxpayers and tax policy makers. This is especially the case since, under the Unshell Directive Proposal, the look-back period for the assessment of the criteria implying that an undertaking is "at risk" is two years. Assuming that the future European Commission's initiative directed at non-EU shells would follow the same approach, Serbian corporate taxpayers should already be made aware of the need to initiate an assessment of their economic substance and implement changes into the manner in which their operations are organized, so as to be able to escape the tax consequences of being identified as a shell.

6. Concluding Remarks

Although various studies have shown that the extent of shell entity misuse for tax purposes within the EU is considerable, these findings predate the introduction (and subsequent application) of national GAARs based on Art. 6 of the ATAD. The European Commission's own acknowledgement of the lack of data on the effectiveness of national GAARs *vis-à-vis* tax avoidance practices involving shell entities implies that the Proposal was published as an answer to the pressure of the public (especially following the reports of investigative journalists, most recently the ones relating to the Open Lux scandal), rather than on the basis of an up-to-date assessment of its necessity. Moreover, the question of how the newly introduced anti-avoidance mechanism is supposed to interact with the existing framework of legislative, as well as judicial measures against tax avoidance applicable in the EU context has not been given much thought. Even if we were to leave aside the issue of compatibility of the anti-avoidance mechanism introduced by the Proposal with the established case law of the CJEU, as well as the controversial aspect of its interaction with the ATAD GAAR transposed into national laws of Member States, serious doubts remain with respect to the choice of substance indicators which are at the core of the new anti-avoidance mechanism: they do not take into account the specific type of economic activity the undertaking is involved in, some of them make little sense in view of the currently widespread remote work arrangements, while some are potentially in contradiction with the fundamental freedoms. At the same time, the Proposal not only substantially increases corporate taxpayers' compliance burden, but it also imposes significant administrative burden on Member States' tax authorities, not least by introducing rather short deadlines for the exchange of information and initiation of audits. It would therefore seem preferable if the European Commission were to put the Proposal on hold until relevant evidence is gathered on the deficiencies of the existing anti-tax avoidance framework in the EU, and sufficient consideration is given to the above questions.

References

Arnold, B. J. 2017. The Role of a General Anti-Avoidance Rule in Protecting the Tax Base of Developing Countries. In: A. Trepelkov, A. Tonino & H. Halka D. (eds.), *United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries*. New York: United Nations, pp. 715-766.

Athanasaki, V. 2021. GAARs: Sui generis Tax Provisions or just a Simple Reminder of Proper Interpretation of Law?. *Journal of Taxation*, pp. 17-27.

Commissie Doorstroomvennootschappen. 2021. *Op weg naar acceptabele doorstroom*. Den Haag: Ministerie van Financiën. Available at: https://open.overheid.nl/repository/ronl-0816d541-5d35-4413-ae74-f27a7e51a45b/1/pdf/rapport-commissie-doorstroomvennootschappen-op-weg-naar-acceptabele-doorstroom.pdf (29. 10. 2022).

Drüen, K. D. 2008. „Präzisierung“ und „Effektuierung“ des § 42 AO durch das Jahressteuergesetz 2008?. *Ubg - Die Unternehmensbesteuerung*, 1(1), pp. 31-38, https://doi.org/10.9785/ubg-2008-010106.

Duff. D. G. 2020. General Anti-Avoidance Rules Revisited: Reflections on Tim Edgar's "Building a Better GAAR". *Canadian Tax Journal* 68(2), pp. 579-611, https://doi.org/10.32721/ctj.2020.68.2.sym.duff.

European Commission. 2021. Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final, 2021/0434(CNS), Brussels, 22.12.2021. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0565&from=EN* (14. 10. 2022).

European Commission. 2021. *Questions and Answers on the Commission's proposal to end the misuse of shell entities*. Brussels: European Commission. Available at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_21_6968/QANDA_21_6968_EN.pdf (31. 10. 2022).

Hoor, O. R., O'Donnell, K. & Schmitz, S. 2022. Using a Sledgehammer to Crack a Nut: The European Commission's Draft Directive to Tackle Shell Entities. *Tax Notes International*, 106(2), pp. 225-246.

Krišto, I. K. & Thirion, E. 2018. *An overview of shell companies in the European Union*. Brussels: European Parliamentary Research Service. Available at: https://www.europarl.europa.eu/cmsdata/155724/EPRS_STUD_627129_Shell%20companies%20in%20the%20EU.pdf (15. 10. 2022).

Popa, O. 2022. Proposal for an EU Directive Laying Down Rules to Prevent the Misuse of Shell Entities for Tax Purposes (Unshell): Seven Steps towards Disgrace or Redemption. *European Taxation*, 62(4), pp. 165-167.

Radenković, I. 2016. *Foreign Direct Investments in Serbia*. Belgrade: Rosa Luxemburg Stiftung Southeast Europe. Available at: https://rosalux.rs/wp-content/uploads/2022/04/108_foreign_direct_investments_in_serbia_ivan_radenkovic_rls_2016.pdf (31. 10. 2022).

Tolman, C. & Molenaars, M. 2022. The Unshell Directive and Its Impact on Dutch Holding Structures. *Tax Notes International*, 106(1), pp. 99-105.

Vanistendael, F. 2006. Halifax and Cadbury Schweppes: One Single European Theory of Abuse in Tax Law?. *EC Tax Review*, 15(4), pp. 192-195, https://doi.org/10.54648/ECTA2006036.

Vržina, S. 2017. Računovodstveni aspekt ofšor poslovanja privrednih društava. *Finansije,* 72(1-6), pp. 82-100.

Internet Sources

Brakočević, M. 2021. U Srbiji trećina firmi posluje bez ijednog zaposlenog. *Politika*. Available at: https://www.politika.rs/sr/clanak/486474/U-Srbiji-trecina-firmi-posluje-bez-ijednog-zaposlenog (29.10.2022).

IBFD Tax Research Platform, Luxembourg - Corporate Taxation - Country Tax Guides. Available at: https://research.ibfd.org/#/doc?url=/linkresolver/static/cta_lu_s_7.3.&refresh=1666006630863%23cta_lu_s_7.3.4. (15. 10. 2022).

IBFD Tax Research Platform, Netherlands - Corporate Taxation - Country Tax Guides. Available at: https://research.ibfd.org/collections/cta/html/cta_nl_s_007.html#cta_nl_s_7.3.3.3. (15. 10. 2022).

Legal Sources

Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, *Official Journal of the European Union*, L 157/49, 26.6.2003. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0049 (16.10.2022).

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (Codified version), *Official Journal of the European Union*, L 310/34, 25.11.2009. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0133&from=EN (15. 10. 2022).

Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *Official Journal of the European Union*, L 84/1, 31.3.2010. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0024&from=EN (15. 10. 2022).

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, *Official Journal of the European Union*, L 64/1, 11.3.2011. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32011L0016 (22. 10. 2022).

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), *Official Journal of the European Union*, L

345/8, 29.12.2011, Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32011L0096 (16. 10. 2022).

Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, *Official Journal of the European Union*, L 193/1, 19.7.2016. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32016L1164 (22. 10. 2022).

Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, *Official Journal of the European Union*, L 144/1. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.144.01.0001.01.ENG. (15. 10. 2022).

Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, *Official Journal of the European Union*, L 265/1, 14.10.2017. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L1852&from=ET (15.10.2022).

Abgabenordnung. Available at: https://www.gesetze-im-internet.de/ao_1977/BJNR006130976.html (22. 10. 2022).

Bundesabgabenordnung. Available at: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003940 (22. 10. 2022).

Ley del Impuesto sobre Sociedades. Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2014-12328 (22. 10. 2022).

Treaty on European Union and Treaty on the Functioning of the European Union: consolidated version, *Official Journal of the European Union* C 326, 26 October 2012. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2012%3A326%3ATOC, (28. 10. 2022).

Case Law

Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2, 1997. CJEU, Judgment of the Court of 17 July 1997. (Case 28/95, ECLI:EU:C:1997:369). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0028&from=EN, (25. 10. 2022).

Cadbury Schweppes, 2006. CJEU, Judgment of the Court (Grand Chamber) of 12 September 2006. (Case 196/04, ECLI:EU:C:2006:544). Available at: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-196/04, (22. 10. 2022).

Euro Park Service, 2017. CJEU, Judgment of the Court (First Chamber) of 8 March 2017. (Case 14/16, ECLI:EU:C:2017:177). Available at: https://curia.europa.

eu/juris/document/document.jsf?text=&docid=188665&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2409469, (22. 10. 2022).

Eqiom and Enka, 2017. CJEU, Judgment of the Court (Sixth Chamber) of 7 September 2017. (Case 6/16, ECLI:EU:C:2017:641). Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=194101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2409173, (22. 10. 2022).

Deister Holding, 2017. CJEU, Judgment of the Court (Sixth Chamber) of 20 December 2017. (Case 504/16, ECLI:EU:C:2017:1009). Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=198073&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2408860, (22. 10. 2022).

Lidija O. Živković
Master, asistent, Pravni fakultet Univerziteta u Beogradu, Srbija
E-mail: *lidija.zivkovic@ius.bg.ac.rs*
ORCID: *https://orcid.org/0000-0003-2113-2566*

O REŠENJIMA KOJE DONOSI PREDLOG *UNSHELL* DIREKTIVE

Sažetak

Predmet rada je nedavno objavljeni Predlog direktive o utvrđivanju pravila za sprečavanje zloupotrebe shell entiteta u poreske svrhe i izmeni Direktive 2011/16/EU – tzv. Predlog unshell direktive. Autorka najpre identifikuje elemente postojećeg legislativnog okvira EU koji su doprineli rasprostranjenoj upotrebi shell entiteta sa ciljem izbegavanja poreza u okvirima jedinstvenog tržišta i objašnjava kontekst u kome je Predlog formulisan. Srž rada predstavlja detaljna analiza anti-abuzivnog mehanizma predviđenog Predlogom, kao i razmatranje osnovnih problema koji se u vezi sa njegovim funkcionisanjem mogu očekivati. Takođe, u radu se ispituju efekti Predloga na srpske obveznike poreza na dobit pravnih lica. Autorka zaključuje da Predlog zaslužuje određene izmene, odnosno preciziranja, pre svega u pogledu načina regulisanja interakcije sa postojećim opštim antiabuzivnim merama sadržanim u nacionalnim zakonodavstvima država-članica, kao i u pogledu odabira indikatora supstance na kojima se zasniva funkcionisanje antiabuzivnog mehanizma koji se njime uvodi.

Ključne reči: Unshell direktiva, zloupotreba shell entiteta, ekonomska suština, izbegavanje poreza, potpuno artificijelni aranžmani.

Primljeno: 6. 11. 2022.
Izmenjeno: 14. 12. 2022.
Prihvaćeno: 30. 12. 2022.

Ana S. Knežević Bojović*
Jovana M. Misailović**

Original scientific paper
UDK: 347.958.8
doi: https://doi.org/10.56461/SPZ_22403KJ

JUDGES' ASSOCIATIONS AND TRADE UNIONS – INTERNATIONAL STANDARDS AND SELECTED NATIONAL PRACTICES***

Abstract

The aim of the paper is to present international standards and their implementation in the national legislations in European countries regarding judges' right to association with special regard to judges' right to unionise.

Authors hypothesise that although not strictly envisaged in any of the hard law sources, there is a plethora of soft-law instruments to assert this right. Consequently, the authors conclude that there is nothing in the relevant international standards that a priori prevents judges from unionising. Additionally, they posit that judges benefit from collective workers' rights generally linked to the trade unions through activities of judges' association, even in cases where judges are explicitly prohibited from joining and forming trade unions. The latter assertion is supported by a comparative overview of practices in selected European countries.

Keywords: *judges, freedom of association, trade unions, judicial independence.*

1. Introduction

Judicial independence is the staple of the rule of law (Venice Commission, 2011; Venice Commission, 2016). It is commonly understood to imply independence from external and internal influence, which is reflected, *inter alia* in merit-based appointment and promotion, clear and fair disciplinary proceedings,

* PhD, Senior Research Fellow, Institute of Comparative Law, Belgrade, Serbia
E-mail: *a.bojovic@iup.rs*
ORCID: *https://orcid.org/0000-0002-3746-5747*

** MA, Research Assistant, Institute of Comparative Law, Belgrade, Serbia
E-mail: j*.misailovic@up.rs*

*** This paper is a result of the research conducted by the Institute of Comparative Law financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2022 registered under no. 451-03-68/2022-14/200049.

and sufficient resources being allocated to the courts to guarantee a fair trial. Judges are not only allowed, but encouraged to actively address phenomena that may affect their institutional or individual independence from undue influences (*Baka v. Hungary*, Application no. 20261/12, para. 168). In doing so, judges not only enjoy the freedom of expression (*Baka v. Hungary* 20261/12; *Harabin v. Slovakia*, Judgment no. 62584/00; *Wille v. Liechtenstein*, Judgment no. 28396/95; *Kudeshkina v. Russia*, Judgment no. 29492/05), but are free to form and join associations and utilise them in advancing their collective and, by extension, individual rights (Garoupa & Ginsburg, 2016, p. 2). Advocating for the improvement of such rights with regard to workers is traditionally the role of trade unions. Judges, however, are not typical workers. They are a third branch of power, public servants (Zherobkina, Maletov & Sevruk *et. al.*, 2020) or agents of society (Garoupa & Ginsburg, 2016, p. 2), even though they can invoke certain rights attributable primarily to workers (*UX v. Governo della Repubblica Italiana*, para. 22); in some national systems, they are deemed to be employed by the state (Apelacioni sud u Beogradu, 2015, para. 9) or effectively have the position of civil servants (Amadeus Wolff, 2011, p. 2). Given their specific position, their right to associate and unionize needs to be explored in more detail. The issue came into a particular spotlight when an association of Portuguese judges, having the term "syndicate" in their name (see *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, para. 117) sought a preliminary reference from the Court of Justice of the European Union, resulting in a seminal decision sustaining that organisation of the national judiciaries is an obligation pursuant to primary EU law.

Freedom of association of judges is recognised in numerous documents developed by the United Nations (UN) and Council of Europe (CoE) bodies, along with a general observation that judges utilise such associations to improve their independence and status, but also foster rule of law.

However, the relation between the freedom of association and the right of judges to form or be members of trade unions is only laconically addressed in supranational standard-setting documents, and mostly left to be regulated within the frameworks of legal traditions in each state. The phenomenon is rather under-researched (Castillo Ortiz, 2017, p. 319), and is commonly seen through the prism of the entire judicial system (see Bell, 2006) or other topical issues *e.g.* judicial councils or activism of judges in defense of the rule of law (see Matthes, 2021). Similarly, academic papers dedicated to the participation of judges in trade unions are limited to the works coming from countries with constitutional and legal traditions that generally allow (Robert, 2016; de Maillard, 2016; Tappert, 2019) or strictly prohibit judge's participation in trade unions (Verzelloni, 2016).

In 2020 the Consultative Council of European Judges issued an Opinion on the role of associations of judges in supporting judicial independence, attempting *inter alia* to formulate standards concerning the relationship between judicial associations and trade unions. The Opinion was informed by answers to a dedicated questionnaire, where one question was precisely devoted to the said issue. While the answers are sometimes rather laconic, they do provide valuable insight into the different approaches employed by various European countries with regard to the legal framework and practice of judges' forming or being members of trade unions.

The present paper posits that associations of judges fulfill a role that is traditionally attributed to trade unions, even though their purpose is primarily focused on fostering judicial independence and the rule of law, and that such a role is not precluded by national legal frameworks that prohibit the unionisation of judges. Further, it suggests that the participation of judges in trade unions is not *per se* contrary to the standards of judicial ethics. These assertions will be supported by relying on relevant international standards regarding the judge's freedom of association and the general right to form trade unions. Subsequent to that, the paper will provide an overview of paradigmatic examples of national legal frameworks and practices concerning judges' participation in associations and/or trade unions in Europe, illustrating also the (in)effectiveness of the prohibition of unionisation for judges. In doing so, the authors will not go into a detailed examination of the status of judges in national legal frameworks, nor the national rules under which associations of judges or their trade unions register and function, but will rather focus on examining their role vis-à-vis issues that are traditionally exercised by trade unions with regards to the rights of workers. Finally, the paper will provide conclusions addressing the relevance of the topic.

2. International Standards on Judges' Right to Association

There are no hard law sources on the international and European level which specifically address the freedom of association of judges in the context of their role as holders of a public office. Nevertheless, their right to associate can be derived from the general rules on the freedom of association. Additionally, a number of soft law instruments which specifically address judicial independence, judicial conduct, or other aspects relevant to insuring citizens' rights to fair trial do establish specific freedom of association for judges and put it clearly in the context of the protection of their professional interest. One of them even expressly addresses the right of judges to unionise. Below, the authors provide a bird's eye view of both hard and soft law documents containing standards related to freedom of association and freedom to form trade unions relevant in the European context.

2.1. Hard-Law Sources

The most important documents guaranteeing human rights applicable in Europe are the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Humans Rights (ECHR). All of them promulgate citizens' right to associate, and also the right to form a trade union (UDHR, Art. 23; ICCPR, Art. 22(1); ECHR, Art. 11(1)). As the case is with other rights, freedom of association and freedom to unionize are subject to legitimate restrictions. In order to be justified, the limitations have to be prescribed by law, to have a legitimate aim, meaning that they can be imposed only when it is needed to secure others to enjoy their rights as well as in order to fulfill requirements of morality, public order and the general welfare in a democratic society (UDHR, Art. 19, 20, 29(2); ICCPR, Art. 22(2)). Three cited human rights treaties impose the said restrictions in relation to specific occupations such as members of the armed forces, police, or of the administration of the State (ECHR, Art. 11(2)). Judges are not explicitly referred to in this context, and generally enjoy the freedom of association on par with other citizens. It is important to note that the European Court of Human Rights (ECtHR) was presented with a rather limited number of cases concerning the freedom of association of judges. However, they addressed the issue of the judge's membership in other, non-judicial associations. ECtHR did find the judge's freedom of association to have been violated, but has dealt with the issue on formal rather than substantive terms, and thus provides little insight into this court's position on what would be legitimate restrictions to judges' freedom of association. (see *N.F. v. Italy* & *Maestri v. Italy*)

The Convention of the International Labour Organisation Convention No. 87, on Freedom of Association and Protection of the Right to Organise, as the core document of international labour law (see Misailović, 2019, p. 116) is instrumental in guaranteeing the right to form and join trade of workers. In Article 2, the ILO lays down the right of both workers and employers to establish their organizations "without previous authorization" by the state. This is crucial for ensuring that trade unions are independent in performing their role in the labour market as the guardians of labour rights. As opposed to the previously presented documents where the right to associate is guaranteed to citizens, the ILO is the sole example where the right to association is precisely guaranteed as a workers' right.

Consequently, this document can also constitute grounds for enabling judges to enjoy the freedom of association and the freedom to unionize. This assertion is supported by the activity of the ILO Committee on Freedom of Association, which on two occasions expressly proclaimed that provisions of national laws which deny the right to set up trade unions to judges (and public prosecutors) are contrary to the principles of freedom of association as guaranteed by relevant ILO Conventions (ILO, 2014, para. 933; ILO, 2016, para. 210). While the following paragraphs will show that some countries nevertheless impose express prohibitions on the right of judges to form trade unions, it is safe to say that international standards in the field of labour law support the right of judges, like all other workers, to freedom of association also in the context of labour law.

2.2. Soft-Law Sources

Unlike hard-law sources, which do not address the freedom of judges specifically, numerous soft-law instruments addressing the various facets of judicial independence promulgate judges' right to form professional associations, including trade unions. However, mindful of the specificities of judicial office, they also frame the said two rights in the context of special duties imposed on judges precisely by virtue of their office. Below, the paper will provide an overview of how the key documents adopted on the UN and European level address these issues.

Notably, the UN Basic Principles on the Independence of the Judiciary (UN Principles) stipulate that members of the judiciary are entitled to freedom of expression, belief, association, and assembly, like other citizens. Furthermore, the UN Principles underline that, unlike others, while exercising these rights, judges need to always preserve the dignity of their office and the impartiality and independence of the judiciary. Further, they allow judges to form and join associations of judges or other organizations, in order to represent their interests, promote their professional training, and protect their judicial independence (United Nations Basic Principles on the Independence of the Judiciary, paras. 8-9). However, this document fails to provide judges with an *explicit* right to form trade unions. The last principle, while not juxtaposing the freedom of association and forming a trade union with judicial dignity and the demand for judicial impartiality, can raise some practical issues with respect to the manner in which the two said rights are exercised. It is important to note that the UN Principles are addressed to member states, aiming to assist them in securing and promoting the independence of the judiciary; in the context of trade unions, there is nothing in the UN Principles that could support an *a priori* prohibition of unionisation of judges. This position can be further supported by the express assertion made by the Special Rapporteur on the independence of judges and lawyers (Human Rights Council, 2019, para. 60) that a judge may be a member of a trade union or non-profit organization. Conversely, point 7.6 of MT Scopus International Standards of Judicial Independence envisages that judges may be organised in associations designed for judges for furthering their rights and interests as judges. This somewhat limits the scope and reach of judges' right to associate if only narrow and linguistic interpretation is employed, which was not necessarily the underlying intention. The currently ongoing development of ELI Mount Scopus European Standards of Judicial Independence and of related comments may provide some much-needed guidance in that respect (see Towards ELI-Mount Scopus European Standards of Judicial Independence).

Another relevant soft law instrument adopted at the UN level is the Bangalore Principles of Judicial Conduct (Bangalore Principles). Unlike the UN Principles, which are addressed to states, the Bangalore principles are directed towards judges, aiming to offer them a framework for regulating judicial conduct (see Mirić, 2013, pp. 327-342). The Bangalore Principles affirm the right of judges to form or join associations of judges or participate in other organizations representing the interests of judges (Art. 4.6). This principle is further elaborated in the Commentary to the Bangalore Principles, stating that judges may form with other judges, or join a trade union or professional association which are organised in order to protect and advance the conditions of service and salaries of judges (Commentary on the Bangalore Principles of Judicial Conduct, 2007, p. 116). Additionally, Commentary underlines that, having in mind the constitutional and public character of the judge's service, restrictions may be placed on the right to strike. The fact that the judges' right to unionise is in the key document governing ethical standards for judges clearly shows that this right is not *per se* contrary to ethical standards. This is of particular relevance, since an informative academic paper examining, *inter alia*, the organisation of judges in trade unions (Fauconnier, Husson & Roux d'Anzi, 2016) underlines that even in the absence of explicit restrictions to forming trade unions, judges do not perceive unionism as a solid tool to protect or advance the position of the judiciary. This, somewhat negative attitude seems to be rooted in the consideration that unionism is not in accordance with the high position of the judge and hence may be in contravention of the principles of judicial ethics. Such a concern can be arguably perceived as legitimate, given that the activity of trade unions is often linked to the political engagement of the members of the trade unions, which may impinge on the duty of impartiality and independence. Gaboriau (2016, p. 36) for instance, indicates that at one point in time in France, there were calls for restricting trade unionism within the judiciary, based on the concerns that trade unions are likely to be politically engaged, which is contrary to the principle of judicial independence. The issue of collective activities of judges' associations, regardless of whether through associations or trade unions, is particularly relevant in authoritarian societies where public criticism of the reforms in this sphere of judiciary sponsored by the executive and legislative is often perceived as inherently political, and is hence sanctioned (*Miroslava Todorov v. Bulgaria*), or where any affiliation of a judge in an association is implicitly or explicitly incorporated in criteria of judicial appointments (Ford, 2020; Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland, 2019; *Dolinska-Ficek and Ozinek v. Poland*) or where the political activity of judges is prohibited in very general terms (Serbian Constitution, 2007, Art. 148(4)).

It should be noted that even the political activity of judges in the Bangalore Principles is not addressed through a strict prohibition, but rather through the principle of restraint (Commentary on the Bangalore Principles of Judicial Conduct, 2007, p. 95, para. 35; Human Rights Council, 2019, paras. 65/75). Consequently, the concerns related to unionisation being in principle in contravention of high ethical standards that come from judges themselves are not supported by the wording of either the Bangalore Principles or their Commentary. They, however, do impose a duty of restraint, which seems to be more related to the exercise of such rights *in concreto*.

An important set of soft-law instruments relevant to the European context is adopted by the Consultative Council of European Judges (CCJE), CoE Committee of Ministers, and the Venice Commission, which will be presented chronologically.

European Charter on the Statute for Judges (para. 1.7) (Charter) envisages that judges may be members of professional organizations. The Explanatory Memorandum further underlines the significance of judges' organisations being consulted while proposing a change in their statute or any other change regarding the way they are remunerated, their social welfare, including their retirement pension. With specific restrictions connected to some occupations in public service, these activities are usually reserved for trade unions. However, this should ensure that judges are not left out of the decision-making process in these fields, although not having a trade union. (Explanatory Memorandum to the European Charter on the Statute for Judges, 1998, p. 23)

CCJE Opinion No. 3 stipulates that judges should have the right to participate in certain debates concerning national judicial policy. Additionally, it stipulates that judges should be consulted and actively involved in the preparation of legislation concerning their statute and generally the functioning of the judicial system (para. 34). It is recognised in the opinion that this assertion raises the question of whether judges should be allowed to join trade unions; fortunately, the Opinion provides an affirmative answer, underscoring that judges can join trade unions based on their right to freedom of association. However, Opinion No. 3 acknowledges that this right may be limited through the prohibition from enjoying the right to strike as one of the basic rights associated with trade unions.

Council of Europe Recommendation CM/Rec (2010)12 on judges: independence, efficiency, and responsibilities (para. 25) further supports judges in their right to form and join professional organisations. It frames the activity of professional associations of judges in the context of allowing judges to be able to defend their independence and interests.

Magna Carta of Judges (Art. 12) provides judges with the right to be members of national or international associations of judges, entrusted with the defence of the mission of the judiciary in society.

Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association, adopted in 2014 (paras. 144-146), address the freedom of association of state officials and law enforcement personnel. In doing so, they underline that the relevant international treaties, most notably the ICCPR and the ECHR, do recognise that freedom of association may be restricted with regard to some public officials. Nevertheless, the Guidelines underline that such restrictions can affect only limited categories of public officials and, if imposed, must still be subject to the principle of proportionality. Consequently, it would be difficult to argue that every *a priori* prohibition of a particular type of association, such as a trade union, for judges, can be deemed proportionate.

In 2020 CCJE adopted Opinion No. 23 regarding the role of associations of judges in supporting judicial independence. This is a seminal document synthesising the relevant international standards on the issue. Notably, it recognises (para. 17) that the objective for an association of judges of establishing and defending independence encompasses, among others: defending judges and the judiciary against any infringements of independence, claiming sufficient resources and satisfactory working conditions, aiming for adequate remuneration and social security, rejecting unfair criticism and attacks against the judiciary and individual judges, establishing, promoting and implementing ethical standards, and safeguarding non-discrimination and gender balance. Moreover, in it, the CCJE undoubtedly expressed the opinion that associations of judges, although not organisations that represent civil society, should be included at all levels in judicial reforms and hence, consulted by the executive power in projects including budgetary issues and the allocation of resources and all aspects of the status of judges (paras. 38, 40, 41). This statement is based on the stance that the association of judges represents the experience and opinion of judges. Therefore, it is not surprising that this document reiterates the assertion made in the Commentary to the Bangalore Principles by underlining that judges should be allowed to form and join trade unions but also that specific issues such as judges' working conditions, their remuneration, pension, and security, are of highest importance for judges' associations as well. It is clear that CCJE Opinion No. 23 draws similarities between the aims of judges' associations and aims set by the trade unions when striving to protect and improve their status vis-a-vis their employers (paras. 66-68). Relying on this, Opinion No. 23 unequivocally clarifies that activities performed by the associations of judges which are usually carried out by the trade unions should be valued as of the same significance by the state.

3. Trade Unions and Judges' Associations – Selected Examples of National Frameworks

National-level operationalisation of relevant international standards concerning the freedom of judges to associate and form trade unions is very heterogeneous. The answers to the questionnaire used in the preparation of CCJE Opinion No. 23, as well as the national practices cited in the 2019 Report of the UN Special Rapporteur on the independence of judges and lawyers testify to the diversity of approaches to how judges' associations are formed, how they communicate with state bodies and authorities (including judicial self-governance bodies), how they operate in order to protect and improve judicial independence and whether, in doing so, they also form trade unions. Provided below is a birds-eye view of selected European legal frameworks and practices.

3.1. France – judges unionise

Although the idea of an active union of judges might be perplexing to those familiar only with jurisdictions where judges are supposed not to interfere with or be active in political issues, (de Haan, Silvis & Thomas, 1989, p. 477), France provides a good example of a solution where professional trade unions are formally established within the judiciary. What is more, in France unionisation of judges is considered an appropriate tool for the renewal of judicial ethics, through actions in favour of the rule of law and analysis of court practice.

Generally, the process of unionisation in France, which was allowed after the end of the Second Empire, became legally regulated by law in 1884. This law was considered liberal, as it gave employees the right to form and join a trade union or choose not to do so, without imposing on them any specific type of union according to category - workers, employers, or industry (Le Crom, 2019, p. 105).

The unionisation of judges, however, came almost a century later. The process of unionization in France is said to be partially attributed to the social diversification of the magistrates, due to an altered process of recruitment of judges, which rendered the judiciary more heterogeneous (Fauconnier, Husson, Roux d'Anzi, 2016). Unsurprisingly, veteran judges were more conservative and attached to the traditional acceptance of judicial restraint, expressing their disagreement with unionisation. Conversely, prevailingly young judges, striving for a better position, formed the first professional syndicate of judges (SM) in 1968 (Mounier, 1986, p. 28). This push for unionisation eventually, in the mid-1970s, brought about the transformation of an association of judges - *Union Fédérale des Magistrats* into a trade union - *Union syndicale des Magistrats* (USm) (Cristóbal, 2008, p. 122). The unionisation was not only prompted by a strong opinion that a union structure west best suited to defend professional interests, but was also supported by a number of pronouncements made by the *Conseil d'État* in which it was recognized that union activities were not likely to constitute an offense against the "duty of reserve" imposed on magistrates.

One of the wider benefits of allowing judges to unionise in France is seen to be in fostering a perception of judges as humans who are able to integrate into society. One former president of the SM reportedly underscored that promoting a more humanised vision of judges as figures that are integrated into society would help the judge to accept his or her subjectivity and thus be conscious of potential biases, asserting that surpassing judicial restraint can thus strengthen judicial ethics as well as the rule of law (Fauconnier, Husson, Roux d'Anzi, 2016).

It is interesting to note that the French legal framework does not have specific rules authorizing trade unionism in the judiciary, which, in practice, made it very difficult to define its limits in the context of the politicization of trade union activity (De Mallard, 2016, p. 447). In terms of the mission set out by judicial trade unions as compared to the ones commonly promulgated by associations of judges, it is interesting to see that a leading judicial trade union in France declares its statutory mission in the context of insuring judicial independence, defending the moral and material interests of judges, especially in cases of recruitment, training, and promotion, and to contribute to the advancement of laws in judicial institutions, which is highly resemblant of the missions usually assumed by judges associations. The legal advantage of unionisation for the judges in France as compared to professional organisations of judges can perhaps be better perceived by outlining the rights granted to trade unions in France by the Code du travail (Labour Act). Judges' trade unions have the same legal status as any other professional trade union in France, and as such, they are given rights by the labour law – *Code du travail* (Fr.). The importance of having the right to form trade unions in relation to professional associations is in the legal status that trade unions enjoy, given that professional trade unions have as their exclusive goal the defence of the rights, as well as the moral and material interests, both collective and individual, of the persons specified in their statutes (Code du travail, L2131-1). Trade unions also have exclusive competence to negotiate collective agreements and thus enable a wider scope of rights compared to the ones set by law (Code du travail, L2131-2 - L2131-4). Further, trade unions have the right to take legal action in court and to exercise all the rights reserved for civil law parties in relation to facts that cause direct or indirect damage to the collective interests of the profession they represent (Code du travail, L2132-3).

Generally, the high rates of unionization within the French judiciary are seen to foster a high level of protection for judges (Lemennicier & Wenzel, 2018, pp. 33-34).

3.2. Spain – Judges Cannot Unionise but Go on Strike

Spanish legislation is an example that can arguably be deemed to be contrary to relevant international standards when it comes to the enjoyment of judges of the benefit to form trade unions. Namely, Spanish Constitution, specifically Art. 127 (Constitución Española, BOE núm. 311, de 29/12/1978) expressly prescribes that judges and public prosecutors, whilst actively in office, may not be members of political parties or of trade unions. This prohibition is reiterated in the Organic Law of the Judiciary (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE» núm. 157, de 02 de julio de 1985 esp.), in Art. 395, para. 1 where it is further elaborated that judges are also prohibited from attending any public acts or meetings that are not judicial in nature, except when so authorized by the General Council of the Judiciary. Their voting rights are also restricted to a passive voting right (Art. 395, para. 2). The strict prohibition of judicial (and prosecutorial) unionisation was debated at the time of the adoption of the Spanish Constitution and was accepted as a prevailing opinion, based on the perceptions that trade union activity is contrary to the dignity of the judicial office; additionally, their membership in trade unions was seen as a tool for jeopardising judicial independence (Sanz Llorente, 1992). Further, unionisation was deemed likely to induce a lack of trust in the judiciary within the society, and would necessarily lead to a politicisation of judges (Fauconnier, Husson & Roux d'Anzi, 2016, p. 5).

Nevertheless, the Spanish Constitution in Art. 127 also envisages that the system and modalities for the professional association of judges shall be prescribed in more detail by the law. In this way, the Constitution went in line with the relevant international standards, allowing judges to form their associations.

The purposefulness of the Spanish prohibition of unionisation of judges was, however, challenged in 2009, when judges in February, went on strike for the first time, demanding a better legal position - including higher salaries and greater penalties for judges who had not followed the rules properly, as well as adjustment of workloads. The action was condemned as illegal by the government in the context of the constitutional prohibition of judges' right to unionise, and by extension, to strike, and was the subject of a heated debate on its legality (Villarejo, 2009).[1] The strike also revealed the divide within the judicial profession - the majority of the judges supported the claims raised, but differ on the legitimacy of the right to strike and the call to strike. The President of the Superior Court in Madrid said that judges who went on strike had had the 'legitimacy', while also calling for 'prudence' among those taking action. The President of the Barcelona Audiencia (Court), claimed that judges were not allowed to strike because they were an agency of the state. This opinion was supported by in the Progressive Prosecutors' Union which had claimed that resorting to strike action was an 'inadequate' and 'disturbing' way for judges to highlight their demands (Villarejo, 2009). Finally, the General Council of the Judiciary, the highest judicial self-governance body in Spain, declared that there was no legal basis for or against the strike, or for the council to intervene (Villarejo, 2009).

In the absence of clear rules, the judge's strike also caused an extensive academic debate, where opposing opinions on the judge's right to strike were presented, relying not only on the texts of the Constitution and the Organic Law, but also on civil service and labour legislation (see Sánchez, 2010, pp. 573-586). While the issue of whether judges have the right to strike remains normatively unresolved, in Spain the practice of judges going on strike in order to defend their working conditions and the independence of their profession in this country has evolved, with nationwide strikes organised in 2013 (Europa Press, 2013; Ceberio Belaza, 2013) and in 2018 (Perez, 2018; Recuero, 2018).

The said practice lends itself well to a conclusion that the strict prohibition of unionisation of judges in Spain has not prevented them from protecting their rights through collective action, including that which is commonly assumed by trade unions – strikes. It demonstrates the futility of an *explicit* prohibition of the right of judges to form trade unions, while also testifying to the assumption that judge's associations can take on the roles traditionally played by trade unions.

[1] The paper will not go into a detailed elaboration of the causes of the strike. For more, see Villarejo, 2009.

3.3. To Unionise or not to Unionise – Approaches in Selected European Countries

In addition to the above-presented opposing examples of prohibition of judicial unionisation and its widespread acceptance in the judicial corps, there are other examples found in different European countries that can support the claim that judicial associations often take up the role of trade unions despite the lack of express legislative recognition of the right of judges to unionise or even in spite of a clear prohibition.

A particularly relevant practice is identified in Germany, a country with a long tradition of unionism. In Germany, judges have the status of public servants[2] (which can be different depending on their function as a professional judge or lay judge) and generally enjoy the freedom of association, which is guaranteed to all German citizens with no restriction linked to any occupation specifically (Grundgesetz für die Bundesrepublik Deutschland, Art. 9). Surprisingly, trade unions of judges are not customary (at this point it is worth recalling that in Germany in some cases trade unions of public servants nominate their members as candidates for judicial office (see Corby, Burgess & Höland, 2021, pp. 232 and more)). An important facet of trade unions in Germany lies in the fact that different political and ideological wings are united in one association, and that they are organized on an industry or branch basis. This means that a union is open to all employees in the industry concerned, no matter which trade or occupation they are engaged in, so there is only one union for all employees of the branch or industry (Weiss, 2004, p. 74).

Due to a lack of formal unionisation of judges in Germany, their professional association play a significant role in improving the position of judges. The main and most powerful judges' professional association in Germany is the *Deutcher Richerbund* (Ger.) which was established in late 1909, during the reign of William II (Böttcher, 2016, p. 499). This association is presumed independent of any political party and as a consequence, has an important and specific role in representing the entire body of the judiciary (Cristóbal, 2008, p. 122). The aims set by *Deutcher Richerbund*, resonate with those commonly taken up by trade unions, namely the promotion of legislation, the administration of justice and jurisprudence, maintaining judicial independence and impartial administration of justice, promotion of the professional, economic and social interests of judges and public prosecutors, especially in the areas of personnel, material resources, salaries, pensions, promotion of the exchange of information and experience and further training (*Deutscher Richterbund*, 2018). The legitimacy of this association

[2] German judiciary system is often criticized for the lack of self-administration within judiciary, based on the fact that judges are usually appointed by the government (Riedel, 2020, p. 1).

goes even beyond representing judges, resulting in it being consulted by the line minister on any changes in legislation that could have an impact on the judiciary. It seems evident that the *Deutscher Richterbund* carries out activities similar to that of a trade union.

Similarly, in Luxembourg, judicial associations reportedly act as judge's union even though they are not registered as such (Louxembourg-Questionnaire pour la préparation de l'Avis No. 23 du CCJE, 2020, para. 24), while in Greece, judicial associations self-identify as trade unions (Greece-Questionnaire for the preparation of the CCJE Opinion No. 23, 2020, para. 24)).

In a similar vein, at one point in time, the Polish Judges Association *Iustitia* focused its activities on improving judges' salaries and working conditions (Matthes, 2022, p. 473). In Romania, the dominant Association of Romanian magistrates during the 2000s and early 2010s reportedly focused on matters such as salaries and workload of judges (Beers, 2012, p. 57). However, in 2016 they were instrumental in preventing an ill-designed transplant, having the potential to undermine judicial independence, from being implemented in Romania (see Knežević Bojović, Matijević & Glintić, 2021, pp. 163-184).

During the 1960s in Italy judges formed unions, demanding better conditions and freedom from constraints imposed by higher levels of the judiciary (Garupa & Ginsburg, 2015, p. 121).

An interesting example can be found in Belgium, where associations of judges are clearly excluded from the scope of the law governing the dialogue between relevant public authorities and their corresponding syndicates. Nevertheless, the Belgian legal system has developed a dedicated forum enabling structured dialogue between relevant authorities and judicial associations. This is done in the form of a consultative council of judges (*Conseil consultatif de la magistrature* Fr.) established by a 1999 dedicated law (Loi instaurant un Conseil consultatif de la magistrature). What is more, judicial associations are qualified to participate in the work of this body provided they have at least 75 members. This requirement does not fully coincide with the concept of representativeness applicable to trade unions in various contexts but does indicate the need for the judicial association to channel the voice of a significant number of judges in order to have a say within this body. Likewise, the Bulgarian legal system recognizes a consultative body (*Съвета за партньорство към Висшия съдебен съвет* Blg.) (Наредба No. 8 от 8.11.2018 г. за организацията и дейността на Съвета за партньорство към Висшия съдебен съвет) comprising representatives of judicial council on the one hand and of judges' and prosecutors' associations on the other. Only associations representing at least 5 percent of judicial prosecutorial corps are qualified to take part in such consultations (Bulgaria-Questionnaire for the preparation of the CCJE Opinion No. 23, 2020, para. 24). Again, this is resemblant of the principle of representativeness.

In Serbia, the Judges Association of Serbia had a prominent role in protecting the interests of its members during the infamous judicial reform (Rakić Vodinelić, Knežević Bojović & Reljanović, 2012, pp. 102, 119, 206-214); its trade-union-like activity is perhaps best illustrated by a recently developed policy paper in an attempt to fortify and improve judges' remuneration and pension schemes (Društvo sudija Srbije, 2022).

4. Conclusion

Judges, given their instrumental role in the system of separation of powers and in protecting human rights, hold a special role in the constitutional and legal system of each individual country and are bound by high legal and ethical standards. Just like other citizens, judges have the right to associate in order to advance their independence and their professional status. While judge's right to associate is not explicitly guaranteed in international hard-law instruments, it is elaborated in detail in numerous soft-law instruments adopted by the UN and CoE and their bodies. Given that freedom of professional association is closely linked to the freedom of forming trade unions, the question of whether this right is granted to judges is particularly interesting. The interpretation of the key labour-law supranational instruments asserts the right of judges to unionise. However, the operationalization of these international standards is rather heterogenous on the national level. In a seeming contravention of the cited international standards, some countries, such as Spain, formally prohibit judges' membership in trade unions, relying mostly on the concern that this could lead to the politicization of the judiciary, thus impinging on judicial independence, or considering that unionization is contrary to the dignity of judicial office or judicial ethics.

In light of the realistic possibility of trade union activity being politicized, the question of whether judges are allowed to form trade unions naturally raises the question of whether judges are allowed to partake in political activities. The analysis presented in this paper shows that there is nothing in international standards on judicial independence and judicial ethics that would *a priori* prevent the unionisation of judges. The duty of restraint and the virtue of prudence, however, need to be employed *in concreto*, with due care being taken to ensure that the judges' freedom of expression or the duty to speak up are duly observed, regardless of whether the freedom of association and freedom of expression are exercised in the context of judicial trade unions or judges' associations. The last two considerations are particularly relevant in the context of authoritarian regimes which persistently impinge on judicial independence.

Judiciaries in some countries, such as France, have taken a different path, and following a sound tradition of unionization, have formed strong and active judicial unions which largely contribute to advancing the judiciary. Evidence from comparative practice also shows that in some countries judicial associations that take up the roles otherwise commonly assumed by trade unions, fight, *inter alia*, for the improvement of judges' working conditions, including salaries, workload, and pensions. The Spanish example of nationwide strikes of judges organized by associations of judges – an action for which only trade unions are legitimized - testifies to the futility of a strict prohibition of judicial unionization.

The analysis lends itself to the conclusion on the need for the possibility of unionisation within the judiciary to be clearly regulated. Further development of unambiguous international standards on judicial unionisation would help clarify some of the blurry lines and guide national legislators and judicial professionals alike. At the same time, numerous good practice examples show that in the absence of clear rules, judges' associations successfully assume the roles traditionally attributed to trade unions, implying *de facto* unionisation and their active role in protecting the collective interests of judges.

References

Amadeus Wolff, H. 2011. The Civil Service in Germany Annual Report. *Ius Publicum Network Review*. Available at: http://www.ius-publicum.com/repository/uploads/07_01_2022_10_04_08b_Wolff.pdf (13. 11. 2022).

Beers, D. J. 2012. Judicial Self-Governance and the Rule of Law. *Problems of Post-Communism*, (59)5, pp. 50-67, https://doi.org/10.2753/PPC1075-8216590504.

Bell, J. 2006. Judiciaries within Europe: A Comparative Review. New York: Cambridge University Press.

Böttcher, H.E. 2016. Le syndicalisme judiciaire en Allemagne: du monolithisme au pluralisme. *Les Cahiers de la Justice*, 3(3), pp. 497-508, https://doi.org/10.3917/cdlj.1603.0497.

Castillo Ortiz, P. J. 2017. Councils of the Judiciary and Judges' Perceptions of Respect to Their Independence in Europe. *The Hague Journal of the Rule Law*, 9, pp. 315–336, https://doi.org/10.1007/s40803-017-0061-2.

Corby, S., Burgess, P. & Höland, A. 2021. Employees as Judges in European Labour Courts: A Conflict of Interests? *European Journal of Industrial Relations*, 27(3), pp. 231-247, https://doi.org/10.1177/0959680120906631.

Cristóbal, R.S., 2008. El Derecho de Asociación de los Jueces: Asociacionismo profesional y asociación del juez a asociaciones no profesionales. *Revista Española de Derecho Constitucional*, (83), pp. 115-145.

de Haan, W., Silvis, J., & Thomas, P. A. 1989. Radical French Judges: Syndicat de la magistrature. *Journal of Law and Society*, 16(4), pp. 477-482, https://doi.org/10.2307/1410332.

de Maillard, J. 2016. Syndicalisme et justice: vieille lune ou idée neuve?. *Les Cahiers de la Justice*, 3(3), pp. 441-455, https://doi.org/10.3917/cdlj.1603.0441.

Fauconnier, G., Husson, A. & Roux d'Anzi, C. 2016. Collective Organizations of Judges and Professional Conduct: A Revived Approach to Judicial Ethics. European Judicial Training Network Themis Competition Semi-Final D. Omšenie, Slovakia, 26–30 June.

Garoupa, N. & Ginsburg, T. 2015. Judicial Reputation: A Comparative Theory. Chicago: University of Chicago Press, https://doi.org/10.7208/chicago/9780226290621.001.0001.

Knežević Bojović, A., Matijević, M. & Glintić, M. 2021. *International Standards on Judicial Ethics and the Pitfalls of Cursory Legal Transplantation*. In: Balkan Yearbook of European and International Law. Springer, Cham, pp. 163-184, https://doi.org/10.1007/978-3-030-97431-2_8.

Le Crom, J.P. 2017. Trade unions and labour law in France during the Second World War. Sindacati e diritto del lavoro tra dittature e democrazie nell'Europa mediterranea e latina del XX secolo. Attidel convegno Firenze, 23-24 novembre, pp.103-121.

Lemennicier, B. & Wenzel, N.G. 2018. The Judge and His Hangman: Judicial Selection and the Accountability of Judges. *ICL Journal-Vienna Journal on International Constitutional Law*, 12 (3), pp. 239-256.

Matthes, C.Y. 2022. Judges as Activists: How Polish Judges Mobilize to Defend the Rule of Law", East European Politics, (38)3, pp. 468-487, https://doi.org/10.1080/21599165.2022.2092843.

Misailović, J. 2019. Collective Bargaining with Special Reference to the Law of Germany and Republic of Serbia. Strani pravni život, 63(4), pp. 115-124. DOI: 10.5937/spz63-24186, https://doi.org/10.5937/spz63-24186.

Mirić, R. 2013. Bangalorski principi - doprinos razvoju sudijske etike, Strani pravni život, 57(3), pp. 327-342.

Mounier, J.P. 1986. Du corps judiciaire à la crise de la magistrature. In: Actes de la recherche en sciences sociales. De quel droit?, 64, pp. 20-29; doi :https://doi.org/10.3406/arss.1986.2333. Available at: https://www.persee.fr/doc/arss_0335-5322_1986_num_64_1_2333, (6. 11. 2022), https://doi.org/10.3406/arss.1986.2333.

Rakić Vodinelić, V., Knežević Bojović, A. & Reljanović, M. 2012. *Judicial Reform in Serbia 2008-2012*. Beograd: Centar za unapređivanje pravnih studija.

Riedel, J. 2020. Judicial Review of Judicial Appointments in Germany. *International Journal for Court Administration*, 11(1), pp. 1-19, https://doi.org/10.36745/ijca.296.

Robert, M. 2016. Le Fait Syndical Dans La Magistrature Française. *Les Cahiers de la Justice*, 3(3), pp. 417-423, https://doi.org/10.3917/cdlj.1603.0417.

Sánchez, L.M. 2010. La huelga en el poder judicial. *Anuario da Facultade de Dereito da Universidade da Coruña*, (14), pp. 573-586.

Sanz Llorente, F. J. (1992). La libertad sindical de jueces, magistrados y fiscales. *Revista de Derecho Político*, (35), https://doi.org/10.5944/rdp.35.1992.8554.

Swepston, L. 1998. Human Rights Law and Freedom of Association: Development through ILO Supervision. *International Labour Review*, 137(2), pp. 169-194.

Tappert, W. 2019. Bewegte Geschichte – 110 Jahre Deutscher Richterbund. *Deutsche Richterzeitung*, (5), pp. 166-167.

Verzelloni, L. 2016. Au-delà des voix plurielles. Les nouvelles transformations du syndicalisme judiciaire en Espagne. *Les Cahiers de la Justice*, 3(3), pp. 489-496, https://doi.org/10.3917/cdlj.1603.0489.

Weiss, M. 2004. Collective Representation in Labour Law in Germany. *Managerial Law*, 46(4/5), pp. 71-103, https://doi.org/10.1108/03090550410771125.

Zherobkina, Y., Maletov, D., Sevruk, Pavlenko, S. & Serbyn, N. 2021. Judge as a Public Servant. *Journal of Law and Political Sciences*, 29(4), pp. 240-260.

Internet Sources

Bangalore Principles of Judicial Conduct. 2002. Available at: https://www.icj.org/wp-content/uploads/2014/03/Bangalore-Principles-of-Judicial-Conduct-instrument-2002-eng.pdf (8. 11. 2022).

Ceberio Belaza, M. 2013. Más de 2.000 jueces y fiscales secundan la huelga contra las reformas de Gallardón. Available at: https://elpais.com/politica/2013/02/19/actualidad/1361305954_647889.html, (9. 11. 2022).

Council of Europe. 2020. Bulgaria-Questionnaire for the preparation of the CCJE Opinion No. 23. Available at: https://rm.coe.int/bulgaria-en-ccje-questionnaire-2020-bulgaria/16809f92e5, (5. 11. 2022).

Council of Europe. 2020. Greece-Questionnaire for the preparation of the CCJE Opinion No. 23. Available at: https://rm.coe.int/greece-en-reply/16809f9331, (5. 11. 2022).

Council of Europe. 2020. Louxembourg-Questionnaire pour la préparation de l'Avis No. 23 du CCJE, 2020. Available at: https://rm.coe.int/luxembourg-fr-reply/16809f965d, (5. 11. 2022).

Deutscher Richterbund. 2018. Available at: Leistungen für Mitglieder - Deutscher Richterbund (DRB), (8. 11. 2022).

European Law Institute. 2021. Towards ELI-Mount Scopus European Standards of Judicial Independence. Available at: https://www.europeanlaw-institute.eu/news-events/news-contd/news/towards-eli-mount-scopus-european-standards-of-judicial-independence/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=235e7141385a529f88a83b657222d747, (9. 11. 2022).

Evropa Press. 2013. Los jueces cifran en un 62% el seguimiento de la huelga. Available at: https://www.expansion.com/2013/02/20/economia/politica/1361348581.html (9. 11. 2022).

International Association of Judicial Independence and World Peace. 2008. Mount Scopus International Standards of Judicial Independence. Available at: https://www.icj.org/wp-content/uploads/2016/02/Mt-Scopus-Standards.pdf, (8. 11. 2022).

Pérez, F.J. 2018. La huelga de jueces y fiscales logra un amplio seguimiento. Available at: La huelga de jueces y fiscales logra un amplio seguimiento | Politica | EL PAÍS (elpais.com), (7. 11. 2022).

Pravna shvatanja, stavovi i zaključci Apelacionog suda u Beogradu / Odeljenje radnih sporova. 2015. Available at: http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pravna-shvatanja-stavovi-i-zakljucci-apelacionog-suda-u-beogradu/odeljenje-radnih-sporova/minuli-rad-za-sudije.html, (13. 11. 2022).

Recuero, M. 2018. Todos los jueces y fiscales acuerdan ir a la huelga el 19 de noviembre contra la gestión de Dolores Delgado. Available at: https://www.elmundo.es/espana/2018/11/05/5be01d21268e3edc7d8b45cf.html, (7. 11. 2022).

Villarejo, E. 2009. Debate on legality of judiciary strike. European Foundation for the Improvement of Living and Working Conditions. Available at: Debate on legality of judiciary strike | Eurofound (europa.eu), (8. 11. 2022).

Ford, M.N. 2020. 'Muzzle Law' Ends Poland's Ability to Call Itself a Democracy. Available at: https://theglobepost.com/2020/01/30/poland-muzzle-law/, (4. 11. 2022).

Legal Sources

Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations General Assembly in Paris on 10 December 1948. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (10. 11. 2022).

International Covenant on Civil and Political Rights (ICCPR), Adopted by General Assembly Resolution 2200A (XXI) on 16 December 1966, Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights, (10. 11. 2022).

European Convention on Humans Rights (ECHR), Adopted by Council of Europe in 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf, (10. 11. 2022).

Serbian Constitution, *Official Gazette of the Republic of Serbia*, Nos. 98/2006 and 115/2021.

Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 28. Juni 2022 (BGBl. I S. 968) geändert worden ist.

Code du travail. Available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000006145393/ (3. 11. 2022).

Constitución Española, BOE núm. 311, de 29/12/1978.

Organic Law of the Judiciary (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, BOE» núm. 157, de 02 de julio de 1985. Ley Orgánica del Poder Judicial Última modificación: 28 de julio de 2022. Available at: https://www.boe.es/biblioteca_juridica/abrir_pdf.php?id=PUB-PB-2022-150. (5. 11. 2022).

Loi Instaurant Un Conseil Consultatif De La Magistrature. - Coordination Officieuse En Langue Allemande. Service Public Federal Interieur 1999. Available at: https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=12-03-05&numac=2012000113, (4. 11. 2022).

Наредба No. 8 от 8.11.2018 г. за организацията и дейността на Съвета за партньорство към Висшия съдебен съвет, Издадена от Висшия съдебен съвет, обн., ДВ, бр. 97 от 23.11.2018 г., изм. и доп., бр. 37 от 7.05.2019 г., доп., бр. 79 от 8.10.2019 г.

Case Law

European Court of Human Rights

Case of Baka v. Hungary, Application no. 20261/12, Judgement from 23 June 2016. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22baka%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-163113%22]}

Case of Harabin v. Slovakia, Application no. 58688/11, Judgement from 20 February 2013. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-114666%22]}.

Case of Wille v. Liechtenstein, Application no. 28396/95, Judgement from 28 October 1999. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20WILLE%20v.%20LIECHTENSTEIN.

Case of Kudeshkina v. Russia, Application no. 29492/05, Judgement from 14 September 2009. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kudeshkina%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-91501%22]}.

Case of N.F. v. Italy, Application no. 37119/97, Judgment from 12 December 2001. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22N.F.%20v%20Italy%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-59622%22]}.

Case of Maestri v. Italy, Application no. 39748/98, Judgment from 17 February 2004. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22N.F.%20v%20Italy%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61638%22]}.

Case of Miroslava Todorova v. Bulgaria, Application no. 40072/13, Judgment from 19 January 2022. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-212376%22]}.

Case of Dolińska-Ficek and Ozimek v. Poland, Applications nos. 49868/19 and 57511/19, Judgment from 8 February 2022. Available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Dolinska%20Ficek%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-213200%22]}

Court of Justice of the European Union

Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment of the Court (Grand Chamber) of 27 February 2018.

Case C-658/18, *UX v. Governo della Repubblica italiana*, Judgment of the Court (Second Chamber) of 16 July 2020

Other Sources

Consultative Council of European Judge. 2002. Opinion no. 23 on the role of the Associations of Judges in supporting the judicial independence. Strasbourg: Council of Europe.

Consultative Council of European Judge. 2002. Opinion no. 3 on the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality. Strasbourg: Council of Europe.

Consultative Council of European Judges. 2010. Magna Carta of Judges (Fundamental Principles). Strasbourg: Council of Europe.

Council of Europe. 1948. European Charter on the Statute for Judges and Explanatory Memorandum. Strasbourg.

Council of Europe. 2010. Recommendation CM/Rec (2010)12 on judges: independence, efficiency and responsibilities. 2010. Strasbourg: Council of Europe.

Društvo sudija Srbije. 2022. Broj sudija u Srbiji, njihove plate u odnosu na stanje u državama članicama Saveta Evrope i predlozi za uspostavljanje efektivnih materijalnih garancija nezavisnosti sudstva. Beograd: Društvo sudija Srbije.

European Commission for Democracy through Law (Venice Commission). 2011. Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session, (Venice, 25-26) March.

European Commission for Democracy through Law (Venice Commission). 2016. Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12) March.

Human Rights Council. 2019. Report of the Special Rapporteur on the independence of judges and lawyers from the 41st session 24 June–12 July 2019. Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

International Labor Office. 2014. Report of the Committee on Freedom of Association, 320th Session, Geneva, 13–27 March.

International Labor Office. 2016. Report of the Committee on Freedom of Association, 326th Session, Geneva, 10–24 March.
Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association. 2015. Helsinki: Organization for Security and Co-operation in Europe.
Organization for Security and Co-operation in Europe. 2020. Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (as of 20 December 2019).
United Nation Basic Principles on the Independence of the Judiciary. 1985. Adopted on 6 September 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.
United Nations Office on Drugs and Crime. 2007. Commentary on the Bangalore Principles of Judicial Conduct.

Ana S. Knežević Bojović
Viši naučni saradnik, Institut za uporedno pravo, Beograd, Srbija
E-mail: *a.bojovic@iup.rs*
ORCID: *https://orcid.org/0000-0002-3746-5747*
Jovana M. Misailović
Master, istraživač saradnik, Institut za uporedno pravo, Beograd, Srbija
E-mail: *j.misailovic@iup.rs*

UDRUŽENJA SUDIJA I SINDIKATI – MEĐUNARODNI STANDARDI I IZABRANE NACIONALNE PRAKSE

Sažetak

Cilj rada je da predstavi međunarodne standarde i njihovu primenu u nacionalnim zakonodavstvima u zemljama Evrope u pogledu prava sudija na udruživanje sa posebnim osvrtom na pravo sudija na sindikalno udruživanje.

Autorke pretpostavljaju da, iako nije striktno predviđeno ni u jednom od izvora tvrdog prava, mnoštvo instrumenata mekog prava jasno potvrđuje da sudije imaju pravo na sindikalno organizovanje. Shodno tome, autorke zaključuju da u relevantnim međunarodnim standardima ne postoji ništa što *a priori* sprečava sudije da se sindikalno udružuju. Pored toga, autorke smatraju da sudije imaju koristi od kolektivnih radnih prava koja se uobičajeno povezuju sa delovanjem sindikata, kroz aktivnosti udruženja sudija, čak i u slučajevima kada je sudijama izričito zabranjeno da se udružuju i osnivaju sindikate. Poslednja tvrdnja je podržana uporednim pregledom prakse u odabranim evropskim zemljama.

Ključne reči: sudije, sloboda udruživanja, sindikati, sudijska nezavisnost.

Primljeno: 15. 11. 2022.
Prihvaćeno: 30. 12. 2022.

Anita Rodina*

Review scientific paper
UDK: 342.565.2 (474.3)
doi: https://doi.org/10.56461/SPZ_22404KJ

INTERACTION OF SUSTAINABILITY AND ENVIRONMENT IN THE CASE LAW OF THE LATVIAN CONSTITUTIONAL COURT

Abstract

The article provides an analysis of interaction of the principle of sustainability and environmental protection in the case law of the Constitutional Court.

The principle of sustainability in Latvian constitutional law is a quite new one. Still, it is applied by the Constitutional Court reviewing different cases. It is included also in the written text of the Constitution and all development of the state is focused on sustainability. As environmental protection is the core of this principle, the Constitutional Court has applied it by solving different environmental issues.

The article points out also the content of environmental constitutionalism. Namely, in Latvia, it is implemented also as a specific fundamental right to live in a benevolent environment. Legal remedies such as those before the administrative court and the Constitutional Court are analysed which can be used to protect violated fundamental rights.

To get insight into the case law of the Constitutional Court, three different issues are explained. First, the importance of agricultural land and its cultivation and protection by achieving the idea of sustainability is given. Then the author explains the main arguments of the application of this principle in spatial planning. In the end, sustainable energy cases where sustainability is applied lead to conclusions about the future and importance of renewable sources.

Keywords: *sustainability, environmental constitutionalism, benevolent environment, agricultural land, spatial planning, renewable resources*

1. Introduction: Content of the Sustainability

In legal science, sustainability is a new concept, which originated and has developed facing with challenges to global politics, economy, and environmental protection. Sustainability gained international recognition in 1987 when the World Commission on Environment and Development (known as the Bruntland

* Dr. iur., Justice of the Constitutional Court, Associate Professor of the Faculty of Law, University of Latvia, Latvia
E-mail: *Anita.Rodina@lu.lv*

Commission) published the statement "Our common future" (Bruntland, 1987). Naturally, the ideas of sustainability were reflected in the policies of nation-states[1], as well as in law. Today, sustainable development is an ideal or an aim for all states, as well as for the European Union and all global communities.

The definition of sustainability, provided by the Bruntland Commission, which explains the most essential aspects of this concept, is used also by the Constitutional Court[2] of the Republic of Latvia (hereinafter Constitutional Court or CC, Judgement by the CC in case No. 2010-48-03, para. 6.1 and case No. 2007-11-03, para. 15) Namely, sustainability is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (Bruntland, 1987). Quite a similar definition of sustainable development is included in environmental legal acts, *i.e.*, Section 1 of the Environmental Protection Law.[3] In other words, sustainability combines the development interests of the present generation with the future generations, requiring long-term thinking and actions.

Undeniably, in each area where this principle is applied, it is filled with appropriate content, and courts play a major role in revealing it. Although sustainability continues to cover new areas and fields (in Latvia, for example, sustainability has been applied in higher education (Judgement by the CC in case No. 2018-15-01, para. 14.1), legislation procedure (Judgement by the CC in case No. 2018-11-01 para. 18.1., para. 18.4.1), preparing the state budget (Judgement by the CC in case No. 2020-40-01, para. 8.2), taxation policy (Judgement by the CC in case No. 2016-14-01, para. 26), it cannot be denied that sustainability, first of all, was applied focusing to environmental issues. Moreover, examination of sustainability from the perspective of its central axiom (interests of generations) reveals that the environment and all related to it are an indispensable element and the central focus of sustainability because the environment is the pre-condition for the existence of human beings (Kamal, 1995, p. 17). This idea is encoded also in the Rio Declaration on Environment and Development, which emphasizes that human beings must be at the centre of concerns for sustainable development and

1 See, for example, **National Development Plan of Latvia for 2021-2027 (NDP2027)**. Available at: https://pkc.gov.lv/sites/default/files/inline-files/NAP2027__ENG.pdf; *Sustainable Development Strategy of Latvia until 2030.* https://pkc.gov.lv/sites/default/files/inline-files/LIAS_2030_en_0.pdf (28. 7. 2022).

2 The terms "Court" and the "Constitutional Court" will be used interchangeably in this paper.

3 The law states that "principle of sustainable development should be regarded as the integrated and balanced development of public welfare, the environment and economy, which meets the present social and economic needs of inhabitants and ensures the compliance with environmental requirements, not endangering the possibility to meet the needs of the future generations, as well as ensures the preservation of biologic diversity".

that human beings are entitled to a healthy and productive life in harmony with nature (UN, 1992; Judgement by the CC in case No. 2010-48-03, para. 6.1.1).

Judge Weeramary has said that sustainability is a principle of normative value and this is because it (sustainability) is widely and generally accepted by the global community (Lowe, 2001, p. 21). Latvia is part of this global community. Therefore, also the Latvian legal space which has become acquainted with, has recognised, and developed sustainability as one of the central elements for national development. Moreover, it has been concluded that the State's existence is based on the principle of sustainability (Judgement by the CC in case No. 2020-40-01, para. 8.2).

2. The Principle of Sustainability and the Right to Live in a Benevolent Environment in the Constitution of Latvia

In the modern constitutional law theory, constitutions are characterized as a living instrument (Letsas, 2013, p. 106). This means, *inter alia*, also the constitution's openness to new ideas and concepts. Sustainability and environmental protection have entered constitutions relatively recently. However, as noted in a study, in 2021, 41% of constitutions in the world contain a reference to future generations (Araújo & Koessler, 2021, p. 10). Around 20 countries (James, Daly M. & Daly E., 2016, p. 40) clearly recognize sustainability or sustainable development in their constitutions. Whereas constitutions of tens of countries – over 70 – mention the need and the importance of environmental protection (Cho & Pedersen, 2015, p. 401).

Two aspects need to be highlighted with respect to the interaction of the environment and sustainability in the Latvian Constitution (hereinafter also Satversme).

Everyone's right to live in a benevolent environment, protected by the State by providing information about environmental conditions and by promoting the preservation and improvement of the environment, has been included in the catalogue of fundamental rights, in Article 115 of the Constitution (Satversme). The Constitutional Court, in specifying the scope of this subjective fundamental right (UN, 2022), has recognised that it (this provision of the Constitution), imposes an obligation upon institutions of public power to establish and ensure an effective system of environmental protection; grants to a private person the right to acquire environmental information, in the procedure laid down in regulatory enactments, and to participate in making decisions related to the use of the environment (Judgement by the CC in case No. 2007-12-03, para. 13).

The right to live in a benevolent environment is a person's subjective right, which like other fundamental rights, is directly applicable. Moreover, the fundamental right defined in the aforementioned Article intends the State's obligation to protect a person against both activities actually ongoing, which might jeopardise human health or environment, and such activities planned for the future (Judgement by the CC in case No. 2007-11-03, para. 13.1). This relates to the precautionary principle, known in the case law of the European Court of Human Rights and the Court of Justice of the European Union, pursuant to which environment protection is not limited to protection against imminent danger or liquidation of consequences that have already set it, its aim is to diminish possible negative future effects (Judgement by the CC in case No. 2007-11-03, para. 20.1). Therefore, the term "everyone", used in Article 115 of the Constitution, which points to everyone's right to live in a benevolent environment, protects the interest to live in a benevolent environment not solely of the present but also of the future generations, which must be respected upon deciding on issues related to environment (Judgement by the CC in case No. 2008-03-03, para. 17.1). Namely, the Constitutional Court, in revealing the content of Article 115 of the Satversme, has taken into account the core of the sustainability.

Fundamental rights included in Article 115 of the Constitution, can be protected directly[4] by the Courts (Gouritin, 2016, pp.11-13). At the same time, the Constitutional Court has also pointed to the close interconnection of Article 115, with other fundamental rights, respecting the principle of unity of the Constitution (Judgement by the CC in case No. 2006-04-01, para. 15.3). Thus, for example, the Constitutional Court has recognised that noise could be examined both from the perspective of Article 115 and Article 96 of the Constitution (Judgement by the CC in case No. 2010-48-03, para. 6.9), *i.e.*, also from the perspective of the right to private life, which is linked to the fact that, *inter alia*, the European Court of Human Rights examines various environment-related issues in the context of Article 8 of the European Convention on Human Rights, considering, for example, that excessive noise is a restriction on the right to private life (Hatton and Others v. the United Kingdom, 2003). Likewise, the Constitutional Court has pointed to the close interconnection between Article 111 and Article 115 of the Constitution, underscoring that Article 115 of the Constitution, similarly to Article 111[5], defines the State's obligation to protect a person's health. Namely, Article 111 of the Constitution encompasses all areas pertaining to a person's health.

[4] As opposed to indirect protection of environmental interests when environmental interests or rights related to them are protected with the mediation of another fundamental right.

[5] Article 111 of the Constitution says: "The State shall protect human health and guarantee a basic level of medical assistance for everyone."

Whereas in the context of Article 115 of the Constitution, this obligation should be examined from the perspective of environmental protection (Judgement by the CC in case No. 2017-02-03, para. 16). Thus, for example, the issue of excessive noise has been repeatedly examined in the Constitutional Court's case law as a circumstance that restricts a person's fundamental rights, included in Article 115 of the Constitution (Judgement by the CC in case No. 2017-02-03, para. 16).

With respect to the environment, the Constitution urges everyone to be responsible, as well as uses *stricto sensu* the term "future generation".

Namely, the third sentence in the fifth paragraph of the Introduction to the Constitution provides: "Each individual takes care of [...] the common good of society by acting responsibly toward other people, future generations, the environment and nature." This reflects an individual's obligations or a person's place and role in relation to the environment and nature (Judgement by the CC in case No. 2018-04-01, para. 20). It is obvious that the Introduction to the Constitution reflects the substance of environmental sustainability – responsible treatment of resources, which prohibits a person from acting in a way that might jeopardise or seriously encumber the life of future generations (Levits, 2019, p. 648). In view of this elaboration in the Introduction, it can be concluded that the Latvian Constitution has clearly joined those modern constitutions that have undertaken and defined not only environmental protection but also the aim of protecting future generations, as well as sustainability as the main direction of the national development, which is directly reflected in the last paragraph of the Introduction.

Legal science knows the term "environmental constitutionalism" (Weis, 2018, pp. 836-870), which means that environmental issues, which may be related to environment protection, ecology, and nature, are referred to in legal provisions of the constitutional level (O'Gorman, 2017, p. 438). The aim of this concept is, *inter alia*, to reach environmental sustainability. Scholars have even defined good practice examples or ideas to be implemented in order to reach this aim (May & Daly, 2016, p. 34).

In Latvia, environmental constitutionalism is implemented both as a specific fundamental right – the right to live in a benevolent environment, and in the principle of sustainability, which should be regarded as one of the fundamental principles of constitutionalism and of the national development in general, which, undoubtedly, also includes environmental protection and environmental sustainability (Judgement by the CC in case No. 2016-24-03, para. 11).

3. Legal Remedies in Latvia: Administrative Courts and the Constitutional Court

One of the important aspects of environmental constitutionalism is access to justice. It is generally known that in countries, where the rules on access to justice are inviting and broad, more cases reach a court that may be significant not only in protecting the fundamental rights of the particular applicant but also to the society in general. The significance of a person (an individual) in the protection of environmental rights follows also from, for example, the 10th principle of the Rio Declaration of 1992 (UN, 1992)[6], as well as Agenda 21 (UN, 21), and Agenda 2030 (UN, 2030). It should be underscored once again: environmental protection goes hand in hand directly with the protection of human rights because all human beings are entitled to health and well-being.

In Latvia, effective legal remedies, such that ensure real rather than illusory protection in the area of environmental law, are available before the administrative courts, as well as before the Constitutional Court.

The jurisdiction of administrative courts over issues of environmental law is regulated, *inter alia*, by Section 9 of the Environmental Protection Law, the third part of which provides: "The public is entitled to contest and appeal the administrative act or actual actions of a State institution or local government if it does not meet the requirements of the laws and regulations regarding the environment, or creates threats of damage or causes environmental damage."

The Supreme Court has recognised that the third part of Section 9 of the Environmental Protection Law, in particular in the light of the Law's purpose to ensure the preservation and recovery of the quality of environment and also sustainable use of natural resources, envisages the right of every person (natural or legal) and associations, established by such persons (associations, organisations, groups), to turn to a court regarding issues of environmental protection (Decision by the Senate in Case No. SKA-989/2018, para. 6). Substantially, the third part of Section 9 of the Environmental Protection Law allows submitting to an administrative court the so-called *actio popularis* (Višķere, 2019) if it meets the following criteria: possible violation of environmental regulatory enactments (or possible damage to environment) *per se* is indicated in the application and there are no grounds

[6] Principle 10 says that environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

for considering that the provisions of Section 9 of the Environmental Protection Law are being abused (Decision by the Senate in Case No. SKA-824/2016, para. 17).

The Constitutional Court has the jurisdiction to review cases with regard to compliance of normative acts and provisions thereof with the Constitution. To be more precise: the object of the constitutional review can be a law passed by the Saeima, also an international agreement, both after ratification and before ratification (*a priori*), as well as any normative regulation, and in specific cases order of the minister. The Constitutional Court examines, *inter alia*, also cases regarding the constitutionality of spatial or local plans of local governments that have been approved by the binding regulations of local governments.[7]

It is known that a person's access to the constitutional court is always restricted. Opposite to administrative courts, upon submitting a constitutional complaint to the Constitutional Court, a person – physical or legal – must prove an infringement on their rights (Decision by the CC in case No. 2002-07-01, para. 3); *actio popularis* cannot be brought before the Constitutional Court (Decision by the CC in case No. 2021-11-01, para. 10).

Undeniably, the non-governmental sector plays a special role in the protection of environmental rights (Berny, Rootes, 2018, pp. 947-972). To stand before the Constitutional Court also those legal persons have to prove a violation of their fundamental rights, including the right to live in a benevolent environment. In accordance with the Constitutional Court's case law, specific requirements must be met if an application is submitted by a non-governmental organisation. Namely, to prove that the contested legal act has infringed on a legal person's right to a benevolent environment, first of all, the aims of this legal person's activities must be examined, which should be the protection of the environment. Moreover, this legal person must have been established in accordance with the normative regulation and it must have been active in the process of adoption of challenged legal regulation (Judgement by the CC in case No. 2007-11-03, para 13.1).

In Latvia, the Constitutional Court may become involved in dealing with issues related to the environment and its sustainability, firstly, by respecting the limits of its jurisdiction. Secondly, the Constitutional Court is open for the so-called non-governmental sector, which aims to protect the right to live in a benevolent environment. It gives the chance for them to participate in solving environmental issues, participation being an essential element of sustainable development, which ensures greater equity and legitimacy (Burgess & Clark, 2009, p. 159). In general, the approach of the Constitutional Court (and also that of administrative courts), relates to the guidelines advanced by the so-called Aarhus Convention (UN, 1998),

[7] Competence of the Constitutional Court is explained in the Constitutional Court Law, Section16.

which, *inter alia*, imposes upon the State the obligation to establish a system of environmental protection, which includes the task of not only ensuring accessibility of information to society and the right to participate in the process of making environment-related decisions but also to establish a due mechanism for the protection of these rights (Judgement by the CC in case No. 2002-14-04, para. 3).

4. Environment and Sustainability: Interaction in the Case Law of the Constitutional Court

The Constitutional Court has dealt with various issues related to the sustainability and environment. Although the number of cases directly linked to environment and sustainability, being examined over the past 26 years of the Constitutional Court's existence, is not high, several important findings relating to issues important for Latvia can be summarised. At the same time, national boundaries are not of decisive importance in environmental law because the environment is common for the entire global community. This means that the conclusions made by the Constitutional Court can be of significance to other countries.

Sustainability and sustainable development always require a balance of various interests (Judgement by the CC in case No. 2007-11-03, para. 15). It is not secret that decisions and normative acts, which may cause, *inter alia*, infringement on fundamental rights, included in Article 115 of the Satversme, most often are linked to the realisation of economically important interests and touches interests of private owners or property rights which are founded in the Article 105 of the Satversme. Thus, society's interest in living in a benevolent environment, on the one hand, must always be balanced with, on the other hand, facilitation of economic development (Judgement by the CC in case No. 2017-02-03, para. 20). Hence, in deciding on issues related to the environment, a choice always must be made as to which interests – those of environmental protection or economic – should be given preference (Judgement by the CC in case No. 2008-38-03, para. 9).

4.1. Agricultural Land

Land, in particular, agricultural land is one of the important and significant resources for Latvia.

The Constitutional Court, in assessing legal provisions that provided paying additional immovable property tax rate for agricultural land that was not farmed (not cultivated), recognised agricultural land as one of the most important natural resources for the national economy, having a significant influence on a benevolent living environment, and also as an important natural treasure and valuable economic resource (Judgement by the CC in case No. 2018-04-01, para. 16). Being aware of the importance of this resource, the Constitutional Court has pointed out that in order to maintain such land and preserve it for future generations appropriate requirements with respect to its cultivation must be specified.

Taking into consideration importance of the agricultural land and the principle of sustainability the Constitutional Court has ruled that the aim of using agricultural land is to ensure the protection and improvement of the environment, as well as promoting of sustainable consumption and production, seeking a balance between economic growth and environmental protection. Land management should underscore responsibility for the welfare of future generations and balance various interests (Judgement by the CC in case No. 2018-04-01, para. 16). Respecting the core of sustainability, the Constitutional Court has specified responsibility of every owner and every person for the responsible treatment of this resource. Every person must ensure the use, cultivation and preservation of such land for future generations. Responsible treatment of this natural resource is also in the interests of the entire society as proper cultivation of agricultural land fosters economic growth of the agricultural sector and also improves employment in rural territories (Judgement by the CC in case No. 2018-04-01, para. 20).

The publicly available statistics, provided by the State Land Service, show that the areas of agricultural land are decreasing (State Land Service, 2020).[8] Although to a small extent, but also from 2019 to 2022 the areas of agricultural land have decreased, which proves that this resource must be protected in the interests of existing and future generations.

4.2. Spatial Planning

The Constitutional Court has applied sustainability in reviewing cases related to issues of spatial planning. It is known that sustainability as a criterion or a principle in spatial planning has been recognised in the majority of European countries and has become a common and important principle for the Member States of the European Union (Judgement by the CC in case No. 2008-03-03, para. 17.2). Namely, sustainability not only determines the main guidelines on the future use of territory but also provides the possibility for complex solutions and balancing of different interests, particularly interests of the environment, culture, society and economy (Judgement by the CC in case No. 2003-20-01, para. 8.2).

[8] On 1 January 2022, the area of agricultural land was 2271653 ha; on 1 January 2021 - 2285477 ha; on 1 January 2020 - 2299858 ha, but on 1 January 2019 it was 2311030 ha. See: Division of land according to the type of use.

Basically, resolving of issues related to spatial planning has been placed in local governments' competence (Decision by the CC on initiating case No.111/2022).[9] They are mainly responsible for ensuring that inhabitants of the respective local government could live in an economically developed environment, but also lead a healthy and productive life in tune with nature (Judgement by the CC in case No. 2010-48-03, para. 6.1.1). This also means that the development solutions, adopted by a local government, should be carefully considered and well-grounded (Judgement by the CC in case No. 2008-38-03, para. 9.2).

The Constitutional Court recognised already in 2003 that, in reviewing a local government's discretion in the area of spatial planning, the compliance of the procedure of spatial planning with its main objectives – complex alignment of the interests of individuals with possibilities of sustainable development of the said territory – should be examined. If only the economic growth of the territory were taken into account, without considering the values of nature and culture, the achieved outcome would be unlawful (Judgement by the CC in case No. 2003-16-05, para. 5). The Court also has underscored that development of the spatial plan is not solely formal procedure. It is because the spatial plan is one of the most important instruments not only for use but also for protecting a particular territory. This, *inter alia,* means assessing whether, in the process of planning, in compliance with the interests of the entire society, legal provisions, which protect the values of nature and culture, located within the particular territory, have been complied with (Judgement by the CC in case No. 2003-16-05, para. 5.1).

The Constitutional Court has also highlighted that Article 115 of the Constitution *a priori* does not provide preservation of the existing environment and does not prohibit from implementing projects that are related to economic interests; however, Article 115 of the Constitution prohibits from realising economic interests if the impact of economic changes upon environment and, thus, upon each member of society has not been carefully examined, as well as if society has not been convinced of the need for these changes (Judgement by the CC in case No. 2007-11-03, para. 13.2). The sustainability does not require placing, in spatial planning, the environmental interests above economic and social interests; however, it requires taking these interests into account as equally important (Judgement by the CC in case No. 2008-03-03, para. 17.2). Namely, such development

[9] The Constitutional Court may state its opinions regarding the legal aspects of spatial planning by reviewing binding regulations of local governments, which approve spatial and local plans. Previously, the Constitutional Court Law provided for a person's possibility to turn to the Constitutional Court with regard to the detail plan of a local government; however, following amendments to regulatory enactments, according to which henceforth a detailed plan is approved in the form of an administrative act, this issue is outside the Constitutional Court's jurisdiction.

policy, which balances the need to facilitate economic growth and improve the quality of life for every member of society, as well as the need to safeguard natural environment for future generations, complies with the contemporary model of sustainable development (Judgement by the CC in case No. 2008-38-03, para. 9.1).

It follows from the case law of the Constitutional Court that within the process of spatial planning, alignment of various and different interests is one of the most important tasks (Judgement by the CC in case No. 2010-54-03, para.12.1.1). In this situation, a local government has the task to assess and balance various interests and to adopt a decision that would be most suitable for society (Judgement by the CC in case No. 2013-19-03, para. 15.1). This assessment should be made by involving all stakeholders in the process of developing the plan, as well as by considering all the expressed opinions and providing arguments for the chosen solution. Likewise, environmental requirements must be respected. Thus, only such a development solution, which has been comprehensively assessed and substantiated, can be deemed to be sustainable (Judgement by the CC in case No. 2010-54-03, para. 12.1.1).

4.3. Renewable Resources

Sustainable development is not possible without sustainable energy. Our society is highly energy-intensive. Therefore, the Constitutional Court has recognised that Latvia has to fulfil two equally important and very complex tasks: facilitate economic growth and, thus, social welfare, but, at the same time, must decrease the emissions of hothouse gases, by introducing measures of energy efficiency, as well as environment-friendly technologies, replacing fossil fuel with renewable energy resources (Judgement by the CC in case No. 2010-48-03, para. 6.1.2).

Presently, facilitating the use of renewable resources is an issue on the agenda of all governments. This is determined both by geopolitical considerations and aspects of environmental protection. The use of renewable resources is inseparably linked to the ideal of sustainability (Judgement by the CC in case No. 2010-54-03, para. 9.1).

With respect to electricity production, the Constitutional Court has recognised that legal regulation, which would facilitate sustainable and secure production of electricity, complies with the requirements of sustainable development. And if the State provides aid to those producers of electricity who produce it, by using renewable resources, then it should comply with the purpose of the state aid and also should be reasonable and proportional to the purpose of this aid (Judgement by the CC in case No. 2018-16-03, para. 15.3).

In reviewing a matter related to wind energy (development of so-called wind energy parks), the Constitutional Court noted that the development of wind energy production was aimed at ensuring that the State performed its positive obligation to improve the environmental conditions; namely, was aimed at public welfare (Judgement by the CC in case No. 2010-54-03, para. 9.2). Although the applicants had pointed out to some negative aspects of wind-powered generators, for example, noise, shadows, vibrations and flicker effect, the Court recognised that the contested acts facilitated the development of energy sector in Latvia and Latvia's energy independence (Judgement by the CC in case No. 2010-54-03, para. 16.2.4). The Constitutional Court took into account that the area, where the construction of the power plants was planned, was located in a territory with one of the highest average wind power in the entire territory of Latvia. Hence, the high economic efficiency of wind energy, produced in this territory, was possible. Likewise, reviewing the proportionality in a narrower understanding, the Court held that the established restriction on persons' right to property was not large and did not outweigh the benefit that society gained from developing the production of wind energy in the framework of the particular project (Judgement by the CC in case No. 2010-54-03, para. 16.2.4).

Whereas, in assessing an issue related to another renewable resource – the constitutionality of the obligation of small hydroelectric power plants to pay the natural resources tax, in connection with sustainability, the Constitutional Court underscored the importance of water as a resource in ensuring sustainable development, which makes states urge the users of water resource to make useful use of it. The Court found that the aim to pay the natural resources tax, is to ensure more effective and responsible use of natural resources, and to ensure revenue into the state budget, which can be used, *inter alia*, for financing measures to improve the environment (Judgement by the CC in case No. 2014-11-0103, para. 19). The Court also stressed that small hydroelectric power plants contribute to the national energy supply and strengthen the energy independence. Moreover, they produce electricity from renewable resources, which can be considered as being environmentally friendly energy resources. Thus, the State, by introducing this tax, has attempted to make the functioning of small hydroelectric power plants even more effective and environmentally friendly, as well as, to the extent possible, has tried to facilitate the introduction of more modern technologies in their operation and identify the environmental impact of small hydroelectric power plants. In other words – these measures are aimed at the sustainable use of environmental resources.

5. Conclusion: Future Challenges

One can fully agree with Mr. Vaughan Lowe (doctrinist) that sustainable development is potentially a tool of great power in the hands of decision-makers. It is not necessary for them to wait for a judgement or ruling. They can take the initiative and put the content in this principle (Lowe, 2001, p. 37). At the same time, also courts, within the limits of their jurisdiction, must ensure the application of sustainability.

However, irrespective of the function that each institution fulfils, it is necessary to work and think about harmonious co-existence between humankind and the environment. We have to consider collective values, such as morality, respect for life, equity, solidarity, and co-existence (Derani, 2016, p. 312). The greatest challenge for everyone always will be finding the right balance between satisfying the interests of the present generation and protection of the future generations, and the values that surround us in our daily life.

Sir David Attenborough has said that climate change is a threat to global security (McGrath, 2019). In addition to this, we all – not only the State but also each person of Latvia and also those of other countries – live in very challenging times, which can lead to problems in accessing natural resources. However, survival is impossible without these resources. Energy is indispensable for providing for basic needs. This means that already now institutions have to look urgently for solutions in order to meet daily needs. But the satisfaction of daily needs cannot influence the environment in a negative way. We are responsible for future generations.

References

Araújo, R. & Koessler, L. *The Rise of the Constitutional Protection of Future Generations*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933683.

Berny, N. & Rootes, Ch. 2018. Environmental NGOs at a Crossroads? *Environmental Politics*, 27(6), https://doi.org/10.1080/09644016.2018.1536293.

Burgess, J. & Clark, J. 2009. Practitioner Evaluations of Participatory Processes in Environmental Decision Making. In: Adger, W.N., & Jordan, A. (eds.), *Governing Sustainability.* Cambridge: Cambridge University Press, https://doi.org/10.1017/CBO9780511807756.010.

Cho, H.S. & Pedersen, O.W. 2015. Environmental Rights and Future Generations. In: Tushnet, M., Fleiner, T., Saunders, C. (eds.), *Routledge Handbook of Constitutional Law.* Routledge.

Derani, C. 2016. Agriculture, Energy and Development: An Uneasy Relationship. In: Jaria-Manzano, J., Chalifour, N., Kotzé, L.J. (eds.), *Energy, Governance and Sustainability*. Cheltenham, UK: Elgar Publishing.

Gouritin, A. 2016. *EU Environmental Law, International Environmental Law, and Human Rights Law. The Case of Environmental Responsibility*. Leiden: Brill Nijhoff, https://doi.org/10.1163/9789004302143.

James R., Daly M. & Daly E. 2016. Ten Good Practices in Environmental Constitutionalism that can Contribute to Sustainable Shale Gas Development. In: Jaria-Manzano, J., Chalifour, N., Kotzé, L.J. (eds.), *Energy, Governance and Sustainability*. Cheltenham, UK: Elgar Publishing.

Kamal, H. 1995. Evolving Principles of Sustainable Development and Good Governance. In: Ginther, K., Denters, E., de Waart, P. J. I. M. (eds.), *Sustainable Development and Good Governance*. Netherlands: Springer.

Letsas, G. 2013. The ECHR as a Living Instrument: Its Meaning and Legitimacy. In: Føllesdal, A., Peters, B., Ulfstein, G. (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*. Cambridge: Cambridge University Press, https://doi.org/10.1017/CBO9781139169295.005.

Levits, E. 2019. Izvērsts Satversmes preambulas iespējamā teksta piedāvājums un komentārs [The proposal and comment on the possible text of the preamble to the Constitution has been elaborated]. In: Levits, E. *Valstsgriba. Idejas un domas Latvijai 1985-2018*. Rīga: Latvijas Vēstnesis.

Lowe, V. 2001. Sustainable Development and Unsustainable Arguments. In: Boyle, A., Freestone, D. (eds.), *International Law and Sustainable Development, Past Achievements and Future Challenges*. Oxford: Oxford University Press.

May, J.R. & Daly, E. 2016. Ten Good Practices in Environmental Constitutionalism that Can Contribute to Sustainable Shale Gas Development. In: Jaria-Manzano J., Chalifour N., Kotzé L.J. (eds.), *Energy, Governance and Sustainability*. Cheltenham, UK: Elgar Publishing.

O'Gorman, R. 2017. Environmental Constitutionalism: A Comparative Study. *Transnational Environmental Law*, 6(3), https://doi.org/10.1017/S2047102517000231.

Višķere, I. 2019. Par pieeju tiesai vides aizsardzības interesēs [On access to court in the interests of environmental protection]. *Jurista Vārds*, 10 (1067).

Weis, L.K. 2018. Environmental Constitutionalism: Aspiration or Transformation? *International Journal of Constitutional Law*, 16(3), https://doi.org/10.1093/icon/moy063.

Legal Sources

The Constitution of the Republic of Latvia of 15 February 1922. Available at: https://www.saeima.lv/en/legislative-process/constitution, (1. 8. 2022).

The Environmental Protection Law of 2 November 2006. Available at: https://likumi.lv/ta/en/en/id/147917, (28. 7. 2022).

Constitutional Court Law of 5 June 1996. Available at: https://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/, (10. 8. 2022).

UN, 1992, Rio Declaration on Environment and Development. Available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf, (1. 8. 2022).

Bruntland, 1987, Report of the World Commission on Environment and Development: Our Common Future. Available at: http://www.un-documents.net/our-common-future.pdf, (1. 8. 2022).

UN, 21, United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21. Available at: https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, (10. 8. 2022).

UN, 1998, UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Available at: https://unece.org/DAM/env/pp/documents/cep43la.pdf, (15. 8. 2022).

UN, 2030, Transforming our world: the 2030 Agenda for Sustainable Development. Available at: https://sdgs.un.org/2030agenda, (10. 8. 2022).

UN, 2022, Resolution adopted by the General Assembly on July 28, 2022 "The human right to a clean, healthy and sustainable environment". Available at: https://digitallibrary.un.org/record/3983329?ln=en (3. 8. 2022).

Case law

Judgement by ECtHR of 8 July 2003 in Case *Hatton and Others v the United Kingdom*, Application No. 36022/97. Available at: https://hudoc.echr.coe.int/Eng#{%22itemid%22:[%22001-61188%22]} (9.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 7 May 2021 in Case No. 2020-40-01. Available at: https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/08/2020-40-01_spriedums.pdf, (10. 8. 2022).

Judgement by the Constitutional Court of the Republic of Latvia of 6 March 2019 in Case No. 2018-11-01. Available at: https://www.satv.tiesa.gov.

lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2018/07/2018-11-01_Spriedums.pdf#search, (10. 8. 2022).

Judgement by the Constitutional Court of the Republic of Latvia of 18 April 2019 in case No. 2018-16-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-16-03_Spriedums.pdf#search=2018-16-03, (15. 8. 2022).

Judgement by the Constitutional Court of the Republic of Latvia of 7 June 2019 in Case No. 2018-15-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-15-01_Spriedums.pdf#-search=2018-15-01 (10.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 18 October 2018 in Case No. 2018-04-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/01/2018-04-01_Spriedums.pdf#search=2018-04-01, (10. 8. 2022).

Judgement by the Constitutional Court of the Republic of Latvia of 6 October 2017 in Case No. 2016-24-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/11/2016-24-03_Spriedums.pdf#search=2016-24-03, (9. 8. 2022).

Judgement by the Constitutional Court of the Republic of Latvia of 19 October 2017 in Case No. 2016-14-01. Available at: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-14-01_Spriedums-2.pdf (10.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 19 December 2017 in Case No. 2017-02-03. Available at : https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/01/2017-02-03_Spriedums.pdf (10.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 25 March 2015 in case No. 2014-11-0103. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/04/2014-11-0103_Spriedums_ENG.pdf#search=2014-11-0103 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 9 October 2014 in Case No. 2013-19-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2013-19-03_Spriedums.pdf#search=2013-19-03 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 24 February 2011 in Case No. 2010-48-03. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/07/2010-48-03_Spriedums_ENG.pdf#search=2010-48-03 (28.7.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 3 May 2011 in Case No. 2010-54-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.

html?file=/wp-content/uploads/2016/02/2010-54-03_Spriedums.pdf#-search=2010-54-03 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 6 July 2009 in Case No. 2008-38-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-38-03_Spriedums.pdf#-search=2008-38-03 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 17 January 2008 in Case No. 2007-11-03, Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search=2007-11-03 (1.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 24 September 2008 in Case No. 2008-03-03. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-03-03_Spriedums.pdf#search=2008-03-03 (8.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 8 November 2006 in Case No. 2006-04-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2006/03/2006-04-01_Spriedums_ENG.pdf#search=2006-04-01 (8.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 30 January 2004 in Case No. 2003-20-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/09/2003-20-01_Spriedums_ENG.pdf#search=2003-20-01 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 9 March 2004 in Case No. 2003-16-05. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2003/07/2003-16-05_Spriedums_ENG.pdf#search=2003-16-05 (15.8.2022)

Judgement by the Constitutional Court of the Republic of Latvia of 14 February 2003 in Case No. 2002-14-04. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2002/07/2002-14-04_Spriedums_ENG.pdf#search=2002-14-04 (15.8.2022)

Decision by the Constitutional Court of the Republic of Latvia of 10 December 2021 on Terminating Legal Proceedings in Case No. 2021-11-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/04/2021-11-01_lemums_par_tiesvedibas_izbeigsanu.pdf#search=2021-11-01

Decision by the Constitutional Court of the Republic of Latvia of 11 November 2002 on Terminating Legal Proceedings in Case No 2002-07-01. Available at: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/

uploads/2016/02/2002-07-01_Lemums_izbeigsana.pdf#search=2002-07-01 (10.8.2022)
Decision by the Senate of 23 April 2018 in Case No. SKA-989/2018. Available at: https://www.at.gov.lv/downloadlawfile/5482 (10.8.2022)
Decision by the Senate of 25 October 2016 in Case No. SKA-824/2016, para. 17. Available at: https://www.at.gov.lv/downloadlawfile/590 (10.8.2022)

Internet sources

National Development Plan of Latvia for 2021-2027 (NDP2027). Available at: https://pkc.gov.lv/sites/default/files/inline-files/NAP2027__ENG.pdf (1.8.2022)
Sustainable Development Strategy of Latvia until 2030. Available at: https://pkc.gov.lv/sites/default/files/inline-files/LIAS_2030_en_0.pdf (28.7.2022)
Division of land according to the type of use. Available at: https://www.vzd.gov.lv/lv/zemes-sadalijums-zemes-lietosanas-veidos (15.8.2022)
McGrath, M. Climate change: Sir David Attenborough warns of ‘catastrophe’. Available at: https://www.bbc.com/news/science-environment-47976184 (15.8.2022)

Anita Rodiņa
Vanredni profesor, Pravni fakultet, Univerzitet u Letoniji, Letonija
E-mail: *anita.rodina@lu.lv*

INTERAKCIJA ODRŽIVOSTI I ŽIVOTNE SREDINE U PRAKSI USTAVNOG SUDA LETONIJE

Sažetak

Članak daje analizu interakcije principa održivosti i zaštite životne sredine u praksi Ustavnog suda Letonije. Princip održivosti u letonskom ustavnom pravu je sasvim nov. Ipak, primenjuje ga Ustavni sud razmatrajući različite slučajeve. To je takođe uključeno u pisani tekst Ustava i sam razvoj države je usmeren na održivost. Kako je zaštita životne sredine srž ovog principa, Ustavni sud ga je primenio rešavajući različita pitanja u pogledu životne sredine.

U članku se ukazuje i na sadržaj ekološkog konstitucionalizma. Naime, u Letoniji se ono sprovodi i kao specifično osnovno pravo na život. Takođe, analiziraju se pravni lekovi poput onih pred upravnim i Ustavnim sudom koji se mogu koristiti za zaštitu povređenih osnovnih prava.

Da bi se stekao uvid u praksu Ustavnog suda Letonije, objašnjena su tri različita pitanja. Prvo, dat je značaj poljoprivrednog zemljišta i njegove obrade i zaštite ostvarivanjem ideje održivosti. Zatim autorka objašnjava glavne argumente primene ovog principa u prostornom planiranju. Na kraju, slučajevi održive energije u kojima se održivost primenjuje dovode do zaključaka o budućnosti i značaju obnovljivih izvora.

Ključne reči: održivost, ekološki konstitucionalizam, životna sredina, poljoprivredno zemljište, prostorno planiranje, obnovljivi resursi.

Primljeno: 14. 11. 2022.
Prihvaćeno: 30. 12. 2022.

Božidar M. Banović*
Vince Vari**
Dragana S. Čvorović***

Review scientific paper
UDK: 343.126.1 343.126.1 (439)
doi: https://doi.org/10.56461/SPZ_22405KJ

DETENTION IN THE CRIMINAL PROCEDURE LEGISLATION OF HUNGARY

Abstract

The paper presents the situation of detention in Hungary. The legal institution of detention is the deprivation of personal liberty without a final court decision, i.e., a final decision. The Hungarian Criminal Procedure Act, which entered into force on 1 July 2018, aims to renew the practice of detention. According to the new regulation, detention can be applied only if the intended purpose of the proceedings cannot be ensured by less coercive measures (criminal supervision, bail). The paper describes the legal reasons for the detention, the statistics, and the previous problems in the case law that characterized the legal institution.
Keywords: *detention, criminal supervision, bail, deprivation of liberty*

1. Introductory Considerations

More than a hundred thousand people are currently being held without trial in the European Union. Detention plays an important role in some criminal proceedings, ensuring that defendants are brought to justice, while its use is excessive, which imposes significant costs on individual states (Bieber, Ivány & Kádár, 2019). Unjustified and prolonged detention obviously affects the exercise of the right of defendants to liberty and the presumption of innocence. With effect from 1 July 2018, Act XIX of 1998 on Criminal Procedure (Criminal procedure code of Hungary, 1998) was repealed by Act XC of 2017 on Criminal Procedure (Criminal Procedure Code of Hungary-Be., 2017). The new law and its regulations have introduced basically up-to-date regulations in Hungary that meet international and human rights standards. The new Be. therefore, introduced an important

* Full Professor, Faculty of Security Studies, University of Belgrade, Serbia
E-mail: *bbvsup@yahoo.com*

** Associate Professor, University of Public Service, Faculty of Law, Hungary
E-mail: *varivince@uni-nke.hu*

*** Associate Professor, University of Criminal Investigation and Police Studies, Serbia
E-mail: *dragana.cvorovic@kpu.edu.rs*

and positive change in the field of coercive measures: its explicit aim is to ensure that the principles of gradation, necessity and proportionality apply, i.e. detention can only be ordered if the aim pursued cannot be achieved by a lesser measure (Budaházi & Fantoly, 2019). It follows from the *ultima ratio* nature of criminal law that it cannot interfere in any area of social coexistence, its task is merely to protect the social order and fundamental values. Such basic values are essentially the basic and inalienable human rights, which are enshrined in Arts. 1-31 of the Fundamental Law of Hungary under the heading "Freedom and Responsibility", itemized in its Article. These include, *inter alia*, the fundamental right to human life and dignity, the right to personal liberty and security (Fundamental Law of Hungary- FLH, 2011, Art. 18, par.1). "A lawful deprivation of personal liberty can also cause unjustified harm. Certain restrictive provisions may be accepted as constitutional only if the restriction is necessary and proportionate to the aim pursued and constitutionally recognized." (Constitutional Court decision- CCD, 66/1991. (XII. 21). The principle of subsidiarity, which is one of the basic provisions, justifies the development of a prosecution practice and approach in the case of coercive measures affecting personal liberty, according to which deprivation of liberty or stricter coercive measures may take place only in the last case (Attorney General's Office- AGO LFNIGA//142/2019. 271.§).

2. The Concept and Principles of Detention in Hungarian Criminal Procedure Law

Herke (2014, p. 184) defines the concept of coercive measures as "measures of coercive content which may be used by the authorities in criminal proceedings for procedural purposes, primarily against the accused, in order to ensure the success of the criminal proceedings, and which necessarily entail various degrees of restriction of fundamental constitutional rights, the so-called human rights". Coercive measures in criminal proceedings can be classified according to several criteria - their procedural purpose, the fundamental human right restricted, their subject, their deed-binding nature, etc. - which is carried out by current Criminal Procedure Act. According to the Act's provisions, there is a distinction between coercive measures affecting personal liberty and coercive measures affecting property (Be, 2017, Art. 272). The detention with other word the arrest is classified in the category of coercive measures affecting personal liberty, and within that category, in the category of coercive measures authorized by a judge affecting personal liberty. The arrest is the most severe coercive measure that deprives a person of his fundamental constitutional human right to personal liberty.

It is defined in the Be. as "Arrest is the judicial deprivation of the personal liberty of the accused person before a final decision on the case has been taken". (Be, 2017, Art. 296). It follows from the statutory definition that arrest can only be ordered against the accused. It is also clear that it is the most severe coercive measure since the fundamental right concerned, personal liberty, is deprived in its entirety in such a way that the court has not yet made a final decision on the guilt of the accused. At first glance, it is very similar to a custodial sentence, but the two have several differences. As a procedural measure, arrest deprives the accused of his liberty, but only temporarily, since it can only last until a final court decision has been taken. Its purpose is to ensure that criminal proceedings are conducted. In contrast, the purpose of imprisonment is to prevent the perpetrator or others from committing a crime to protect society.

The Constitutional Court has defined pre-trial detention as "the deprivation by a court of the personal liberty of an individual suspected of having committed a criminal offense and who is presumed innocent before a final decision has been taken, is the most serious coercive measure restricting personal liberty". (Constitutional Court decision- CCD, 19/1991. (VI. 25).

According to the European Convention on Human Rights (European Convention on Human Rights- EC, Act. XXXI. 1993, Art. 5), everyone has the right to liberty and security. No one shall be deprived of his or her liberty. The Convention lists lawful detention and arrest as exceptions to the right to liberty:

- lawful detention after conviction by a competent court;
- the arrest or detention of a person who does not comply with a lawful order of the court or the arrest or detention to secure the performance of an obligation imposed by law;
- lawful arrest or detention to bring him or her before the competent authority on reasonable suspicion of having committed a criminal offense or when reasonably necessary to prevent him or her from committing or absconding after having committed a criminal offense;
- lawful arrest or detention to prevent unlawful entry into the country or lawful arrest or detention of a person against whom action is pending for expulsion or extradition.

Constitution declares the Convention as follows. As for the restriction of fundamental rights, Constitution provides that a fundamental right may be restricted to the extent strictly necessary and proportionate to the aim pursued to ensure the exercise of another fundamental right or to protect a constitutional value while respecting the essential content of the fundamental right. (Foundamental Law of Hungary- FLH, 2011, Art. 1).

The Be., in Part I, Chapter I, guarantees, among its fundamental provisions, the protection of fundamental rights already protected at the primary constitutional level. Article 2 of the Be. provides for the protection of fundamental rights, and these provisions constitute the general rules for the use of coercive measures. The fundamental provisions contain the basic principles with which coercive measures restricting personal liberty must comply to be effective.

In order to be lawful, the following principles must apply to the ordering and maintenance of arrest:
- The principle of proportionality;
- The principle of fairness;
- The principle of the presumption of innocence;
- The principle of contradiction.

2.1 The Proportionality Principle

The principle of proportionality must be a key consideration for the court when ordering an arrest. Under this principle, the court may restrict the liberty of the accused only if and to the extent that this is necessary to achieve the purpose of the criminal proceedings. In this case, the court has to examine the conflict of two interests, the interest of the State in the prosecution of the offense and the interest of the accused in his liberty (Bíró, 2019).

The Hungarian Helsinki Committee, in its proposal on the current Criminal Procedure Code issued on 20 June 2016, welcomed the fact that the draft law contains an element aimed at ensuring the sanctity of some restrictions on liberty. Among these elements, it mentions the prominent inclusion of the proportionality requirement in the text and the extension of the range of coercive measures as an alternative to detention (Opinion of the Hungarian Helsinki Committee, 2016).

According to the Recommendation of the Committee of Ministers of the Council of Europe, an arrest warrant should not be issued if the deprivation of liberty would be disproportionate to the nature of the alleged offense and its penalty. In making the order, the nature and seriousness of the offense being prosecuted, the seriousness of the offense, the person's sexuality, his or her criminal record, his or her conduct during the proceedings or after the offense, and the seriousness of the suspicion must be taken into account by the judge. The duration of the detention must be proportionate to the sentence the person is likely to serve if convicted (Council of Europe Committee of Ministers Recommendation, 1980, R (80) 11).

2.2. The Principle of Fairness

The principle of fairness is not a question of the relationship between the fundamental right being restricted and the aim pursued by the coercive measure. However, the suspect should be detained before the final court decision, i.e., only for the period for which he would have been detained if the final decision had been expected. The investigating judge cannot assess the exact nature of the offense or the level of the penalty imposed when imposing a coercive measure. However, an appropriate decision can be taken based on previous judicial practice. This principle is enforced by several provisions in Be., including the section on the maximum duration of arrest, in which the legislator determines the maximum duration of arrest in relation to the punishment for the offense (Be, 2017, Art. 298). The maximum period for which arrest may be extended increases in proportion to the seriousness of the offense committed. Mention should also be made here of the provision on criminal procedure, which states that criminal proceedings must be conducted without an order if the suspect is subject to a compulsory measure involving personal liability authorized by a court (Be, 2017, Art. 79, par. 1).

2.3. The Principle of the Presumption of Innocence

The principle of the presumption of innocence is enshrined in the Code of Criminal Procedure in force, which states that no one is presumed guilty until a final court decision has established his or her guilt (Be, 2017, Art. 1).

This principle is protected internationally, as declared by the EC: “Every person suspected of a criminal offense shall be presumed innocent until proven guilty according to law.” (EC, 1993. Art. 6, par. 2)

The presumption of innocence applies throughout the criminal proceedings, and its positive effects on the accused last until the final decision on the case becomes final. The accused, regardless of his or her attitude, whether passively defending himself or herself (refusing to confess) or actively participating in the proceedings, is entitled to be treated as innocent by the prosecuting authority. A suspected person must be treated as innocent even if he or she has been in custody for an extended period for the offense for which he or she is a well-founded suspect and must be afforded all the rights and facilities necessary to promote his/her innocence to facilitate his/her defense. At all stages of the proceedings, it is necessary to consider whether the conditions for arrest exist based on the evidence available. As regards the relationship between arrest and the presumption of innocence, the Constitutional Court stated in its Decision 19/1999 (25.6.1999) AB that if the legal conditions for the order of provisional arrest are met, it is not limited by the presumption of innocence.

2.4. The Principle of Contradiction

The prosecution, defense, and judgment are separate in criminal proceedings (Be, 2017, Art. 5). The division of procedural tasks, i.e., the division of functions, is a fundamental principle throughout criminal proceedings. Even the most severe coercive measures may only be imposed or maintained based on the principle of contradictory jurisdiction. The court decides on the order of arrest, or the extension of arrest before indictment, on the prosecution's motion. The prosecution's motion must contain a brief description of the facts of the case and the classification of the offense under the Criminal Code (Criminal Code- BtK, 2012), and the existence of the general and special grounds for arrest. When the arrest is ordered and, in the cases, provided for by the law, the suspect must be heard at a hearing held by the investigating judge on the subject of the coercive measure authorized by the judge, and the accused and the defense counsel acting on his behalf may present their defense on the merits. The presiding judge shall give his decision after hearing the arguments of the prosecution and the defense; he may not consider the evidence supporting the suspect's guilt and shall decide at the hearing only whether there are general and special grounds for arrest.

3. The System and Rules of the Detention in the Hungarian Criminal Procedure Act

In addition to detention, the new regulation renamed and consolidated the former law on disqualification and house custody, instead of uniformly called criminal supervision. The regulation of bail and absenteeism has also changed significantly. The change in concept was emphasized by the law in particular through the development of the general part. After all, the imposition of coercive measures restricting personal liberties does not require a decision on a possible derogation from the detention, as opposed to the essentially detention approach of the former Be.

Coercive measures can be categorized according to several criteria: their purpose, their orientation, their passive subjects, the persons entitled to impose them, and the fundamental right concerned. Grouped according to these criteria, we can say that arrest is a coercive measure that, in terms of its purpose:

- ensures the presence of the participants in criminal proceedings;
- the success of the evidence and
- the prevention of a repetition of the offense.

These goals are personal, can be used only against the person charged, can be ordered only by a court and is a coercive measure restricting personal liberty.

The Be. in force lists the purpose and conditions of arrest among the purposes and conditions of coercive measures involving personal liberty authorized by the court. It follows from the legal provisions that there are general and specific conditions for arrest. The general conditions for arrest are conjunctive, i.e., all must be met for an arrest to be ordered. The general conditions:

- if the accused has been reasonably suspected of or has been charged with the offense and
- this is necessary to achieve the objective of the coercive measure affecting the personal liberty of the judge, and the objective pursued cannot be achieved in any other way. (Be, 2017, Art. 276, par. 1)

In contrast, the specific conditions are subordinate to each other, but at least one must be met in addition to the general conditions for an arrest to be ordered. It follows that the existence of the general conditions together with at least one specific condition may already constitute grounds for an arrest warrant, but this also requires the absence of the so-called obstacles to prosecution, which are listed as negative conditions. In other words, the absence of obstacles to prosecution is also a general condition for an arrest to be ordered. Thus, if the offender is subject to the provisions of the Btk. 16., if the offender was a child at the time of the offense - an arrest cannot be ordered (Karprinay, 2017).

Coercive measures subject to judicial authorization affecting personal liberty may be ordered only after a well-founded suspicion (or indictment) and only if this is absolutely necessary to achieve this goal. Their special (positive) conditions pursuant to article 276 of Be. can be summarized as follows:

	To ensure the presence of the accused (Be. 2017, Art. 276, par. 1) a.	**In the event of a collision and its danger** (Be. 2017, Art. 276, par. 1b.)	**In order to prevent crime** (Be. 2017, Art. 276, par. 1c.)
Restraining order		X	X (in relation to the victim)
Criminal supervision (house custody with technical equipment)	X	X	X
Bail	X		
Detention	X	X	X
Preliminary compulsory medical treatment			X

Source: Herke, 2018, p. 55

Prior to each of the more coercive measures involving deprivation of liberty lasting at least one month, the purpose and rules of police detention for 72 hours remained essentially unchanged. In the first place, pending the decision necessary to order such longer-term coercive measures, this shorter detention ensures a shorter, temporary deprivation of liberty of the suspect, without a separate judicial decision.[1]

If we look at the nature of detention, we can see that it also carries procedural and substantive law elements. It deprives the accused of his or her personal liberty - without a court judgment - while not using punishment as a goal and reason – i.e. not a category of substantive law - but clearly naming a system of expediency of criminal proceedings (Vári, 2012). Among the principles applicable and enforceable in the institution, we consider it important to mention the principle of proportionality, because this is of the greatest importance from the point of view of material weight. When taking somebody in custody, the court must always keep in mind the principles of necessity and proportionality. According to the principle of proportionality, the personal liberty of the accused may be restricted only if and to the extent that it is necessary for the purpose of criminal proceedings or the prevention of further criminal offenses (Herke, 2002a, p. 21). R (80) 11 issued by the Committee of Ministers of the Council of Europe on 27 June 1980 recommends that, when ordering detention, account be taken of the type of offense, the seriousness of the suspicion, the identity of the suspect, his/her conduct during the proceedings or after his/her act. The court must always weigh the public interest in the criminal proceedings against the private interest in the defendant's personal liberty by the ordering of the detention. It can be stated the detention may be ordered only if a less severe coercive measure is not sufficient to achieve the aim.

During the most coercive criminal measure involving deprivation of liberty, all authorities, and even the counsel for the defense, have a special requirement, as only as a result of the effective work of all procedural stakeholders can detention become a truly *ultima ratio* tool (Fazekas, Kádár & Novoszádek, 2015). At the initial stage of the investigation, the police make a proposal to the prosecutor,[2] who initiates its order, and then the investigating judge may order a coercive measure

[1] This is in line with Art. 5 (1) (c) of the EC, which states that a person may be deprived of his liberty if the deprivation of liberty is "lawful arrest or detention for the purpose of inciting a serious suspicion of having committed a criminal offense to the competent authority or when it is necessary for a reasonable reason to prevent the commission of an offense or the escape after it has been committed".

[2] See more about the role of the police in Hungarian criminal proceedings (Čvorović & Vary, 2021, pp. 23- 38).

affecting the most serious personal liberty or decide on a less coercive measure. Which could be criminal supervision, restraing order or even bail. The emphasis is on the counsel for the defense because, citing European standards, he/she can argue for a lesser coercive measure, helping to bring a number of mitigating circumstances to the attention of the investigating judge against a motion prepared by the police and submitted by the prosecutor. Due to the adversarial nature of the proceedings, the statement of reasons must address all the grounds for detention established by the investigating judge. What factual data is available should also be addressed in the factual and legal reasoning of the defense counsel against the prosecutor's motion and the position of the investigating judge in relation to it, which can also be based only on facts (Decision Hungarian Supreme Court-HSC, BH. 2009.7). This is consistent with article 5 of Be. (Right of defense), and thus the decision may become fully substantiated, can be challenged on the merits with a legal remedy and may be overruled on the merits in the second instance proceedings (Opinion of the Mansion Criminal Chamber- OMCC, BKv 93). It is clear that the investigating judge does not have the opportunity to conduct an all-encompassing investigation when ordering a detention. However, as the Hungarian Supreme Court (Kúria) pointed out in its summary opinion based on the analysis of case law: the investigating judge must also act carefully before deciding on coercive measures restricting or depriving him or her of his/her personal liberty and may not ignore the defendant's and defense's arguments. In order to eliminate the errors of the previous practice, it is appropriate to examine in each case whether the application of a less coercive measure is not sufficient to achieve the objective pursued. Detention or maintenance should be ordered only if the court does not see the possibility in addition to less severe deprivation of liberty measures, as well as ordering house detention only if the prohibition on leaving the home does not ensure this purpose (Summary Opinion of the Hungarian Supreme Court- Kúria, 2016. El.II.JGY.B.2)

In Nikolovna v. Bulgaria, the Court of Justice stated that the proceedings in pre-trial detention must be adversarial and ensure the equality of arms between the prosecutor and the accused. The principle of equality of arms is not guaranteed if the defense does not have access to the investigation documents, knowledge of which is indispensable to refute the fact that his/her client is being detained (Nikolova v Bulgaria, Case 31195/96).

It follows from the adversarial nature of the court hearing that the suspect and his/her lawyer may put forward defense to the charges brought by the prosecutor, which may be directed against the general or particular grounds for arrest or the necessity of the arrest, pointing out that the use of a less coercive measure than arrest may ensure the successful conduct of the criminal proceedings

(Németi, 2013). The investigating judge is heavily exposed to the investigative documents placed at his/her disposal; he or she cannot take evidence and can only assess the evidence in so far as there is a reasonable suspicion of a criminal offense. The same is also stated in the case law of the Supreme Court, according to which, in reviewing the justification for pre-trial detention, evidence indicating or refuting the guilt of the accused cannot be assessed - cannot be taken into account - only the ascertain ability of the legal grounds justifying the coercive measure can be examined. The decision can only be based on that (Decision Hungarian Supreme Court- HSC, BH. 2008.9.934).

The investigating judge does not rule on the merits of the case at a hearing on the adoption or extension of a coercive measure involving personal liberty, nor does he or she exercise a judicial function; the purpose of the hearing is to examine the applicability of the coercive measure based on the evidence presented. At the hearing, the judge shall inform the accused of the warnings, draw his/her attention to his/her right to remain silent, and inform himor her of his/her circumstances, which may significantly influence the decision to order his/her arrest (Be. Art. 185). Notwithstanding the fact that the investigating judge does not take evidence, the accused may also make a statement on the case's merits following his/her circumstances, which may be used as evidence in subsequent proceedings.

The investigating judge will decide on the motion by a reasoned order granting, partially granting, or dismissing the motion. The reasons for the order shall contain

- the substance of the motion,
- a brief description and qualification of the offense on which the proceedings are based, and
- an indication of the existence or otherwise of the legal conditions for the motion.

The statement of reasons shall not only refer to the facts set out in the prosecutor's motion. However, it shall also state what the investigating judge considers to be the reasonable suspicion of the suspect or the specific reason(s) for the provisional detention and the facts based on which they consider that the motion is well founded, or what reasonable doubt has been raised as to the merits of the motion. In this context, it should also be stated which personal circumstances of the suspect have been examined and what conclusions have been drawn from them (Opinion No 93 of the Curia).

The reasoning of the investigating magistrates' orders is often criticized by defense lawyers and suspects, who usually claim that the reasoning of the orders is formalistic and that the court merely repeats the relevant provisions of the Be. in its reasoning without supporting it with evidence. One of the research showed that judges, in their reasoning, fulfill the general grounds of the existence of reasonable suspicion by listing the means of proof that support the existence of reasonable suspicion and that reasonable suspicion exists against the accused. In the case of special reasons, the judges generally see in their reasoning not one but several reasons as being established. Similar reasons support each special ground; the risk of absconding is preferably supported by the material gravity of the offense and by certain special circumstances of the accused, such as foreign ties and family living abroad. The investigating authority would have to look at some circumstances that would argue for or against the risk of absconding (Faragó, 2000). The justification for the delay in providing evidence is usually that the investigation is still ongoing and that the procedural steps still to be taken are being delayed. The risk of recidivism is generally considered to be established if the suspect is a repeat offender or has been prosecuted in the past and is confirmed by the suspect's criminal record (Farkas, 2014).

4. Statistics on Detention and Inconsistencies in Case Law

Thus, coercive measures, in particular when applying detention, must meet two conditions: on the one hand, the protection of universal human rights must be met, and on the other hand, the needs of state law enforcement must be met and the desired effectiveness criteria must be achieved. The problem lies in the tense contradiction between these expectations, and the dilemma also appears in the clash of the two approaches. In essence, the imposition of coercive measures on the imposition of coercive measures involving deprivation of liberty has been introduced as a legislative step to resolve this difference. However, the question is whether this eliminated or just added an additional adaptive element to the system and also made the judge a server for formal outcome-oriented law enforcement. Examining the figures, it can be seen that the total number of detentions has decreased year by year since 2014, similar to the total number of crimes, criminals and defendants in Hungary: in 2014 there were 3,052 detentions, while in 2017 there were 2,333. In 2013, 28% of the prison population had been detained, and in November 2018, 19%. This is partly due to the fact that the number of prosecutor's motions for detention has been steadily declining during the investigation period, similar to the number of police referrals.

Year	Inmates	They have been detained (proportion within detainees)
2008	14 782	4403 (30%)
2009	15 373	4502 (29%)
2010	16 203	4780 (29%)
2011	17 195	4875 (28%)
2012	17 517	4888 (28%)
2013	18 146	5053 (28%)
2014	18 042	4400 (24%)
2015	17 792	3978 (22%)
2016	18 023	3572 (20%)
2017	17 944	3416 (19%)
2018	14 632	2780 (19%)

Source: Tóth, 2018

If the courts did indeed order detention in actually justified cases, the number of prosecution and police motions would certainly be reduced, so that case law could also significantly shape official proceedings. Prosecutor motions in over 90% (2015) referred to the weight of the expected sentence as a factor underlying this reason. Judicial decisions also often established the danger of absconding and concealment solely on the basis of the outstanding material weight of the crime and the high penalty.[3] The material weight of the criminal offense, manifested in a sentence, can only play a role together with the special characteristics of the specific case, and provides a basis for such a conclusion. With regard to the material weight, the legislative assessment alone (according to the General and Special Part of the Btk) cannot provide an independent basis for concluding a detention (Decision Hungarian Supreme- HSC, BH 2007. 403)

5. Problems Related to Detention

The European Court of Human Rights (ECoHR) examines the lawfulness of detention as a deprivation of liberty in the context of the right to liberty and security guaranteed by art. 5 of the EC. Of course, not only coercive measures in criminal proceedings fall within its material scope, but also, for example, compulsory medical treatment or detention by the police. The Court has already condemned Hungary in a number of cases, citing in particular the length of detention, the schematic justification of the courts and the lack of consideration of alternative coercive measures.

[3] The notion that arrest should be ordered without consideration in the case of a crime of outstanding material gravity cannot be accepted at all (Herke, 2002b, p. 19).

In two areas of the conditions for ordering detention, we find an unregulated, immature issue that allows for the abuse of power, the unresolved nature of which adversely affects the practice of applying this coercive measure. The problem with both stems from the simple principle that the burden of proof rests on the authority, while being overwhelmed by the increased expectation of a mission of effectiveness and procedural efficiency, while being given the discretion to initiate an detention warrant, for example. One such problematic issue is the well-founded suspicion, while the other of the order conditions is the scope of the order conditions depending on the defendant's future conduct.

In establishing a well-founded suspicion, it is problematic that the adversarial principle does not apply, it is only a claim of a criminal authority.[4] There must be a well-founded suspicion that the crime has been committed and that the crime has been committed by the accused (Stepuleac v. Moldova, Case 8207/06). If two forms of suspicion meet, i.e. both the offender and the perpetrator are thoroughly prosecuted, i.e. criminal proceedings have been instituted against the person, he or she is already the defendant, as the serious suspicion was communicated to him or her and the suspect was first questioned, may be a place to order a detention (Bánáti *et al.*, 2009, p. 202). Of the various interpretations of probability, statistical probability can sometimes be used in criminal proceedings, but the perception of logical probability may prevail in the examination of suspicion. In examining the thoroughness of the suspicion, the court decides whether the act that is the subject of the suspicion is a criminal offense and whether the evidence presented is suitable to prove that the offense was committed by the accused (Bócz, 1990).

A cardinal issue for the application of the legal institution is the existence of grounds for detention depending on the future development of the defendant's behavior and the practice of their application. It is not enough to justify the judicial decisions related to detention with a legal text, but they require the collision of specific arguments and counter-arguments and their indication in the order (Folta, 2017, p. 3).

As a starting point for the judicial conclusion necessary for the existence of the reasons for detention (Be, 2017, Art. 276, par. 1), the age, personal and financial circumstances of the accused must always be assessed in addition to the danger of the crime to society (Neumeister v Austria, Case 1936/63). A severe punishment is not in itself a reason for detention if the accused's personal circumstances

4 The European Court of Human Rights has made it clear that the examination of the existence of a well-founded suspicion cannot be dispensed with when ordering an arrest. This is also in line with Opinion BK 93, which confirms that, in accordance with the adversarial nature of the proceedings, the evidence submitted by both parties must be assessed by the investigating judge.

do not make the escape likely (Vámbéry, 1916, p. 170). Taking all these circumstances into account, it is therefore possible to draw the right conclusion - a well-founded assumption - about the danger of escaping and hiding. If the starting point of the conclusion is not complete, the conclusion cannot be logically correct either. Thus, for example, an order ordering the risk of absconding merely by reference to the homelessness of the perpetrator may not be a sufficient ground for prolonging the deprivation of liberty. On the other hand, the assumption is based on the risk of absconding, concealment, if the accused moves from his/her known place of residence at the beginning of the proceedings to an unknown place of residence and the investigating authority can only reach him or her on the basis of an detention warrant (Elek, 2016). One of the special conditions of the law was the punishment, i.e. the seriousness, of the crime committed. Thus, the situation, as exemplified in judicial practice to this day, is that the court orders the detention of the suspect merely on the grounds of the serious nature of the act committed, and the personal circumstances of the perpetrator are completely disregarded (Köpf, 2000, p. 15). This reason for the strictest coercive measure involving prior deprivation of liberty is the most controversial in the application of law (Holhós, 2010). The unfoundedness of the reference to material weight was already pointed out in a judgment of the European Court of Justice in 1991 (Letellier v France, Case 12369/86). On the basis of another characteristic ground, it is clear that an order for failure to give evidence is justified where the defendant has in fact sought to influence the means of personal and material evidence to his/her own advantage (W v Switzerland, Case 14379/8). However, this special condition is often used unjustifiably as a reason in cases where the accused has been in custody for several years and there is almost no evidence left by the authority (Szeloch v Poland, Case 33079/96, Imre v Hungary, Case 53129/99). And although the former Be. no longer included the threat of a sentence as a separate special condition for ordering detention,yet we find that this principle is applied with preference by investigative judges and, so to speak, with a predictable frequency. Unfortunately, in most cases, judicial decisions are characterized by procedures without investigation based on stereotypical and rough submissions and motions (Yankov v Bulgari, Case 39084/97). The legitimacy of orders - the presumption of innocence and the principle of in *dubio pro reo* - is established by criminal convictions, often erroneous, made after the evidence has been collected, evaluated and the entire evidentiary process has been conducted (Nehéz-Pozsony, 2004).

6. Conclusion

Detention is increasingly falling victim to a tightening penal policy and, forgetting its original procedural purpose, is mistakenly treated by law enforcers as a punishment, a sanctioning legal institution. In many cases, it is still wrong to decide, on the basis of the material gravity of the offense, whether or not there is a possibility of escape or hiding, even though it must always be specifically examined in order to terminate the detention (Decision Hungarian Supreme- HSC, BH. 2007. 216). The pre-emptive nature of detention clearly distorts the practice of sentencing and leads law enforcement authorities to use the custodial sentence to be enforced, even if the subject matter and material circumstances of the offense may be suspended or reduced to a principal sentence. If the offender has already spent all or part of his/her sentence in custody, the final custodial sentence will be adjusted to that period. Therefore, the right to free discretion in the imposition of a sentence does not apply, as the trial judge is greatly influenced by the extent of the previous deprivation of liberty in custody. Fortunately, the rate of detentions in Hungary has been declining recently, and law enforcement is taking the Kúria's guidelines and European legal standards more seriously as regards the substantive issues of justifying orders.

References

Bánáti, J., Belovics, E., Csák, Z., Sinku, P., Tóth, M. & Varga, Z. 2009. *Büntető eljárásjog*. Budapest: HVG-ORAC kiadó.

Bieber, I., Ivány, B. & Kádár. A. 2019. *Ügyvédi kézikönyv. Hatékony jogi segítségnyújtás a kényszerintézkedésekkel kapcsolatos eljárásokban*. Budapest: Magyar Helsinki Bizottság.

Bíró, D. 2019. *A letartóztatás. Thesis*. Budapest: NKE.

Bócz, E. 1990. Elgondolások a büntetőeljárás újrakodifikálásához. *Belügyi Szemle*, 28(1), pp. 51-58.

Budaházi, A. & Fantoly, Z. 2019. *A büntetőeljárásjog. Statikus rész*. Budapest: Dialóg Campus kiadó.

Čvorović, D. & Vari, V. 2021. Police in the Hungarian criminal proceedings. *Crimen*, XII(1), pp. 23- 38, https://doi.org/10.5937/crimen2101023C.

Elek, B. 2016. Az előzetes letartóztatás indokolása az európai emberi jogi bíróság gyakorlatának tükrében. *Büntetőjogi Szemle*, 5(3).

Faragó, Á. 2000. *Az előzetes letartóztatás elrendelésének feltételei*. Bűnügyi Tudományok, Pécs.

Farkas, H.R. 2014. Az előzetes letartóztatás legvitatottabb kérdései a gyakorlatban. *Jura*. 20(2), pp. 196-202.

Fazekas, T., Kádár, A. & Novoszádek, N. 2015. *Az előzetes letartóztatás gyakorlata: az alternatív kényszerintézkedések és a bírói döntéshozatal vizsgálata*. Budapest: Magyar Helsinki bizottság. Available at: https://helsinki.hu/wp-content/uploads/MHB_kutatasi_jelentes_elozetes_letartoztatas_2015.pdf.

Folta, N. 2017. Jobb lehet az új? Az előzetes letartóztatás elrendelése az új Büntetőeljárási törvény tükrében. *Eljárásjogi Szemle*, 11(1), pp. 1-10.

Herke, C. 2002a. Az előzetes letartóztatás elrendelése a terhelt várható magatartása alapján. *Jogtudományi Közlöny*, 57(1), pp. 13-26.

Herke, C. 2002b. *A letartóztatás*. Budapest-Pécs: Dialógus Campus kiadó.

Herke Cs., Fenyvesi Cs. & Tremmel F. 2014. *A büntető eljárásjog elmélete. Dialóg Campus Kiadó,* Budapest-Pécs.

Herke, C. 2018. *Büntető eljárásjog. Egyetemi jegyzet*. Pécs: Pécsi Tudományegyetem.

Holhós, Sz. 2010. Előzetes pro és kontra a bírósági eljárás és a végzések tükrében tanulmány, az letartóztatás általános és különös okaira vonatkozó bírói vizsgálat szükséges terjedelméről. Study: Available at: https://debreceniitelotabla.birosag.hu/sites/default/files/field_attachment/elozetes.pdf.

Kaprinay, E. 2017. Az őrizetbe vétel és az előzetes letartóztatás általános, valamint fiatalkorú terheltekre vonatkozó speciális feltételei és dilemmái. *Jogelméleti Szemle*. 3, pp. 51-76.

Köpf, M. 2000. Az őrizetbe vétel és az letartóztatás az angol, a francia és a magyar jogban. *Ügyészek Lapja*, (7)6, pp. 5-19.

Nehéz-Pozsony, M. 2004. Nem lehet előrehozott büntetés, az előzetes letartóztatás feltételeinek régi és új szabályozása. *Fundamentum,* 8(1), pp. 109-118.

Németi, S. 2013. Az előzetes letartóztatás néhány kérdése. In: Jungi Eszter (szerk.): *Büntetőjogi Tanulmányok XIV.*, MTA Veszprémi Területi Bizottsága, Veszprém., pp. 81-95.

Tóth, M. 2018.A hazai börtönnépesség újabb kori alakulásának lehetséges okai és valószínű távlatai. *Büntetőjogi Szemle*, 7(2), pp. 107-114.

Vámbéry, R. 1916. *A Bűnvádi perrendtartás tankönyve. Garmadik kiadás*. Budapest: Grill Károly Könyv kiadó vállalata

Vári, V. 2012. Előzetes letartóztatás dilemmái és a tárgyi súly problematikája. *Magyar Rendészet*, 12(4), pp. 93-100.

Legal Sources

Attorney General's Office [AGO LFNIGA]: REMINDER on certain aspects of the application of the Criminal Procedure Code. 142/2019.

Act XIX of 1998 on Criminal Procedure 1998, *Hungarian Gazette*, no. 37/2002.

Act XC of 2017 on Criminal Procedure (Be.), *Hungarian Gazette*, no. 99/2017.

Act C of 2012 on Criminal Code, (Btk.), *Hungarian Gazette*, no. 92/2012.

Act XXXI of 1993 on the promulgation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the eight additional protocols thereto. Convention for the Protection of Human Rights and Fundamental Freedoms 1993, *Hungarian Gazette*, no. 70/1993.

The Fundamental Law of Hungary, *Hungarian Gazette*, no, 43/11.

Case Law

Judgment of the Court (Chamber) on Merits and Just Satisfaction of 26 June 1991. *Letellier v. France* (Case 12369/86, ECLI:CE:ECHR:1991:0626JUD001236986).

Judgment of the Court (Chamber) on Merits and Just Satisfaction of 27 June 1968. *Neumeister v. Austria* (Case 1936/63).

Judgment of the Court (Chamber) on Merits and Just Satisfaction of 06 November 2007. *W. v. Switzerland* (Case 14379/88, ECLI:CE:ECHR:1993:0126JUD001437988).

Judgment of the Court (Fourth Section) on Merits and Just Satisfaction of 22 February 2001. *Szeloch v. Poland* (Case 33079/96, ECLI:CE:ECHR:2001:0222 JUD003307996).

Judgment of the Court (Second Section) on Merits and Just Satisfaction of 02 December 2003. *Imre v. Hungary* (Case 53129/99, ECLI:CE:ECHR:2003:1202JUD005312999).

Nikolova v. Bulgari, No. 31195/96, Judgment of the Court on Merits and Just Satisfaction of 25 March 1999. Available at: http://webcache.googleusercontent.com/search?q=cache:WqDrS9-9Pe0J:www.menschenrechte.ac.at/orig/99_2/Nikolova.pdf&cd=3&hl=hu&ct=clnk&gl=hu.

Stepuleac v. Moldova, No. 8207/06, Judgment of the ECHR of the Court on Merits and Just Satisfaction, 06. 11. 2007, ECLI:CE:ECHR:2007:1106JUD000820706.

Yankov v. Bulgari, No. 39084/97, Judgment of the Court on Merits and Just Satisfaction of 11 March 2004. Available at: http://hrlibrary.umn.edu/research/bulgaria/Yankov-eng.pdf.

Constitutional Court decision, no. 66/1991. (XII. 21.), *Hungarian Gazette*, no. 35/1991.
Constitutional Court decision, no. 19/1991. (VI 25.), *Hungarian Gazette*, no. 56/1991.
Decision Hungarian Supreme Court, BH. 2007. 216.
Decision Hungarian Supreme Court, BH. 2007. 403.
Decision Hungarian Supreme Court, BH. 2009. 7.
Decision Hungarian Supreme Court, BH 2008.9.394.

Other Sources

Council of Europe Committee of Ministers Recommendation No R (80) 11 on pre-trial detention.
Opinion of the Mansion Criminal Chamber, (BKv. 93.) on the procedure of the investigating judge regarding the order of pre-trial detention.
Opinion of the Hungarian Helsinki Committee on the draft of the new Criminal Procedure Act (20 June 2016) Available at: http://www.helsinki.hu/wp-54content/uploads/MHB_velemeny_Be_ draft_20160620.pdf.
Összefoglaló vélemény a személyi szabadságot korlátozó kényszerintézkedésekkel kapcsolatos joggyakorlat vizsgálatáról. (Summary of coercive measures restricting personal liberty case law) Kúria büntető kollégiuma joggyakorlat-elemző csoport 2016.el.ii.jgy. b.2., 2017. Available at: https://www.kuria-birosag.hu/sites/default/files/joggyak/osszefoglalo_velemeny_7.pdf (download: 03/06/2020).
Rec 1980. Council of Europe, Recommendations CM/ Rec (80) 11 of the Committee of Ministers to member states concerning custody pending trial. Adopted by Committee of Ministers on 27 June 1980.
Summary Opinion of the Hungarian Supreme Court, 2016. El.II.JGY.B.2.

Božidar M. Banović
Redovni profesor, Fakultet bezbednosti, Univerzitet u Beogradu, Beograd, Srbija
E-mail: *bbvsup@yahoo.com*
Vince Vari
Vanredni profesor, Univerzitet javne službe, Pravni fakultet, Mađarska
E-mail: *varivince@uni-nke.hu*
Dragana S. Čvorović
Vanredni profesor, Kriminalističko-policijski univerzitet, Beograd, Srbija
E-mail: *dragana.cvorovic@kpu.edu.rs*

PRITVOR U KRIVIČNOM PROCESNOM ZAKONODAVSTVU MAĐARSKE

Sažetak

U radu je prikazano stanje pritvora u Mađarskoj. Pravni institut pritvora predstavlja lišenje lične slobode bez pravnosnažne sudske odluke, odnosno pravnosnažne odluke. Mađarski Zakon o krivičnom postupku, koji je stupio na snagu 1. jula 2018. godine, ima za cilj da revidira praksu pritvora. Prema novom propisu, pritvor se može primeniti samo ako se svrha postupka ne može obezbediti blažim merama prinude (krivičnim nadzorom, jemstvom). U radu su opisani pravni razlozi pritvora, statistika i dosadašnji problemi u sudskoj praksi koji su karakterisali ovaj pravni institut.

Ključne reči: pritvor, krivični nadzor, jemstvo, lišenje slobode.

Primljeno: 1. 11. 2022.
Prihvaćeno: 30. 12. 2022.

Marina M. Matić Bošković*

Review scientific paper
UDK: 004.738.5:343.537
doi: https://doi.org/0.56461/SPZ_22406KJ

CYBERCRIME MONEY LAUNDERING CASES AND DIGITAL EVIDENCE

Abstract

The widespread dependence on digital systems and increased value of digital commerce in the metaverse boosted cyber vulnerability. The cybercrime will be more profitable than the global trade of all major illegal drugs combined, while Cybersecurity Ventures expects global cybercrime costs to grow by 15 percent annually by 2025. Cybercrime changed traditional money laundering methods which is difficult to detect since it could be committed from anywhere in the world. The threat posed by cybercrime money laundering methodologies has been aggravated by the Covid-19 pandemic.

To investigate cyber laundering the e-evidence are crucial, which is confirmed by the EU Commission estimate that 85 percent of criminal investigations require electronic evidence. Additional challenge for law enforcement authorities presents the fact that the organised cybercrime is joining forces and their likelihood of detection and prosecution is estimated to be 0.05 percent in the USA. Furthermore, the digital evidence is often held by service providers as private companies based in another country, which causes many obstacles to access to those data by investigative and law enforcement authorities.

The paper identifies impact of Covid-19 on cybercrime and increased risks of cyber laundering. In relation to investigation and prosecution of cyber money laundering, the paper analyzes challenges for investigative authorities to gather data and evidence in cyber money laundering cases and efforts of EU and USA authorities to facilitate access to digital evidence and relevant data stored by service providers. The paper refers to possible shortcomings of proposed instruments and need for efficient response and adaptation to changes in the cybercrime.

Keywords: *cyber laundering, mutual legal assistance, digital evidence, data gathering, cross-border cooperation.*

* PhD, Senior Research Fellow, Institute of Criminological and Sociological Research, Belgrade
E-mail: *m.m.boskovic@roldevelopmentlab.com*
ORCID: *https://orcid.org/0000-0003-1359-0276*

1. Introduction

The staggering advancement of information and communication technologies over the last few decades has significant impact on the society in different forms and on number of areas ranging from communication and trade to education and agriculture. Besides benefits, innovations in information and communication technologies and its application in the number of areas create opportunities for criminals to conduct crimes in the cyberspace (World Economic Forum, 2021, Chapter 2).

In 2015, cybercrime cost the global economy around $3 trillion (Cybersecurity Ventures, 2020) and it was estimated that in 2021 that figure increased to $6 trillion (Morgan, 2020). According to Cybersecurity Ventures the cybercrime will be more profitable than the global trade of all major illegal drugs combined. Having in mind the relevance of the cybercrime and the threat it causes to functioning of the states and business, it is clear that investigation of these crimes represents the high interest of the criminal justice. To conduct investigation of cybercrime the cross-border access to digital information is of paramount interest. However, the organised cybercrime is joining forces and according to the World Economic Forum their likelihood of detection and prosecution is estimated to be 0.05 percent in the USA (World Economic Forum, 2020, p. 63).

Cybercrime changed traditional money laundering methods which rely on the banking system. Money laundering is a constantly changing criminal phenomenon, with updated modus operandi and evolving business models (Savona, 2014, p. 1). According to several sources, money laundering is an offence that has benefited most from the modern technologies (Souto, 2013, p. 266). Cyber laundering could be committed by using different methods that involves various types of transactions such as wire transfers, relies on use of various types of transactions ranging from wire transfers, withdrawals to money mules and via ATM, use of accounts opened with lost documents or fictitious companies, etc. Electronic payment systems facilitate money laundering since it is more convenient for moving high amount of money and due to speed of transactions difficult to control property or freezing (Financial Action Task Force, 2010).

Cybercrime is not used only for laundering money gained through criminal activities, it is also used for laundering of money obtained by cybercrimes. Modalities to gain money by cybercrime differ from malicious malware and phishing to account takeovers. Common for all methods of cybercrime is that offenders are interested to quickly move the illicit funds to avoid confiscation.

According to the United Nations Office on Drugs and Crime (UNODC), the three stages of traditional money laundering can be distinguished: placement, layering and integration (See more: United Nations, Money Laundering). However, if money originates from the cybercrime, the money laundering process immediately jumps to the second stage – layering. The UNODC highlighted three main ways of layering: moving funds within the financial system through offshore accounts or anonymous shell accounts, moving funds into unregulated financial e-cash systems such as electronic money or casinos and removing funds from the financial system.

Development of new technologies put additional risks for combating cybercrime, since it provides almost complete anonymity to perpetrators seeking to exploit this arena. In addition, the 59.5 percent of the world population are active internet users (Worldwide digital population as of January 2021). Cybercrime is difficult to detect due to the fact it could be committed from anywhere in the world, relatively easy and without significant costs. For investigators it is difficult to trace identities, while victims of cybercrime do not always want to disclose the fact to investigative authorities. Development of cryptocurrencies, like bitcoin, increased complexity of investigation of money laundering, since criminals start to embrace bitcoin as a partner in their cash-out strategy (van Wegberg, Oerlemans & van Deventer, 2018, p. 420).

In the article the impact of modern technologies and Covid-19 on cyber laundering will be analysed. Measures introduced during Covid-19 incentivised people and business to increase use of modern technologies in daily operations, which increased risk of cybercrime and cyber-attacks. Covid-19 has permanently changed behaviour of both people and business, which will require transformation of government and investigative bodies' response to increased risk of cybercrime. Due to the fact that cyber laundering often involves cross border evidence, the challenges in gathering that evidence in the EU and USA will be elaborated. Furthermore, the author will assess attempts of the national and international institutions (EU and USA) to facilitate access to e-evidence in cyber laundering cases.

2. Impact of Covid-19 on cyber laundering

The threat posed by cybercrime money laundering methodologies has been exacerbated by the Covid-19 pandemic. The International Criminal Police Organization (Interpol) issued a global threat assessment on crime and policing to its 194 member countries (The International Criminal Police Organization, 2020). Furthermore, the Financial Action Task Force (FATF) highlighted an expansion of money laundering originated from Covid-19-related crime, which could include increased misuse of online financial services and virtual assets to move and conceal illicit funds; and possible corruption connected with governmental stimulus funds or international financial assistance (Financial Action Task Force, 2020).

Introduction of measures to prevent spread of Covid-19 virus in 2020 and to some extend in 2021 influenced the behaviour of citizens and business. Both groups increased online activities and e-commerce. Remote work, introduced during Covid-19, and still in use to certain extent, requires the use of online platforms and exchange of sensitive data. Value of the digital commerce in the metaverse grows and it is estimated to be $800 billion by 2024 (World Economic Forum, 2022). The increase of online financial activities and change of customer behaviour enable criminals to target vulnerable individuals and institutions more easily and take advantage of existing legal gaps.

To overcome challenges caused by measures imposed to prevent spread of virus, such as social distancing and office closure, financial institutions introduced remote onboarding and identity verification. The introduced changes created loopholes for money launderers, especially at the beginning of the process when financial institutions had not been fully prepared to remotely verify identity of customers and clients.

Prior to Covid-19 outbreak, cyber-attacks and money laundering violations exposed financial institutions to significant operational and reputational risks. To ensure effective business operation during pandemic, financial institutions needed additional resources and transformation of some business processes which decreased their capabilities to monitor suspicious transactions. Public authorities were faced with similar problems. As consequence of all challenges, many authorities are prioritising other sensitive areas and therefore postponing anti-money laundering onsite inspections or relying only on off-site monitoring. Some authorities were delaying anti-money laundering reporting and other regulatory requirements to decrease the pressure on the staff (Crisanto & Prenio, 2020, p. 4). Moreover, many countries reported an increase in cash withdrawals during the Covid-19 outbreak (Report in the Financial Times). After stabilisation of situation the cash will return which could provide cover for money laundering activities) (Auer, Cornelli & Frost, 2020).

Pandemic specifically influenced using of money mules for money laundering.[1] While technique of money mules has been used for a long time, Covid-19 lockdowns had an effect on the increase in the typology due to the fact that people's behaviour and daily routines were changed and most of the people worked from their homes. Work from home increased the use of computers. Restriction

[1] Money mules are individuals who wittingly or unwittingly help criminals launder money through their individual and business checking accounts.

of movement had as a result that people were spending more time online and were exposed to ads and dubious schemes. Criminals reacted promptly to the change of people's behaviour, and they were looking for marks online of those unexperienced who can be persuaded to move criminal funds through their accounts. Those schemes were used by criminal gangs to defraud the USA government out of unemployment checks, tax refunds and other financial disbursements. Criminals were using different methods to conduct frauds and apply for state assistance, from stealing identities to purchasing synthetic identities and at the later stage using money mules to move the money.

The recent Financial Crimes Enforcement Network (FinCEN) Advisory on Imposter Scams and Money Mule Schemes Related to Coronavirus Disease 2019 (FIN-2020-A003)[2] issued in July 2020 details some of typologies on money mule schemes. Furthermore, the USA institutions issued warnings on different scams and possible cyber-attacks on citizens and business (Federal Trade Commission Business Blog, 2020; Federal Bureau of Investigation (FBI) Internet Crime Compliant Center Public Service Announcement, 2020).

Furthermore, according to the SIRIUS EU Digital Evidence Situation Report, pandemic led to longer delays in receiving responses from online service providers, which caused challenges for law enforcement and judicial authorities in the EU (European Union Agency for Law Enforcement Cooperation, 2021, p. 6).

3. Evidence Gathering Challenges

For the collection of electronic evidence, the most relevant biding international instrument is the Council of Europe Convention on Cybercrime (Budapest Convention).[3] The Budapest Convention is accompanied by assessment mechanism established in the form of Cybercrime Convention Committee. Currently the Committee is focused on assessing access to electronic evidence on cloud servers by law enforcement authorities. The aim of the Convention is to ensure that criminal law

[2] Document is available at:
https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2020-a003.

[3] Council of Europe, Convention on Cybercrime (EST No. 185). The Convention is supplemented by a First Additional Protocol covering the criminalization of acts of a racist and xenophobic nature committed through computer systems (CETS 189) and a Second Additional Protocol on enhanced international cooperation and disclosure of electronic evidence (CEST 224). Non-binding instrument is Council of Europe Recommendation No. R (89) 9 of the Committee of Ministers to Member States on Computer-Related Crime, adopted on 13 September 1989 that resulted in the approximation of national legislation regarding certain forms of computer-related crime elaborated by the European Committee on Crime Problems.

is in line with technological developments that could lead to misuse of cyberspace facilities and cause damage (Clough, 2014, p. 702). The main value of the Convention is contribution to the creation of common standards by providing the criminalisation of a list of attacks against and by means of computer systems[4] and by establishment of procedural law tools to make the investigation of cybercrime and the securing of electronic evidence and international police. Furthermore, the Convention enables international police and judicial cooperation on cybercrime and e-evidence by providing legal framework for international cooperation.

The Budapest Convention on Cybercrime provides definitions of terms relevant for cybercrime, like definition of the computer system, computer data, service provider, and traffic data. According to Article 1 of the Convention, the computer data means the representation of facts, information or concepts in a form suitable for processing in a computer system (e.g., photo, video, sound, text), while service provider means any public or private entity that provides to service users the ability to communicate by means of a computer system and any other entity that processes or stores computer data on behalf of such communication service or users of such service.

For collection and analysis of data from computer systems, networks, wireless communication and storage devices in a way that is admissible as evidence in a court of law, the digital forensics as a new discipline has been developed (Craiger, 2006, p. 720). According to Interpol, digital forensics is a discipline that combines elements of the law and computer science that focuses on identifying, acquiring, processing, analysing and reporting on data stored electronically (Interpol, Digital Forensics). Digital evidence is any information and data of value to an investigation that is stored on, received or transmitted by an electronic device and could be found on a computer hard drive, a mobile phone, internet etc. (National Institute of Justice, 2008, p. ix).

The main challenge for collection of digital evidence is that their content and location can be easily and swiftly altered. In addition, one of the challenges for gathering of digital evidence is the practice to conduct digital forensics by law enforcement officers who are not digital forensic scientist (Adams *et al.*, 2013, p. 31). Additionally, most of the forensics labs are linked with law enforcement, either through financial dependence on law enforcement or as institutional part of the law enforcement agencies (Doyle, 2019, p. 7).

[4] The Budapest Convention covers crimes of illegal access, interference and interception of data and system networks, and the criminal misuse of devices. In relation to offences conducted by means of computer systems, the Budapest Convention regulated computer-related fraud, production, distribution and transmission of child pornography and copyright offences.

To overcome existing challenge that the investigators lack competence to attribute, evaluate, interpret, and re-construct digital traces (van Baar *et al*., 2014, p. S58), digital forensics is used in the investigation phase. However, use of digital forensics raise questions of professional bias, protection of innocent defendants and equality of arms in respect to digital forensics aid for the defence (Stoykova, 2021, p.10). Investigation is a process that develops and tests hypotheses to answer questions about events that occurred (Carrier, 2004, p. 9), while digital forensic scientists, evaluate facts to establish their probative strength (Pollitt *et al*., 2019, p. 15).

Frequently, in investigation of cyber laundering cases there is a need for collaboration between digital forensics experts and forensic accountants with experience in analysing financial records and providing an accounting analysis suitable to be used in legal proceedings. Forensic accounting is used in criminal investigations to trace funds, identify assets, recover assets, etc.

According to SANS Institute for information security training and security certification (Braid, 2002, p. 3), law enforcement authorities and forensics should follow specific rules in confiscation of digital evidence to ensure their admissibility in the court. Digital evidence must be collected in line with legal procedure, related directly to the case, and unbiased, while method of extraction should maintain integrity. Having in mind that digital evidence might be complex, the law enforcement authorities should present them to a court in understandable manner.

According to the European Commission estimation from 2019, electronic evidence is necessary in 85 percent of criminal investigations (European Commission, 2019, Recommendation for a Council Decision, Authorising the Opening of Negotiations in View of an Agreement between the European Union and the United States of America on Cross-Border Access to Electronic Evidence for Judicial Cooperation in Criminal Matters). Additionally, in two thirds of these investigations there is a need to obtain evidence from online service providers as private entities that have seat in other country, which requires use of mutual legal assistance instruments to access to evidence (European Commission, 2019, Recommendation for a Council Decision, Authorising the Opening of Negotiations in View of an Agreement between the European Union and the United States of America on Cross-Border Access to Electronic Evidence for Judicial Cooperation in Criminal Matters). Electronic data must be handled with certain scientific procedures to maintain their high probative value, since their legal assessment will lead a judge to reach a conclusion in the case (Karagiannis & Vergidis, 2021, p. 186).

Nevertheless, permanent changes of information and communication technology require from state authorities and criminal justice system to constantly revise and adapt their policies and standard operating procedures to strengthen the legal framework of a jurisdiction. One of the main challenges for legislators and law enforcement agencies is access to service provider data, since the different jurisdictions are responsible based on different criteria, such as the location of service provider's headquarter, location of clients who access to services or location of servers. The new payment technologies have influenced the increase of abovementioned challenge, since they allow citizens and legal entities to conduct business between different countries and various legal systems (Filipkowski, 2008, p. 17). As a consequence of that globalization, if an offence occurs, several jurisdictions have to be involved which requires the cooperation between different authorities from revenue services to judiciary. Although countries signed many mutual legal assistance treaties, the complexity of cooperation influence on investigation and prosecution of transnational crimes and creates it as one of the most difficult tasks.

The increasing use of internet and transfer of data in digital form led investigation and prosecution authorities to rely on digital evidence. To ensure efficient investigation and prosecution of cybercrime it is necessary to permit law enforcement agencies cross-border access for gathering electronic data.

In the EU member states investigating and prosecuting authorities are relying on cross-border data and evidence in significant number of cases. EU instruments of mutual legal assistance in criminal matters provide legal basis for judicial cooperation and possibility to request needed information also in digital form, from competent authorities of another EU Member States (Stefan, Gonzalez, 2018, p. 8). However, the available judicial cooperation and mutual assistance instruments are too slow and complex for cybercrime cases (Tinoco-Pastrana, 2020, p. 46; Non-paper: Progress Report following the Conclusions of the Council of the European Union on Improving Criminal Justice in Cyberspace, 2016, p.5).

Additional problem for cross-border cooperation in cybercrime is caused by the fact that electronic evidence is held on servers owned by service providers who are often foreign, non-EU companies. Majority of service providers are USA legal entities (i.e. Google, Facebook, Microsoft, Apple). However, the location of servers could be in the third country which contributes to further complexity for law enforcement authorities. Also, territorially based mutual legal assistance instruments are not applicable on cloud-based services (Krishnamurthy, 2016, p. 1). Furthermore, the jurisprudence and interpretation of access to foreign searches differ among jurisdictions. Namely, USA Supreme Court judges are on the position that USA courts do not have competence to issue warrants for foreign searches (Daskal, 2015, p. 354). On contrary, the European Court of Justice recognised the right of European courts to order the search of service provider parent company in the USA (Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12, ECLI:EU:C:2014:317, para. 43). Despite the decision of the European Court of Justice, there is no mechanism to oblige services providers to respond on requests of law enforcement authorities. At the national level, the example of the court decision where the principle of territoriality was abandoned was delivered in Belgium (*Yahoo! Inc. v Belgium* case, Hof van Cassatie of Belgium, Case P.13.2082.N.). The first example is the case law of the Supreme Court of Belgium in case of Yahoo in 2011, 2012 and 2015 and latter in case against Facebook (De Hert, Parlan & Thumfart, 2018, p. 343). The court jurisprudence influenced on the legislation and as consequence national legislation of Belgium, Germany and Austria was amended to include provisions allowing remote evidence gathering through the internet. (Warken, 2018, p. 227)

4. EU Cross Border Cooperation in Evidence Gathering

To overcome problem in evidence gathering the EU authorities prepare proposals of the two legal instruments, Regulation and Directive (Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM/2018/225 final 2018/0108 (COD); Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings COM/2018/226 final 2018/0107 (COD)), with the aim to establish legislative framework that will permit direct communication between law enforcement agencies and service providers from different EU Member States. Based on the proposals the law enforcement authorities will be equipped to directly request from service providers in another Member State to produce or preserve electronic data (Tosza, 2020, p. 162). Implementation of proposed acts in the EU member states would create new challenges for direct interconnection of investigating and prosecuting authorities and private companies (Carrera, Mitsilegas & Stefan, 2021, p. 26).

The European Production and Preservation Orders are designed to bring a new dimension in mutual recognition. In comparison to other EU mutual recognition instruments that ensure direct communication between state authorities, the proposed instruments are focussed to empowering law enforcement actors to request, access and share data held by service providers across borders. However, both legal acts have been criticized for violation of human rights standards (Matić Bošković, 2021, pp. 132-135).

As far as cross-border demands for electronic information involving EU member states which are not part to the European Investigation Order Directive (Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ* L 130, 1 May 2014, pp. 1-36; Directive (EU) 2022/228 of the European Parliament and of the Council of 16 February 2022 amending Directive 2014/41/EU, as regards its alignment with Union rules on the protection of personal data, *OJ* L 39, 21 February 2022, pp. 1-3) such as Ireland or Denmark, or third countries (e.g., the USA or Japan), EU Mutual Legal Assistance Treaties present framework for communication and establish rules for requesting, gathering, and exchanging data for criminal investigations and prosecutions.

As for transatlantic cooperation, the Agreement on Mutual Legal Assistance (MLA) between the European Union and the United States of America (Agreement on mutual legal assistance between the European Union and the United States of America, *OJ* L 181, 19 July 2003. pp. 34-42) has set conditions relating to the provision of mutual legal assistance in criminal matters between the EU and the US and represents the framework agreement to their bilateral mutual legal assistance treaties (Stefan & Gonzalez Fuster, 2018, p. 18). The aim of the Agreement is to enhance cooperation between EU member states and the US as a complement to existing bilateral mutual legal cooperation treaties with particular EU member states and to amend some of their provisions, if they provide for less effective avenues of cooperation (Council Decision 2009/820/CFSP of 23 October 2009 on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America). In the absence of such a treaty, the EU member states and USA undertake to ensure that the agreement is applied and provides a suitable legal basis for cooperation.

The Agreement is setting framework that ensures compliance of the mutual legal assistance request on access to electronic information with the legal and procedural requirement of issuing and requested country (Carrera *et al*., 2015, pp. 7-8). Gathering of electronic evidence by law enforcement agencies in USA is regulated by the Electronic Communication Privacy Act (ECPA) and Stored Communication Act (SCA). Furthermore, the Fourth Amendment sets the default rule that any search and seizure without a warrant is unreasonable that could be obtained upon a showing standard of probable cause (Swire, Hemmings, Vergnolle, 2016, p. 110). The ECPA and the SCA set different rules for different type of electronic evidence,[5] which cause challenges for EU investigating

[5] The ECPA and the SCA make distinction between following categories of evidence: basic subscriber information; dialing, routing, addressing and signaling information; other metadata,

authorities. For certain categories of evidence, the EU member state authorities can submit request directly to the service provider, while other type of electronic evidence are subject to the MLA process. The EU–US Agreement ensures that rights of suspects and accused persons are protected in line with national legislation and data protection standards, including the need to provide a court order for qualifying categories of electronic evidence.

The EU investigating bodies may request stored non-content electronic information directly from USA service providers. However, the SCA has complex rules on voluntary disclosure of that type of electronic evidence. Basic subscriber information is type of electronic evidence that is not protected under the Fourth Amendment and service providers can voluntarily disclose this information to law enforcement upon request. However, this ability to provide evidence voluntarily has as a consequence lack of legal certainty, compared with mutual legal assistance request which has to be compulsory executed. Although the cross-border requests to access and gathered electronic data held by service providers have become a common investigative practice in the EU, the Commission is on the position that the high volume of request to access e-evidence under the MLA put whole system under the strain and has shown its weakness. The MLA processes with the US on average takes 10 months and is perceived too long for efficient investigation (European Commission, 2018; Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, 2018, p. 9). Having in mind mentioned limitations of the MLA system, it is evident that direct cooperation is not a fully satisfactory solution.

The transparency reports showed that number of EU Member States requests to the main service providers has increased by 70% over the four-year period (2013-2016). The two service providers were dominant, Google and Facebook received more that 70 percent of total number of requests from the EU Member States. However, the percentage of requests from the EU Member States answered by service providers is relatively low and range from 46% in 2013 to 58% in 2016. The limitation of transparency reports is that they include information on the number of requests answered, which is not same as fulfilled.[6]

---

such as location information; the stored content of electronic communications and the real-time content of electronic communications.

[6] According to the European Commission Impact Assessment, five main service providers are Google, Facebook, Apple, Microsoft and Twitter. The EU Commission estimated that up to 90% of current cross-border requests for non-content data are sent to these five providers, based on their market share, (European Commission, 2018, pp. 16-17).

While indicating that these requests "mostly" concern non-content data, the European Commission in the 2018 Impact Assessment also noted how these transparency reports suffered from important limitations. For example, the reports did not distinguish whether reported requests came directly from the member state in which they originated, or it came from the public authorities of member state that was asked to cooperate with the one in which the request originated (European Commission, 2018, pp 16-17). As such, based on the information provided by the transparency reports it is difficult to precisely quantify the number of requests executed based on voluntary procedures.

A specific challenge arises when data collection measures are requested directly from service providers subject to EU law but originating from non-EU countries. According to the SCA, the US investigative and prosecuting authorities can obtain a warrant requiring from US companies to produce data stored abroad. The competence to order disclosure of data stored abroad is explained that it is for the US company with control over the data to grant US authorities the competence to require its production (Kyriakides, 2019, p. 100).

The US Government adopted the CLOUD Act (Clarifying Lawful Overseas Use of Data (CLOUD Act), S. 2383, H.R. 4943) after the *Microsoft Ireland* case,[7] which challenged the competence of the US federal courts to issue warrants for the search and seizure of data located outside the territory of the United States. The aim of the CLOUD Act was to clarify that the SCA's scope application extends to data stored abroad.[8] The adoption of the CLOUD Act raised questions of compliance with EU acquis, especially articles 48 and 49 of the EU General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)).

To overcome challenges that could arise from different level of fundamental rights protection in the EU and the US legal system, the EU–US Umbrella Agreement was signed in 2016 (Agreement between the United States of America and the European Union on the protection of personal information relating to the

[7] The dispute questioned the lawfulness of extraterritorial assertion of US criminal jurisdiction in light of standing (i.e. pre-CLOUD Act) domestic legislation. The US Department of Justice argued that its warrant authority under the SCA required US-based companies to turn over the requested data, regardless of where the latter were stored.

[8] Part I of the Act (section 103) now formally grants USA authorities the power, under USA law, to order private companies to disclose the "content of a wire or electronic communication and any record of other information" about a person, regardless of either the nationality of the latter or the location of the data. Providers can also be ordered to preserve data in their possession for up to 180 days prior to the issuance of any compulsory process.

prevention, investigation, detection, and prosecution of criminal offences, *OJ* L 336/3, 10 December 2016). The Umbrella Agreement puts in place a data protection framework for EU – US law enforcement cooperation, which is confirmed in definition of its purpose in the Article 1 of the Agreement. The Agreement applies to all personal data exchanged between the EU and the US for purpose of prevention, investigation, detection and prosecution of criminal offences. The Agreement also covers transfer by private companies in the territory of one party to the competent authority of the other party (Stefan & Gonzales Fuster, 2019, p. 20). The Umbrella Agreement grants EU citizens the possibility to seek judicial remedies before US courts if US authorities mistreat their data.

According to the Review of the EU–US MLA Agreement implementation (Council of the European Union, 2016) the two problems are identified and affect the process of obtaining electronic evidence from the US. The first one relates to the non-enforcement of the requests due to the inadequacy and insufficient presentation of probable cause. The second one relates to the fact that majority of the service providers are located in the US, which has caused high volume of request for electronic evidence to be submitted to the US (Daskal, 2016, p. 358).

The EU and US authorities are assessing possibilities for improvement of cooperation under the existing MLA Agreement with the aim to strengthen fight against crime and especially cybercrime and cyber laundering. Over the time the EU and the US were introducing practical measures as specialised personnel including establishment of the European Judicial Cybercrime Network (EJCN) in 2016 to foster contacts between practitioners specialised in cybercrime and to increase the efficiency of investigations and prosecutions of cybercrime. The EJCN is the body with which US Department of Justice liaise. Additionally, national contact points and liaison officers are also practical solutions that could contribute to better results in combating cybercrime. Complexity of procedures could be overcome by simplification and streamlining of processes for requesting and providing assistance as well as allocation of sufficient financial and human resources for enforcement of received requests.

Exercising reciprocal judicial scrutiny over incoming law enforcement agencies requests for data emerges as an essential requirement under EU law. The reciprocal judicial scrutiny ensures the protection of the subject whose data are requested under the EU-US Agreement. Due to this protection the requests are being refused for the reason: the failure to demonstrate probable cause, the absence of dual criminality, the failure to demonstrate a connection between the evidence sought and the criminal conducted alleged, and on the basis of essential interests (Council of the European Union, 2016a, p.7). Additionally, judicial scrutiny has a purpose to guarantee the EU citizens' fundamental rights, both in the EU and US.

5. Conclusions

Development of information and communication technologies affected on development of cybercrime and specifically cybercrime laundering. The criminal justice systems developed new legal instruments to adapt to new circumstances and to the fact that majority of evidence are in the digital form. The Covid-19 pandemic and introduced social distancing measures, increased used of online tools and platforms worsened situation and increased risks of cybercrimes, and specifically cyber laundering.

The specific of the cyber laundering is cross-border element. Patchwork enforcement mechanisms across the jurisdiction continue to hamper efforts to control cybercrime. Within the EU, the member states could use the mutual recognition instruments to collect digital evidence. However, majority of service providers are US legal entities, so mutual recognition instruments are not applicable. Cyber laundering and use of cryptocurrencies require immediate response of law enforcement authorities, due to possibility to easily move assets and destroy evidence. Requirement for efficient investigation and prosecution of cybercrimes, including cyber laundering put authorities within the EU and US under the pressure to enable law enforcement smooth access to data at the international level.

Collection of digital evidence in cyber laundering cases is challenging since evidence is stored by service providers that might have headquarter in another EU member state, or very often in the US since there is a headquarter of five main service providers. Access to this electronic evidence and its gathering create difficulties for law enforcement agencies and criminal investigation authorities. The EU Commission Impact assessment has identified that traditional mutual legal assistance and mutual recognition instruments have limitations that affect effectiveness of investigations.

The recent EU and US legislative initiatives have focused on ensuring of the direct cross-border requests of the criminal justice authorities to service providers as private companies. The proposed Regulation on Production Order and Preservation Order within the EU is criticized since they are not in line with EU rule of law standards.

The analysis has shown that new cross-border data collection and evidence gathering instruments are useful in practice only if they are in line with the human rights protection standards.

References

Adams, R., Hobbs, V. & Mann, G. 2013. The Advanced Data Acquisition Model (Adam): a process model for digital forensic practice. *Journal of Digital Forensics, Security and Law,* 8 (4), pp. 25-48, https://doi.org/10.15394/jdfsl.2013.1154.

Braid, M. 2002. Collecting Electronic Evidence After a System Compromise, Global Information Assurance Certification Paper for SANS Institute. Available at: https://www.giac.org/paper/gsec/659/collecting-electronic-evidence-system-compromise/101519.

Carrera, S., González Fuster, G., Guild, E. & Mitsilegas, V. 2015. Access to Electronic Data by Third-Country Law Enforcement Authorities. *CEPS Paperback*. Brussels: CEPS.

Carrera, S., Mitsilegas, V. & Stefan, M. 2021. Criminal Justice, Fundamental Rights and the Rule of Law in the Digital Age. *Report of a CEPS and QMUL Task Force*, Brussels

Carrier B. & Spafford, E. 2004. *An Event-based Digital Forensic Investigation Framework*. Presented at the Digital Forensic Research Workshop, Baltimore.

Clough, J. 2014. A World of Difference: The Budapest Convention of Cybercrime and the Challenges of Harmonisation. *Monash University Law Review,* 40(3), pp. 698-736.

Craiger, P. 2006. Computer Forensics Procedures and Methods. In: Bidgoli, H. (ed.) *Handbook on Information Security,* Vol. 2. New Jersey: John Wiley & Sons. pp. 715-750.

Crisanto, J. C. & Prenio, J. 2020. Financial Crime in Times of COVID-19 / AML and Cyber Resilience Measures. Financial Stability Institute, *FSI Briefs*, 7.

De Hert, P., Parlan, C. & Thumfart, J. 2018. Legal Instruments Used in Courts Regarding Territoriality and Cross-border Production Orders: From Yahoo Belgium to Microsoft Ireland. *New Journal of European Criminal Law*, 9(3), pp. 326-352, https://doi.org/10.1177/2032284418801562.

Daskal, J. 2015. The Un-Territoriality of Data. *Yale Law Journal*, 125(2), pp. 326–398.

Doyle, S. 2018. *Quality Management in Forensic Science*. London: Elsevier.

Filipkowski, W. 2008. Cyber Laundering: An Analysis of Typology and Techniques. *International Journal of Criminal Justice Science*, 3(1), pp. 15-27.

Kyriakides, E., 2019. United States of America - The CLOUD Act, E-Evidence, and Individual Rights. *European Data Protection Law Review*, 5(1), pp. 99-106, https://doi.org/10.21552/edpl/2019/1/16.

Karagiannis, C. & Vergidis, K. 2021. Digital Evidence and Cloud Forensics: Contemporary Legal Challenges and the Power of Disposal. *Information*, Vol. 12, pp. 181-197, https://doi.org/10.3390/info12050181.

Matić Bošković, M. 2021. Impact of Modern Technologies on Free Movement of Evidence in European Union. *Journal of Criminology and Criminal Law*, 59(3), pp. 123-140, https://doi.org/10.47152/rkkp.59.3.6.

Morgan, S. 2020. Cybercrime to Cost the World $10.5 Trillion Annually by 2025. *Cybercrime Magazine*. Cybersecurity Ventures. November 13, 2020. Available at: https://cybersecurityventures.com/hackerpocalypse-cybercrime-report-2016/.

Pollitt, M., Casey, E., Jaquet-Chiffelle, D.O. & Gladyshev, P. 2019. *A Framework for Harmonizing Forensic Science Practices and Digital/Multimedia Evidence*. National Institute of Standards and Technology – Organization of Scientific Area Committees for Forensics Science, Task Group on Digital/Multimedia Science, https://doi.org/10.29325/OSAC.TS.0002.

Savona, E. 2014. Organised crime numbers. *Global Crime*, 15(1-2), pp. 1-9, https://doi.org/10.1080/17440572.2014.886512.

Souto, A.M. 2013. Money Laundering, New Technologies, FATF and Spanish Penal Reform. *Journal of Money Laundering Control*, 16(3), pp. 266-284, https://doi.org/10.1108/JMLC-01-2013-0002.

Stefan, M. & Gonzalez Fuster, G. 2018. Cross-border Access to Electronic Data through Judicial Cooperation in Criminal Matters – State of the Art and Latest Development in the EU and the US. *CEPS Paper in Liberty and Security in Europe*. Brussels: CPES.

Stoykova, R. 2021. Digital Evidence: Unaddressed Threats to Fairness and the Presumption of Innocence. *Computer Law and Security Review*, Vol. 42, https://doi.org/10.1016/j.clsr.2021.105575.

Swire, P., Hemmings, J. & Vergnolle, S. 2016. A Mutual Legal Assistance Case Study: The United States and France. *Wisconsin International Law Journal*, Vol. 34 (2), pp. 102-144, https://doi.org/10.2139/ssrn.2921289.

Tinoco-Pastrana, A. 2020. The Proposal on Electronic Evidence in the European Union. *Eucrim*, 1, pp. 46-50, https://doi.org/10.30709/eucrim-2020-004.

van Baar, R.B, van Beek, H.M.A. & van Eijk, E.J. 2014. Digital Forensics as a Service: A Game Changer. *Digital Investigation*, 11(S-1), pp. S54–S62, https://doi.org/10.1016/j.diin.2014.03.007.

van Wegberg, R., Oerlemans, J-J. & van Deventer, O. 2018. Bitcoin money laundering: mixed results? An explorative study on money laundering of cybercrime proceeds using bitcoin. *Journal of Financial Crime*, 25(2), pp. 419-435, https://doi.org/10.1108/JFC-11-2016-0067.

Warken, C. 2018. Classification of Electronic Data for Criminal Law Purposes, *Eucrim*, pp. 226-234, https://doi.org/10.30709/eucrim-2018-023.

Marina M. Matić Bošković
Viši naučni saradnik, Institut za kriminološka i sociološka istraživanja, Beograd, Srbija
E-mail: *m.m.boskovic@roldevelopmentlab.com*

PRANJE NOVCA PUTEM VISOKOTEHNOLOŠKOG KRIMINALA I DIGITALNI DOKAZI

Sažetak

Široka zavisnost od digitalnih sistema i povećana vrednost digitalne trgovine u metaverzumu povećali su sajber ranjivost. Sajber-kriminal će biti profitabilniji od globalne trgovine svim glavnim ilegalnim drogama zajedno, dok *Cybersecurity Ventures* očekuje da će globalni troškovi sajber kriminala rasti za 15% godišnje do 2025. godine. Sajber kriminal je promenio tradicionalne metode pranja novca koje je teško otkriti jer se isti može počiniti bilo gde u svetu. Pretnja koju predstavljaju metodologije pranja novca sajber kriminala pogoršana je usled pandemije Covid-19.

Za istragu *cyber laundering-a* e-dokazi su ključni, što potvrđuje i procena Evropske komisije da 85% krivičnih istraga zahteva elektronske dokaze. Dodatni izazov za istražne organe za sprovođenje zakona predstavlja činjenica da organizovani sajber kriminal postaje sve organizovaniji i da se verovatnoća otkrivanja i krivičnog gonjenja procenjuje na 0,05% u SAD. Štaviše, digitalne dokaze često drže pružaoci usluga - privatne kompanije sa sedištem u drugoj zemlji, što uzrokuje mnoge prepreke pristupu tim podacima od strane istražnih organa.

U radu se identifikuje uticaj Covid-19 na sajber kriminal i povećani rizik od cyber laundering (sajber pranja novca). U vezi sa istragom i procesuiranjem sajber pranja novca, u radu se analiziraju izazovi istražnih organa da prikupe podatke i dokaze u slučajevima sajber pranja novca i napore vlasti EU i SAD da olakšaju pristup digitalnim dokazima i relevantnim podacima koje čuvaju pružaoci usluga. Rad ukazuje na moguće nedostatke predloženih instrumenata i potrebu efikasnog reagovanja i prilagođavanja promenama u sajber kriminalu.

Ključne reči: sajber pranje novca, međusobna pravna pomoć, digitalni dokazi, prikupljanje podataka, prekogranična saradnja.

Primljeno: 2. 11. 2022.
Prihvaćeno: 30. 12. 2022.

Dragana B. Petrović*

Review scientific paper
UDK: 343.211.3:342.721
doi: https://doi.org/10.56461/SPZ_22407KJ

PRIVACY AND PROTECTION OF PERSONAL DATA – CRIMINAL LAW ASPECT**

Abstract

Currently, across the globe and on different levels, serious debates are held on the possibilities of modern information communication technologies (ICT), including the internet, as well as their undesirable consequences. To an ordinary person, the "new" way of communicating via the internet and mobile phone is at the same time easy, simple, quick, and essential – it has become a fact of their daily lives. Moreover, the modern age purports the internet as one of the critical means of communication. If used "properly", it represents an abundance of information on nearly every topic and entails many opportunities. With a vast and varied amount of collected data, it easily negotiates the acquirement of new learning and the shaping of lifestyle. However, the use of modern technologies which constantly transform, at times even completely changing and automatising nearly all areas of human activity, has its dark, destructive, and devastating side. Within that perspective, life in a network becomes increasingly more susceptible to manipulation and abuse. And the list of abuses is long... from having these technologies abused as a database, to an assault on someone's privacy, stalking, cyber-mobbing, peer violence, sexual harassment and violence, human trafficking, organ trafficking, etc. Thus, a stance is formed – the emergence of new technologies has significantly endangered the right to privacy. In recent years, the right to privacy has been mostly associated with personal data, so, in that regard – when speaking about privacy, it is nearly always done in the context of personal data processing. The right to privacy and personal data protection falls within basic human rights, so, being that it is a fundamental right of man and citizen, the baseline of its protection in our legislation is comprised within, above all, the Constitution, The Law of data protection and The Criminal Code (Art. 146. Unauthorized collection of personal data). As the title suggests, the criminal law aspect of privacy and protection of personal data provided for in Art. 143 of the CC is the focus of this paper. In this context, the author,

* PhD, Research Fellow, Institute of Comparative Law, Belgrade, Serbia
E-mail: *d.petrovic@iup.rs*

* This paper is a result of the research conducted by the Institute of Comparative Law financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2022 registered under no. 451-03-68/2022-14/200049.

first of all, embarked on an analysis of the current state of threats to the right to privacy as a prerequisite for action in the direction of its protection. Abandoning the general consideration of this type, the examination is then focused on concretely explaining the meaning and essence of the criminal act – unauthorized collection of personal data, the forms in which it manifests itself, the criminal responsibility and punishment of the person who committed this act. With the statement that this is a dynamically changing reality, some of the key problems and challenges in the application of appropriate mechanisms for the protection of the right to privacy in the Republic of Serbia (with a special emphasis on the year behind us) were highlighted.

Keywords: *information technologies, internet, privacy, personal data protection, Criminal Code.*

1. Introductory Contemplations

Today it is useless to memorize data from history, mathematics, art, and literature... we are but two clicks away from the information. By becoming increasingly dependent on the internet and, to the delight of numerous users all across the globe, modern technology is becoming more available and easier to use by each day. Most of us have smartphones, computers, tablets... social media, SMS, videos, and photos... As one can observe, new technologies are becoming our external memory. They have, for the most part, subdued our lives and spontaneous communication. With its omnipresence, they have comprehended the "microstructures of everyday lives all the way to human privacy and intimacy, even to their dream".

On the fourth of March 2022, the internet social media Facebook celebrated its 18th birthday. Two billion and eight hundred million of its monthly active users across the globe confirmed that it was one of the most attractive media phenomena at the beginning of this millennium (2010-2019), globally (Diligenski & Prlja, 2018, p. 9).[1] Yes, it's a global phenomenon – spatial, regional, ethnic, and all other restrictions are cancelled – and thus, the world becomes a global community, and the internet – a super-road network of information (Cybercrime law around the world | Links and updates). It is noteworthy that it has become a technological, social, media, political, and at the same time a legal phenomenon. That

[1] Facebook was conceived by Mark Zuckerberg, a former Harvard student (together with his friends). Initially, it was intended only for the students of the university to communicate and exchange information via this network. Later, it was joined by many other universities, high schools, large global corporations, etc. When the famous Microsoft company bought 1.6 shares of Facebook for 240 million dollars, and the value of the site was estimated to 15 billion dollars, it became clear that a new global phenomenon was born, and its creator – the youngest person on Forbes Billionaire list. In 2021, Facebook changed its name to META.

"multitude" suddenly seems like an incomprehensible chaos. Undoubtedly, it is not possible to achieve complete protection of the information system at today's level of development. Therefore, it is necessary to provide absolute and effective protection if it comes to its abuse (identity theft, fraud, terrorism, piracy, hate-speech, internet vandalism, abuse of photographs, pathological internet addiction, etc.) (Summers, 2015, pp. 48-60).

As the powerful dynamics in this field has swept us, the technicalization of human communication has adopted new methods, and it is done in such a way that there is only one thing left – a complete substitution of reality with the "reality" of the network. The mobile phone has become a crucial accessory. Manufacturers are very quickly adapting to the new trend of mass and obsessive usage of this device, drawing customers into their networks of pathological addiction (the "big brother" tool) (Stallman, 2011) with no resistance. It is an irreversible process – modern internet technology has nested itself everywhere and has not spared a single level of human activity and personality. It has made everything bare and public, leading to the annulment of every part that comprises the human most intimate "private property".

From the point of view of the world we live in, with the sudden development of digital technologies, the right to privacy, and so personal data protection has seriously been challenged. It is as if the affliction of privacy and illegal personal data processing has become inevitable elements of the modern internet landscape (Prlja & Reljanović, 2009, pp. 163-164). It is the reality in which we currently find ourselves. However, alongside this ominous reality, the efforts to develop a legal regulation on both a national and international level have been growing – all intending to efficiently solve the matter of protection and to strengthen and expand that protection (What is IT law, ICT law or Cyber law).

Because, understandably, the changes in the modern IT usage stage and the negative effects they produce also require changes in terms of reacting to the endangerment of this right – one of the most cardinal human rights.

2. What Is Privacy?

As early as the first written article on the notion and content of privacy, in 1890 Samuel D. Warren and Louis Bradeis defined this right as "the right to be alone" (Popović & Jovanović, 2017, pp. 123-125).[2] In such an interpretation, a more

[2] "The right to privacy" as a term that is so widely discussed today, existed in ancient cultures as well – in Chinese, Hebrew, Greek, and Roman. It is first mentioned by Aristotle in his *Politics*, when making a distinction between private and public spheres. However, even though Ancient

extensive meaning of the notion is being defined – one which comprehends the right of a person to autonomously select "isolation from the presence of others if they desire and the right to be protected from being followed in a private environment such as their own home" (Ilić, 2016. p. 20). In regular communication, the term privacy is used to signify something which is personal, confidential, unofficial, hidden, shut from the public (Hadson, 2010, p. 13). From this perspective, we can consider private what is opposite of public. Within the private sphere, an individual has the right to be unavailable to others in things that do not concern them (that they should not even engage in), it is a protected space from which every other person is physically or mentally excluded (Vodinelić, 2012, p. 259). Within the private space, the individual is free from the involvement and interference of others, left to themselves, their feelings, needs, or whims. In such a manner, privacy implies the establishment of physical boundaries against the entrance of a third party into the personal space of the individual. From the marked conceptualizations of the term privacy (Bornes, 2006), its basic meaning and essence emerge, which involve the protection of moral and physical integrity, the right to choose a corresponding style and manner of living, interaction between people, etc. (Ilić, 2016, p. 20).

On an international level, normative regulation of this area began with the adoption of Universal Declaration of Human Rights – the United Nations, (Art. 12), in 1948, The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (Art. 8) in 1950, and International Covenant on Civil and Political Rights (Art. 17) in 1966. European Convention on Human Rights which by Art. 8, includes the right to privacy among basic human rights "with a fanfare", "everyone has a right of respect towards their private and family lives, homes, or correspondences". The European Court of Human Rights in Strasbourg stipulated that the relative article provides protection in communication via the internet, e-mail communication, online tracking of an internet communication. By precisely establishing the aforementioned forms of protection, the Court puts an emphasis on the protection of personal data which is, in fact, included in the article. In short, the protection refers to data on the entire mental and physical integrity of a human (from name, origin, health condition, sexual orientation... to potentially sensitive data, *e.g.* IP address of an internet user) (Popović & Jovanović, 2017, p. 127).

Within the European Union, there is the exceptionally significant Charter of Fundamental Rights of *the European Union*,[3] which regulates the right to

Greece and Rome knew about privacy, they did not practice it in the way we know it today. It was only in Early Christianity and propagating prayers in silence, and the right and need for peace and unobstructed intimacy, that privacy in its genuine sense gained importance.

3 The Charter of Fundamental Rights of the European Union (CFR) enshrines certain political,

protection of personal data via Art. 8, Protection of personal data[4] while Art. 7 is specifically focused on the protection of private and family life, and The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. Today, the legislation of the EU rests on two most important prescripts: General Data Protection Regulation (EU) GDPR 2016/679, which substituted Directive 95/46/EC, and Directive 2002/58/EC. In a sense, the standing ePrivacy Directive is the precursor of today's general act, as well as the new ePrivacy Regulation, which should, in fact, be a *lex specialis* concerning GDPR. We turn our attention to Directive 95/46/EC, which largely determined – "paved the path" – for further development of legal prescripts in the EU considering data protection and the right to privacy – to General Data Protection Regulation. In that sense, we are concerned with the most substantial directive not only because a longstanding jurisprudence is based on it, but also because other directives represent an annex so as to enable their application in electronic communications area (Tomić & Petrović, 2009, pp. 95-97). We want to emphasize the importance of Directive 95/46/EC with the fact that it has provided basis for the new GDPR. So, to reiterate, we are dealing with the most important documents on an international level, whose orders were later incorporated into all national criminal laws of signatory countries and countries that ratified the relative documents.

This right is mentioned in over 150 national constitutions in the world (Right to privacy). The Constitution of Serbia[5] does not define the right to privacy in an explicite manner, but it does it in a way that guarantees the rights and freedoms through which that right is realized, meaning – it protects dignity and free personal development (Art. 23 of the Constitution), inviolability of psychological integrity (Art. 25 of the Constitution), inviolability of the home (Art. 40 of the Constitution), as well as the secrecy of letters and other means of conversation (Art. 41 of the

social, and economic rights for European Union (EU) citizens and residents into EU law. It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission.

4 Art. 8, Protection of personal data:

"1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

5 See: *Sl. glasnik RS*, nos. 98/2006, 16/2022 Decision on the proclamation of the Constitutional law for the execution of Act on changing of the Constitution RS – Amendments I - XXIX: *Sl. glasnik RS*, no. 115/2021.The attention is drawn to the fact that, via the Act on Changing the Constitution from the year 1888, inviolability of the home and secrecy of letters and telegraphic despatches have been guaranteed.

Constitution). However, the extent of response differs when it comes to the protection of personal data because the Constitution in Art. 42 explicitly provides special guarantees, "The protection of personal data is guaranteed (para. 1). Law regulates gathering, keeping, processing, and use of personal data (para. 2). The use of personal data beyond the purpose for which they were gathered is forbidden and punishable by the law, except to conduct a criminal proceeding or for protection of the security of the Republic of Serbia, in the manner provided by law (para. 3). Everyone has the right to be informed on their gathered personal data, in accordance with the law, and the right to legal protection in case of their abuse (para. 4)."

In this segment of the protection of human rights and freedoms, our Constitution thoughtfully tended to resolutions of the Law of Personal Data Protection, 2018, (further LPDP), which had served as the basis during its construction (Prlja, 2018, pp. 92-96). Under the influence of GDPR, in November 2018, Serbia adopted LPDP, by which it recognized the principles and values of GDPR with slight variations, thus undoubtedly introduced immeasurably higher standards of personal data protection. Practical adoption of GDPR resolutions with the effects of actual "raising" of personal data protection to a higher level represents a significant step towards improving our legislature.

3. Unauthorized Gathering of Personal Data (Art. 146 CC)

Even those with superficial and incomplete knowledge of information communications technology understand that the criminal-legal problem of use and protection from abuse of data on an individual is of exceptional importance. From the previous observation, the right to privacy includes the right to personal information with regard to gathering, keeping, revealing, insight, or security from third parties and displaying via the internet, etc. On the other hand, the growing use of the internet and social media, as well as the use of computer technology in everyday life increase the possibility of their abuse in various, highly sophisticated ways... and the data that is gathered without authorization by abusing the information system can be manipulated in various ways. The massiveness of these abuses has evolved to greater lengths, and direct damages are unfathomable (Grazia, 2012). It should be particularly emphasized that significant efforts are being made to suppres these phenomena, both in the Republic of Serbia and worldwide.

In that context, the regulation of criminal-legal personal data protection in our legislation was executed by formulating and sanctioning the criminal act of "unauthorized gathering of personal data". This act represents a novelty in the 2005 CC RS, systemized in section XIV under the title "Criminal acts against freedom and rights of man and citizen". Therefore, it is a new incrimination that was justifiably included in the legal text due to the perspective of changed situations, new demands, and the conflict of interests.

As our intention is to problematically develop the essence of this criminal notion, it is only natural that in the observation that follows, we will rely on the legal conceptualization:

(1) "Whoever collects personal data that is being gathered, processed, and used based on the law without authorization, communicates them to others, or uses them for a non-intended purpose, will be punished with a fine or imprisonment up to one year.

(2) Whoever unlawfully gathers the personal data of citizens and thus uses the collected data will be punished with sanction from para. 1 of this Article.

(3) If an official commits the act from para. 1, he/she will be punished by imprisonment for up to three years."

It should be kept in mind that this is a criminal offence of blank nature, which means that it requires provisions of another appropriate prescript, more precisely, the Law of Personal Data Protection (LPDP), whose implementation began in August 2019, to be thoroughly understood and applied.

1. a) From the legal provision of Art. 146, two basic forms of this criminal act (paras. 1 and 2) and a qualified one clearly arise (para. 3). The action of execution when it comes to the basic form is alternatively determined and consists of gathering, communication, use... Thus conceptualised, the criminal act of unauthorized gathering of personal data from Art. 146. CC can be committed only via one of the abovementioned actions, for only they constitute the substance of this criminal act. More precisely, this criminal act consists of multiple actions of execution, of which each one separately is enough for the execution of the act and the establishment of criminal responsibility, because the central element of the act is alternatively determined in Art. 146.

It is precisely on that "scale" of different modalities of actions of execution that we first come across "gathering" of personal data. "Arriving" to those data, realizing their content is also taken into account. It is of no significance how these data are obtained unless it represents a realization of another criminal act. Moreover, communicating the data to another person means introducing him/her to the content of the data, while the use of personal data for non-intended purposes means the use of personal data to achieve an aim for whose achievement they were not intended (Lazarević, 2011, p. 552).

b) The listed actions ought to be done without authorization, meaning that there was no legal basis for their gathering or communicating with another. Regarding their use for purposes that are forbidden, it is always unauthorized, since there cannot be legal authority for such an action (Lazarević, Vučković, B. & Vučković, V., 2004, p. 463). Along these lines, professor Z. Stojanović regards the execution of such actions without a legal basis as an abuse of personal data which can themselves be, under conditions determined by law, a matter of gathering, processing, and using for purposes specified by law (Stojanović, 2018, p. 538). In the case of such conduct in the processing of personal data, it is obvious that the CC refers to provisions of LPDP. Thus, the processing of personal data entails any automated or unautomated action which is undertaken regarding personal data. It includes gathering, recording, keeping, sorting, insight, deleting, storing, as well as all other actions which refer to personal data.[6]

During the process of alignment with the Law, but also later during the application of handling data, six principles of data processing must be constantly attended to. These are, in fact, the so-called “Holy Commandments” which entail that every procedure or rule in the processing of data must be in accordance with them. The mere failure to respect principles, without violating any other provision of the Law, can generate a misdemeanor responsibility and a fine. In that sense, the LPDP first prescribes that data processing must be legal (Arts. 12, 13, 14 ZZPL), fair an unconcealed (Art. 21 ZZPL), then limited to the purpose intended and the necessary data which must be protected and kept only for the amount of time necessary to achieve the purpose of processing (Stojanović, 2018, p. 538). Likewise, they must be timely updated and aligned with the possibly occurring of changes concerning the person whose data it is. From this perspective, the problem of defining the term “unauthorized gathering of personal data” is seen not only when it is done in disagreement with the principle of legality, but also when it is done in disagreement with other principles provided by law (unfair, concealed, etc.).

c) The object of the criminal act is personal data gathered, processed, and used based on law. From the point of view of general specification of personal data, as we have much emphasized, we again enter the “domain” of LPDP, which very precisely and fully defines personal data (Art. 4, para. 1, point 1 LPDP; Art. 4, para 1. points 14-16 of LPDP).

d) The act is committed by undertaking some of the listed actions, so no harmful consequences to the person whose data it is are necessary to follow for the act to exist.

What is necessary for the existence of this act, according to Art. 146 CC, is intent.

[6] *E.g.* merely keeping personal data on a server, with no insight, is enough to be considered as processed data and to apply the new law (Art. 3 LPD).

2. In the beginning we have said, and now repeat, that the action of this criminal act consists of three forms, two basic and one severe – qualified. We have seen that the first basic action shows certain distinctions, *i.e.* characteristic features. However, from a wider perspective, but also, above all, from a closer, a more detailed one, one can observe that the second basic form does not differ from the first, although the difference is insisted upon in the legal description of the criminal act. Precisely, the act from para. 2 appears in the same form as the act from para. 1. There are no crucial details to define it as different from the first basic form. Therefore, the essence of the second act and its relation to the previously analyzed act (from para. 1) remain unclear. This stance arises from the fact that the object of the act from para. 2 is personal data, and gathering and using should be executed "contrary to law", while para. 1 criminal act mentions the term "unauthorized", which is, again, contrary to the law. However, it might be that the core of the issue is that a certain singularity of this form is seen in the fact that it concerns the personal data of "citizens". Thus, the act from para. 2 could only be performed in relation to a single person, while the term "citizen" implicates multiple persons (Lazarević, 2011, p. 554; Lazarević, Vučković, B. & Vučković, V., 2004, p. 464).

With regard to other features, they are identical, displaying no distinction between them.

3. Para. 3 provides a qualified form of the act from para. 1. The qualifying circumstance is in the capacity of the executor, an authorized official. According to the provision of Act. 1, para. 3 of CC, an authorized official is one of the following: a person who performs official duties within the state body, an elected, appointed, or assigned person in the state body, a body of a local government, or a person who performs official duties in those bodies (constantly or occasionally), then a notary public, public enforcement agent and arbiter including persons in an institution, enterprise, or other establishments, who has been entrusted with the execution of public authority, who decides on rights, obligations, or interests of natural and legal persons or public interests, as well as a person who has been entrusted with the performance of certain official duties or tasks, and military personnel.

The specified circumstances must involve the intent of the offender (Lazarević, Vučković, B. & Vučković, V., 2004, p. 464).

By the execution of this criminal act, a substance of another criminal act, such as unauthorized tapping or audio recording from Art. 143 CC or the criminal act of disclosure of another's writings from Art. 145 CC can be realized. Then, the principle incorporates offence-inclusion with this criminal act, unless the act represents a necessary way to commit another criminal act (Lazarević, Vučković, B. & Vučković, V., 2004, p. 464).

Para 3. of this Article of the CC provides heavier penalties for those who commit the act as an authorized official. In such cases, the competent public prosecutor's office takes over the criminal proceeding, *i.e.* persecution, while that is done after a private lawsuit, as is determined by Art. 153 of the CC. The competence for conducting a court proceeding for Art. 146 is entrusted to Basic Courts in the Republic of Serbia.

In light of all that has been said on the criminal act of unauthorized personal data gathering and their contents, it is necessary to make a few remarks in terms of certain incoherences or, let us say, inconsistencies on a unique level Constitution–CC –LDPD.

Firstly, our attention is drawn to a particular terminological incoherence between constitutional guarantees and the term of this criminal act. To illustrate: the Constitution guarantees the protection of personal data, while the criminal act is termed – the unauthorized gathering of data about a person, although this term is not defined by any provision (Krivičnopravna zaštita podataka o ličnosti u Republici Srbiji).

Along these lines, pointing to the internal content of this criminal act is crucial, for, in the name of the criminal act, only data about a person appears, and not personal data. Thus, another inconsistency of a terminological and essential nature is formed.

Likewise, when dealing with certain terminological and essential inconsistencies, what draws attention is that the action itself is comprehended within the name of the criminal act – unauthorized gathering of personal data – and the criminal act incriminated: unauthorized acquiring, communicating to others, or using personal data gathered and used based on the law for non-intended purposes, as well as gathering personal data contrary to law or using thus gathered data. Therefore, the gathering of data represents only one form of personal data processing, while other unauthorized processing actions mentioned above are included within this criminal act.

In the first paragraph of this act, incriminated actions of processing exclusively include personal data which are gathered, processed, and used based on law, while the second paragraph includes unlawful gathering and using of thus gathered personal data, regardless of which data it is about.

* * *

Even though we will not cover a detailed explanation of public prosecutor's office proceedings from the area of personal data protection in the Republic of Serbia, our particular approach to the consideration of the relative problem will partly be based on this analysis. Of course, only to the extent to which it will lead us to a more in-depth understanding of key problems and challenges in the application of criminal-legal protection of this right – a right for which we claim rests in the very centre of human freedom!?

So, are mechanisms of criminal law protection from the violation of this right effective in the Republic of Serbia, and what are the effects of adopting and adjusting to the new LPDP, in terms of judicial protection and sanctioning of right violation guaranteed by this law (after the first year of its application) (Mileusnić *et al.,* 2021, p. 12)?

In short, before the courts of Serbia (14 Basic Courts), from 2015 to July 2020, 28 cases for the criminal act from Art. 146 CC were formed, 26 cases were initiated by private lawsuits, while the remaining 2 were initiated by the act of indictment of the competent public prosecutor's office.

In 6 cases a decision was made to dismiss the petition, in 13 cases it was rejected, in 2 cases the decision of suspension was made, 2 cases were finalized by a guilty verdict, 4 cases reached acquittal, while one court altered the verdict and denied the charge against the accused. Furthermore, amongst the cases which were closed by an acquittal, one case was initiated by the act of indictment of the competent public prosecutor's office, and three by a private lawsuit. What also attracts attention is the fact that among cases that ended with a guilty verdict, two probations were ruled.

Only a superficial glance at these statistics plainly shows that a dramatically small number of cases of authorized personal data gathering were opened in the courts of Serbia. Namely, the number of 28 cases in this area since 2015 is evidently inconsistent with the frequency of violating the right to data protection in the same period relying on the results of a previous analysis – on only two guilty verdicts for Art. 146 CC and, what is more, probation. It is not even possible to declare whether the penalty policy of courts for this criminal act is mild or harsh. As the basic reason for such poor (devastating) statistics or, otherwise, why the mechanisms of personal data protection "failed", we can provide the fact that the criminal departments of courts in Serbia "have not received a case with a substantial violation of privacy, either in the sense of the severity of consequences for the injured party or in the number of injured parties" (Mileusnić *et al.,* 2021, pp. 11-20).

This certainly doesn't serve to transfer responsibility to the courts. On the contrary, the lack of this approach should be searched for outside the courts – having in mind the authorities for particular proceedings (Mileusnić *et al.,* 2021, pp. 11-20).

Relating to what was mentioned above, one of the reasons could be found in the small number of proceedings initiated by the public prosecutor's office, that is, the small number of indictments that the public prosecutor's offices direct to the courts. To illustrate: in the observed period which encompasses 5 years, only two cases had the public persecutor's office as the prosecutor (Mileusnić *et al.*, 2021, pp. 20-28).

In conclusion, adequate legal protection for the injured parties (the victims of personal data abuse) in terms of the protection of individuals and their privacy is absent. Unfortunately, it appears that in these, in many ways reckless, times the criminal law protection to the injured parties for violations from Art. 146 is neither efficient, nor effective (Mileusnić *et al.,* 2021, pp. 30-31). Arriving at the accurate explanation for this, ultimately negative, practice, the emphasis is on the following: not a single criminal charge filed to the Commissioner for information of public interest and personal data protection in the last five years has reached its epilogue. Likewise, the highest number of filed criminal charges for the relative criminal act ends in the public prosecutor's office due to it being statute-barred or with no outcome whatsoever, which practically undermines the criminal law protection for personal data abuse, as the constitution guarantees (Krivičnopravna zaštita podataka o ličnosti u Republici Srbiji).

4. Data Protection: Normative Basis for Action in the Countries of the Former Yugoslavia

We will round off the previous presentation on the criminal law protection of personal data with a presentation of the current situation in this area in the ex-Yugoslavia countries.

For our consideration, which we did on the occasion of the comparative presentation of the provisions on the protection of this, one of the fundamental, human rights, it must first of all be stated that the adopted solutions are conceptually very similar to each other, some even identical. But there are those who advocate different approaches in this regard. Let us go in order.

1. Criminal Code of the Republic of Slovenia, Chapter 14 – Criminal offenses against human rights and freedoms: Art. 143. Misuse of personal data: from the

wording of the criminal offense of misuse of personal data, it can be seen that this criminal offense fully belongs to computer crime because it is carried out over the internet. A criminal offense is committed by anyone who enters or accesses a computer database about a person without authorization with the aim of obtaining certain personal data for himself or someone else; who makes other people's personal data publicly available via the internet, and especially about victims of criminal acts, victims of violations of the rights and freedoms of protected witnesses, persons who are in the court files of court proceedings, as well as protected personal files about them in connection with court proceedings (*Uradni list*, no. 59/2012).

2. The Croatian Criminal Code, Chapter 14, Criminal offenses against privacy provides: (1) Whoever collects, processes or uses personal data of natural persons contrary to the conditions specified in the law, will be punished by imprisonment for up to one year. (2) Whoever, contrary to the conditions specified in the law, brings personal data from the Republic of Croatia for the purpose of further processing or publishes them or otherwise makes them available to others, or who by the action referred to in para. 1. of this article obtains a significant material benefit for himself or another or causes significant damage, shall be punished by imprisonment for up to three years. (3) With the penalty from para. 2. of this article will be punished who commits an act from para. 1. of this article, commits a crime against a child or who collects, processes or uses personal data of natural persons related to racial or ethnic origin, political views, religious or other beliefs, trade union membership, health or sex life and personal data of natural persons regarding criminal or misdemeanor proceedings. (4) If the criminal offense referred to in paras. 1. to 3. of this article committed by an official in the exercise of his powers, he shall be punished by imprisonment from six months to five years (*Narodne novine*, nos. 125/11, 144/12 … 84/21, consolidated text of the law made official on 31 July 2021).

3. Criminal Code of Bosnia and Herzegovina, Chapter XVII, Criminal offenses against the freedom and rights of man and citizen, Unauthorized use of personal data, Article 193: An official or responsible person in the Federation who, without the consent of an individual, collects, processes or uses his personal data or uses the data contrary to the legally permitted purpose of their collection, will be punished by a fine or a prison sentence of up to six months (*Sl. novine FBiH*, nos. 36/2003, ... 75/2017).

Other legislations have almost identical solutions to the Serbian legislative solution.

4. Criminal Code of Montenegro, Chapter XV, Criminal offenses against freedoms and rights of man and citizen. As we can see, this is also one of the criminal offenses that protect an individual's freedom of personality and his right to know all the information that concerns him. Unauthorized collection and use of personal data, Article 176: (1) Whoever unauthorizedly obtains personal data that is collected, processed and used on the basis of the law, communicates it to another or uses it for a purpose for which it was not intended, shall be punished by a fine or imprisonment of up to one year. (2) The punishment referred to in paragraph 1 of this article shall also be imposed on those who, contrary to the law, collect personal data of citizens or use such collected data. (3) Whoever takes over the identity of another person without authorization and under the name of that person uses one of his rights or gains a benefit for himself or another, or by using his identity interferes with the personal life of that person or orders his personal dignity or causes him any damage, shall be punished by imprisonment for up to one year. (4) If the act from paras. 1 and 3 of this article is committed by an official in the performance of his duties, he shall be punished by imprisonment from three months to three years (*Službeni list Republike Crne Gore*, nos. 070/03, ... 003/20).

5. Criminal Code of the Republic of Srpska, Chapter XIII – Criminal offenses against the freedoms and rights of citizens, Article 157: (1) Whoever, contrary to the conditions set forth in the law, without the consent of citizens, obtains, processes, communicates to others or uses their personal data, shall be punished by a fine or imprisonment up to one year. (2) Whoever enters another's protected computer database without authorization with the intention of using it to obtain a benefit for himself or another or to cause harm to another shall be punished with the penalty referred to in paragraph 1 of this article. (3) If the act from paras. 1 and 2 of this Article, is committed by an official by abuse of position or authority, he shall be punished by a prison sentence of six months to three years. (4) Attempted criminal offense from paras. 1, 2 and 3 of this article is punishable (*Službeni glasnik Republike Srpske*, nos. 64/2017, 104/2018 – decision of the Constitutional Court, 15/2021 and 89/2021).

6. The Criminal Code of the Republic of North Macedonia, Misuse of personal data, Article 149: (1) Whoever collects, processes or uses his personal data contrary to the conditions established by law without the consent of the citizen, will be punished with a fine or imprisonment for up to one year. (2) The penalty from paragraph 1 shall be imposed on the person who enters the computer information system of personal data with the intention of using it for himself or for another to achieve some benefit or to cause some damage to another. (3) If the

crime from paragraphs 1 and 2 is committed by an official in the performance of his duties, he will be punished with imprisonment from three months to three years. (4) The attempt is punishable. (5) If the offense of this article is committed by a legal entity, it will be punished with a monetary penalty (*Služben vesnik na RM*, nos. 80/1999 … 132/2014).

5. Conclusion

A grandiose development of information-communications technologies marked the age after the turn of the century. The internet and social media have, with no exaggeration, become a part of our daily lives, "permeating" every part of human being, every human gene. The process is active and drastically rising. A central position in the process is taken by the chip, *i.e.* microchip or bit. It is a way to biochips, artificial intelligence, robotization, digital communication, etc. We live in a world in which an immeasurable amount of data, movies, photos, and other materials is exchanged, posted on profiles, and made publicly available – in other words, they are turned into data that make new capital. Because digital network technologies have transformed this type of criminality, the society of the future will be forced to adopt a different concept of thinking which will increase both the complexity of investigations and crime prevention, while simultaneously expanding regulation challenges. Along these lines, not so long ago, laws that comprehensively treat this complex and very dynamic problem have been incorporated into our legal system. Thus, responses have been offered to the wide range of questions regarding data protection, the right to privacy, the right to freedom of opinion and expression, the freedom of the internet as a medium, and others. From our perspective, LPDP (which is practically a translated version of GDPR) came as the center of focus. Judicial protection guaranteed by this law comprehends the right of the individual of the relative personal data to initiate: an administrative dispute, a civil dispute (a suit for the protection of rights, a suit for damages compensation), as well as an offense proceeding. LPDP, however, does not treat the criminal law judicial protection in the case of "personal data abuse", like several laws which provide criminal acts from the areas they manage. Instead, this protection is regulated by the Criminal Code, which provides the criminal act of unauthorised gathering of personal data in Art. 146. Considering that this is an act of blank nature, it was necessary to "cross" from this general position to a special theoretical interpretation that arises from LPDP in order to contemplate its conceptual definition, that is, the complete understanding of its meaning and essence.

Lastly, we must emphasize that the right to privacy and protection of personal data is one of the rights of the foundation of human freedoms. It is inseparable from the character of a political system of a society. We are talking about a reciprocal influence because societies based on ideas such as the rule of law and human freedoms take the highest positions on the scale of respect for the privacy of citizens. On the contrary, in authoritarily "colored" societies, the concept of rule is directed towards the devastation of the private lives of citizens.

Our CC implemented norms of international law. On the one hand, it has achieved the fulfilment of all assumed obligations, and on the other, it has followed the regular standards of criminal law, and also applied solutions that correspond to the needs of our society and the legal system. However, relying on the results of the analysis of existing practice (which served as the basis for this conclusion), the right to privacy and personal data protection at the extent of their application shows its objectivity and effectiveness, which is yet to be improved both in the public and the private sector.

References

Bornes, S., 2006. A Privacy Paradox: Social Networking in the United States. *First Monday*, 11(9). Available at: http://firstmonday.org/article/viev/1394/1312, https://doi.org/10.5210/fm.v11i9.1394.

Diligenski, A. & Prlja, D. 2018. *Fejsbuk, zaštita podataka i sudska praksa*. Beograd: Institut za uporedno pravo.

Hadson, L.D. 2010. *The Right to Privacy.* New York: Infobase Publishing.

Ilić, m.B. 2016. *Povreda prava na privatnost zloupotrebom društvenih mreža kao oblik kompjuterskog kriminaliteta.* Doktorska disertacija. Niš: Pravni fakultet Univerziteta u Nišu.

Lazarević, Lj. 2011. *Komentar Krivičnog zakonika*. Beograd: Pravni fakultet Univerziteta Union u Beogradu i JP Službeni glasnik.

Lazarević, Lj., Vučković, B. & Vučković, V. 2004. *Komentar KZ Crne Gore*. Cetinje: Obod.

Mileusnić, D., Ćurčić D., Tasić D. *et al.* 2021. *Privatnost i zaštita podataka o ličnosti u Srbiji, Analiza odabranih sektorskih propisa i njihove primene*. Beograd: Partneri za demokratske promene Srbija (Partneri Srbija).

Popović, D. & Jovanović, M. 2017. *Pravo interneta – odabrane teme.* Beograd: Pravni fakultet Univerziteta u Beogradu.

Prlja, D. & Reljanović, M. 2009. Sybercrime - Comparative experiences. *Strani pravni* život, 65(3), pp. 161-184.

Prlja, S. 2018. Pravo na zažtitu ličnih podataka u EU. *Strani pravni život*, 62(1), pp. 89-99, https://doi.org/10.5937/spz1801089P.

Stojanović, Z. 2018. *Komentar Krivičnog zakonika*. Beograd: Službeni glasnik.

Summers, S. 2015. EU Criminal Law and the Regulation of Information and Communication Technology. *Bergen Journal of Criminal Law and Criminal Justice*, 1, https://doi.org/10.15845/bjclcj.v3i1.827.

Tomić, N. & Petrović, D. 2009. *Društveno umrežavanje i zaštita privatnosti korisnika interneta*, Simpozijum o novim tehnologijama u poštanskom i telekomunikacionom saobraćaju, Beograd: Saobraćajni fakultet Univerziteta u Beogradu.

Vodinelić, V.V. 2012. *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava*, Beograd: Pravni fakultet Univerziteta Union i JP Službeni glasnik.

Legal Sources

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* L 281, 23.11.1995, p. 31.

European Convention on Human Rights, of the Council of Europe (1949) on the protection of freedoms and rights, adopted in Rome, Italy, on November 4, 1950.

International Covenant on Civil and Political Rights, United Nations General Assembly. Resolution 2200A (XXI) of December 16, 1966.

Privacy and Electronic Communications Directive 2002/58/EC on Privacy and Electronic Communications, otherwise known as ePrivacy Directive (ePD), is an EU directive on data protection and privacy in the digital age, L201, 2002-07-31, pp. 37–47.

Službeni glasnik RS, no,. 98/2006, 16/2022 Decision on the proclamation of the Constitutional law for the execution of Act on changing of the Constitution RS – Amendments I - XXIX: *Sl. glasnik RS*, no. 115/2021. The attention is drawn to the fact that, via the Act on Changing the Constitution from the year 1888, inviolability of the home and secrecy of letters and telegraphic despatches.

The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.

The Charter of Fundamental Rights of the European Union (CFR) enshrines certain political, social, and economic rights for European Union (EU) citizens and residents into EU law. It was drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission.

The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data is a 1981 Council of Europe treaty that protects the right to privacy of individuals, taking account of the increasing flow across frontiers of personal data undergoing automatic processing.

The ePrivacy Regulation (ePR) is a proposal for the regulation of various privacy-related topics, mostly in relation to electronic communications within the European Union. Its full name is "Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications).

Universal Declaration of Human Rights - the United Nations, 1948.

Kazneni zakonik Republike Slovenije (*Uradni list*, no. 59/2012).

Kazneni zakon Hrvatske (*Narodne novine*, nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, consolidated text of the law made official on July 2021).

Krivični zakon Bosne i Hercegovine (*Sl. novine FBiH*, nos. 36/2003, 21/2004 – correction notice, 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017).

Krivični zakonik Crne Gore (*Službeni list Republike Crne Gore*, nos. 070/2003, 013/2004, 047/2006, *Službeni list Crne Gore*, br. 040/2008, 025/2010, 073/2010, 032/2011, 064/2011, 040/2013, 056/2013, 014/2015, 042/2015, 058/2015, 044/2017, 049/2018, 003/ 2020).

Krivični zakonik Republike Srpske (*Službeni glasnik Republike Srpske*, nos. 64/2017, 104/2018 - decision of the Constitutional Court, 15/2021 and 89/2021).

Krivičen zakonik na Republika Makedonija (*Služben vesnik na RM*, nos.80/1999…132/2014).

Website References

Stallman, R. 2011. Mobilni telefoni su Staljinov san. Sajt *B92*. Available at:. http://www.b92.net/tehnopolis/vesti.php?yyyy=2011&=038nav_id=499267, (19. 7. 2012).

Right to Privacy. Available at: https://cic.gov.in/sites/default/files/Right%20 to%20Privacy%20 and%20RTI %20by% 20Aditya%20Verma%20%20 %281%29%20%281%29.pdf, (30. 3. 2018).

Grazia, M. 2012. Data Protection and the Prevention of Cybercrime: The EU as an area of security?. Available at: https://cadmus.eui.eu/handle/1814/23296, (27. 3. 2022).

Petrović, Z., Krivičnopravna zaštita podataka o ličnosti u Republici Srbiji, *LAW-Life* portal za pravo i privredu. Available at: https://lawlife.rs/index.php/pravo/144-krivicnopravna-zastita-podataka-o-licnosti-u-republici-srbiji, (15. 9. 2022).

What is IT law, ICT law or Cyber law?. Available at: https://www.michalsons.com/blog/what-is-it-law-ict-law-or-cyber-law/286, (17. 12. 2021).

Cybercrime law around the world | Links and updates. Available at: https://www.michalsons.com/focus-areas/cybercrime-law, (14. 10. 2021).

Dragana B. Petrović
Naučni saradnik, Institut za uporedno pravo, Beograd, Srbija
E-mail: *d.petrovic@iup.rs*

PRIVATNOST I ZAŠTITA PODATAKA O LIČNOSTI – KRIVIČNO-PRAVNI ASPEKT

Sažetak

Danas se u svetu na različitim nivoima vode ozbiljne rasprave o mogućnostima modernih informaciono-komunikacionih tehnologija (ICT) uključujući i internet, ali i o njihovim neželjenim posledicama. Za običnog čoveka „nov" način komunikacije preko interneta i mobilne telefonije je istovremeno lak, jednostavan, brz, nužan – postaje činjenica njegovog svakodnevnog života. Štaviše, savremeno doba podrazumeva internet kao jedno od glavnih sredstava komunikacije. Ukoliko se koristi „kako treba", predstavlja izobilje informacija na gotovo svaku temu i donosi mnoge benefite. Uz ogromnu i raznovrsnu količinu prikupljenih podataka, s lakoćom posreduje u sticanju novih znanja i oblikovanju životnog stila. Ali, korišćenje modernih tehnologija koje se neprekidno transformišu, do mere da potpuno promene i automatizuju gotovo sve aspekte ljudske delatnosti, ima i svoju tamnu, rušilačku stranu. U toj perspektivi život u internet mreži postaje sve više prostor podložan manipulacijama i zloupotrebama. A spisak zloupotreba je dug... od toga da se ove tehnologije mogu zloupotrebiti kao baza podataka do napada na tuđu privatnost, proganjanja, sajber mobinga, vršnjačkog nasilja, seksualnog uznemiravanja i nasilja, trgovine ljudima i ljudskim organima i dr. Na taj način, precizira se stav: pojava novih tehnologija značajno ugrožava pravo na privatnost. Poslednjih godina se pravo na privatnost u najvećoj meri dovodi u vezu sa podacima o ličnosti, pa u tom pravcu, kada se govori o privatnosti, to se gotovo uvek čini u kontekstu obrade podataka o ličnosti. Pravo na privatnost i zaštita ličnih podataka spadaju u red osnovnih ljudskih prava, pa budući da se radi o temeljnom pravu čoveka i građanina, osnov njegove zaštite u našem zakonodavstvu sadržan je, pre svega, u Ustavu, Zakonu o zaštiti podataka (ZZLP) i Krivičnom zakoniku (čl. 146. Neovlašćeno prikupljanje ličnih podataka). Kao što iz naslova proizilazi, krivičnopravni aspekt privatnosti i zaštite podataka o ličnosti predviđen odredbom člana 143 KZ nalazi se u fokusu ovog rada. U tom kontekstu, autorka se, najpre upustila u analizu postojećeg stanja ugroženosti prava na privatnost kao pretpostavke za delovanje u pravcu njegove zaštite. Napuštajući opšte razmatranje te vrste, ispitivanje je zatim usmereno na konkretno objašnjavanje smisla i suštine krivičnog dela Neovlašćeno prikupljanje ličnih podataka, formi u kojima se ono ispoljava, krivične odgovornosti i kažnjivosti onoga ko je učinio ovo delo. Uz konstataciju da je ovde reč o realnosti koja se dinamično menja, posebno su istaknuti i neki od ključnih problema i izazova u primeni odgovarajućih mehanizama zaštite prava na privatnost u Republici Srbiji (sa posebnim akcentom u godini iza nas). Na ovaj način obeležen je i osnovni problem u pogledu zaštite ovog prava, jednog od onih prava koja se nalaze u temelju ljudskih sloboda.

Ključne reči: informacione tehnologije, internet, privatnost, zaštita podataka o ličnosti, Krivični zakonik.

Primljeno: 10. 11. 2022.
Izmenjeno: 12. 12. 2022.
Prihvaćeno: 30. 12. 2022.

Katarina S. Živanović*

Review scientific paper
UDK: 343.156: 341.231.14
doi: https://doi.org/10.56461/SPZ_22408KJ

THE POSSIBILITY OF LIMITING THE EXERCISE OF THE RIGHT TO APPEAL IN CRIMINAL MATTERS ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

The right to a legal remedy in criminal proceedings, which enables the refutation of the legal and factual basis of a court decision, is a guarantor of a legal and correct court decision, i.e. the pillar of a legal and fair procedure without which modern criminal procedural systems could not be imagined. Guaranteeing and exercising this right contributes to the protection of individual and general interests, as well as the realization of fundamental principles of criminal procedure, such as legality, fairness, truth and legal certainty. Despite the exceptional and unequivocal importance of legal remedies, i.e. appeals in criminal proceedings, in one of the most important international legal instruments in the field of protection of human rights – the European Convention for the Protection of Human Rights and Freedoms, it was proclaimed in such a way that gives the possibility of its limitation. Pointing out the exceptional importance of this legal remedy, the author analyzed the provisions of the European Convention for the Protection of Human Rights and Freedoms, which proclaimed the right to appeal in criminal proceedings, as well as the decisions of the European Court of Human Rights, with the aim of pointing out the shortcomings of the provisions of the Convention that the signatory states provides the possibility of limiting the review of certain court decisions in criminal proceedings.

Keywords: *right to a legal remedy, appeal in criminal proceedings, limitation of the right to appeal in criminal proceedings, European Convention for the Protection of Human Rights, European Court of Human Rights.*

1. Introduction

The possibility of reviewing a court decision by means of legal remedies, which represents a fundamental feature of modern criminal procedural legislation, viewed through the history of criminal law, existed even in the criminal procedure

* PhD, Ministry of Interior of Republic of Serbia
Email: *kaca_zivanovic@yahoo.com*

of the Roman Empire (*provocatio ad populum)*. By means of *provocatio ad populum*, a Roman citizen who was sentenced to death could present the verdict for review before the people's court (see more about that Bayer, 1995, p. 12) as well as in medieval Germanic and Frankish law (*urteilsschelte*) – the party that was not satisfied with the verdict could challenge the opposite party to a duel and on that occasion propose a new verdict. After the duel, the verdict proposed by the side that won it would be passed (see more: Bayer, 1995, p. 55; Avramović & Stanimirović, 2013, p. 209). Relying on the definition of justice (fairness) by the Roman jurist Ulpian, which reads *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*, it is noted that the possibility of challenging a court decision in early social periods was recognized as a way to achieve justice, *i.e.* as an integral part of the legal mechanism for the realization of the principle of fairness of the criminal procedure.

Woven into the criminal procedure of the earliest social periods, the thought of the need to standardize the possibility of reviewing a court decision, as a presumption for the achievement of a fair and legal procedure, is today as a generally accepted legal standard embodied in the most important international legal instruments and in national legal systems. Without the procedural institute of legal remedies, which can eliminate possible illegalities and irregularities in the decision-making process, as well as in the decision itself, it is impossible to imagine the realization of the core principles of criminal procedure, as well as the goal of the criminal procedure. Precisely because of the above, a general agreement has been reached in modern criminal procedural systems on the necessity of standardizing this procedural institute (on the necessity and justification of legal remedies in criminal proceedings, see: Živanović, 2022, pp. 40-43).

The Procedural Institute of Legal Remedies, which is the guarantor of making a legal and correct court decision, is a fundamental assumption for achieving a fair trial (see *Delcourt v. Belgium*, par. 25.2), which is proclaimed as the goal of criminal proceedings. The importance of legal remedies for the implementation of fundamental procedural principles and for the implementation of a fair procedure is indicated by prominent authors in the field of criminal procedural law (Grubač, 2002, p. 119; Brkić, 2016, p. 149; Škulić, 2016, pp. 46-75; Bugarski, 2016, pp. 174-189; Bejatović, 2016, p. 13; Đurđić, 2006, p. 126; Knežević, 2012, p. 244). It is about an institute that enables „access to justice" (Beširević *et al.,* 2017, p. 710; Ilić, 2015, p. 82). Since fairness can be defined as compliance with justice (fairness) (*Pravna enciklopedija,* 1979, p. 1037), from the aspect of procedural logic as well as from the aspect of international legal standards achieved in the field of human rights protection, a procedure in which the defendant would be exposed to the possibility of arbitrary action and punishment by judicial authorities cannot be considered a fair procedure, without the possibility of reviewing a decision that may be made contrary to legal provisions or based on a factual situation that is wrongly or incompletely determined. Hence, it is clearly seen that a fair trial is unthinkable without the procedural institute of legal remedies, which is an inseparable part of it.

The importance of the role of legal remedies in achieving a fair trial is also reflected in the fact that the principle of procedural fairness has a wide domain, that is, it is not limited only to criminal proceedings. Namely, the guarantee of the right to a legal remedy and its realization are a reflection of the level of development of a legal system and social community, which is why, as stated in professional literature (Mol & Harbi, 2006, p. 11) and judicial practice (*Delcourt v. Belgium*, par. 25), this right represents the foundation of a democratic society, and „is of essential importance for the functioning of a democracy".

The importance of this right is primarily indicated by international legal instruments adopted under the auspices of the United Nations and the Council of Europe. In the first case, it is about the Universal Declaration of Human Rights from 1948 (hereinafter: Declaration) and the International Covenant on Civil and Political Rights from 1966 (hereinafter: ICCPR; Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima, 1971). Among the minimum legal standards for the protection of human rights set by the Declaration, the right to a legal remedy took its place. The guarantee of the mentioned right is guaranteed by the provisions of Art. 8 of the Declaration, which stipulates that everyone has the right to a legal remedy, which can be exercised before national courts „against acts that violate the fundamental rights recognized by the constitution or laws". Then, the ICCPR more specifically determines the right to a legal remedy, by the provision of Art. 14, para. 5 guarantees every person, who has been declared guilty of a criminal offense, the possibility to request a review of his guilt and conviction from a higher court in accordance with the law. It follows from the aforementioned provision that only a conviction decision, *i.e.* a decision declaring a person guilty of a criminal offense, is subject to review by a higher court instance, leaving no possibility for a wider interpretation, in relation to other types of decisions that the court can make. Also, the ICCPR does not provide for restrictions regarding the use of the said right, from which it can be concluded that it can be exercised in all criminal cases, regardless of the prescribed type and severity of punishment. Then, the right to a legal remedy is guaranteed by the European Convention for the Protection of Human Rights of the Council of Europe from 1950 (hereinafter: ECHR; Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, 2003), as the most important international instrument in the field of protection of human rights and freedoms. It is important to note that, unlike the right to an effective legal remedy (Art. 13) and the right to a fair trial (Art. 6), which are provided for in the original text of the ECHR, and which are closely related, the right to appeal in criminal matters was proclaimed under Art. 2 of Protocol 7 to the ECHR from 1984 (hereinafter: Protocol 7). In addition to the fact that it is a right that is an essential prerequisite for achieving a fair and legal procedure, the ECHR regulates certain possibilities of deviating from the right to appeal in criminal matters. Although of an optional nature, deviations from the aforementioned right can lead to a worsening of the defendant's procedural position, *i.e.* endangering both individual and general interests, as well as certain principles of criminal procedural law, such as the principles of legality, fairness, the principle of truth and the principle of legal certainty.

2. Right of Appeal in Criminal Matters According to the European Convention on Human Rights

The original text of the ECHR did not contain a special right to review the court's decision in criminal matters. The need to guarantee it was recognized at the Fourteenth Session of the General Assembly in 1959, when a proposal was made to proclaim a „general right to review". The aforementioned proposal also contained the idea of limiting such a right, in the sense that „minor offenses" would be exempt from the possibility of review. Then, the next step taken in order to standardize the right to appeal in criminal matters followed the comparison of the text of the ECHR with the text of the ICCPR. After comparing the mentioned international legal instruments, it was established that the ECHR contains fewer legal standards in this regard, which is why there was a need to equalize them (Trechsel, 2005, pp. 361-362). The aforementioned steps resulted in the prescription of the right to appeal in criminal matters, the provision of Art. 2 of Protocol 7, which entered into force in 1988, four years after its adoption.

Provision of Art. 2 of Protocol 7 prescribes the right to appeal in criminal matters as follows:

"1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal."

As they are directly related to the exercise of the right to appeal in criminal matters as the right to a legal remedy, it is important to refer to certain convention rights, such as the right to a fair trial, which, *inter alia*, means ensuring a fair trial before an independent and impartial court (Art. 6 ECHR) and the right to an effective remedy (Art. 13 ECHR). Although the rights proclaimed by special provisions of the ECHR, the European Court of Human Rights (hereinafter: ECtHR) in its decisions has long advocated the position that the right to an effective remedy is consumed by the right to a fair trial. The ECtHR defended this position with the argument that Art. 6 of the ECHR sets „more requirements" and that as such they include the right to an effective legal remedy from Art. 13 of ECHR. In this sense, in cases where it was established that there was a violation of the right to a fair trial, the ECtHR did not consider the existence of a prominent violation of the right to an effective legal remedy. The stated point of view persisted until the decision of *Kudla v. Poland* (paras. 152, 157), in which the ECtHR established that the right to an effective legal remedy is directly related to the right to a fair trial, that is, to the right to access the court, but that it is not included in it. Bearing in mind the above, the ECtHR established that the right to a fair trial is strengthened by the right to an effective legal remedy (*Efendiyeva v. Azerbaijan*, para. 59; *Titarenko v. Ukraine*, para. 80). The effectiveness of the legal remedy is one of the basic questions that arise in connection with the realization of the right to a legal remedy, bearing in mind that only an effective legal remedy enables the achievement of the purpose of its legal constitution. In order for a certain legal remedy to be effective, it must have the ability to achieve both legal and real, practical efficiency (on the effectiveness of the legal remedy, see Živanović, 2022, pp. 65-69), that is, as established by the ECtHR: an effective legal remedy is a legal remedy that achieves a sufficient degree of certainty in law and in practice (*Gutsanovi v. Bulgaria*, paras. 88–89; *Salman v. Turke*y, para. 81; *İlhan v. Turkey*, para. 58; *O'Keeffe v. Ireland*, para. 175). The effectiveness of the legal remedy ensures that the legal remedy is available to everyone in the national legislation, which aims to ensure the enjoyment of the rights and freedoms proclaimed by the ECHR (Škulić & Bugarski, 2015, p. 494).

2.1. The Manner and Basis of Prescribing the Right to Appeal in Criminal matters – Art. 2, para. 1 of Protocol 7

Provision of Art. 2, para. 1 of Protocol 7 guarantees the right of every person to present the decision by which he was convicted or punished for review before a higher judicial instance, leaving the manner and basis of its prescription to national legislations. From the interpretation of the mentioned provision, it follows that the ECHR regulates the possibility of rebutting only the decision on conviction or sentence, whereby the ECHR protects the procedural position of the accused. In this sense, the ECHR starts from the point of view that the defendant has the (greatest) immediate legal interest in challenging such a decision, since it was made to his detriment.

When it comes to the way of prescribing the right to appeal in criminal matters, the ECHR prescribes the obligation to standardize it, but does not oblige the contracting states with regard to the way of prescribing the said right, that is, the contracting states are free to regulate the way of exercising the said right themselves, in accordance with their legal order (*Natsvlishvili and Togonidze v. Georgia*, paras. 90–98; *Gurepka v. Ukraine*, para. 59; *Krombach v. France*, para. 96). Although left to the discretion of the signatory states, prescribing the manner of exercising the right to appeal in criminal matters should be in accordance with the standards set by the ECtHR. In this sense, in national legislations, the possibility of rebutting a conviction can be narrowed if it is a conviction that was made on the basis of the legal instruments on the recognition of a criminal offense, that is, when it is the result of a settlement. The possibility of narrowing the right to appeal against such a conviction is justified, as the ECtHR points out, by the fact that the acceptance of a settlement by the defendant and the waiver of the right to a regular criminal procedure entails the waiver of the right to a regular review of the appeal on the merits (*Natsvlishvili and Togonidze v. Georgia*, paras. 90-98; *Krombach v. France*, para. 96).

However, this position of the ECtHR must be interpreted in a restrictive manner, bearing in mind that it does not imply the right of the signatory state to deprive the defendant of the right to review the conviction decision in special criminal procedural forms, since the defendant's consent to resolve the criminal case in a special criminal procedural form, does not imply his necessary waiver of the right to appeal in full. The defendant's waiver of the right to appeal in that case cannot be the subject of a presumption, but must be established *in concreto* in a clear and unambiguous manner. Also, the defendant's waiver of the right to appeal must be covered by minimal protective measures commensurate with its importance (*Galstyan v. Armenia*, para. 90; *Sejdovic v. Italy*, para. 86; *Rostovtsev v. Ukraine*, para. 29).

When it comes to the grounds on which the decision on conviction or sentence can be brought before a higher court as a subject of review, the ECHR does not specify what the grounds are, which leads to the conclusion that such a decision can be challenged both on legal and factual grounds. In this sense, as found by the ECtHR, the signatory states can limit the review of the conviction or sentence only *de iure*, just as they can make the statement of the defendant's appeal conditional on obtaining the permission of the court. However, all restrictions prescribed by national legislation, in this case regarding the grounds for contesting a court decision, in accordance with the protection of the right of access to court (Art. 6, para. 1 ECHR), must be established with a legitimate aim in a way that does not violate the very essence of law (*Rostovtsev v. Ukraine*, para. 27; *Gurepka v. Ukraine*, para. 59; *Galstyan v. Armenia*, para. 125; *Tsvetkova and others v. Russia*; *Krombach v. France*, para. 96).

As follows from the above, it is clear that the ECtHR is trying to bring closer to the signatory states how to interpret and apply the provision of the ECtHR that proclaims the manner and basis of prescribing the right to appeal in criminal matters. In its decisions, the ECtHR sets the correct standards that must be respected in national legislations when regulating this right. In this way, the ECtHR additionally protects the procedural position and rights of the defendant, not allowing the interpretation of this convention provision in a way that may harm the interests of the defendant, on the one hand, but on the other hand it enables the narrowing of the scope of guaranteeing the right to appeal in special procedural forms, strictly according to the conditions established by law, in which way the principle of effectiveness of criminal proceedings is protected.

2.2. The Possibility of Limiting the Exercise of the Right to Appeal in Criminal Matters – Art. 2, para. 2 of Protocol 7

By interpreting the provisions of Art. 2, para. 2 of Protocol 7, which foresees the possibility of limiting the exercise of the right to appeal in criminal matters, *i.e.* the possibility of deviating from the said right, it is established that the ECHR allows the signatory states to, when proclaiming the said right, in their national legislations, deviate from it if it is: 1) on acts of minor importance that represent a legal category, 2) on cases in which the first-instance decision was made by the highest court instance or 3) on cases where a conviction was passed after an appeal against an acquittal.

The possibility of limiting the right to appeal in the case of acts of minor importance entails certain difficulties. Although the ECHR requires that it is about acts that are provided for by law as such, the interpretation and application of the said provision can cause wide and different interpretations on the one hand, and on the other hand it can harm the principle of legality and fairness of the procedure, and thus the procedural position of the defendant.

In connection with the way of interpretation of the provisions of Art. 2, para. 2 of Protocol 7, which can be wide and varied, it is important to note that the criteria that make up the “lower limit” of the interpretation (application) of this provision have been established, below which the signatory states cannot go when proclaiming the mentioned limitation. Namely, as established by the ECtHR, a signatory state in its legal system can provide for the limitation of the right to appeal in criminal matters if it is based on "achieving a legitimate goal" and if it "does not violate the essence of the right" (*Rostovtsev v. Ukraine*, para. 27; *Gurepka v. Ukraine*, para. 59; *Galstyan v. Armenia*, para. 125; *Tsvetkova and others v. Russia,* para. 179; *Krombach v. France*, para. 96). Also, the ECtHR took the position that an act of lesser importance cannot be considered an act for which a prison sentence is prescribed. In this sense, the signatory states cannot refer to the exception regulated by the provision of Art. 2, para. 2 of Protocol 7 if a prison sentence is prescribed for that offense according to domestic law (*Zaicevs v. Latvia*, para. 52; *Galstyan v. Armenia*, para. 124).

When standardizing the mentioned exception, the creators of the ECHR were probably guided by the principle of the efficiency of the procedure, starting from the assumption that such lighter acts (acts of minor importance), characterized by low social danger, do not harm the general, social interest. However, even though the principle of efficiency of criminal procedure is classified as a key principle of criminal procedure, in this case it would not be justified to give it priority in relation to the realization of the principle of legality and fairness. Although the ECtHR has set legal standards regarding a more restrictive interpretation of the possibility of limiting the right to appeal when it comes to offenses of lesser importance, it is still important to point out that every sentence and conviction should have the possibility to be reviewed by a higher court instance, respecting the principle of dispositive procedure by legal remedies. Namely, accepting such a limitation would mean the assumption that a certain national legal order tacitly agrees to possible legal and factual errors in court decisions, which would cause the survival of illegal and irregular court decisions in the legal system. Also, it is evident that in this way damage is caused to the individual interest, that is, the interest of the defendant, which calls into question the realization of the right to a fair procedure, which is also an international core legal standard set by the original text of the ECHR.

If we try to determine the place of the principle of procedural efficiency in modern criminal procedural systems and in the work process of judicial bodies, we will come to the conclusion that it is an extremely important principle, that is, a principle whose importance can be equated with the importance of the principle of legal and correctly resolution of criminal matters. The aforementioned results from the fact that the stated principles represent a prerequisite for the realization of the principle of fair trial, proclaimed in Art. 6 ECHR. Bearing in mind the above, the judicial authorities do not have an easy task, which is reflected in the achievement of equality in the realization of the interests of the effective resolution of criminal matters on the one hand, and their legal and correctly resolution on the other, even if they were acts of lesser importance with a lighter threat. At this point, it is important to point out the decision of the ECtHR (*Intiba v. Turquie*, cited by: Manojlović-Andrić, 2018, p. 14) in which the position was taken that "the principle of good administration of justice has a greater scope" than the principle of procedural efficiency and that therefore "the choice of less quick but fairer procedures can be justified".

Also, in addition to the protection of individual and general interests, as well as the basic principles of criminal procedure, the possibility of refuting the court decision by which the defendant was convicted of a crime of "minor importance" (in the sense of its determination according to the ECHR) has a preventive effect on the work of the first-instance court instance, which will strive to determine the factual situation correctly and completely, as well as to implement the law as precisely as possible. Bearing in mind the above, it can be concluded that the limitation of the right to appeal against a conviction and sentence for a minor criminal offense may have negative rather than positive consequences on the principles of criminal procedure as well as on the protection of the defendant's procedural position.

When it comes to the possibility of limiting the right to appeal, pursuant to Art. 2, para. 2 of the Protocol, in the case that the first-instance judgment has been rendered by the highest court, it is clear that the creators of the aforementioned rule have been guided by the authority and integrity of the highest judicial authorities at the national level, competent for making decisions in the first instance. Despite the fact that it may be difficult to imagine the way in which a two-stage trial could be envisaged in this case, in terms of realizing the fundamental property of legal remedies – the property of devolution, certain authors (Ilić, 2015, pp. 86-87; Beširević *et. al.,* 2017, p. 715) rightly point out that in that case a review should be done by a panel that has different composition from the panel that made the decision. In this way, in such a procedure for legal remedies, the characteristic of (false) devolution, *i.e.* horizontal devolution, would be achieved, since in this case there is no court on the hierarchical ladder of the judicial system that is above the court that made the first-instance decision (thereby preventing the realization of properties of devolution, *i.e.* vertical devolution).

Finally, the third case in which the ECHR allows for the norming of an exception to the exercise of the right to appeal in criminal matters concerns the situation in which a conviction was rendered after the appeal procedure against the acquittal. This provision of the ECHR justifiably caused certain criticisms in the domestic procedural doctrine. As certain authors rightly note (Đurđić, 2006,

p. 180; Ilić, 2015, pp. 86-87; Beširević *et. al.,* 2017, pp. 715-716), the mentioned restriction can be said to be controversial in itself, since in this case it would be more logical if the ECHR prohibited the possibility of excluding the legal remedy, since it is the most difficult situation that can occur for the defendant after the investment legal remedy. In this case, it can be assumed that the defendant's procedural position worsened after the filing of a legal remedy by the opposing party, assuming that the defendant had no legal interest in appealing the decision by which he was acquitted. Bearing in mind the above, it is against the principle of fairness as well as procedural logic to prevent the rebuttal of a conviction that was made after the rebuttal of an acquittal, primarily because in this way the defendant is deprived of the opportunity to defend himself.

In connection with the aforementioned possibilities of limitation of the right to appeal in criminal matters provided for by Art. 2, para. 2 of Protocol 7, it is important to point out the positions of the ECtHR, taken in relation to them. It is about the following points: 1) limitation of the right to appeal in criminal proceedings must be done respecting the right to access the court in accordance with the provisions of Art. 6, para 1 ECHR (*Rostovtsev v. Ukraine*, para. 27; *Gurepka v. Ukraine*, para. 59; *Galstyan v. Armenia*, para. 125; *Krombach v. France*, para. 96); 2) signatory states must not hinder the defendant in the process of exercising the right to appeal, which violates the essence of the right to appeal (*Ruslan Yakovenko v. Ukrain*, app. no 5425/11, ECHR 4 September 2015, paras. 74–81); 3) the limitation of the right to appeal in criminal proceedings cannot be compensated by the right to compensation for material and non-material damage caused as a consequence of the aforementioned limitation, and in case of wrongful conviction (*Shvydka v. Ukraine*, paras. 53–55; *Airey v. Ireland*, para. 24; *García Manibardo v. Spain*, para. 43), etc.

3. Conclusion

Bearing in mind the importance of the institute of legal remedies, which is reflected, *a priori*, in ensuring the protection of the individual interest (that is, the protection of the defendant's procedural position), the general interest (that is, the protection of society and the legal system from improper and illegal decisions), as well as the protection of fundamental principles of criminal procedure (legality, fairness, truth, legal certainty), it is clear why this procedural institute is the basis of modern criminal procedural legislation. Taking its place in the criminal procedure of the Roman Empire, this institute in its normative legal genesis in the modern age reached the level of a general international legal standard. It is a standard set by the most important international legal instruments adopted by the UN and the Council of Europe. However, in addition to the aforementioned inevitable importance of this institution in criminal proceedings, the ECHR provided for the possibility of deviating from the right to appeal in criminal matters when standardizing it. After interpreting and analyzing the provisions of the ECHR, as well as the practice of the ECtHR, the author takes the stance that the mentioned restrictions cannot be taken as valid and justified, since they conflict with the basic principles of criminal procedure. In connection with the exclusion of the possibility of rebutting the conviction and sentence for a minor offense, the author believes that it would be justified and expedient to allow the possibility of reviewing the said court decision, since otherwise there is a tacit consent that possible illegalities and irregularities in a certain court decision will persist in the legal order.

When it comes to the possibility of limiting the rebuttal of a conviction rendered after the rebuttal of an acquittal, its controversy arises from the very text of the provision. Namely, the exclusion of the possibility of rebutting a guilty verdict that was passed after the acquittal was rebutted cannot be considered justified and directly contradicts the principle of fairness, as well as procedural logic. Namely, in the case of an acquittal, there will most often be no appeal by the defendant or his defense counsel, but the appeal will be filed by the public prosecutor as the opposite party. If the appeal is successful, the court issues a guilty verdict and thereby worsens the position of the defendant. The impossibility of rebutting such a second-instance verdict cannot be taken as correct. This is due to the fact that its adoption caused the procedural situation for the defendant to worsen, since the defendant found himself in a new, harmful situation, which is why he needs to be able to challenge the conviction.

References

Avramović, S. & Stanimirović, V. 2013. Uporedna pravna tradicija. Beograd: Pravni fakultet Univerzitet u Beogradu.

Bayer, V. 1995. Kazneno procesno pravo – odabrana poglavlja: Knjiga II. Povjesni razvoj kaznenog procesnog prava. Zagreb: Ministarstvo unutarnjih poslova Republike Hrvatske, Sektor kadrovskih, pravnih i obrazovnih poslova.

Bejatović, S. 2016., Pravni lekovi u krivičnom postupku kao instrument zakonitosti rešenja krivične stvari (pojam, vrste, stanje i iskustva u primeni). U: Pravni lekovi u krivičnom postupku regionalna krivičnoprocesna zakonodavtsva i iskustva u primeni. Beograd, pp. 9-23.

Beširević, V. Et al. 2017. Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda. Beograd: Službeni glasnik.
Bugarski, T. 2016. Osnovi ulaganja žalbe i zakonitost rešenja krivične stvari u pravu Srbije. U: Pravni lekovi u krivičnom postupku-regionalna krivičnoprocesna zakonodavstva i iskustva u primeni. Beograd, pp. 174-189.
Brkić, S. 2016. Krivično procesno pravo II. Novi Sad: Pravni fakultet, Centar za izdavačku delatnost.
Đurđić, V. 2006. Krivično procesno pravo – posebni deo. Niš: Center za publikacije Pravnog fakulteta.
Grubač, M. 2002. Krivično procesno pravo: posebni deo. Beograd: Službeni glasnik.
Ilić, G. 2015. Pravo na žalbu protiv krivične presude kao osnovno ljudsko pravo, Kaznena reakcija u Srbiji – VI deo: Tematska monografija. Beograd, pp. 81-91.
Knežević, S. 2012. Osnovna načela krivičnog procesnog prava. Niš: SKC.
Manojlović-Andrić, K., et al. 2018. Kriterijumi za ocenu povredu prava na suđenje u razumnom roku. Beograd: Savet Evrope.
Mol, N. & Harbi, K. 2006. Pravo na pravično suđenje – Vodič za primenu člana 6 Evropske konvencije o ljudskim pravima: Priručnik o ljudskim pravima. Beograd: Savet Evrope.
Pravna enciklopedija, 1979. Beograd: Savremena administracija.
Trechsel, S. 2005. *Human Rights in Criminal Proceedings*. European University Institute, Oxford: Oxford University press.
Škulić, M. & Bugarski, T. 2015. Krivično procesno pravo. Novi Sad: Pravni fakultet.
Škulić, M. 2016. Stepen (ne)usaglašenosti krivičnog postupka Srbije sa evropskim standardima, LVI Savetovanje Srpskog udruženja za krivičnopravnu teoriju i praksu. Zlatibor.
Živanović, K. 2022. Žalba protiv presude u krivičnom postupku. Doktorska disertacija. Pravni fakultet Univerzitet u Novom Sadu. Novi Sad.

Legal Sources

The Universal Declaration of Human Rights, https://www.un.org/en/about-us/universal-declaration-of-human-rights, (28. 8. 2022).
Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima, Službeni list SFRJ, Official Gazette of the Socialist Federative Republic of Yugoslavia, no. 7/1971.
Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, izmenjene u skladu sa Protokolom broj 11, Protokola uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 4 uz Konvenciju

za zaštitu ljudskih prava i osnovnih sloboda kojim se obezbeđuju izvesna prava i slobode koji nisu uključeni u konvenciju i prvi protokol uz nju, Protokola broj 6 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne, Protokola broj 7 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 12 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda i Protokola broj 13 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne u svim okolnostima. Official Gazette of Montenegro – International Treaties, nos. 9/2003, 5/2005 and 7/2005 and Official Gazette of the Republic of Serbia – International Treaties, nos.12/2010 and 10/2015).

Case Law

Airey v. Ireland, Application no. 6289/73, ECHR 9 October 1979.
Efendiyeva v. Azerbaijan, Application no. 31556/03, ECHR 11 March 2009.
García Manibardo v. Spain, Application no. 38695/97, ECHR 29 June 2000.
Galstyan v. Armenia, Application no. 26986/03, ECHR 15 February 2008.
Gutsanovi v. Bulgaria, Application no 34529/10, ECHR15 October 2013.
Gurepka v.Ukraine, Application no.61406/00, ECHR 6 September 2005.
İlhan v. Turkey, Application no. 22277/93, ECHR 27 June 2000.
Krombach v. France, Application no. 29731/93, ECHR 13 February 2001.
Kudla v. Poland, Application no. 30210/96, ECHR 26 October 2000.
Natsvlishvili and Togonidze v. Georgia, Application no. 9043/05, ECHR 29 April 2014.
O'Keeffe v. Ireland, Application no. 35810/09, ECHR 28 January 2014.
Rostovtsev v. Ukraine, Application. No. 2728/16, ECHR 25 October 2017.
Ruslan Yakovenko v. Ukraine, Application. No 5425/11, ECHR 4 September 2015.
Salman v. Turkey, Application. No 21986/93, ECHR 27 June 2000.
Sejdovic v. Italy, Application no. 56581/00, ECHR 2006.
Shvydka v. Ukraine, Application no. 17888/12, ECHR 30 January 2015.
Titarenko v. Ukraine, Application no. 31720/02, ECHR 20 December 2012.
Tsvetkova and others v. Russia, Application no. 54381/08 and 5 others, ECHR 10 September 2018.
Zaicevs v. Latvia, Application no. 65022/01, ECHR 31 July 2007.

Katarina S. Živanović
Doktor pravnih nauka, Ministarstvo unutrašnjih poslova Republike Srbije
E-mail: *kaca_zivanovic@yahoo.com*

MOGUĆNOST OGRANIČENJA OSTVARIVANJA PRAVA NA ŽALBU U KRIVIČNIM STVARIMA PREMA EVROPSKOJ KONVENCIJI O LJUDSKIM PRAVIMA

Sažetak

Pravo na pravni lek u krivičnom postupku, kojim se omogućava pobijanje pravne i činjenične osnove sudske odluke, predstavlja garant donošenja zakonite i pravilne sudske odluke, odnosno stožer zakonitog i pravičnog postupka bez kojeg se ne bi mogli zamisliti savremeni krivičnoprocesni sistemi. Garantovanjem i ostvarivanjem ovog prava doprinosi se zaštiti pojedinačnog i opšteg interesa, ostvarenju fundamentalnih krivičnoprocesnih načela, poput zakonitosti, pravičnosti, istine i pravne sigurnosti. I pored izuzetnog i nedvosmislenog značaja pravnih lekova, odnosno žalbe u krivičnom postupku, u jednom od najznačajnijih međunarodnopravnih instrumenata u oblasti zaštite ljudskih prava – Evropskoj konvenciji za zaštitu ljudskih prava i sloboda– ovo pravo je proklamovano na takav način da daje mogućnost njegovom ograničenju. Ukazujući na izuzetan značaj ovog pravnog leka, autorka je analizirala odredbe Evropske konvencije za zaštitu ljudskih prava i sloboda koje proklamuje pravo na žalbu u krivičnom postupku, kao i odluke Evropskog suda za ljudska prava, u cilju ukazivanja na manjkavosti konvencijskih odredaba kojima se državama potpisnicama daje mogućnost ograničenja preispitivanja određene sudske odluke u krivičnom postupku.

Ključne reči: pravo na pravni lek, žalba u krivičnom postupku, ograničenje prava na žalbu u krivičnom postupku , Evropska konvencija za zaštitu ljudskih prava, Evropski sud za ljudska prava.

Primljeno: 31. 10. 2022.
Prihvaćeno: 30. 12. 2022.

Sanda S. Ćorac*

Review scientific paper
UDK: 347.63
doi: https://doi.org/10.56461/SPZ_22409KJ

CROSS-BORDER SURROGACY AND THE RIGHT TO RESPECT FOR FAMILY LIFE

Abstract

Surrogacy is indisputably connected with the right to respect for family life guaranteed by Article 8 of the European Convention on Human Rights and Fundamental Freedoms. In the practice of the European Court of Human Rights (ECHR), many issues are open as disputable, among other things also in the context of the connection between cross-border surrogacy and the right to respect for family life. Taking into account the circumstances of each specific case, ECHR considered, first of all, the question of the (non) existence of a genetic link between the intended parents and the child born by the surrogate mother, the duration of cohabitation between them and the legal uncertainty that surrogacy creates, i.e., their possible impact on the violation of the right to respect for family life.

Keywords: *practice of the European Court of Human Rights, cross-border surrogacy, right to respect for family life.*

1. Introduction

A unique instrument for the protection of human rights dedicated to reproductive rights doesn't exist. Different international and regional documents related to human rights protect different elements of reproductive rights. Among them, for the purposes of this paper, the European Convention on Human Rights and Freedoms (hereinafter: the Convention) stands out as important (Jović-Prlainović, 2021, p. 49). Although the Convention was created to ensure the general recognition of rights and freedoms, reproductive rights are not specifically mentioned. That is, the Convention does not define them and they are not specifically guaranteed by it, but it is still possible to establish a direct connection between the provisions of the Convention and the violation of reproductive rights. Reproductive rights are a part of human rights and constitute a corpus of rights and freedoms of individuals in the sphere of human reproduction which ensure the

* PhD, Assistant Professor, Faculty of Law, University of Kragujevac, Serbia
E-mail: scorac@jura.kg.ac.rs

possibility of a human being to accomplish his own wishes and intentions regarding children (free parenthood) (Petrušić, 2007, p. 319). Their holder is every individual, and their application is based on the principles of human dignity and equality. As in the case of other human rights, countries have an obligation to recognize and promote reproductive rights, but they also have a duty to refrain from intervention - based on the right to non-harassment (Živojinović, 2007, p. 378). Before the European Court of Human Rights (hereinafter: ECHR), there was a whole series of cases concerning the violation of reproductive rights and related to: abortion, *i.e.* the right to terminate a pregnancy, embryo donation, home birth, medically assisted reproduction, precautionary measures for health protection of a newborn, prenatal medical tests-prenatal diagnosis, sterilization, surrogacy, use of surgical symphysiotomy, anonymous birth. Analyzing all reproductive rights from the rich practice of the ECHR is not possible in a paper of this scope, so in the following text only the attitudes on cross-border surrogacy in the context of the right to respect for family life from Art. 8 of the Convention are presented.

2. About Surrogacy in General

Family planning represents one of the freedoms of parents protected by conventions and constitutions (Stjepanović & Stjepanović, 2018, p. 476). Surrogacy (from the Latin word *surrogatus*, which means a substitute, *i.e.* a person who is appointed to act on behalf of another person)[1] is a procedure of biomedically assisted fertilization, in which the surrogate mother is contractually obligated to carry and give birth to a child, who after birth will be handed over to the couple with who she entered into a contractual relationship. The development of biomedicine has therefore made it possible for couples, who didn't consciously choose not to have children, to become parents (Bordaš, 2012, p. 98). This procedure conditions serious theoretical dilemmas regarding ethical, moral and legal justification.

National legislations in the signatory states of the Convention (and beyond) relate differently to this issue. While some European legislations recognize this institute, in others it is not legally regulated. From a comparative point of view, the legislatures that allow surrogate motherhood are, for example, Greece, Great Britain, Israel, Ukraine, Georgia (Kovaček Stanić, 2013, p. 5).[2] Some countries, *e.g.*

[1] The terms used to denote this form of reproduction with the help of medicine are, in addition to surrogate motherhood, also: surrogate pregnancy, surrogate gestation, surrogate parenting, and in domestic literature "birth from a service" (Kovaček Stanić, 2013, p. 2).

[2] Some countries that do not belong to the European circle of countries, such as India and Thailand, have become the center of "reproductive tourism" or "birth tourism", as evidenced by the data of the World Health Organization (Župan, Puljko & Sukačić, 2013, p. 11).

The Netherlands and Russia, do not have special legislation on surrogacy, but this practice is considered permissible, while in contrast, in a number of European countries surrogacy is not allowed (Germany, Austria, France, Italy, Spain, Switzerland, Sweden) (Kovaček Stanić, 2013, p. 11).

Serbia is one of the countries where surrogate motherhood is prohibited by law. In the Family Act (2005) there is an explicit provision that the mother of a child conceived with biomedical assistance is the woman who gave birth to it (Art. 57, para. 1). In this way, the legislator gives primacy to carrying and giving birth to a child, and not to the genetic origin. Besides that, there is a prohibition of determination of maternity of a woman who donated an egg cell (Art. 57, para. 2). In addition to the Family Act, the Act on Biomedically Assisted Fertilization (2017) regulates the framework and organisation of this process, as well as the types of procedures, but according to the letter of the law, surrogacy is not allowed (Art. 49, para.1, item 18 and Art. 66).

3. The Right to Respect for Family Life in Art. 8 of the Convention

In the catalog of rights guaranteed by the Convention, family life is recognized as a special value. There is general accordance that this is a widely recognized need of every human being, and that is why it is an integral part of the idea of human rights. This right is guaranteed by Art. 8 of the Convention. Unique in its way of regulation, this article primarily indicates that it must protect, *i.e.*, must ensure respect for, both the family life that has already been established and the one that has yet to be created, and this implies the obligation of the contracting states to enable everyone to establish and organize a family life, as well as to enjoy an established one undisturbed (Palačković & Ćorac, 2016, p. 74). Basically, the right to family life implies the right of individuals to live together and develop mutual relationships (Draškić, 2006, p. 97). Even though the right to family life is an individual right, it actually protects the relationship between at least two people, so this right gains its meaning only in such a relationship. By guaranteeing this right, protection is provided to a certain type of emotional relationship between two beings with the desire for such a relationship to last, that is, to maintain its continuity. Therefore, the key determinant and connective tissue of family life are close personal ties and the right to respect them. This type of family relationship, *i.e.*, its existence in a specific case and its quality, is at the same time a condition for realization of protection, *i.e.*, rights to protection. However, this subject of legal regulation is quite generally set. More precisely, the relationships that fall within the scope of the term "family life" are not defined, and the absence of specifying these relationships by the enumerative method also caused the absence of a definitive determination of the situations that can determine an individual to seek protection within the framework of this right. In theory, an attitude was stated that the recognition of the right to respect for family life is not accompanied by efforts to define its content and that, without a doubt, in such an approach there is a certain audacity of the creators of the Convention, even a lot of risk, to leave one right whose control and respect is left to international bodies undefined (Ponjavić, 2003, p. 827).

4. Child Born Abroad through a Gestational Surrogacy Arrangement and the Right to Respect for Family Life

Surrogacy in most cases causes problems when it comes to cross-border surrogacy (Samardžić, 2018, p. 214). Namely, couples (or individuals), in an effort to have a child at any cost, go to countries where surrogacy is allowed and, in that way, bypass the regulations of the country they come from, but bypassing restrictive domestic laws creates particular problems precisely in the case of surrogacy (Samardžić, 2018, p. 214). European courts are frequently confronted with the question of how to deal with international surrogacy *ex post facto* (Thomale, 2017, p. 464). The legal problems usually begin when the individual or couple returns to their country with the surrogate-conceived child and try to be recognized as the child's parent(s) (González, 2020, p. 917). Issues can also start before travelling back to their country, for instance, a passport needs to be obtained for the infant, and their own embassy may not issue the needed documents because they may have evidence that the child was born from an arguably legal fraud (González, 2020, p. 917).

Surrogacy is undoubtedly related to the right to respect for family life. In Europe, as already stated, there is no consensus on the legality of surrogacy,[3] but also on the legal recognition of the relationship between parents and a child obtained in that way abroad. This was the reason for the ECHR to declare itself on this issue in the case of *Mennesson v. France*, in the context of a possible violation of the right to respect for family life. The applicants are spouses who have French citizenship and American-citizen twins born by a surrogate mother in California. The children are biologically related only to the father, the first applicant. The

[3] The ECHR in the judgment *SH and Others v. Austria*, (No. 57813/00 of November 3, 2011) stated that "concerns based on moral considerations or on social acceptability are not in themselves a sufficient reason for the complete prohibition of certain artificial birth techniques (para. 74), and that countries should not hesitate to allow new types of "unusual family relationships" that "do not follow the typical parent-child relationship based on a direct biological connection" and which have "the purpose of supplementing or replacing biological family relations" (para. 81).

relevant circumstance is that the Supreme Court of California, at the joint request of the first and second applicants, issued a decision specifying the data that must be entered in the birth register after the birth of the twins. The decision states that the first applicant will be registered as the "genetic father" of the children born by the surrogate mother, and the second applicant as the "legal mother", that is, they will be registered as parents. Then the *Mennesson* couple filed a request in France for the recognition of this decision of the American court. The French court first recognized this decision and the applicants were entered in the birth register as parents of twins, only to have this entry annulled by the court of second instance with the argument that such entry is contrary to the public order of France.[4]

Due to the refusal of the national authorities to register them in the birth register as parents of the children, the applicants felt that their right to respect for family life was violated. They stated that, although there was an "effective family life" and a *de facto* family relationship, it was not recognized in the country they live in, so similar to a domino effect, it caused a number of other consequences. Thus, according to the applicants, the children could not obtain French citizenship and do not have a French passport, or even a valid residence permit (although they are protected from deportation as minors), and they could, when they come of age, face the impossibility of legal residence on French territory, as well as the impossibility of acquiring and exercising the right to vote. Other than that, there are a number of administrative obstacles when it comes to the use of social services and education. In addition, the consequence could be the impossibility of inheriting from the parents. Also, in case of death of the first applicant (biological father) or in case of divorce, the second applicant could be deprived of all rights towards the children. Therefore, according to the allegations in the application to the ECHR, the legal status of the children was extremely uncertain.

According to the ECHR, the decision of the national authorities not to allow legal recognition of the relationship between the applicants undoubtedly affects their family life. The ECHR thereby emphasized that it does not consider as relevant potential or future risks for family life, but only concrete obstacles and limitations. However, regardless of the importance of the possible risks that threaten the family life of the applicants, the ECHR believes that it is necessary to determine what are the concrete obstacles that stand in their way. It also points out that the refusal of the French national authorities to legally recognize the family relationship of the

[4] According to the opinion of the ECHR in the case of *Mennesson v. France*, the impossibility to recognize the applicants' legal relationship with the children in French law is a consequence of the choice of the French legislator to prohibit surrogacy (para. 68), with which France actually tries to discourage its citizens from resorting to a method of procreation abroad that it prohibits on its territory (paras. 62 and 99).

applicants is an issue that should be viewed from the aspect of negative obligations, *i.e.*, the non-interference of the defendant state with the rights from Art. 8, and not from the aspect of positive obligations, *i.e.*, its action (para. 48).

Considering the specific effects on the family life of the applicants, the ECHR concluded that the state did not intervene and that it certainly continues to exist. The applicants live together in conditions that are generally comparable to the conditions in which other families live, which does not lead to the thought that there is a risk that the state authorities decide to separate them because of their situation (para. 92). Therefore, the ECHR considers that their right to respect for family life has not been violated.

However, considering the rights, that is, the legal position of children who were born through surrogacy, the ECHR took the position that the repercussions of surrogacy are different. Based on the circumstance that every human being has the right to know the details of their identity,[5] also that this right can be questioned when the legal relationship between parents and children has not been established, the ECHR, in the specific case in which the registration of children and the establishment of that legal relationship towards the parents they live with is refused, concludes that the right of children to preserve their identity is called into question, which according to the position of the ECHR is a key element of the right to respect for private life. The ECHR concludes that refusing to recognize the biological relationship between the children and their father and preventing them from acquiring French citizenship place children in a position that is not in their best interest, which is why their right to respect for private life is violated.[6]

On the obligations of the state to enable the recognition of parentage in the case of the birth of a child through cross-border surrogacy, the ECHR declared itself at the request of the French Court of Cassation - Grand Chamber A*dvisory*

---

[5] Since the second half of the 20th century, the idea according to which the construction of personal identity is not only a private, intimate and psychological issue, but also has a social dimension and encompasses the right of every person to know its origin, has been increasingly present. The request to know one's personal past is not only a means for obtaining a certain benefit, status, inheritance, etc., but can also be understood as a goal: complete knowledge and construction of one's own personality (Ponjavić & Palačković, 2017, p. 21).

[6] See the decision and the same attitude of the ECHR in an almost identical situation in the case of *Labassee v. France*. In this case, the ECHR made a unanimous decision that the refusal of France to recognize the first and second applicants as parents of the child did not violate their right to respect for family life under Art. 8 of the Convention, but that there was a violation of the child's right to a private life, which entails determining his identity and recognizing the parental relationship between him and the first and second applicants. The ECHR confirmed the same position in the decision *D v. France*.

opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (Request No P16-2018-001, April 10, 2019):

> In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognized in domestic law:
>
> 1. the child's right to respect for private life within the meaning of Art. 8 of the Convention requires that domestic law provides a possibility of recognition of a legal parent–child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";
> 2. the child's right to respect for private life within the meaning of Art. 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

Regarding surrogacy, the ECHR reasoned somewhat differently in the case of *Paradiso and Campanelli v. Italy*. The applicants in this case are spouses originally from Italy who, due to their inability to become parents naturally, resorted to a "surrogate arrangement" in Russia. The surrogate mother gave birth to a boy, and the applicants are registered as parents in the birthplace of the child. The birth certificate obtained in Russia did not, however, contain information that the child was born by a surrogate mother. After returning to Italy the applicants tried to verify the child's birth certificate issued in Russia. However, this led to the initiation of an investigation against them for providing false information. The national court ordered a DNA analysis, which showed that the boy had no genetic connection with the applicants. This circumstance, as well as the violation of regulations related to international adoption of children and the circumvention of the prohibition of surrogate arrangements that is in force in Italy, decided the national court to make a decision for the boy to be taken from the applicants and placed in a children's home. At the same time, the applicants were not informed about the boy's whereabouts, and they were forbidden to have contact with him. Then, in 2013, the boy got a new identity, and in the registers, it was recorded that the parents were unknown, foster care was established, and then he was placed in a family with the aim of being adopted.

The applicants turned to the ECHR, stating that their right to respect for family life had been violated due to the child being taken away and the refusal of legal recognition of their relationship. The ECHR found a violation of this right, stating that due to the non-recognition by the national authorities of the child's birth certificate issued in Russia, it was impossible to establish a legal relationship, but that the applicants had, at least initially, parental responsibility for the child and therefore *de facto* family ties must be taken into account. According to the opinion of the ECHR, the national authorities of Italy, by placing the nine-month-old boy in a home for neglected children, did not demonstrate that they properly considered his best interests, considering that separating a child from his family is always a measure of last resort, justified only in the case when the child is in immediate danger. Therefore, in its opinion, the policy of the national authorities and the position on a certain issue, in this case specifically the explicit prohibition of surrogate motherhood in Italy, are not an adequate and acceptable justification for the measure of taking away the child, and that is why the violation of the right to respect for family life has been established. Nevertheless, the consequence of determining the violation of this right does not however imply, according to the ECHR position, the obligation of the Italian authorities to return the child to the applicants, with reference to the fact that since 2013 he has been in a foster family, within which close personal ties have been developed.

In one of the harshest critiques presented in the theory, it was stated that the decision in the case of *Paradiso and Campanelli v. Italy* marks a new step in the extension of the notion of family life (Puppinck & Hougue, 2015, p. 41) and due to the fact that protection is provided to an illegally determined state with reference to the best interest of the child. This then implies that parents from this, we could say wild card principle, derive for themselves the right to family life and its protection, which the ECHR allowed. The applicants have neither biological nor legal ties to the child, but only a relationship that was based illegally in the past, so they seek to protect the right arising from an illegal factual situation which they created themselves (Puppinck & Hougue, 2015, p. 44). In theory it's also pointed out that despite the ECHR's statements about the importance of biological origin, the misconception that it has some objective value for the ECHR, *i.e.*, that its value depends on the individual's will, should be avoided, so the blood relationship is valid if it is required in a specific case (Puppinck & Hougue, 2015, p. 43). Proof of this is the fact that the ECHR in the case of *Paradiso and Campanelli v. Italy* completely ignores the child's biological parents, and the issue of the child's right to know his origin is not even raised (Puppinck & Hougue, 2015, p. 44). [7]

[7] In recent years, on an international level, the issue of legal regulation of the right of a child conceived with biomedical assistance (cases of conception by artificial heterologous insemination

Given that they lived together for only six months, the conclusion of the ECHR on the existence of family life between the applicants and the boy is disputed in theory, and the question of whether family life is a relationship that is not based on biological ties, nor is it based on law, but only on the fact that it looks like that, is also problematic (Puppinck & Hougue, 2015, p. 42). In support of this is the argument of the ECHR stated in para. 69 of the decision *Paradiso and Campanelli v. Italy* that the applicants "behaved like parents" in relation to the child for six months, which was sufficient for the ECHR to conclude on the existence of a *de facto* family life. It is stated that the primary reason for the existence of a family life with a child is the fact that a contract about surrogate motherhood existed, the signing of which expressed "an intended family life" (Puppinck & Hougue, 2015, p. 42). Finally, in theory, it is concluded that the ECHR tries to protect all forms of family life with this practice, regardless of biology and legality, thus introducing into practice the protection of "illegal family life" (Puppinck & Hougue, 2015, p. 42).

At the request of the Italian government, the case was considered by the Grand Chamber.[8] The ECHR first established that the relationship between the applicants and the child does not fall under the concept of family life. Namely, the parental right of the applicants was challenged in the Italian legal system because the applicants acted illegally - firstly because they brought a child to Italy from abroad who had no biological relationship with any of them, contrary to the current rules on international adoption and, secondly, because they entered into an agreement that contravened the prohibition of heterologous assisted reproduction. Taking into account the absence of any biological connection between the child and "parents", the short duration of the union of life with the child and the uncertainty of the legal ties between them, the ECHR, despite the existence of parental intentions, considered that the conditions for the existence of family life were not met (para. 157). According to the position of the ECHR, to allow the applicants to keep the child with them would be equal to legalizing the situation they themselves created by acting contrary to important provisions of Italian law. The ECHR has, therefore, accepted that the Italian courts, concluding that the child would not suffer serious or irreparable harm as a result of the separa-

or a donated egg cell) to know its biological origin is attracting a lot of attention. Two problems have been noticed regarding this issue. The first problem concerns the parents' moral obligation to tell the child the truth about its conception, that is, about its genetic origin. The other problem relates to the child's legal ability to find out information related to the identity of the donor (Stjepanović, 2018, 234).

[8] The decision of the Grand Chamber in the case of *Paradiso and Campanelli v. Italy* from January 24, 2017.

tion, had struck a fair balance between various interests involved, while remaining within a wide margin of appreciation. Therefore, the Grand Chamber of the ECHR concluded that there was no violation of Art. 8 of the Convention.

Regarding the legal connotations of cross-border surrogacy in ECHR practice, the case of *Valdís Fjölnisdóttir and Others v. Iceland*, the first case of its kind involving a married same-sex couple. The first and second applicants were "intended parents", but they were not biologically related to the child (the third applicant), who was born by a surrogate mother in California. The child was placed under foster care by the decision of the national authorities, and the first and second applicant were appointed as the child's foster parents. In this case, the ECHR considered the refusal of the national authorities to recognize the parental ties between the applicants and the child, because surrogate motherhood is illegal in Iceland.

In the specific case, the ECHR found that the applicant's right to respect for family life was not violated, because thanks to foster care there were no real and practical obstacles to enjoying family life. That is, the national authorities made an effort to maintain *de facto* family ties (family life) between the applicants and the child and to provide them with legal protection through foster care. Therefore, as in the aforementioned case *Mennesson v. France*, the ECHR found that there was family life between the three applicants, but that there was no positive obligation on the part of the state to recognize the parent–child relationship (according to the California birth certificate).

As pointed out in theory, the judgment *Valdís Fjölnisdóttir and Others v. Iceland* is a symbol of the general, cautious and minimalist approach of the ECHR in assessing the proportionality of the recognition of non-conventional parent–child relationships (Isailovic, Margaria, 2021). According to the ECHR, the child in this case was not left in complete legal limbo like the children in *Mennesson v. France*, nor given for adoption as in the case of *Paradiso and Campanelli v. Italy* (Isailovic, Margaria, 2021).

5. Conclusion

A number of specific issues related to reproductive rights are the subject of interpretations of the ECHR within the right to respect for family life. Despite its respectable jurisprudence, the ECHR does not have a clear and firm attitude on the issue of cross-border surrogacy, which can be concluded by analyzing the cases presented in the paper. Due to the lack of consensus on this issue, the contracting states are left with a very wide margin of appreciation. In all cases, including those related to the issue of cross-border surrogacy, the ECHR always examines whether the state has fulfilled its positive and negative obligations, *i.e.*, the obligation not to interfere with the law or the obligation to act actively to enable the respect and protection of rights.

It is clear from the judicial practice cases related to cross-border surrogacy that, on one hand, there is a negative relationship and a trend of non-recognition of the right of the intended parents to be registered as parents of a child born with the help of surrogacy (refusal of the national authorities of the contracting states to recognize the parent–child relationship established in accordance with foreign law on the basis of surrogate motherhood being prohibited under national laws), while on the other hand, the ECHR in its decisions recognizes the protection from Art. 8 of the Convention and in cases where there is no genetic connection between the child and the parents, but *de facto* family life and close family relations have been established between them.

References

Bordaš, B. 2012. Surogat materinstvo sa prekograničnim dejstvima: stvarnost i pravo. *Zbornik radova Pravnog fakulteta u Novom Sadu*, 4, pp. 97-117.

Draškić, M. 2006. Pravo na poštovanje porodičnog života u praksi Evropskog suda za ljudska prava. U: Ponjavić, Z. (ur.), *Novo porodično zakonodavstvo*. Kragujevac: Pravni fakultet Univerziteta u Kragujevcu, pp. 93-134.

Jović-Prlainović, O. 2021. Presude Evropskog suda za ljudska prava protiv Republike Srbije o primeni genetskog testiranja u paternitetskim parnicama. *Strani pravni život*, 1, pp. 47-61, https://doi.org/10.5937/spz65-30886.

Kovaček Stanić, G. 2013. Biomedicinski potpomognuto začeće i rođenje deteta: Surogat materinstvo u uporednom evropskom pravu i Srbiji. *Stanovništvo*, 1, pp. 1-21.

Palačković, D. & Ćorac, S. 2016. Procesne garantije prava na poštovanje porodičnog života (praksa Evropskog suda za ljudska prava). *Pravni život*, 10, pp. 73-87.

Petrušić, N. 2007. Jurisprudencija Evropskog suda za ljudska prava u zaštiti reproduktivnih prava.*Pravni život*, 10, pp. 319-338.

Ponjavić, Z. & Palačković, D. 2017. Pravo na anonimni porođaj, *Stanovništvo*, 1, pp. 21-40.

Ponjavić, Z. 2003. Evropska konvencija za zaštitu ljudskih prava i pravo na poštovanje porodičnog života. *Pravni* život, 9, pp. 821-839.

Samardžić, S. 2018. *Prava deteta u oblasti medicinski asistirane reprodukcije*. Doktorska disertacija. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu.

Stjepanović, S. & Stjepanović, B. 2018. Naučna saznanja perinatologije kao razlog za zaštitu prava fetusa. *Zbornik radova Pravnog fakulteta u Nišu*, 80, pp. 463-480, https://doi.org/10.5937/zrpfni1880463S.

Stjepanović, B. 2018. Pravo deteta začetog uz pomoć asistirane reprodukcije da dobije informaciju o svom donoru – uporednopravna rešenja. *Strani pravni* život, 3, pp. 233-254, https://doi.org/10.5937/spz1803233S.

Živojinović, D. 2007. Pravo nerođenog deteta na život u međunarodnom pravu. *Pravni* život, 10, pp. 371-382.

Župan, M., Puljko, V. & Sukačić, M. 2013. Međunarodni ugovori o zamjenskom majčinstvu – nestaje li paradigma mater semper certa est. *Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta J.J. Strossmayera u Osijeku*, 2, pp.7-20.

Website References

Grand Chamber Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (Request No P16-2018-001, April 10, 2019). Available at:

https://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22ADVISORYOPINIONS%22],%22itemid%22:[%22003-6380464-8364383%22]}.

Igareda González, N. 2020. Legal and Ethical Issues in Cross-Border Gestational Surrogacy. *Fertility and Sterility*. 113(5), pp. 916-919. Available at: https://www.sciencedirect.com/science/article/pii/S001502822030248X.

Isailovic, I. & Margaria, A. 2021. Conversations on Transnational Surrogacy and the ECtHR case Valdís Fjölnisdóttir and Others v. Iceland. *Conflict of Laws.net – Views and News in Private International Law*. Available at: https://conflictoflaws.net/2021/conversations-on-transnational-surrogacy-and-the-ecthr-case-valdis-fjolnisdottir-and-others-v-iceland-2021/.

Puppinck, G. & Hougue, C. 2015. Paradiso and Campanelli v. Italy: The ECHR Validates the Sale of a Child through Surrogacy (Translation of an original article published in French in the *Revue Lamy Droit Civil*, No. 126, pp. 41-45). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605819.

Thomale, C. 2017. State of Play of Cross-Border Surrogacy Arrangements – Is there a Case for Regulatory Intervention by the EU?. *Journal of Private International Law*, 13(2), pp. 463-473. Available at: https://www.tandfonline.com/doi/abs/10.1080/17441048.2017.1353783.

Legal Sources

Family Act, *Official Gazette of the Republic Serbia*, Nos. 18/2005, 72/2011 and 6/2015.

Act on Biomedically Assisted Fertilization, *Official Gazette of the Republic of Serbia*, Nos. 40/2017 and 113/2017.

ECHR Case-Law

Valdís Fjölnisdóttir and Others v. Iceland, app. 71552/17 (ECHR, May 18, 2021).

SH and Others v. Austria, app. 57813/00 (ECHR, November 3, 2011).

Mennesson v. France, app. 65192/11 (ECHR, June 26, 2014).

Labassee v. France, app. 65941/11 (ECHR, June 26, 2014).

D v. France, app. 11288/18 (ECHR, July 16, 2020).

Paradiso and Campanelli v. Italy, app. 25358/12 (ECHR, January 27, 2015 and January 24, 2017)

Sanda S. Ćorac
Docent, Pravni fakultet, Univerzitet u Kragujevcu, Srbija
E-mail: *scorac@jura.kg.ac.rs.*

PREKOGRANIČNA SUROGACIJA I PRAVO NA POŠTOVANJE PORODIČNOG ŽIVOTA

Sažetak

Surogacija je nesporno povezana uz pravo na poštovanje porodičnog života koje garantuje član 8 Evropske konvencije o ljudskim pravima i osnovnim slobodama. U praksi Evropskog suda za ljudska prava (ECHR) kao sporna otvorena su brojna pitanja, između ostalog i u kontekstu povezanosti prekogranične surogacije i prava na poštovanje porodičnog života. ECHR je, vodeći računa o okolnostima svakog konkretnog slučaja, razmatrao, pre svih, pitanje (ne)postojanja genetske veze između nameravanih roditelja i deteta koje je rodila surogat majka, trajanje kohabitacije među njima i pravnu nesigurnost koju surogacija stvara, odnosno njihov mogući uticaj na povredu prava na poštovanje porodičnog života.

Ključne reči: praksa Evropskog suda za ljudska prava, prekogranična surogacija, pravo na poštovanje porodičnog života.

Primljeno: 12. 11. 2022.
Izmenjeno: 8. 12. 2022.
Prihvaćeno: 30. 12. 2022.

UPUTSTVO AUTORIMA

PRIJAVLJIVANJE RUKOPISA ZA OBJAVLJIVANJE

Autori mogu da dostave radove napisane latiničkim pismom na srpskom ili na engleskom jeziku u elektronskom formatu, kao *Word* dokument. Rokovi za predaju radova su: za prvi broj – 15. februar, za drugi broj – 15. maj, za treći broj – 15. avgust i za četvrti broj – 15. novembar. Rukopisi se dostavljaju putem linka: http://aseestant.ceon.rs/index.php/spz/, izuzetno elektronskom poštom na adresu redništva: **redakcijaspz@gmail.com**, koje će ih uputiti kako da se prijave na sistem *Assestant (CEON).* Autori tom prilikom daju i autorsku izjavu. U slučaju dostavljanja koautorskih radova, korespondencija se u ime svih autora odvija sa autorom koji je rad poslao i koji će biti odgovoran za komunikaciju sa ostalim autorima (tzv. autor za korespondenciju). Autorskom izjavom autori garantuju da su prihvatili uređivačku politiku časopisa i da su prilikom izrade rada i njegovog prijavljivanja za objavljivanje poštovali etičke standarde publicistike i naučnog rada.

Očekuje se da autori u radu, kako bi ostvarili naučni doprinos, pođu od rezultata već sprovedenih istraživanja na datu temu, konsultujući relevantnu domaću naučnu i stručnu literaturu na sistematičan način, moguće korišćenjem digitalnih repozitorijuma domaćih naučnoistraživačkih organizacija i drugih zbirki naučnih i stručnih publikacija u otvorenom pristupu.

Sve aktivnosti vezane za uređivanje časopisa (od prijema rukopisa do objavljivanja elektronskog izdanja časopisa) obavljaju se posredstvom elektronskog sistema *Assestant* (CEON) koji omogućava pripremu i objavljivanje časopisa u elektronskom obliku (*Open Journal Systems* – OJS). U slučaju da autor nema nalog, potrebno je da se registruje preko linka: *http://aseestant.ceon.rs/index.php/spz/user/register*. Detaljno uputstvo za registraciju autora i prijavu rukopisa može se preuzeti sa sajta časopisa *Strani pravni život* (www.stranipravnizivot.rs). Navedene aktivnosti se obavljaju unutar samog sistema, pod nadzorom glavnog i odgovornog urednika i tehničkog urednika, a ključna obaveštenja koja su namenjena autorima, recenzentima ili drugim korisnicima automatski se prosleđuju elektronskom poštom. Zahvaljujući sistemu *Assestant* (CEON) obezbeđeno je čuvanje svih verzija objavljenih radova i odbijenih radova u elektronskoj bazi podataka. Autori, takođe, mogu da se upoznaju u svakom trenutku sa tokom i ishodom postupka recenziranja.

NAPOMENE VAŽNE ZA PRIPREMU RUKOPISA

Način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života* uređen je ovim uputstvom. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako prilozi ne bi bili eliminisani nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Oni moraju sadržati podatke o autoru, naslov, sažetak, ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, rezimea i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku sadrže prevod naslova, sažetka i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman, veličina 12pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvatiće se duži rukopis i to obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, sažetak (do 800 karaktera sa razmacima), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka. Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (koji sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocitata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i **naučnu kritiku ili polemiku**, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 znakova sa razmacima. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 znakova sa razmacima), ključne reči (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne uračunavaju se u obim rada.

Ostali prilozi. Komentari sudskih odluka mogu da imaju najviše do 15.000 znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta

Svi prilozi moraju biti sačinjeni u Microsoft Word-u, latiničkim pismom, fontom Times New Roman, veličine 12 pt, sa proredom 1,5, na strani formata A4, sa uvlačenjem pasusa za 1 tabulator, bez deljenja reči na slogove (hifenacije). Posle svakog znaka interpunkcije staviti samo jedan razmak. Za posebna slova iz srpskog i stranog latiničkog pisma koriste se raspoloživi simboli – dijakritički znaci. Ćirilički znaci iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: *https://www.loc.gov/catdir/cpso/roman.html*. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu (na primer imena iz ruskog jezika). Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Strani pojmovi pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa preciznošću prevesti na sprski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema stilu citiranja i referenciranja – Harvard britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Ime, srednje slovo i prezime autora (jednog ili više njih) navode se na prvoj strani rukopisa u gornjem levom uglu. Pišu se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijakritičkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose na autore: naučna i stručna zvanja, akademske titule, ORCID broj autora, naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove (grad i država) u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

Istraživački podatak / istraživački projekat. Autor može nakon naslova uneti posebnu fusnotu u kojoj će navesti tačne, potpune i aktuelne podatke o okolnostima pod kojima je rad nastao (u okviru međunarodne saradnje, međunarodnog programa, kao deo naučnog ili istraživačkog projekta, u okviru postdiplomskih studija ili postdoktorskih studija, kao saopštenje sa održanog naučnog skupa, gostujuće predavanje i slično) i/ili naznaku o instituciji, državnom organu ili međunarodnoj organizaciji koja je finansijer ili korisnik projekta.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imala učešća u istraživanju ili su pomagala u priređivanju rada, sa objašnjenjem njihove uloge. U fusnoti se može navesti i obaveštenje da je rad urađen u okviru određenog naučnoistraživačkog projekta, da je ranije usmeno izlagan na naučnom skupu i slično.

Naslov rada piše se malim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10 do 12 reči.

Sažetak se navodi ispod naslova članka. Sažetak ne sme da bude duži od 800 znakova sa razmacima. Veličina fonta je 11 pt (složeno kurzivom). U sažetku autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretraživanje članaka.

Ključne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati pet ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt, kurzivom).

Naslov rada, Sažetak i ključne reči na engleskom jeziku (ako je članak na srpskom jeziku), **odnosno, na srpskom jeziku** (ako je članak na engleskom jeziku) navode se dva reda ispod.

Podnaslovi u tekstu se pišu na sredini, malim slovima i podebljanim (boldiranim) slovima, veličine 12 pt i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima. Podnaslovi drugog reda se pišu podebljanim (boldiranim) slovima, složeno kurzivom. Podnaslovi trećeg reda se pišu kurzivom.

Tabele, grafikoni i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

Navođenje izvora unutar teksta

Od autora se očekuje da navedu korišćene izvore, i to potpuno i tačno, i da precizno prenesu tuđe navode, te se prilikom citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene strane sa kojih se preuzima tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa „p.", a više strana sa „pp." (skraćeno lat. *paper – pluta paper).* Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literature uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i strana). Na primer:

> Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.
>
> Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora. Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

> U svom radu Ćirić (2008) konstatuje da je…

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Primeri:

> U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.
>
> Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

> Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje”. Na primer:

> Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)…

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćenica „fn.”:

> Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)…

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efektan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

> Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe”.

Ili:

> Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe” (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili strana na kojima se nalazi citat. Tekst se može preuzeti direktno:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika”.

Indirektno se isti tekst može preuzeti na sledeći način:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u

oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika" (Stanković, 1972, p. 307).

Dugačke citate bi najpravilnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice. Izostavljeni deo reči iz citata označava se trima tačkama u ugaonim zagradama, na primer:

> Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi […] ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)" (*Alternative zatvorskim kaznama*, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

> I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.
>
> Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (vid. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

> Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).
>
> U svom radu Nikolić & Čović (2018) ukazali su na…
>
> Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je…
>
> Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju…

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšteprihvaćena skraćenica „*et al.*" (*et alia*). Na primer:

> Ćeranić *et al.* (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70)… Pored „tvrde", ne bismo smeli da zaboravimo „meku moć"… (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćenica međunarodnih organizacija ili njihovih tela, na primer:

Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, pp. 32-35).

Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)…

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

U *Teoriji države i prava* (1995, p. 204) jasno se kaže…

Rad nepoznate godine izdanja. U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

Zirojević (n.d.) ukazuje na obeležja terorizma…

Ili indirektno:

Obeležja savremenog terorizma su… (Zirojević, n.d.).

Sekundarne reference. Ako primarni izvor nije bilo moguće pronaći, nego ga autor preuzima iz rada drugog autora, mora se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se u tekstu punim nazivom (složeno običnim slovima), uz broj godine kada je usvojen, sem kada se analizira određena izmena ili dopuna propisa, kada se navodi kao izvor službeno glasilo u kome je objavljena takva izmena. Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćenica pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik.

> U krivičnom zakonodavstvu Srbije (Krivični zakonik RS, 2005 – KZ).
>
> Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, 2016).
>
> Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (*Gesetz* über *die Entschädigung für von Gewalttaten* – OEG) s tim što je 1985. godine donet novi zakon koji je i sada na sanzi (OEG, 1985).
>
> U francuskom Građanskom zakoniku (*Code civil* – CC), prema poslednjoj verziji od 1. oktobra 2018. Godine predviđeno je… (CC, 1804).

Akti međunarodnih organizacija citiraju se tako što se u tekstu navodi donosilac akta i pun naziv akta, koji se, po potrebi skraćeno, navodi u zagradi uz naznaku godine u kojoj je donet.

> U Istanbulskoj konvenciji Saveta Evrope (CETS No. 210) od 11. 5. 2011. godine (CoE CETS, 2011) predlaže se…
>
> Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, 1990)…
>
> U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (Concil Regulation (EC), 2000)…

Na isti način kako je citiran propis naveden u tekstu, mora biti označen u popisu literature.

Autor može da koristi tekst propisa preuzet sa interneta sa službene stranice nadležnog organa ili javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. U tom slučaju u popisu literature moraju biti označeni osnovni podaci o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik (što mora biti naznačeno).

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer:

čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor u tekstu treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstavke. Iza teksta autor navodi u zagradi skraćeno oznaku odluke, koja će biti korišćena i u popisu literature. Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 utvrđena je nesaglasnost… (Odluka US, 2017).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

… kako se navodi u obrazloženju Presude Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrže što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke). Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćenica za nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćenica „*v*" za veznik *versus*, npr. *Fremkin v Russia*, *Goobald v Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstavke. Na primer:

Borodin v Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015.

Intrasoft International SA v European Commission (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa interneta. Ukoliko se u radu koriste sadržaji sa interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih publikovale, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže pozivanjem na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora. U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi „n.d." (*non dated* – nepoznat datum), na primer:

> Njihov značaj za parlamentarne procese je nemerljiv (Ostrogorski, n.d).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

> Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

Sastavljanje spiska literature i popisa pravnih izvora

Spisak literature je obavezan na kraju rada. U spisak literature se unose sve bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

1. Knjige (elektronske), druge monografije i udžbenici, poglavlja u monografijama

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov*. Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćenica „*et al.*". Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu „ur." (ako je knjiga izdata na srpskom jeziku), a „ed." (za knjige na engleskom jeziku sa jednim urednikom) ili „eds." (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu*. Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd: Institut za uporedno pravo; Banja Luka: Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI. 1997. *Promoting Probation Internationally*. Publ. no 58. Rome/London: UNICRI.
- Tappan, P. W. (ed.). 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije. Opšti deo*. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford: OUP Oxford. Database: eBook Academic Collection. Dostupno na: http://eds.a.ebscohost.com/ (18. 1. 2019).

2. Doktorske disertacije, magistarski ili završni master radovi

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. Poglavlja u knjigama i naučni/stručni radovi objavljeni u zbornicima i zbirkama radova sa naučnih skupova

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov.* Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu „ur." (ako je zbornik na srpskom jeziku), a „ed." (za zbornike na engleskom jeziku sa jednim urednikom) ili „eds." (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony?. In: Parry, R. & Omar, P. (eds.), *International Insolvency Law: Future Perspectives.* Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. & Čolović, V. (ur.), *Uvod u pravo Nemačke.* Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. Članci

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa,* oznaka sveske/godišta/volumena (broj), str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: https://doi.org/DOIbroj.

Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. & Čolović, V. (ur.), *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd/Valjevo: Institut za uporedno pravo, pp. 463-476.
- Gasmi, G., Prlja, D. & Jerotić, A. 2017. European leading legal principles of combating gender based violence: "Istanbul Convention". U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. *et al.* 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida,* 20(1), pp. 45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://doi.org/10.5937/spz1803065V (18. 1. 2019).

5. Članci objavljeni u elektronskom časopisu ili online bazi podataka

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv *online* baze podataka (datum posete stranici). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686 (18. 1. 2019).

Ili:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (18. 1. 2019).

6. Članci, izveštaji, radovi iz zbornika dostupnog na internetu, koji imaju autora

Članci koji su dostupni na internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa, i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vlasnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. Dostupno na: https://www.paragraf.rs/ (18. 1. 2019).
- Lietonen, A. & Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87.* Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf (18. 1. 2019).

7. Članak dostupan na internetu koji nema naznačenog autora

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- *National Action Plan to combating corruption – Mongolia*. 2016. Dostupno na: https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption (18. 1. 2019).

8. Spisak korišćenih pravnih izvora i izvora sudske prakse

Popisuju se nazivi zakona i drugih propisa korišćenih u radu, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red. Kada se navode akti Evropske unije, obavezno se navodi broj službenog glasnika u kome je propis objavljen i strana na kojoj se nalazi:

- Krivični zakonik RS 2005. *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.
- Izmene KZ RS 2016. *Službeni glasnik RS*, br. 94/2016.
- OEG, 1985. Gesetz über die Entschädigung für Opfer von Gewalttaten, od 7. januara 1985 (*BGBl*. I S. 1), sa poslednjom izmenom od 17. jula 2017 (*BGBl*. I S. 2541). Dostupno na: https://www.gesetze-im-internet.de/oeg/ (18. 1. 2019).
- CC, 1804. Code civil, poslednja verzija od 25. decembra 2018. Dostupno na: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (18. 1. 2019).
- CETS, 2011. Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS No.210) od 11. 5. 2011. godine. Dostupno na: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210 (18. 1. 2011).

- EU Decision 2010. EU Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under document C(2010) 593 (Text with EEA relevance). *OJ* L 39, 12. 2. 2010, pp. 5-18.
- Rec 2011. Council of Europe, Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care. Adopted by the Committee of Ministers on 16 November 2011.
- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćenica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke. Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI).

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje, 1999. Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999, dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Odluka US, 2017. Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama, *Službeni glasnik RS*, br. 68/2018.
- Cass. crim., 19 December 1991, RCA 1992.170. *Ius Commune Casebook for the Common Law of Europe*, 2018.
- Presuda Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012. *Arhiv Apelacionog suda u Beogradu*, 2012.
- *Goobald v Mahmood*, 2005 All ER (D) 251 (Apr). Dostupno na: https://Lexisweb.co.uk/cases/2005/april/godbold-v-mahmood (18. 1. 2019).

- *Intrasoft International SA v European Commission*, 2015. EGC, Judgment of the General Court (Second Chamber) of 13 October 2015 (Case 403/12, ECLI:EU:T:2015:774). Dostupno na : https://eur-lex.europa.eu/l (18. 1. 2019).

Uredništvo stoji na raspolaganju autorima i za sva druga neophodna razjašnjenja (pitanja uputiti elektronskom poštom na adresu uredništva).

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34

STRANI pravni život = Foreign legal life / glavni i odgovorni urednik Katarina Jovičić. - God. 1, br. 1 (1956)- . - Beograd : Institut za uporedno pravo, 1956- (Aranđelovac : Tri O). - 24 cm

Tromesečno. - Drugo izdanje na drugom medijumu: Strani pravni život (Online) = ISSN 2620-1127
ISSN 0039-2138 = Strani pravni život
COBISS.SR-ID 86244103