



**INTERNATIONAL SCIENTIFIC CONFERENCE**

# **LAW BETWEEN THE IDEAL AND THE REALITY**

**THEMATIC CONFERENCE PROCEEDINGS**



**2023.**



University of Priština in Kosovska Mitrovica  
**FACULTY OF LAW**

**INSTITUTE FOR COMPARATIVE LAW**  
Belgrade

International Scientific Conference  
“LAW BETWEEN THE IDEAL AND THE REALITY”  
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Kosovska Mitrovica, 2023.

University of Priština  
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## EDITOR'S NOTE

The Thematic Conference Proceedings "Law between the ideal and the reality" contains the papers of authors which are presented at the XIII International Scientific Conference organized, this year, by the Faculty of Law at the University of Priština in Kosovska Mitrovica and the Institute of Comparative Law from Belgrade. This year's thematic conference proceedings from the international scientific conference has special significance because, despite unfavorable socio-political circumstances on the territory of the AP Kosovo and Metohija, it is being published for the first time in cooperation with the Institute for Comparative Law from Belgrade. This institution has provided immeasurable contributions to the development of legal science in the past decades, thus providing concrete support for the further successful functioning and scientific research work of the Faculty of Law at the University of Pristina in Kosovska Mitrovica.

The socio-political circumstances in which we live pervade everyday life, clash with the values on which a society should rest, and create deep moral dilemmas as to whether something is justified or not. The "conflict" between the real circumstances in which modern society functions and the ideals that it strives for or that are imposed on us was the key reason for the international scientific conference to be organized under the name "Law between the ideal and the reality". The ideals and the ideals of law on which the previous and current generations have tried to establish a society with daily challenges based on fundamental values of protecting freedom, human rights of the individual, and basic social values in the function of individual freedom and rights often represent the biblical struggle between David and Goliath. Some would conclude that it is nothing more than a hopeless Sisyphean task. International Scientific Conference "Law between the ideal and the reality" brought together a large number of eminent legal thinkers with the aim of trying to provide an answer to the question of whether one should give up ideals and accept an unquestioningly imposed value system or establish a balance between ideals and reality, ethical, legal, and political values on which the modern state and society should rest and develop. The thematic collection contains papers that realistically and decisively describe the reality that surrounds us, which, perhaps, is much harsher than most of us think. The published papers and the views contained in them should represent a roadmap for sobering up and leaving the zone of conformism and plush coziness.

Finally, I owe special thanks to my dear and respected colleagues, Teaching Assistant Milica Midžović, Teaching Assistant Branko Šaponjić, and Andjela Nićiforović, Teaching Associate in *dare, facere et pati*, for their self-sacrificing editorial work with which they contributed to the Thematic Collection of Papers being handed over to the scientific and general public.

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Prof. Strahinja Miljković, Ph.D





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### MAGICA INCANTAMENTA

Religio and deviations in ancient roman law until the advent of the Principate.

On the difficult reading of Tab. VIII, 8a and of Tab. VIII, 8b

#### Summary

In the lack of a single - officially and well-established - form of cult, in the pre-Christian Rome there were no conditions for an ideological rejection of the magic arts, so they were generally tolerated, when not deemed harmful for other persons or public concerns. The *vaticinatores*, as corruptors of the public *mores*, were always banished from the city, and in case of recidivism, forced in *vincula* or confined in *insulam*. If anyone had consulted *mathematici*, *hariali*, *haruspices* or *vaticinatores* about the life of the emperor, he would have been punished with death together with the one who had given the response. The XII Tables, by reporting the *incantamenta* aimed at individual evil wills and by interacting about the key aspects of a still limited society, embodies the interactions on the grounds of beliefs, related to the agricultural-pastoral world: crop, harvest, animals. The decemviral legislation through the Tab. VIII, 8a and the Tab. VIII, 8b, eloquently accounts on the aversion toward magic, when it's intended as the art to rule the nature's life spirit, for antisocial purposes.

**Key words:** religious deviations; incantamenta; sacertas; superstizio externa.

#### 1. RELIGIO AND DEVIATIONS

Approximately twenty years after the Italian edition of Religion of the Romans, the interest in Jörg Rüpke's studies, as an important reference for an historian of religion, has recently experienced a revival.<sup>1</sup> This shows a constant interest about the attention that the

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<sup>1</sup> (Rüpke, 2004); more recently (Rüpke, 2018, 2013 e 2014a-b) that I read from the original (Rüpke 2011). The historian's approach to the history of religions, of which the Roman one is the focus (especially through the imperial phase of its history, Rome represents a privileged laboratory for the

Mediterranean's ancient people and, in particular, Romans directed toward their respective deities from the very beginning of their civilization: even indulging in the superstition of rituals celebrated out of turn or in *magica incantamenta* of evil practices. The fine line between *religio*<sup>2</sup> and *superstitio* is emphasized in a wide passage of Theophrastus *Characters* „[...] the superstition seems to be cowardice towards the deity and the superstitious someone who, accidentally running into a funeral cortege, washes his hands, sprinkles himself with lustral water and than goes around all the day with a bay leaf on his mouth. And if a weasel crosses the road, he does not continue until someone walks past him or until he has thrown three stones along the route on his own. [...] If a mouse has gnawed a flour sack, he goes to the fortune teller, who interprets the signs and he asks him what to do. If he responds that he should bring the sack to a craftsman who works leather for mending it, he cannot find peace until, once back, he makes a propitiatory sacrifice“.<sup>3</sup>The *pax* between men and gods,<sup>4</sup> and conversely what drifts them apart, emerges on several occasions in

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Antiquity, with reference to the religious function in a metropolis' life and to its role as intellectual end economical engine) focuses on the research for the individual action set in the socio-historical context of reference. The purpose is to discern what is characterized as a religion in its historical becoming and to spot the agency (in German, *Handeln*) ascribed to superhuman agents or not (divinities, demons, ancestors or others): «the religious acting is given into a time and a space, in a peculiar way in a situation in which a human being involves these agents in its communication with other human beings, both simply referring to them and addressing them directly. (Rüpke, 2018)». Parallel, the acting ability of the human initiators results, most of the time, increased and always modified by this privileged type of communication. Shifting the focus to the “experienced” religion and to the constant action exercised by the individuals within their social sphere and definable religious contexts definitely represents one interesting perspective and a different viewpoint. The emphasis on the historical becoming nobly restores the helm of a history with no preconceptions, allowing to continuously call into question the object the research axis from presuppositions, such as “sacredness”, “faith”, “belief”, “deviations” to the dynamics of innovation-appropriation, action-reaction, reuse, reshaping, refuse, acceptance (precisely)-deviation, by identifying the stages that have contributed to build or change more or less dramatically a certain phenomenon. This makes it possible to rebuild concentric circles of influence on the individual who initiated a given a certain reality or who's simply the promoter of an action, that identifies, at the same time, the interaction networks directly or indirectly established with other individuals or groups, with the ever changing dynamics behind the different strategies, also wicked, implemented to affect the sensible and make the communication result effective. It's praiseworthy the Rüpke's constant attention for the archeological data (especially for the archaic period), because he doesn't neglect the smaller places or at least the usually less considered ones (such as Satricum in Francavilla Marittima in Calabria)

<sup>2</sup> For meanings and the semantic field of the word (Fugier, 1963. Benveniste, 1969. Wagenvoort, 1972-1980a-b; Lieberg, 1974. Muth, 1978. Schilling, 1979-1979a. Montanari, 1988).

<sup>3</sup> See Theof. Char. 16-17

<sup>4</sup> For the definition of “*pax deorum*” (Fuchs, 1926); many references to the sources attesting the human behavior capable of violating it in (Voci, 1953-1985); to which (Bayet, 1957-1969-1976 e

Francesco Sini's studies, to which I refer for any further deepening;<sup>5</sup> the *sapientia* (also juridical) of Roman pontifices, through the definition of *nefas*, addresses its first precautions right to the regulation of peaceful relationships, thus outside of any deviation, between humans and deities, for the purpose of maintain a harmony founded on the perfect knowledge of everything that could disturb it: acts that should never be done; words that should never be spoken.<sup>6</sup>

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1959 (reprint of 1992) (Sordi, 1985. Montanari, 1990-1988. Sini, 2000-1994-1999-1995-1996 and 1991) should be added.; with partly different positions (Fiori, 1996. Humbert, 1993) „La conception – d'ordre philosophique – du monde romain est celle d'un ensemble de rapports ou de forces en équilibre: toute action humaine affecte par définition cette harmonie naturelle et trouble l'ordre voulu par les dieux. D'où la nécessité, avant (ou, au pire, après) toute action, de se concilier l'accord des dieux témoignant leur adhésion. La paix universelle est alors sauvegardée. La religion consiste ainsi à rester en bons rapports avec les dieux, pour les avoir avec soi.“

<sup>5</sup> See for all of them (Sini, 1991-1995-1996 and 2000).

<sup>6</sup> The pontifices are members of the priestly college, at the head of which there was the *pontifex maximus*. During the years of the Roman Kingdom, it had only five members; later, in the Republican age, the number of components was extended to fifteen by Sulla. The pontifices were appointed for co-optation and held office life-long. Initially, they could be chosen only among the patrician; in 300 B.C. the *lex Ogulnia de sacerdotiis* marked the end of that privilege, allowing access to the plebeian. The tasks with which the college was invested transcended the religious field. Beside the power of intervention on the ethical aspects of city life, it was up to the pontifices the task of drafting the calendar and the exclusive competence both in interpretation and jurisdiction, with reference to the Public Law and likewise to the Private Law [about this distinction, I still find very interesting the remarks of (De Marini Avonzo, 1954), as well as the jurisdiction of magistrates of the cult, Flamini and Vestals. In the field of their attributions, the *collegia sacerdotales*, five by the end of the Republic, proceeded maximizing the law in force, by gathering material that would be used in the Twelve Tables codification, in addition the interpretation of *ius* exercised by pontifices achieved a remarkable significance (so-called *interpretatio pontificium*). The pontifices, indeed, introduced themselves as the sole repositories of the *Ius Quiritium* and the typical activity, carried out by them, was realized in the emanation of *responsa*, precisely provided to those who, citizens or magistrates, had turned to the College of Pontiffs (*respondere*). Even after the enactment of the Twelve Tables, they didn't hesitate to pass off *responsa* as wholly original interpretations, in order to speed up the unification process of *ius Quiritium* and *ius legitimum vetus*. The pontifical *responsum* is not mandatory, but binds in relation to its assurance and its political weight. One of the activities originally carried out by the college, no longer on the number of its tasks, was to provide legal assistance (*cavere*) and advice in trials to the individuals who had taken juridical actions (*agere*). The secrecy was the typical connotation of the whole pontifical activity. Every act of the pontifices was readily written in the so-called *commentarii pontificales*, the consulting of which was reserved to the college. On the general topic (Sini, 1992 e 1995. D'Ippolito, 1988 e 1986. Bretone, 1987), to which I cross-refer for further literature. About the qualification, of course very ancient, ascribed to the *pontifex maximus* in the *ordo sacerdotum* see Festus, *De verb sign.* 198-200 [...] *Ordo sacerdotum aestimatur deorum <ordine ut deus> maximus quisque. Maximus videtur Rex, dein Dialis, post hunc*

Regarding the earliest period, which is the proto-urban or decemviral one, in which these considerations are placed, inevitably the shortage of testimonials leads to compensate for the lack of documents with a most scrupulous reading of the archeological data, by identifying in it the religious element and its deviations. Each proposal cannot but be centered on grave goods, on votive deposits, on the production and supply of items, on the rise and the development of the kind of the temple buildings. The obvious fact is the communication activity's extension to recipients defined "not unquestionably plausible", including the dead; and indeed, the religious communication appears sometimes as distinct, sometimes as confused with the non-religious one: the ritualization and the consecration, but also the divination and the magic, characterize the communication as peculiar, in an attempt to modify somehow the daily life, by adding new forms to the religious activity or evil practices, making them more visible in many ways: in other words, by making them public, whether licit or illicit. It's no coincidence that Sulla had to institute in 81 B.C. the *quaestio de sicariis et veneficis*<sup>7</sup> and that previously other *quaestiones* dealt with the same crimes. From this perspective, a key role was played even by the great families within the *res publica* and, above all, as I said, by the priestly colleges, as principal resources in the competition between the elite members.<sup>8</sup> In the antithesis between *fas* and *nefas*, the peculiarity of the relationships between men and deities takes place, positioning itself in the

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Martialis, quarto loco Quirinalis, quinto pontifex maximus. Itaque in solis Rex supra omnes accumbat licet; Dialis supra Martialem, et Quirinalem; Martialis supra proximum; omnes item supra pontificem. Rex, quia potentissimus: Dialis, qui universi mundi sacerdos, qui appellatur Dium; Martialis, quod Mars conditoris urbis parens; Quirinalis, socio imperii Romani Curibus ascito Quirino; pontifex maximus, quod iudex atque arbiter habetur rerum divinarum humanarumque. About the resiliency of the *ordo sacerdotum* attested by Festus, see especially (Dumézil, 1974 and 1977). With regard to the other priestly colleges, I need mention only that the Decemviri one was involved in the interpretation of "Libri Sibillini", the collection of prophetic texts written in Greek and sold, according to the myth, to Tarquinius Priscus from the Cumean Sibyl. The Temple of Aesculapius on the Tiber Island was built exactly as instructed in the Libri, consulted during the plague of 293 B.C., stored in the Temple of Jupiter on the Capitoline Hill and, since 28 B.C. on the Apollo temple on the Palatine Hill (Frier, 1979-1998. Chassignet, 1996. Rüpke, 1993. Monaca, 2010).

<sup>7</sup> The judgment on crimes was previously entrusted to two independent tribunals. There is evidence of this in the *Pro Roscio*, spoken in 80 B.C. I omit other alleged crimes under the jurisdiction of *quaestio sillana*. For all of them (Santalucia, 1994. Laffi, 2001).

<sup>8</sup> The rise to power of Augustus brought with it substantial changes even in the religious field: the Emperor took possession of the aristocratic discussion's forms. Only at a later time they considered again the background in which great families and the Emperor acted, that is to say most of the population: the individual interacts emotionally with other individuals but even with the objects, with the world and with himself. With the expansion of the Empire, the religious changes could extend somewhere else and it was possible to establish a great variety of "religious agents".

juridico-religious system,<sup>9</sup> where the distinction between human and divine represents, in the words of Riccardo Orestano „the most ancient Roman worldview“.<sup>10</sup> In the theological and juridical processing of the Roman priests, all the relevant forms of *vita* and people’s history are represented in an indispensable casualty with the *religio*. Theology and *ius divinum* show that the gods’ will contributed to the *Urbs*<sup>11</sup> foundation, by supporting its extraordinary growth («*civitas augescens*», using the apt expression of Pomponius<sup>12</sup>). And there is more. The peace with the gods protects Rome’s fate and secures the extension *sine fine*.<sup>13</sup> The Roman pontifices posits, since the very beginning of their activity, an unbreakable bond between people’s life and its *religio* („*religione, id est cultu deorum*“<sup>14</sup>).

<sup>9</sup> I’ve used the phrase «juridico-religious system» in place of «legal order» on the basis of arguments offered by Catalano (1965-1978 and 1990), with whom Lombardi (1991) partly agrees. Contra, Orestano (1981-1985 e 1987), followed, inter alios, by Cerami (1996) and only in part by Guarino (1990).

<sup>10</sup> It should be noted that, about this worldview -from which the defining prudence of the priestly knowledge and the universalistic tension of the pontifical theology - both the Ulpianus’ definition of *iusprudentia*, included in the *Digesta*, and the *summa divisio rerum* of the Roman case law. But, almost surely, even Varro referred to this „the most ancient Roman worldview“, structuring his *Antiquitates*.

<sup>11</sup> Ennius already sang, in this way, about the *Urbs* ancient foundation [...] *Augusto augurio postquam inclita condita Roma est* (Svet., August. 7 [...] *cum, quibusdam censentibus Romulum appellari oportere quasi et ipsum conditorem urbis, praevaluisset, ut Augustus potius vocaretur, non solum novo sed etiam ampliore cognomine, quod loca quoque religiosa et in quibus augurato quid consecratur augusta dicatur, ab actu vel ab avium gestu gustave, sicut etiam Ennius docet scribens: Augusto augurio postquam inclita condita Roma est.*); see also Liv. 1.4.1 [...] *Sed debebatur, ut opinor, fatis tantae origo urbis maximique secundum deorum opes imperii principium*. The various foundations that would have regarded Rome in different ages, were studied by Grandazzi (1991) about what see in part 195 ss. in which the french scholar argues that the Romans were fully aware of this «recommencement perpétuel» that characterized their city.

<sup>12</sup> D. 1.2.2.7 (Pomp. libro singulari enchiridii) [...] *Augescente civitate quia deerant quaedam genera agendi, non post multum temporis spatium Sextus Aelius alias actiones composuit et librum populo dedit, qui appellatur ius Aelianum*. The juridical and political implication of the *civitas augescens* concept, with particular regard to the *iura* collection ordered by Justinianus, have been well delineated by Catalano (1990). With the same interpretative line, cf. (Baccari, 1995-1996. EAD, 1996).

<sup>13</sup> Verg., *Aen.*1.27579

<sup>14</sup> See Cic., *De nat. deor.* 2.8 [...] *Nihil nos P. Clodi bello Punico primo temeritas movebit, qui etiam per iocum deos inridens, cum cavea liberati pulli non pascerentur, mergi eos in aquam iussit, ut biberent, quoniam esse nollent? Qui risus classe devicta multas ipsi lacrimas, magnam populo Romano cladem attulit. Quid collega eius L. Iunius eodem bello nonne tempestate classem amisit, cum auspiciis non paruisset? Itaque Clodius a populo condemnatus est, Iunius necem sibi ipse conscivit. C. Flaminium Coelius religione neglecta cecidisse apud Transumenum scribit cum magno rei publicae vulnere. Quorum exitio intellegi potest eorum imperiis rem publicam amplificatam qui*

For the Roman people's good existence it is indispensable to maintain a situation of friendship in the relationships between men and gods, that were in turn considered part of the juridico-religious system, of course the most important one, in proportion to their innate power. The Romans expect to get from the gods peace and forgiveness, nevertheless without ignoring that their faults might be punished with massive pains. Hence the notion of "pax deorum" for how Marta Sordi understood it, when she even placed it „at the origin of the Roman concept of pax“. <sup>15</sup> The expression "pax deorum" is attested again in its archaic form "pax divom" or "deum" by Plautus <sup>16</sup> («sunt hic omnia, quae ad deum pacem oportet

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religionibus paruisent. Et si conferre volumus nostra cum externis, ceteris rebus aut pares aut etiam inferiores reperiemur, religione, id est cultu deorum, multo superiores. See also De nat. deor. 1.117 ([...] religionem, quae deorum cultu pio continetur); De leg. 1.60 ([...] cum suis, omnesque natura coniunctos suos duxerit, cultumque deorum et puram religionem susceperit); 2.30 ([...] Quod sequitur vero, non solum ad religionem pertinet, sed etiam ad civitatis statum, ut sine iis, qui sacris publice praesint, religioni privatae satis facere non possint; continet enim rem publicam consilio et auctoritate optimatum semper populum indigere. Discriptioque sacerdotum nullum iustae religionis genus praetermittit. Nam sunt ad placandos deos alii constituti, qui sacris praesint sollemnibus, ad interpretanda alii praedicta vatium neque multorum, ne esset infinitum, neque ut ea ipsa, quae suscepta publice essent, quisquam extra collegium nosset); and also De har. resp. 18 ([...] Ego vero primum habeo auctores ac magistros religionum colendarum maiores nostros, quorum mihi tanta fuisse sapientia videtur ut satis superque prudentes sint qui illorum prudentiam non dicam adsequi, sed quanta fuerit perspicere possint; qui stas sollemnisque caerimonias pontificatu, rerum bene gerendarum auctoritates augurio, fatorum veteres praedictiones Apollinis vatium libris, portentorum expiationes Etruscorum disciplina contineri putaverunt). A different definition of religio is given by Serv., in Verg. Aen. 8.349. [...] Religio id est metus, ab eo quod mentem religet dicta religio). About the use of this term in Virgil's works, see (Montanari, 1985). (dev. Sánchez-Bayón, 2007-2016-2018 and 2019).

<sup>15</sup> See (Sordi, 1985), («The antiquity of the formula and the pax source in the pangere root, which can be found in the archaic use of pangere clavum and what Livius recollects between the piacula destinati, during the plague of 364 and 363 Varr., "paci deum exposcendae causa" (Liv., 7,2 e 3), leads me to raise the possibility that pax deum is actually at the origin of Roman concept of pax») See also (Montanari, 1988) («In the end, our main objection about Sordi's interpretation regards his attempt to prove the genetical anteriority of the "pax deorum" religious concept compared to the juridical- political one. We feel it would be preferable to talk about conjunction: both because otherwise we would risk postulating an aprioristic category of religion - previous and well distinguished from the "law" one, that is difficulty feasible for the archaic Rome - and because, frequently, both the situations to atone for and the agents chosen for the atonement involves not only a prodigium, a deorum ira sign -but also an high level of the socio-political tension - and because every juridical pax with a public significance is anyhow stated under the testes foederis guardianship and, first of all, of Jupiter», Montanari (1990).

<sup>16</sup> See Plaut., Poen. 252-253 [...] Ergo amo te. Sed hoc nunc responde [mihi]: / Sunt hic omnia, quae ad deum pacem oportet adesse?

adesse»?) by Lucretius («non divom pacis votis adit, ac prece quaesit»),<sup>17</sup> by Virgil (exorat pacem divom)<sup>18</sup> and by Titus Livius («His avertendis terroribus in triduum feriae indictae, per quas omnia delubra pacem deum exposcentium virorum mulierumque turba implebantur»)<sup>19</sup>.

From a human perspective (that is “ius sacrum”), the «religious legalism»<sup>20</sup> of Roman priests configures the “pax deorum” as a sum of acts and behaviors to which the community and the individuals must comply in order to maintain the divine favor. This explains even the meticulous attention for the Roman Annalistics, legacy of the historiographical activity of the pontifices college in documenting facts and events capable of disturbing the “pax deorum”, the negative consequences for the community’s life, the rites and the ceremonies put in place for the atonement.<sup>21</sup> In this perspective, it’s understandable why the pontifical activity is a part of the *ius publicum*, not without reason three-parted by Ulpianus in *sacra*, *sacerdotes*, *magistratus*.

D. 1.1.1.2 (Ulp., 1 institutionum) [...] Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim. Publicum ius in sacris, in sacerdotibus, in magistratibus consistit.<sup>22</sup>

<sup>17</sup> See *Lucr.*, *De rer. nat.* 5.1226-1230 [...] Summa etiam cum vis violenti per mare venti / induperatorem classis super aequora verrit / cum validis pariter legionibus atque elephantis, / non divom pacem votis adit, ac prece quaesit / ventorum pavidus paces animasque secundas?

<sup>18</sup> See *Verg.*, *Aen.* 3.369-373 [...] Hic Helenus caesis primum de more iuvenis / exorat pacem divom vittasque resolvit / sacrati capitis, meque ad tua limina, Phoebe, / ipse manu multo suspensum numine ducit, / atque haec deinde canit divino ex ore sacerdos. This is also the only Virgil’s text in which the expression “pax deorum” is explicitly named; the content, by the way, is of great ritual solemnity see (Bailey, 1935. Sini, 1991), because the verb *exorare* in the priestly language means imploring, as indeed the grammarian Servius had already explained in *Verg. Aen.* 3.370 [...] *Exorat Pacem Divom* aut de sacrificantum more requirit, utrum tempus consulendi esset; nam et hoc vehementer quaeritur, ut in sexto cum virgo poscere fata tempus ait; aut certe, quod et melius est, de sacrificantum more ante nefas expiari ab harpyia praedictum, et sic venit ad vaticinationem. Ut autem hic expiatam famem intellegamus sequens efficit locus, ut aderitque vocatus Apollo, cum constet, nisi in hoc intellexeris loco, famis causa nusquam invocatum esse Apollinis numen. Dubitationem autem in hoc loco “exorat” facit; nam “orare” est petere, “exorare” impetrare: ergo impetrat pacem aut ad inquirendum tempus, aut ad mitigandum famis periculum.

<sup>19</sup> See *Liv.*, 3.5.14; cfr. 7.2.2 [...] nisi quod pacis deum exposcendae causa tertio tum post conditam urbem lectisternium fuit; 42.2.3: prodigia expiari pacemque deum peti praecationibus, qui editi ex fatalibus libris essent, placuit.

<sup>20</sup> The „religious legalism is the set of rules, that teaches how to main the pax deorum“; see, in this respect (Voci, 1953-1985).

<sup>21</sup> See for all (Ravizza, 2020).

<sup>22</sup> About the Ulpianus fragment, it seems to me that the statements averse to the authenticity of the text can be considered overcome (Schulz, 1934-1949. Von Lübtow, 1955) «Die merkwürdige

This is a categorization, as Pierangelo Catalano<sup>23</sup> well noticed, specific to the republican case law, designed in a spontaneous adhesion to the priestly and magisterial documents<sup>24</sup>. In addition, it should be noted what Francesco Sini<sup>25</sup> argues when he points out that the Ulpianus (and also Ciceronian<sup>26</sup>) tripartition of the *ius publicum* finds its roots in priestly formulations of an age prior to the well-known conflicts between patricians and plebeians, which led to the *decemviri* work, or the period immediately after, reflecting a hierarchization of the *ius publicum* parts, basically anti-plebeian.<sup>27</sup> The ritual conservatism and the predominantly priestly character of the mid-republican case law allowed the ancient categorization to succeed in the jurisprudential systemics of the III and II centuries B.C.

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Dreiteilung des *ius publicum*: in *sacris*, in *sacerdotibus*, in *magistratibus* stammt sicherlich nicht von Ulpian», even doubts or uncertainties (Albanese, 1978). Stella Maranca (1931) and Romano (1940) agree with the authenticity of the text and also Nocera (1946-1989) writes «Ulpianus is on the trails of the purest Roman tradition». Wieacker (1949) argues that *sacra, sacerdotia e magistratus* is a republican categorization; (Carcatera, 1980. Aricò Anselmo, 1983. Ankum, 1983. Kaser, M. 1986. Sini, 1991. Stein, 1995. Marotta, 2000).

<sup>23</sup> (Catalano, 1974. Nicolet, 1977. Scheid, 1984).

<sup>24</sup> Gaio, *Inst.* 2.2 (= D. 1.8.1 pr.) [...] *Summa itaque rerum divisio in duos articulos diducitur: nam aliae sunt divini iuris, aliae humani. Sebene nel manuale gaiano questa summa divisio sia preceduta dalla divisione tra cose quae vel in nostro patrimonio sunt vel extra nostrum patrimonium habentur* (*Inst.* 2.1), I don't think anyone can question the oldest character of the categorization of *res in ius divinum* and *ius humanum*; and of course the compilers of the *Digesta Iustiniani* - who reinstated this priority in the VIII title of the first book, *De divisione rerum et qualitate* - didn't doubt it. About this *divisio*, see (Fabbrini, 1968), s.v. *Res divini iuris* with a wide review on the previous debate; see also, for some aspects, Grosso, (1974). About the meaning of the expression *summa divisio*, still with reference to Gaio, see instead Gorla, 1976. About the religious ideologies' influence see (Lantella, 1975). see also Malenica (2014), Alicic (2014).

<sup>25</sup> See Sini (1983) «This similarity represents something all-important, because it allows to define precisely the ideological framework of the Ulpianus and Cicero's conception of *ius publicum*. It draws its roots from a very ancient hierarchization of the *ius publicum* parts, basically anti-plebeian, of course dating back to the priestly formulation of an age older - or immediately after - than the equalization of the two orders: an evidence of this can be found in the fact that, with the arrival of plebeians to the magistracies, they introduced the habit not only to aggregate magistracies and priesthood, but also to place the honores before the *sacerdotia* (pattern still preserved in Varro, *De ling. lat.* 5,80-86), that became typical in the mid-Republican age.

<sup>26</sup> See Cic., *De leg.* 2.19 ss.; 3.6 ss. see. Marotta (2000), he argues that «Ulpianus, by writing that the “*ius publicum in sacris, in sacerdotibus ... consistit*”, reconfirms, in the peculiar political and religious situation of his times, the traditional belief of Ciceronian derivation: if the Romulus' auspices and the Numa's rituals had laid the groundwork of *res publica*, Rome belongs to its deities in every moment and in every aspect of daily life».

<sup>27</sup> See D. 1.1.10.2 (*Ulpianus libro primo regularum*) [...] *Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*. Cfr. (Senn, 1926. Stella- Maranca, 1934. Schulz, 1968. Martini, 1966. Nocera, 1973. Crifò, 1976).



until being transposed with its political function in the I century B.C by Cicero.<sup>28</sup> I cannot linger on this point; it's enough to make some remarks about the sacrifices («sacra omnia exscripta exsignataque») provided for by the pontifical religion established by Numa Pompilius, in order to be able to discern the ensuing customs. The central role of the offers of living beings («hostiae o victimae»), for the cultic practices (and therefore for the protection of “pax deorum”), results truly evident in a famous passage of Titus Livius (1.20.5-7), related to the pontifical priesthood's establishment by the king.<sup>29</sup>

*[...] Pontificem deinde Numam Marcium, Marci filium, ex patribus legit eique sacra omnia exscripta exsignataque attribuit, quibus hostiis, quibus diebus, ad quae templa sacra fierent atque unde in eos sumptus pecunia erogaretur. Cetera quoque omnia publica privataque sacra pontificis scitis subiecit, ut esset, quo consultum plebes veniret, ne quid divini iuris neglegendo patrios ritus peregrinosque adsciscendo turbaretur; nec caelestes modo caerimonias, sed iusta quoque funebria placandosque manes ut idem pontifex edoceret, quaeque prodigia fulminibus aliove quo visu missa susciperentur atque curarentur.*

About the passage, it should be noticed that in the list of the matters of pontifices competence, which the order surely cannot be considered casual, exactly the “hostiae” are located in the first place; preceding respectively “dies, templa, pecunia, cetera sacra, funebria and prodigia<sup>30</sup>”. Furthermore, the classificatory and systematic potentials inherent in the Livius text didn't get by the most attentive part of the contemporary doctrine, in which very diversified positions coexist: some scholars have deemed the tripartition «quibus

<sup>28</sup> See Orestano, 1967 «in these conditions, both the private and public life were dominated by the anxious and continuous preoccupation to operate in harmony with these “forces” or “deities”, to obtain their assistance, to propitiate their consent, to take shelter from their hostile influences, not to do anything that could raise their dissension or a reaction. The fear of displeasing gods or, worse, that some act or behavior could break the pax deorum on which the well-being of the individual, the family and the community depended, made the Roman citizen constantly careful to search, in every aspect of nature, the signs of a divine will». Cf. Orestano, 1939: «Such a conception brings us to the most ancient Roman worldview, that remained constant in the whole tradition, according to which the entirety of thinking beings was divisible into two groups, the gods and the men. From this, the supreme distinction of all the relationships and appliances in “divina” and “humana” sprang»; Sini, 1991.

<sup>29</sup> See Liv., 2.36.1; 3.5.14; 3.10.6; 4.9.3; 4.12.6; 4.21.5; 4.30.7; 5.13.4; 6.20.16; 7.2.2; 7.3.3; 7.27.1; 7.28.7; 8.6.9; 8.9.6-12; 8.25.1; 10.47.6; 21.46.1-3; 21.63.13; 22.3.11; 22.9.7; 22.36.6; 23.31.15; 23.36.10; 23.39.5; 24.10.6; 24.44.8-9; 25.7.7-9; 25.16.1; 25.17.3; 26.23.3-6; 26.45.9; 27.4.11; 27.11.1; 28.27.16; 30.2.9-13; 30.38.8. On the extensive list of reported prodigies, of course important- directly or indirectly - in the Annales Maximi, see (De Saint-Denis, 1942. Rawson, 1971. Macbain, 1982).

<sup>30</sup> See, in this regard, Voci (1953- 1985). Scheid (1984): «la République est effectivement une association de trois partenaires: les dieux, le peuple et les magistrats».

hostiis, quibus diebus, ad quae templa» relevant, for example Auguste Bouché Leclercq<sup>31</sup>; other scholars, such as Nicola Turchi<sup>32</sup> propose subdivision of the subject into five parts: ritual control, responses on the activities about sacred and public things, control on the gods' cult and on the acceptance of foreign cults, control on the funeral right, atonement and counteraction of lightings and other dooming prodigies; others, as in the case of the linguist Emilio Peruzzi,<sup>33</sup> think that they can find even the content, or at least the order layout of the matter, of the primitive *libri pontificum*, precisely on the basis of the cited Livius passage «from which appears that the copy given to the pontifex was divided in seven chapters». After all, it seems quite believable that the Numa Pompilius' religious reforming has imposed the need for written texts, without which it was impossible to follow the complex of «sacra» and «caerimoniae» and the detailed regulation of the most ancient sacrifices.<sup>34</sup> In the light of what has been said, in the Livius' passage it should be considered highly reliable the list, even wanting hierarchical, of the pontifical competences («quibus hostiis, quibus diebus, ad quae templa sacra fierent, atque unde in eos sumptus pecunia erogaretur») based on the order of the very ancient «sacra omnia exscripta exsignataque», considered, by the annalistic tradition, a work of Numa Pompilius<sup>35</sup> himself. By turning it into a broader context, the question involves more problems, compared to the several aspects that invests, over time, the religio itself and the largest phenomenology relating with it: the magic and the evil divination,<sup>36</sup> the supersitio,<sup>37</sup> the fascinum<sup>38</sup> and other practices more or less occult.

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<sup>31</sup> See (Bouché Leclercq, 1932. Bailey, 1932) «Roman ritual, as it was later formulated in the ius divinum of the State-cult, recognized four means (caerimoniae) for securing and maintaining the pax deorum, the relation of kindness between gods and men».

<sup>32</sup> See (Turchi, 1939).

<sup>33</sup> See (Peruzzi, 1973). The scholar's researches proved persuasively the derivation from priestly documents of the Livius text, in which there would be stored very ancient elements of authenticity, such as the onomastic formula of the pontifex.

<sup>34</sup> There are evidences of some ritual prescriptions in the Life of Numa of Plutarch: they regarded the obligation to sacrifice an uneven number of victims to the celestial gods and an even number for the underworld's ones; the prohibition to do libations with wine; the prohibition to sacrifice without flour; the need to pray and worship divinities, by spinning around; in addition we learn from Arnobius that the ancients ascribed to Numa Pompilius the composition of the indigitamenta, ritual names for the divinities (nomina deorum et rationes ipsorum nominum), later collected by the priests in *libris pontificalibus*.

<sup>35</sup> According to the antiquarian tradition, the *libri Numae* would constitute the primitive core of the *libri pontificum*.

<sup>36</sup> See on the topic in general (Habermehl, Lamberti, Ritter, e Schenk, 2008. Lamberti, 2002. Maiuri 2012. Bloch, 1995); see Cicero, *De divinatione*

<sup>37</sup> (Rüpke, 2014b).

<sup>38</sup> The Italian word “affascinare” (to fascinate) comes from the Latin *fascinare*, derived from *fascinus* and complementary to the Italian term “fascino” (charm or fascination). The original meaning “spell, evil influence which is believed to emanate from the envious and flatterers' glance” is shared with the

Between the First and the Fourth century A.C., it's possible to notice some deep changes that are produced not only regarding the Roman religion, but the idea itself of *religio* and its deviations. With such an argument, the statement of the substantial secularity of the Roman law at least until the First Century B.C. represents a safe starting point: the law «acquires its potential by using argumentative places, that remain unrelated to the claims of a cult, from new and old divinities».<sup>39</sup> The transformation process starts manifesting when law and literature begin to deal with religious deviations through its most evident manifestations: the

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original term, but “*fascino*” has later assumed a metaphorical meaning, that indicates “power of attraction and seduction” (fascinated by the slanderers). In the *Carmen V*, Catullus points out that this state of loving bliss attracts “envy”; the poet uses this word even in the *Carmen VII*, in which he claims to have a desire of kisses, so many that they can't be numbered by mischievous persons or connectable to the slanderers above and their potential hexes”. In the ancient roman religion the term *fascinum* (or *fascinus*) could refer to several aspects of the question: to Priapus (also named *fascinus* by Pliny the Elder, to the effigis and the phallic amulets against the hex and, eventually, spells to bewitch someone or something. Pliny the Elder states that the *fascinus*, meant as an amulet, serves as a *medicus invidiae*, that is a cure for the hex. Pliny also states that the *fascinus populi romani* was stored in the Temple of Vesta and it was part of *sacra romana*, that were sacred items associated to the city's origin, hidden and protected by the Vestals. Therefore it was connected to the Palladium by some authors. Some Roman myths, such as the Servius Tullius birth, imply that the phallus was the embodiment of the masculine generating power in the ground, so it was considered sacred. When a general celebrated a victory, a *fascinus* was hanged under the chariot, in order to protect him from envy. Augustine of Hippo, whose principal source is supposed to have been a Varro's lost theological work states that, during the Liber annual festival, the roman god identified as Dionysus and Bacchus, a phallic picture was carried in the procession, with the purpose to protect fields from *fascinatio*, that is the evil spell; according to Varro, in the Italy's crossroads the Liber mysteries were celebrated with so much licentiousness that in his honor there was a phallic cult, celebrated in public with unbridled debauchery. In fact, during the festivals for Liber, an obscene virile member, exposed on a chariot, was carried first in the countryside and in the crossroads and then up to the city. In the village of Lavinium, a whole month was consecrated to Liber and during that everyone spoke vulgar swearing until the phallic organ has recrossed the square and it has been placed back in its location. In this way they had to propitiate Liber for the good outcome of seeds, to remove the hex (*fascinatio repellenda*) and a matron was forced to perform publicly a ritual, that wouldn't be allowed neither to a courtesan in a theater, if some matrons were there. Since it is a deified phallus, the *fascinus* can be related with Mutunus Tutunus, whose temple dates back to the city's origin, and with Priapus, imported from the Greeks. See the Etymological vocabulary of the italian language of Ottorino Pianigiani, sub voce “*affascinare*” e “*fascino*”, to which I cross- refer for the literary places just mentioned; Treccani Dictionary, sub voce “*fascino*”; Catul., *Carm.* 5; *Carm.* 7; Plin., *Nat. Hist.*, 28,7; Aug., *De Civ. Dei*, 7,21; Arnob., *Advers. nation.*, 4,7,1; Varr., *De lingua latina*, 7, 97; *Orat.*, *Serm.*, 1, 8. Cfr. (Wildfang, 2006. Bianchi, Bianchi, and Lelli, 1972-1974. Rykwert, 1988. Wiseman, 1995. Littlewood, 2006. Johns, 1982. Williams, 1990. Henig, 1984. Smith, 1875, sub voce “*fascinum*”. Crummy, 1983).

<sup>39</sup> See (Rüpke, 2014b).

magic and the divination, the superstition, the witchcraft. Cicero<sup>40</sup> and Varro<sup>41</sup> do not foreground the need to define borders, but rather the need to preserve the ancient tradition. This strategy is essentially of intellectualistic nature: the religion is reframed as knowledge. In other words, it is precisely because the religion manifests itself dynamically that, according to the classics, it's necessary to narrow it into normalization's forms: with borders imposed, according to the tradition. The superstition and the other *magica incantamenta* are mainly the sign of an individual deviation. This is confirmed by two parallel development lines that, however, intersect. The first is the one about the religion's conception, intended precisely as knowledge. If the trying to normalize classics leads to delimit the religious practices of the presents on the basis of what was handed down, by ascribing its protection to pontifical colleges and to the magistrates, it's also true that the deviation precisely manifests as a knowledge's form in the magic and the divination (both forbidden, precisely because they were knowledge's forms deemed to affect men's life and the politics). This is a long journey that will end with the religion's transformation into a knowledge, no longer restricted to experts, but available only for those who will have faith: in a way, that's how, in the Late Empire, the *credulitas* of the superstitious can be transformed into the christian's faith, that is a privileged knowledge not accessible for the unbelievers: as well as the superstition's criminalization, between the II and the IV centuries A.C, will identify the other's religion and the heresy.<sup>42</sup> The second development line is the one about the individualization of the religious experience; the choice of non traditional practices is essentially individual. The emergence of new conceptions compared to the origin's ones, after a certain point, allows us to talk more properly about the "religious experience". The religion that has been emerging, manages to gain its own space, that is no more the public one and not even the private one: «the growing depoliticization of the public space, that emerges very clearly in the Empire's newly founded cities, contributes to promote an ethical privatization. Nevertheless this space is not included in the conceptual dichotomy between "public" and "private". This is an expanding field, that has great visibility, without being public in the administrative sense and can result from a wide range of different fields».<sup>43</sup>

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<sup>40</sup> See Cic., *Pro Rabir. per.* 5 [...] *ab Iove Optimo Maximo ceterisque dis deabus immortalibus, quorum ope et auxilio multo magis haec res publica quam ratione hominum et consilio gubernatur, pacem ac veniam peto*; Ovid., *Amor.* 1.2.21 [...] *veniam pacemque rogamus*; Liv., 1.16.3 [...] *pacem praecibus exposcunt*; 3.7.8 [...] *veniam irarum caelestium finem pesti exposcunt*; Liv., 39.10.5 [...] *pacem veniamque precata deorum dearumque*; Plaut., *Merc.* 678 [...] *Apollo, quaeso te ut des pacem propitius*; Senec., *Med.* 595 [...] *parcite, o divi, veniam precamur*. For a broader collection of sources about the *pacem deum petere* by men and about the *pacem dare* by gods, I cross-refer to Fuchs (1926).

<sup>41</sup> For the systemics of Varro's *Antiquitates*, Dahlmann (1935-1976), Collart (1954), Condemi (1965) Cardauns (1976), Catalano (1978), and even Sini briefly (1983) are fundamental.

<sup>42</sup> See for all (Zuccotti, 1992).

<sup>43</sup> See (Rüpke, 2014a).

The individual's personal experience, even acquiring an increasingly central role, does not conflict therefore with the public religion's conceptual core and the considerations included, for example, in biographical and autobiographical works, it's testified that it takes on the characteristics of an individual property appropriate for demonstrating, along with the individuality, that the socialization process was fulfilled. In other words, the conceptualization process which builds from the First century B.C., brings out, together with the public Roman religion, a new form of religion, characterized by the individual experience and, partly, private. This is an effective representation of the changes dynamics, that involve the ancient world as a whole and that proves how social individualization of the religious experience cannot be considered as a foreign object, introduced ex abrupto only during the Late Empire in particular since the new creed's advent, widely accepted by the Christian Roman Law.

Ultimately, the results of a long transformation of the roman religio and its deviations clearly emerge over time. As Francesco Lucrezi<sup>44</sup> notes, Rome itself was born, according to the legend, with a divinatory act, when Romulus saw more birds in the sky than his brother Remus did and found a sign of fate. As Antonio Banfi<sup>45</sup> observes, the haruspicy had considerable importance in the quiritarian society, and in the highest classes the interpretation of phenomena which got by the rudimentary science, had to have a

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<sup>44</sup> See Lucrezi (2008), who highlights how the repression in an ideological sense comes with the Diocletian's Dominate: he is the first to systematically contrast religio and superstitio, in the same ways of christian emperors, who of course changed the categories' contents. The imperial power is, by definition, sacral, totalitarian and absolutist. But it's only with Constantine, who recognises freedom of worship to christians, and then with Theodosios I, that in 380 A.C. with the Edict of Thessalonica makes Christianity the state religion that «every science or art intended to examine freely the divine signs needs to be convicted and prevented» the divinatio results arduous, because the divine will is all contained in the Holy Scriptures and any other manifestation can only come from God. The christians cannot foretell the future, without incurring in the secular punishment, the haruspices cannot practice in private houses and if they do it, they are burned alive, while the hosts are punished with the deportation and the confiscation of property. The anonymous report, far from being loathed, is rewarded, because it's considered preeminent in the public interest. The Theodosian Code is clear about that, but it's equally clear that the auruspicia is tolerated in public spaces, so the ban is not absolute, which easily suggests that the practice was so widespread that an eradication by law wouldn't be possible. In the Justinian Code, lastly, the magical arts ar malae artes and those who dedicate themselves to that are humani generis inimici (C.I. 9.18.6 e 9.18.7.pr) and so in an indifferent manner the Justinian's successors don't deviate from this perspective. The composition of a trial for the punishment of magic and witchcraft proves that in the christian empire such figures fell «in their own right within the criminal prosecution's field, governed by law and statehood» - and as Lucrezi concludes «far from the "sanitary" and "cathartic" conception in the Exodus' rule, according to what the mechashefah must be immediately eliminated by anyone, without judges, trial and conviction.

<sup>45</sup> See (Banfi, 2020).

considerable weight in life's orientation. The sources I resigned about that are many and eminent and, although they are principally referred to the Republican and the Imperial ages, allow me to argue both from a juridical perspective and in a purely literary sense, about gestures, acts and murky events suspended between reality and rumor, result of perversion and detraction; the mass psychosis about numerous poisoners that were assigned to the *quaestio de veneficiis* in 331 B.C. is surely symptomatic of what I'm talking about, to the point of influencing also the following periods; in other words, as Lucrezi also observes « In the lack of a single - officially and well-established - form of cult, in the pre-Christian Rome there were no conditions for an ideological rejection towards the magic arts, so they were generally tolerated, when not deemed harmful for other persons or public concerns. When it was believed that magic was addressed against other people's life or health, it naturally was sanctioned». The *vaticinatores*, as corruptors of the *publici mores*, were always banished from the city and then, in case of relapse, forced in *vincula* or confined in *insulam*.

Besides, if anyone had consulted *mathematici*, *harioli*, *haruspices* or *vaticinatores* about the Emperor's life ("de salute principis"), he would have been punished with death, together with the one who had given the response. As far as I am concerned, the Twelve Tables, by reporting the incantamenta aimed at individual evil wills and by interacting about the key aspects of a still limited society, embodies the interactions on the grounds of beliefs, related to the agricultural-pastoral world: crop, harvest, animals. The decemviral legislation through the *Tab. VIII, 8a* and *la Tab. VIII, 8b*, gives eloquently an account of the aversion toward magic, when it's intended as the art to rule the nature's life spirit,<sup>46</sup> for antisocial purposes that, therefore, are vigorously prosecuted and suppressed.

## 2. THE „MAGICAL“ CRIMES AGAINST AGRICULTURAL ACTIVITIES IN THE DECEMVIRALLEGISLATION: FOR A READING OF *Tab. VIII, 8a e Tab. VIII, 8b*

An accomplished reenactment of the criteria that settle the *ius sacrum* in the Twelve Tables law, for the agricultural heritage's protection from the magic,<sup>47</sup> would require an

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<sup>46</sup> Cf. on the topic, also (Lamberti, 2002. Sandirocco, 2009. Castello, 1990).

<sup>47</sup> Louis Gernet (1983) writes, in one of his most well-known volumes, that before the birth of law and state, magic represents one of the main forces able to rule interpersonal relationships. Starting from the assumption that, among ancient people, it's widely believed that specific items, words, gestures, numbers or colors have the magical power to produce certain effects, he shows the very close continuity relationship, which in many cases is noticeable between this belief in the magical effects of some behaviors (and even words) and the following legal practice. To prove this, Gernet asserts that in the most ancient Greece, a clear magical strength is connected with specific formulas, the *arai* ("imprecations"), which survive for a long time in several cities' law, where they are used as sanctions in laws and international treaties. Cf. (Driediger Murphy and Eidinow, 2019- 2007. Ortiz

application that cannot be enclosed within the limits of these considerations, so I cannot but cross-refer to those who dealt with it *ex professo*. The early Roman Law, but also the Greek<sup>48</sup> one, is greatly influenced by magical contaminations: rituality and gestuality, often used to realize constraints of legal nature. Along with the magic incorporated by the law (just think about the *fescue* for the *manumissio vindicta* or the *obvagulatio*, the magical singing, specifically authorized by the Twelve Tables, useful to force someone to testify in a trial) there is the negative one, practiced on evil and antisocial purposes that, hence, is firmly prosecuted. As Axel Hägerström and Paul Huvelin<sup>49</sup> noticed: «the exaggerated formalism, typical for the early Roman Law, establishes that the the desired results are achieved entirely independently of the will of those who behave as required; therefore, it's correct to consider that the formal gestuality, prescribed for some acts, as well as speaking some words, acts magically, in such a way that it juridically bonds the involved individuals». In the Twelve Tables there are some regulations that harshly punish, probably always with the *sacertas*, illicit magical behaviors. The tradition preserved two fragments in which the ban from engaging magic against the harvests: in particular, it referred to spells aimed at destroying the crop and dragging the harvest in one's plot. By reminding these regulations, Pliny the Elder tells what happened to *Furius Chresimus*, who, because he got from his small plot of land much more fruits than his neighbors in much wider plots did, was summoned to appear in court with the charge of attracting magically in his property the harvests from the bordering pots. However, the defendant was acquitted, because he was able to prove that accusations were unfounded, by bringing there his slaves and his well-fed goods, his shiny and well-finished tools; the *Furius'* victory doesn't diminish the value of this story, which proves actually the unconditioned Roman's faith in the negative efficacy on such enchantments.<sup>50</sup> The Twelve Tables do not punish only the makers of spells against the harvest; they establish the death even for those who have casted a hex against someone; specifically, for the one who's found guilty of *malum carmen incantare* and practicing an *occentatio*. I've reported the Latin words that describes crimes, because there are considerable uncertainties about their content<sup>51</sup>: indeed, some authors of the classical as, one of the first Cicero for example, doubts about the possibility that these expressions characterizes magical crimes and rather they believe that the adjective “malum”, “evil”, which defines the *carmen*, is to be understood in the sense of “famosum”, “slanderous” and

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Carcía, 2021) to which I cross-refer for the latest literature. See (Pepe, 2012. Lucrezi, 2008), even for a comparison with the Jewish Law and the practices in the early Mediterranean.

<sup>48</sup> In the *manumissio vindicta*, a key element of the rite is the *fescue*, the *vindicta* precisely, with which the slave is touched and that works as a true magic wand: this one, together with pronouncing a formula, has the power to change immediately the slave's legal status, so he's “transformed” into a free man.

<sup>49</sup> (Huvelin, 1905).

<sup>50</sup> See Plin., *Nat. Hist.*, 18,41-43.

<sup>51</sup> About this, I entirely refer to Barbara Biscotti (1992).

that, likewise, the *occentatio* is a song aimed at bringing dishonor and disgrace to other persons; the Twelve Tables would have established the death penalty not for those who practiced magic against individuals, but for those who injured other people's honor with a song, a poem or a pamphlet. There is no doubt that, over time, when the need to prosecute magical crimes is no more legitimate, the mentioned decemviral regulations from the Twelve Tables are interpreted in a defamatory key; nevertheless it doesn't mean that the defamatory is their original meaning, even because the defamation begins to be considered a crime in a by far longer period and, however, it isn't punished with death. The words «*incantare malum carmen*» can only refer to the evil (“malum”) spell (“*incantare*”) casted against an individual, aimed at damaging not the honor, but rather the natural person against whom it's addressed. Regarding the *occentatio*, it's always an evil enchantment, but it's plausible that it is not casted against an individual, but rather against his home: as a matter of fact, the verb *occentare* emerges in the Latin literature only in some Plautus' comedies, by indicating the serenade that the rejected lover does at his loved one's door. Undoubtedly, the term *occentare* in Plautus designs not any magical practices: nonetheless, his testimony can lead to the conclusion that formerly the *occentatio* had been used as a magical song, practiced in front of a door, in the belief that thereby it was possible to open it and therefore trespassing. In that case, the death seems to be a punishment well-compatible with such a serious crime. Since I cannot linger on this topic, I'm limiting myself to some problematic data, that Tab. VIII, 8a and Tab. VIII, 8b (but also Tab. VIII, 9 e la Tab. VIII, 10) suggest. The decemviral rules about the harvest's *incantamenta* (*traductio segetum*) are reported by several literary texts, that however persuaded a part of the doctrine to deny the duplicity in the precepts stated in Tab. VIII, 8; this especially on the basis of a more accurate analysis of the “*excanto*” verb's meaning. By this, the aid of latin erudites about the use of locutions like “*excantare significat “excludere”*” and “*excantare magicis carminibus obligare*”, which converge, especially with *excanto*, in expressing complex relationships between spirit and matter, proper to the most ancient animistic faiths; by emphasizing elements from which it would be licit to infer that the regulation “*qui fruges excantassit*”, conversely from what is stated in Tab. VIII, 8b which bans the “*pellectio alienae segetis*”, it refers to the *incantamentum* to destroy the harvest (by depriving the plant of its “vital will”). It is clear that such a conclusion needs to be approved with caution, considering that a definitive interpretation of Tab. VIII, 8 meaning, in its complex legal-sacral involvements, posits a more accurate examination about the general system provided by the decemvirs for the protection of the cereal-growing heritage. In that case, it's correct to proceed in an orderly manner. The Tab. VIII, 8a and the Tab. VIII 8b attest two particular cases against the harvests:

- 1) *QUI FRUGES EXCANTASSIT*
- 2) *NEVE ALIENAM SEGETEM PELLEGERIS*



But, about these circumstances, they add nothing else. The different hypotheses differ for the behavior that they consider and for the purpose they are aimed at: the first one (Tab. VIII, 8 a) at the “*incantare malum carmen*” («*quid? Non et legum ipsarum in duodecim tabulis verba sunt: qui fruges excantassit, et alibi: qui malum carmen incantassit*»<sup>52</sup>) the other one (Tab. VIII, 8 b) at the *incantamentum* directed to a «*traductio segetem*»: *magicis quibusdam artibus hoc fiebat: unde est in XII Tabulis neve alienam segetem pellexeris*».<sup>53</sup> In the uncertainty of the decemviral gaps, it is commonly believed<sup>54</sup> that “*qui fruges excantassit*” refers to a magical rite, while the “*alienam segetem pellicere*” a “*lucrum facere*”, tp a theft committed through magical practices. The punishment established for such practices would be the *sacertas*.<sup>55</sup> In the “*qui fruges excantassit*” a magical operation is to be recognized: through the *maleficium*, the *fruges* are freed from the *spica*, before they ripen, so falling on the ground and rotting.<sup>56</sup> This argument does not hold up to a more

<sup>52</sup> See., Nat. Hist. 28,2,4. The rule sets the stage for a heated discussion between the scholars, about the nature of the crime that had to be repressed. A part of the doctrine gathered in this particular case, on the basis of ancient literary testimonies and a passage from *Pauli Sententiae* (5,4,6; see also Aug., *De Civ. Dei* 2,9), the crime of verbal defamation, punished, according to what Cicero states (*Cic. De rep.* 4,12), with the death penalty, probably because of the absolute social isolation to which the victim was forced. See on the general topic Mommsen (1943). Brecht, (1937), S.v. *Occentatio*. (Momigliano, 1942). (Leonhard, 1899), S.v. *Carmen famosum*, in RE 6. (Pfaff, 1926). S.v. *Libellus famosus*, in RE 13. Cuq (1900), S.v. *Injuria*, in DS 3.1. Berger (1953). S.v. *Occentare*, in *Encyclopedic Dictionary of Roman Law*. Cfr. (Crifò, 1964. Tupet, 1976. Lepointe, 1955. Usener, 1901. Fraenkel, 1925). The other opinion is more recent. The crime would have been constituted by the practice of harmful magical activities, in parallel to the other case, also reported by Plinius (*Nat. Hist.* 28,2,4,17), about the harvests’ bewitchment See (Mashke, 1903. Huvelin, 1903-1971. Beckmann, 1923. Frank, 1927. De Sarlo, 1935). The two conflicting hypotheses are founded on two equally important testimonies; if on one hand Plinius (*Nat. Hist.* 28,2,4,18) cites the decemviral rules, ascribing to it an indubitably magical meaning, on the other Cicero (*De rep.* 4,12) advances in turn a decemviral regulation that, for some aspects might seem the same one reported by Plinius, but within a context that doesn’t leave uncertainties on the crime’s defamatory nature. Therefore, as Barbara Biscotti (1992) notices, at this point it’s necessary to recognize the magical nature of the crime proposed by Plinius, even thanks to the new contributions on the parallel regulation about the *fruges*.

<sup>53</sup> See *Serv.*, *Comm. in Verg. Buc.* 8,99.

<sup>54</sup> In particular Bruns (1909).

<sup>55</sup> (Pepe, 2012).

<sup>56</sup> In particular Huvelin, 1903. Landucci, 1898 who, by highlighting the religious and public character of these crimes, identifies two particular cases, distinguishing between «magic against the other people’s fruits and harvests»; Arangio-Ruiz (1975) («to the detriment for the harvests the “*fruges excantare*” - aimed at preventing the harvests to ripen - and the “*alienam segetem pellicere*” - a spell with which they believed that cereals in the targeted plot of land could move into the charmer’s plot»); Santalucia (1979): «who curses the crops or tries to attract the neighbor’s harvests with spells is (probably) punished with death». It should be noted that the mismatch between the verbal forms with which the two bans included in Tab. VIII, 8a e Tab. VIII, 8b are attested, fuels questions of the

accurate examination about the meaning of “excanto”, especially on the basis of those texts that, even being apart from it, employ a terminology to describe such magics: based on several data, mostly legal, the verb would signify “traducere” (“magicis carminibus”) or, in any case, a physical translation of the harvests, object of the magic itself. In the Forcellini’s *Lexicon Totius Latinitatis* in the entry “excanto” we read «[...] excanto est incantationibus, veneficiis et magicis artibus elicio, evoco, exire facio, traduco, transfero: nam incantamenta plerumque carminibus et cantionibus fiunt». And further ahead he adds «[...] legum in duodecim Tabulis verba sunt: Qui fruges excantassit. h. e. ex agro vicini in suum incantationibus transtulisset; id enim carminibus posse fieri, vulgo credebant».<sup>57</sup> The *Thesaurus Linguae Latinae* brings instead a less emphasized physical undertone of the verb «[...] i.q. carmine, incantatione usum foras citare, exire iubere, evocare (hic illic sic ut evocatum quasi evanidum reddatur» and regarding the regulation “qui fruges excantassit” he clarifies «[...] i. cantando mag. carmine “foras”, e loco suo citare ita, ut evanescant».<sup>58</sup> In this way the decemviral rule’s traditional interpretation is not confirmed, in the sense of a mere magic but neither the material catching, translated by Forcellini («fruges ex alieno in suum agrum c. m. traducere»<sup>59</sup>). Burdened with such an exegetical complexity, the prevailing doctrine therefore believe that is possible to overlap the meaning of the verb “pellicere” to “excantare”, by interpreting it as a (material) transfer of someone else’s harvests in one’s own plot: as though the two different offenses were connected to only one criminal regulation.<sup>60</sup> By relating “fruges excantare” with “foras, e loco suo citare ita, ut evanescant”, it explains why the fruges, once “e loco suo citae et evanidae” can be related to

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commentators on the form “pellexeris” reported by Servius, because differently from “excantassit” it is expressed (with the subjunctive and not with the imperative mood) with the second-person singular rather than the third-person. See (Schoell, 1866. Wordsworth, 1874).

<sup>57</sup> (Forcellini, 1940-1864-1890). S.v. “excanto”: 333: «EXCANTO, as, āvi, ātum, are, a. 1 (ex et canto).

<sup>58</sup> See Th. L.L., V,2, s.v. “excanto”, 1202, 1 ss. «excanto, - āvi, - ātum, - āre. ab ex et canto».

<sup>59</sup> In that sense, see also Manfredini (1979).

<sup>60</sup> See Manfredini (1979), according to whom the meaning of “excantare” may contain both the particular cases (spoiling and theft of the crops), because the expression “alienam segetem pellicere” needs to be reduced to «a vulgar and current interpretation of the originate locution fruges excantare, which describes, among the spells on the fruits, the occasionally prevailing one, that is what makes the responsible earn the neighbor’s fruits». In favor of this reenactment, Manfredini cites the definition of “excanto”, rebutted, as we saw, in the *Thesaurus*, but still present in the Forcellini’s *Lexicon* «excanto est incantationibus, veneficiis et magicis artibus elicio, evoco, exire facio, traduco, transfero». On that basis it’s possible to argue that «excantare» doesn’t mean to cast a spell aimed to destroy something, but rather to steal something and, in the Twelve Tables, to steal someone else’s fruits»; therefore «both in the event that the sorcerer wants to transfer on his advantage the fruits from a someone’s plot to his, and in the event that he wants to leave the plot bare, they are conceptually included in the excantare».

the incantator<sup>61</sup> field. The perception of “*foras e loco suo ciere ita, ut evanescant*” referred to “*fruges excantare*” reveals no divergences between the results of such an incantamentum and the ones described with the “*alienam segetem pellicere*”: if “*excanto*” is meant in a more or less physical sense, the ban to “*fruges excantare*” includes even, and above all, the incantamentum aimed at seizing the other people’s harvests. By following this argumentation, even the Servius’<sup>62</sup> testimony, about the existence of a stated prohibition to “*alienam segetem pellicere*” in the decemviral legislation (Tab. VIII, 8b) would not be credible.<sup>63</sup> Nevertheless the interpretation of the verb “*excanto*” in the sense of a physical translation, would find foundations in some passages, mainly poetical which, on the purpose on exemplifying the perceivable results of the carmina magica, describe or, at least, mention some related supernatural effects, in particular, for the crops.<sup>64</sup> But it is a matter of texts in which the verb “*excanto*” is not present, therefore, by using a meticulous approach, they too need to be related with the arcane meaning of the verb *pellicio*: they deal with incantamenta aimed at moving elsewhere the crops object of the magical operation, ranking in this way under the regime of Tab. VIII, 8b more than under the one of Tab. VIII, 8a<sup>65</sup>, in which the connection turns out to be strained. It is not correct to compare “*traducere messis*” with “*qui fruges excantassit*” of Tab. VIII, 8a, neither with other similar poetical passages, in order to explain the technical-esoteric concept expressed with “*excanto*”. If the use of verbs such “*traduco*”, “*transfero*” or “*transeo*” acquires a certain relevance for the purposes of an antiquarian reenactment, this makes sense only in relation to the “*neve alienam segetem pellexeris*” in Tab. VIII, 8b. The description of the carmina magica effects, included in the same texts, belongs to a same rhetorical place: it is a matter of a magical powers’ stereotype that has numerous validations in the Latin literature and that focuses on some recurring topics: the crops, the snake, the tomb, the moon and the stars, as well as the incantamenta on the clouds and the rain, on the ground and even other phenomena.<sup>66</sup> In the explanation of

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<sup>61</sup> The definition in the Thesaurus distances itself from the Forcellini’s one (even without refusing it explicitly) especially in the moment in which it disregards every material undertone of the «magical» operation’s results, expressed with the verb “*excanto*” (material undertone that is instead implied in the use of verbs such “*traduco*” and “*transfero*”, which refer to a spatial translation of the physical benign, object of spell in its bodily substance). So it cannot be excluded that even the Thesaurus Linguae Latinae interprets the verb “*excanto*” in the sense of translate (*magicis carminibus*), from a place to another the being (person, animal or thing) object of incantamentum.

<sup>62</sup> See Serv., Comm. in Verg. Buc. 8,99.

<sup>63</sup> In this sense, see Manfredini (1979).

<sup>64</sup> See Verg., Ecl. 8,99 (“*satas alio vidi traducere messis*”); Ovid., Rem. Am. 255 (“*non seges ex aliis alios transibit in agros*”); Tib., El. 1, 8,19 (“*cantus vicinis fruges traducit ab agris*”); Nemes., Ecl. 4, 70 ss. (“*cantavit [...] quo migrant satas*”).

<sup>65</sup> (Bruns, 1909).

<sup>66</sup> For a critical analysis of the apologia of Apuleius I limit myself to report just (Marchesi, 1992. Paradiso, Mancini and Filigrana, 2017). The process against Apuleius, although it’s cause of

their content, it's possible to notice the intention to hark back to codified factors as for the magical practice's definition; to the point of believing that the changes were due to more furthered arcane knowledge and the research for an aesthetic originality. It follows that it's irrelevant regarding the primigenial Latin religious-animistic conceptions and, therefore, there is a scarce possibility to deduce from them philological elements, on which establishing the technical meaning of a term related to such ancient principles, as the one connected with the verb "excanto" (that, however, it is worth repeating, is not to be found at all in these passages). This inspiration meets a common rhetorical-literary matrix that doesn't add anything to the knowledge about the ancient magical conceptions: they do not offer food for investigations, neither for a greater understanding of the procedures with which the action against *mala carmina* was initially conceived, nor for better interpreting the meaning of the verb "excanto", that results unrelated. The only text that seems to provide a plausible explanation about the locution "traducere messis" is in the aforementioned *Commentarius* of Servius, that doesn't relate the locution with the verb "excanto" (and so, with the decemviral provision "qui fruges excantassit" of Tab. VIII, 8a but provides its explanation based on the "neve alienam segetem pellexeris" of Tab. VIII, 8b); his testament, which relates the locution "traducere messis" not with "excanto" but with "pellicio", is not isolated: other texts move in this direction by confirming, albeit in a less specific manner, the clear distinction between the provision contained in Tab. VIII, 8a and the ban on "alienam segetem pellicere" (Tab. VIII, 8b).<sup>67</sup> Nonetheless, I would rule out that the "pellectio alienae segetis" and the act of "excantare magicis carminibus" may be identified in a single crime, by considering the magical practices described and prosecuted in Tab. VIII, 8a and Tab. VIII, 8b in the same manner as a strange duplicate. The sources do not attest that as well as the crop's spoilage, also the other's harvests theft falls into the "excantare" concept; they only report that, both in the particular case of "excantare fruges" and in "pellectio alienae segetis" the crime is executed "magicis carminibus". Other factors support this reasoning. By examining of some latin texts,<sup>68</sup> they seem far from giving to the verb "excanto" that notion of "foras citare" or even of "traducere" referenced above. "Excantare" is described by Servius as "obligare", that is "binding to oneself" and so «to

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interesting reflections, would lead me over the time limits imposed by these pages. For some other remark, I cross-refer to Pellecchi, 2012. Lamberti, 2013). See also (Banfi, 2020. Lucifora, 2012).

<sup>67</sup> See Apol. 47 [...] magia ista, quantum ego audio, res et legibus delegata, iam inde antiquitas XII tabulis propter incredundas frugum inlecebras interdica, igitur et occulta non minus quam tetra et horribilis, plerumque noctibus vigilata et tenebris abstrusa et arbitris solitaria et carminibus murmurata.

<sup>68</sup> It's appropriate to report the insufficient attention paid by modern scholars to the definitions of the verb "excanto", bequeathed by latin sources: in the *Thesaurus*, for example it is overlooked the expression «EXCANTARE devocare cantando» (Adnot. Lucan., 6,686) that is the one, among the many received definitions, may support the settlement "foras citare, exire iubere, evocare" reported in the *Thesaurus*. See (Zuccotti, 1992).

take possession of» (not exactly in a physical sense) someone or something:<sup>69</sup> basically, a concept very close to the one expressed with the verb “ammaliare” (“to enchant”, indeed). The interpretation of “excanto” reported by Nonio Marcello<sup>70</sup> is equally far from the modern dictionaries’ definitions: the statement “excantare significat excludere” is effortlessly interpretable by considering that, the meaning with which the verb “excludo” is interpreted, is explained through mentioning the Plautus’ verse (“excantare cor”<sup>71</sup>) reported immediately after: that is the same quote that Servius uses to support the assertion according to which “excantare est magicis carminibus obligare”. This proves that every hypothetical discordance between the two definitions is, credibly, ostensible. Based on the Nonio Marcello’s equalizing between the meaning of “excanto” and the one of “excludo”, it’s good to notice the sense in which the second one is interpreted, by moving from the other definition contained in the same lexicographic work<sup>72</sup> [...] «excludere dicitur eicere. Terentius in Eunuchis:<sup>73</sup> exclusit. Revocat. Redeam? Excludere, liberare. Lucilius lib. XXVII.<sup>74</sup> primum qua virtute servitute excluderit». The locution “excantare significat excludere” returns the second verb in the meaning of “eicere”, “liberare”, “exigere”: that is the sense of “separate” (on one side by freeing and on the other by seizing it) something physical or spiritual from the body that contains it.<sup>75</sup> The idea itself about abstraction (detachment), proper to the verb “excludo”, can be found in the medical terminology, in which “exclusio” means “emissio”, “egestio”.<sup>76</sup> The most clear evidence that the definition of “excantare significat excludere” is well-founded lies in the conception that the Latin world had about madness: unfortunately I cannot but limit the references to what relates it with the verb “excanto”.<sup>77</sup> The “furor” is inspired, precisely, by the earliest animistic conceptions [...] «vix pauca furenti subicio: insani doloris muliebris immoderatione ab statu mentis exclusus vix, inquit, etiam ipse paucis respondi, vel quod essem turbatus vel quod scirem illam plura audire non posse<sup>78</sup>». The tone of what I’m talking about, remains relegated in this place, that cannot be dismissed as a casual fact. Claudio Donato’s recourse

<sup>69</sup> See Serv., Comm. in Verg. Buc. 8,71 (excantare [...] magicis carminibus obligare).

<sup>70</sup> See Non. Marc., De comp. Doctr. 2 (excantare significat excludere).

<sup>71</sup> See Plaut., Bacch. Frag. 27.

<sup>72</sup> See Non. Marc., De Comp. Doctr. 4

<sup>73</sup> See Ter., Eun. 1,1,4.

<sup>74</sup> See Lucil., Sat. 27,49.

<sup>75</sup> Meaning here the being in an animistic manner *latu sensu* (excludere with reference to *mens, cor, virtus*). On the detachment between body and soul in the ancient religious conception, see (Dodds, 1991-1951 e 1973).

<sup>76</sup> Cael. Aur., Chron. siv. tard. pass. 5,10,117 (in which there are references to “exclusio liquidorum”).

<sup>77</sup> I can’t debate, neither *per incides*, about the different aspects of the latin conception about mental anomaly, so I generally refer you to the still interesting remarks of Zuccotti (1992).

<sup>78</sup> Tib. Cl. Donat., Interpret. Verg. ad Aen. 3,314.

to the locution “ab statu mentis exclusus” in order to define the “furiosus” (“fruens”) is recurring on the sources. The Romans explain the mental anomaly by considering the madness as a sort of detachment, a soul’s estrangement (animus, mens) from the body: a deprivation imagined not only statically as a result, but in its dynamism: in other words, it is a matter of a becoming that deprives, frees the body (eicere, liberare) and, conversely, a magical seizing (obligare).<sup>79</sup> On the basis of these arguments, which account for the meaning of “excanto” in the same manner as a spiritual kidnapping,<sup>80</sup> it’s licit to gather from the sources the elements that describes such phenomena, in relation to animistic conception about detachment or separation of the spirit from the person<sup>81</sup> or, for what’s more relevant here, the things. The definition of Nonio Marcello is to be red in the sense that the action expressed by the verb “excanto” is, in a religious-animistic context (“magicis carminibus”), the same to which the verb “excludo” refers: “excantare animam” means, in a *latu sensu* magical scope, “steal” the spirit (and specifically the mind (e specificamente il senno “ab statu mentis excludere”). It follows that, if most of the times certain dynamics are solved in the person’s insanity,<sup>82</sup> with a further analysis it’s possible to observe how they express through other signs, from the simple loss of consciousness<sup>83</sup> to the individual’s death. According to Nonio Marcello, “excantare significat excludere”, is to be red as a detachment and so, extensively, as a possession: the only common denominator of the cases in which the verb “excanto” emerges in the sources. The interpretive questions descend from the will to find the meaning of “excantare” based on a modern and basically materialistic viewpoint, capable of completely understanding the effects that the *carmina magica* can lead into the perceivable world: from this, the difficulty to attribute to the verb a simple and, especially unambiguous meaning. Ultimately, we must speak about appropriation in regard to the *excantata* being, just because this has been deprived of its vital will by the incantator: in other words he seized the object of the magical operation that, depending on the incantamentum intensity, cannot but dissolve. This doesn’t change the fact that the incantator can, beyond the *excantata* thing, turns in his favor the incantamentum as he wishes, acting against its owner, for example, by causing to him confusion or other frames of mind; in that case, it would be a second degree appropriation, capable of easing the overcoming of the mismatch between the Nonio Marcello’s definition (“excantare significat excludere”) and the Servius’ one (“excantare est magicis carminibus obligare”).

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<sup>79</sup> On the topic of the madness of «magical» origin see (Massonneau, 1934).

<sup>80</sup> See Lucan., *De bell. Civ.* 6,457 (mens [...] excantata perit) e Dracont., *De laud. Dei* 2,336 (excantavit [...] animam).

<sup>81</sup> See Verg., *Ecl.* 8,66 ss. «coniugis ut magicis sanos avertere sacris experiar sensus; nihil hic nisi carmina desunt». The ways in which the *carmina magica* actually will bring the loved man to the enchantress are explained by resorting to the detachment between spirit and matter.

<sup>82</sup> See Lucan., *De bell. Civ.* 6,458; Dracont., *De laud. Dei* 2,336; Plaut., *Bacch. Fragm.* 27 and *Propert.*, *El.* 3,3,49.

<sup>83</sup> See Liv., 34,38,7.

### 3. THE TRIAL FOR *SUPERSTITIO* AGAINST POMPONIA GRAECINA: PARTICIPATION FOR *CONCILIUM DOMESTICUM AC NECESSARIORUM*

In 57 A.C the trial for *superstitio externa* was conducted against Pomponia Graecina at the request of her husband Plautius “*propinquis coram*”

Tac., Ann. 13.32 [...] Et Pomponia Graecina insignis femina, A. Plautio, quem ovasse de Britannis rettuli, nupta ac superstitionis externae rea, mariti iudicio permissa. Isque prisco instituto *propinquis coram de capite famaue coniugis* cognovit et insontem pronuntiavit. Longa huic Pomponiae aetas et continua tristitia fuit. Tacitus, who reports the incident, doesn't give a detailed account, from which infer with no ambiguity the nature of the facts attributed to the noblewoman: although the crime's nature remains uncertain, it is however plausible that the “*insignis femina*” had embraced an extraneous cult<sup>84</sup>. The passage is interesting even also on another account: when it involves the participation of that *concilium domesticum ac necessarium* about which I've spoken elsewhere, the general legitimacy granted by Tiberius and reported by Svetonius<sup>85</sup> finds its explanation. Regarding the viewpoints about the incident expressed by the doctrine, according to Volterra,<sup>86</sup> it wasn't an actual crime but rather a behavior that, along with some circumstances, would have been liable to «*police coercive measures*». Therefore Plautius, with the assistance of *propinqui*, was just supposed to sift whether the practice of a *religio externa* had shared in licentious and immoral acts, for which it was possible to institute a public trial. The husband would investigate *not iure proprio* but by the delegation of public authority. For his part, Aldo Balducci<sup>87</sup> rejects the existence of an imperial authorization to carry out *domi* the *cognitio de “capite famaue coniugis”*, believing that the term “*permissa*” alludes «*only to a permittere derived by mores*»: therefore Plautius would have just applied a “*prisca institutio*” in order to try Pomponia Graecina, in other words the *iudicium domesticum*. Carmela Russo Ruggeri<sup>88</sup> highlights that the nature of judgment “*de capite coniugis*”, in order to recognize in the *superstitio externa* the realization of acts exposed to public persecution, not to the mere social blame: so that, precisely on the light of the public-law nature of the committed crime, the academic consider that the trial done by Plautius could have been conducted only on the basis of a delegation given by the princeps. As for Nunzia Donadio,<sup>89</sup> the idea that the city set of rules recognised a concurrent - and distinguished from the state - jurisdiction is to be rejected, deeming that the *pater familias*

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<sup>84</sup> See (Volterra, 1948). On his part Balducci (1976). About the topic in general see, recently Ramon (2015), to whom I refer for the residual literature and the different positions that still divide the doctrine.

<sup>85</sup> See Svet., Tib. 35.1 (cfr. nt. 103).

<sup>86</sup> See (Volterra, 1948).

<sup>87</sup> See (Balducci, 1976).

<sup>88</sup> See (Russo Ruggeri, 2010).

<sup>89</sup> See (Donadio, 2012).

was allowed to «be able to verify in person, before and aside from a public trial, the responsibility of his subordinates, in order to dissociate himself from their actions». It's also interesting what is noticed by Alfonso Manaresi,<sup>90</sup> according to whom the discovery on the Callistus' cemetery, on the Appian Way, of a sepulchral greek inscription «To Pomponius Graecino», probably a relative of the woman, would suggest that she, like others in her family, was christian. In the case in point the only reference emerging from the text regards the object of Plautius' iudicium, that is *de capite fama que coniugis*<sup>91</sup>: this leads to suppose that the trial didn't concern only behaviors contrary to the family's morality, enough to justify a judgment about Pomponia Graecina's reputation, but even real public crimes, such as the evil *superstitio*, if not even something worse, such as to still entail a death sentence: indeed, it would be unusual, for someone, that the *ius vitae ac necis* exercised during the principedom for transgression concerning the religious field; instead, it would be plausible that such serious measures could be provided for serious violations of the *mores maiorum*, regarding for example violent acts against the *pater familias* or the non-observance of *puđicitia*, that result unstated<sup>91</sup> in the passage. Precisely the fact that the matron was convicted of facts subjected to the state repression explains the meaning of the expression «*mariti iudicio permissa*», because it's conceivable that an authorization released by the princeps to the husband was necessary, so that the latter could carry out *domi* the judgement about the woman, that actually should have been on the responsibility of the *civitas*. Moreover, it's not doubtable that it was a real trial, since the textual references to «*cognoscere*» and «*pronuntiare*» represent further confirmations about the exercise of a jurisdictional activity, rather than a simple fact-finding investigation. Furthermore, the fact that the husband couldn't do it without an imperial proxy seems confirmed, even more so, by the legal status of Pomponia Graecina, simply *nupta* to Plautius: so the lack of a previous *conventio in manum*, usual in that period's marriages, didn't allow the spouse to exercise powers, that were proper of the *pater familias*, among which the one to judge the woman in the cases of *mores*<sup>92</sup> violation. The domestic trial, in types of crime part of the city

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<sup>90</sup> See (Maranesi, 1914)

<sup>91</sup> Although the official suppression of the *ius vitae ac necis* occurred with the Constantinian Constitution of 318 A.C, with which the killing of a son by his own father was included in the notion of *crimen parricidii*, by providing for its responsible the *poena cullei*, already in the late republican age the *pater familias* no longer exercised the *ius puniendi* supreme expression, to the point that Voci (1980) considers that, during the Principate Period, killing was never justified, recognizing only on the *civitas* «the authority to punish the most serious guilts and, in particular, the ones of public nature ». For this reason, although the *ius vitae ac necis* was not yet abrogated, it remained as «a ruin, killed by the desuetude and by the succession of imperial decisions».

<sup>92</sup> Lobrano (1984) underlines this aspect, by noticing first of all that the power of *propinqui* could be exercised only on the *sui iuris* women, that were neither in their father's *potestate* and nor in their husband's *manu*, concluding in this way that Plautius, after he was pushed by the public authority for an intervention, resorted - since he hadn't the Pomponia Graecina's hand - to the *priscus iustitutus* of



jurisdiction, finds its own legitimacy certainly not in the atavistic traditions - which mostly ruled the punitive action of the parental responsibility's holders under the *patria potestas* or the *manus* - but rather in the stated renounce of the public authority to punish that crimes, with related concession of the repression's power to families. Therefore, as Volterra<sup>93</sup> asserts, the event can indeed be compared to the one that had as its protagonist Manilus Torquatus: in both the cases, the *civitas* would have delegated to the family's leader the *ius coercitionis* against a subordinate, providing the authorization's legitimacy with the recognition of the delegates' honor and civic virtues, due to the military successes in Brittany achieved by the first one and the officium of *pontifex* exercised by the second one.<sup>94</sup> In the end, it's important to notice that the emperor just abdicated the exercise of the *potestas iudicandi* in favor of the domestic court, without stating yet which procedure the husband should follow in his *cognitio*: so Plautius, solicited to make a decision on his wife's *superstitio externa*, borrowed from the mores the domestic court's "*priscus istitutus*", settling the case "*propinquis coram*". The jury summon of the *propinqui* provides a further evidence about the particular domestic *modus iudicandi*: in fact, if still in 57 A.C. the *dominus familiae* felt the moral duty to involve his relatives in the exercise - even if delegated - of the *ius puniendi*, the domestic court could not but represent the average family repressive practice, even in the previous centuries. Once again, the serious repercussion of the *civitas* against superstition is stated by the sources, since it's considered a magical and antisocial practice, detrimental for the community's rights and most of all for the family itself.

#### 4. CONCLUSIONS

I consider the few observations gone through capable of expressing the religious deviation's concept, for the way it developed already from the decemviral codification, which returns its important traces, or even from the proto-urban age: both on the synchronic and the diachronic level, *superstitio*, magic, evil divination and *fascinum* are characterized, most of all, as rule's violations, even of public nature. As Hans Joas<sup>95</sup> notices «on the sociology and humanities level, it is possible to recognize actions that may be damaging for a general rule in force or a certain community's group». A behavior, in order to be deemed deviant, has to violate certain socially connoted norms, not necessarily codified in rules: as a consequence, with this particular interpretation, not only the criminal behaviors but also the

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*propinqui*, inspired by «a juridical tradition in his time (at least) still effective and binding». See also (Di Simone, 2021)

<sup>93</sup> See (Volterra, 1941).

<sup>94</sup> See in this sense also Voci (1980) that recognises in '*iudicio permissa*' a «legitimacy to judge derived from the imperial authority».

<sup>95</sup> See (Joas, 2006. Brelich, 2021) (dev. Sánchez-Bayón et al, 2017 e 2018).

immoral, indecorous and degrading ones - even if not illegal strictly speaking - need to be considered. The trial against Pomponia Graecina, although in its charge's indefiniteness, accounted for it. It seems to me that Francesco Lucrezi, Francesca Lamberti and Antonio Banfi illustrate the religious deviation as an absolutely punishable crime, even severely; and more, even if there is no wicked intent against the State or specific persons, however it deserves to be stigmatized, since it transgresses the shared community regulations and the conventions, often ingrained, that contribute to the peculiar society's inner features: initially confined into an agricultural-bucolic economics's context, but immediately after opened to an ampler international approach. The rule as a deviation's logical requirement, had to be acquired in the aptitude and regulate a reality that needed reorganization and defense, about the magic and various evil incantamenta in the case of the Twelve Tables. This doesn't mean that the rule is necessarily to be traced back to legal profiles, examined in their general scope as a human behavior's category, applicable in relation to its different far-reaching implementations. The rules shows, essentially, the procedural universe's distinguishing features, in the meaning that their ratio is grounded on a strong common law component which relates with the community's traditional values, resumed in the *mos* (or *habitus*). Therefore, the *religio*'s individual deviations, as an objective criteria can also violate «pre-contemplative disposition or cultural representations, valid for a community reflection that implies the existence of social rules in terms of “how it could be better”». Varro and Cicero move in this direction: the first one's *Antiquitates rerum humanarum et divinarum* and the second one's *De legibus* (in the fragments that were received) support the deviant behavior's specific evaluation by contemporary intelligence. From Varro, for example, we can deduce the privilege granted to the knowledge, since it's a fundamental requirement for an effective understanding of the polytheistic pantheon's complex system and the related rituals on institutional level: conversely, the ignorance is considered as the worst trouble, since it is the aberrant - religious and magical - behaviors' direct source. Cicero's novelty instead supports the Roman religion's need of universalization, as a function of the gradual imperium Urbis stratification. The divinity's knowledge and superiority are not exclusively identified and recognised in their cogent religious strength, but in the *sovranity* concept's majestic archetype, within the special power structure that made Rome rise as a *oikoumene* hegemonic dominion. If they didn't bring me over the limits that I setted for these pages, on closer inspection, even Seneca and Plutarch could be mentioned: the first one wrote the *De superstitione* around the middle of the First century A.C., so approximately a century after Varro and Cicero; the other one, about twenty years later, around the 70 A.C. wrote the *Peri desidaimonias*. So I'm not focusing on that, except by gathering the insistence with which they report the inexcusable insanity that afflicts sorcerers and superstitious individuals, by using a wide range of words belonging to the madness' semantic field,<sup>96</sup> as we saw by

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<sup>96</sup> Negatively connoted terms, such as *insanire*, *demenza* and *furor* emerge several times.

rereading the text of Tabulae VIII, 8a and 8b.<sup>97</sup> The individual recognition, on which every deviation lies, refers - very briefly - to the idea of a selfdetermination's personal choice, although wicked, which can involve in the individual the deposition of a detraditionalization's process to the detriment of the official state creed, jealously guarded, up to a certain time by the priestly colleges; that is, ultimately, in the name of a not very reassuring difference, along which the fine line between the allowed magic and the evil incantamenta - between the state divination and the forbidden one - is to be placed; in conclusion, the superstition's vastness comes into benign in the scope of a critical-hermeneutical perspective, necessarily acute and convincing. Such a process had to concern also, and maybe especially, the districts, where the native faiths were without a doubt many and not always in step with the official ones. The successful solution was found late in a general absorption of the several deviations, when they were compatible; the natural consequence was that the prevailing annexation's dynamics, both before and after the Constitution of Antoninus in 212 A.C., followed the path of an osmotic ideal capable of acquiring a mentality trait and the activation of an inner ideological belief that would have collapsed after the Christian Roman Empire's coming and with a completely different assessment about the religious phenomenon and the heresy.

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<sup>97</sup> A decisive directional change lies in the Codex Theodosianus, which is the first official collection of rules issued in Rome after the Twelve Tables. From the last book, it's possible to find the regulation in the subject of religion, at that point with a natural prominence toward the Catholica fides, with regard to which all the other pagan cults are compared under the same mark as an unacceptable deviation, that must be sanctioned in the legal branch. One of the most important measures of the Christian Empire concerned, for example, the divinatory practices' tacit assimilation, once considered mostly often licit, and actually as an integral part of the State religion until the accusations of magic, which made them subjected to the most serious repression, by reason of the potential subversive charge with which they could attempt the law and order. The future's control, that allowed to obtain informations about crucial political events, among which the fate about principes and the imperial domus, couldn't possibly be tolerated, especially if it was realized in the shape of private conventicles. So the atavistic fears, reported by Tacitus - and that in the early principate had produced the mass measures against the unpopular sorts of mathematici and Chaldaei (Tac., Ann. 2,32,3) - kept happening; and so, still in the Fifth Century, under Honorius and Theodosius II, the banishment of such so-called fortune-tellers from all the Empire's cities was proclaimed (CTh. 9,16,12), given the irreconcilability between astrological predictions and Catholicism.

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## МАГИЧНА БАЈАЛИЦА

Религија и девијације у старом римском праву до појаве Принципата  
О Потешкоћама у читању Tab. VIII, 8a и Tab. VIII, 8b

### Апстракт

У недостатку једног званичне и добре утемељене форме култа у прехришћанском Риму није било услова за идеолчку забрану магијске праксе. Тако да је ома толерисана све док није причињавала штету другим особама или јавним обзирима. *Vaticinatores*, као неко ко квари јавне обичаје (*mores*), увек су протеривани из града и у случају поврата стављани су у окове (*vincula*) протеривани на острво (*insula*). Ако је било ко консултовато *mathematici*, *hariali*, *haruspicias* или *vaticinatores*, у вези живота императоразаједно са оним од кога би тражио помоћ био осуђен на смрт. Закон XII таблица говорећи о *incantamenta* имају у виду зле намере појединаца. Имао је у виду кључне аспекте још увек ограниченог друштва и његова веровања која су везана за свет пољопривреде: усеве, жетву и животиње. Децемвирско законодавство кроз Tab. VIII, 8a and the Tab. VIII, 8b, елоквентно рачуна на аверзију према магији када је приказује као вештину владања духом природе у атнидруштвену сврху.

**Кључне речи:** религија девијације, *incantamenta*; *sacertas*; *superstizio externa*.

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## AMBIGUOUS LEGAL TREATMENT OF ILLEGAL STRUCTURES IN THE MACEDONIAN REAL PROPERTY LAW

### Summary

The paper analyses the legal treatment of illegally constructed structures in the Macedonian real property law since 2001, when the basic Law on ownership and other real rights came into force, until today. By analyzing the legal treatment of illegal structures, we will show that the Macedonian legislator has struggled to find a sustainable legal solution that will resolve the problem of illegal construction. As the paper will demonstrate, the illegal construction is a decades old problem that many laws have addressed, including the basic Law on ownership and other real rights. Evidently, none of the laws regulating the legal treatment illegal structures has accomplished the two main objectives that the Macedonian legislator has aimed for – putting an end to illegal construction and resolving the legal status of the existing illegal structures. The purpose of the research and the analysis in this paper is to give a critical perspective on existing regulation related to illegal structures and to pinpoint the main reasons why the issue of illegal construction persist in spite of the strict regulation intended to prevent it.

**Key words:** property, construction, illegal structures, ownership.

### 1. INTRODUCTION

Illegal construction is a phenomenon with a negative impact on the economy, the environment, the urban planning and development and the safety of people and their property. In the area of economy illegal construction has been deemed as a practice

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detrimental to the construction industry. Environmental studies have warned about the negative effect of illegal construction on the environment, especially when it is conducted in protected areas<sup>1</sup>. Illegal construction also effects urban planning and development by impeding the full implementation of zoning plans and disrupting the long-term urban planning and development process. Safety of people and their property has also been affected because illegal construction is often conducted contrary to zoning plans, safety procedures are usually being ignored and construction standards are not being upheld.

Considering the wide-spread negative effect of illegal construction there is a general consensus that this phenomenon needs to be eradicated. However, there is no foolproof or universal method for dealing with the problem of illegal construction since the source and background for emergence of this phenomenon varies in different countries and regions. It is considered that main catalysts for illegal construction are poverty and unmet housing needs accompanied with corruption and inaction on part of public authorities. Poverty and unmet housing needs may be on top of the list of reasons that entice illegal construction, but there are also cases where luxury housing, villas, resorts and industrial structures have been built illegally, in part or in full<sup>2</sup>. Corruption and inaction on part of public authorities in preventing and sanctioning illegal construction undoubtedly have a significant contribution in expansion of the phenomenon, but there are also other contributors such as: lack of precise and comprehensive regulation on construction, lengthy procedures for issuing building permits, insufficient urban planning and development<sup>3</sup> and etc. Regarding the countries and regions where illegal construction is present, it is considered that the problem of illegal construction is typical for the underdeveloped and developing countries. Generally speaking, we must recognize that illegal construction finds a favorable climate for

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<sup>1</sup> In 2019 in the city of Belgrade, Republic of Serbia, an international conference was held examining the topic of “Environmental Impact of Illegal Construction, Poor Planning and Design - IMPEDE 2019”. Main conclusion derived from the presented research on the conference is that illegal construction has a devastating effect on the environment. Various proposals were also given on how to deal with the issue of illegal construction such as: implementing zero tolerance policy for illegal construction in protected natural and cultural areas, implementing mechanisms for protection of green areas in the cities and settlements, increasing oversight on construction and adopting proactive attitude in prevention of illegal construction by state authorities. See: M. Jovanovic (2019). Review Article “*Environmental Impact of Illegal Construction, Poor Planning and Design in Western Balkans*”. Global Journal of Engineering Science. Volume 3-Issue 5. DOI: 10.33552/GJES.2019.03.000572.

<sup>2</sup> See: B. Romano, F. Zullo, L. Fiorini, A. Marucci (2021). *Illegal building in Italy: Too complex a problem for national land policy?*. Cities. Volume 112. May 2021. 103159. available at: <https://www.sciencedirect.com/science/article/abs/pii/S0264275121000573>

<sup>3</sup> On the effect of insufficient urban planning see: C. Ioannidis, C. Psaltis, C. Potsiou (2009). *Towards a strategy for control of suburban informal buildings through automatic change detection*. Computers, Environment and Urban Systems, 33(1), 64–74. doi:10.1016/j.compenvurbsys.2008.09.010.

flourishment in underdeveloped and developing countries. Such countries have higher rate of poverty and corruption and therefore there is the need and the room for illegal construction to expand. However, we mustn't neglect the fact that illegal construction is worldwide phenomenon that can also be found in developed countries such as EU member states<sup>4</sup>. Illegal construction has been identified as serious problem in EU countries such as Italy, Spain, Portugal, Greece and Bulgaria, where the protected coastline area was the most affected (J. Allen, J. Barlow, J. Leal, 2004, 175-186). The entire Balkan region is an area where illegal construction is a deep-seeded problem and many of the neighboring counties have passed regulation intended to deal with the problem.<sup>5</sup>

Considering the variety of reasons for illegal construction it is necessary to recognize that it represents a complex problem and affects more or less every country and region in the world. Since illegal construction can be result of many different reasons, dealing with the problem may require a more personalized approach that may vary from country to country. The first step in preventing illegal construction is identifying the causes that enable it. Knowing the main causes for illegal construction enables legislators to draft an appropriate regulation for prevention and sanctioning of illegal construction.

However, having the appropriate regulation accomplishes nothing if the regulation is not being enforced. The enforcement of the regulation against illegal construction requires effective institutional mechanisms and trained professionals who can correctly identify illegal construction and adequately enforce the regulation.

In the text that follows we will analyze the legislative and institutional approach in dealing with the issue of illegal construction in the Macedonian legal system in order to evaluate its consistency and effectiveness.

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<sup>4</sup> Attesting to the worldwide expansion of the phenomenon of illegal construction are international documents such as: The United Nations Pretoria Declaration for Habitat III, "Informal Settlement" (2016), UN-Habitat, available at: [The Pretoria Declaration.pdf \(unhabitat.org\)](#), and the Vienna Declaration on Informal Settlements in South Eastern Europe, signed 2004 in Vienna by representatives of North Macedonia, Serbia, Montenegro and Kosovo. In attempt to aid the resolution of the problem with illegal construction the United Nations Economic Commission for Europe prepared Guidelines for the Formalization of Informal Constructions (2019), UN, Geneva, available at: [Guidelines for the formalization of informal constructions | UNECE](#).

<sup>5</sup> Croatia regulated legalization of illegal structures in the Law on dealing with illegally built buildings (Official Gazette number 86/12). Serbia regulated the matter in the Law on legalization of structures (Official Gazette of the Republic of Serbia number 96/2015). Before this Law there was the Law on legalization of structures from 2013 (Official Gazette of the Republic of Serbia number br. 95/2013). In Montenegro the process of legalization of illegal structures is regulated by the Law on urban planning and building of structures (Official Gazette of the Republic of Montenegro number 64/2017). In Slovenia the legalization of illegal structures is regulated by the Law on construction of buildings (Official Gazette of the Republic of Slovenian number 102/04).

## 2. LEGAL TREATMENT OF ILLEGAL STRUCTURES IN THE MACEDONIAN LAW ON OWNERSHIP AND OTHER REAL RIGHTS.

The problem with illegal construction existed in the Macedonian legal system long before the enforcement of the Law on ownership and other real rights<sup>6</sup> (further: Law on ownership). Illegal structures were registered in the real estate cadaster according to the Law on survey, cadaster and registration of rights on real estate from 1986<sup>7</sup>. Data related to the illegal structures was entered in the cadaster plans. The illegal structures were marked with special signs so that they could be distinguished from legal structures in the cadaster plans<sup>8</sup>. The real estate cadaster also contained data about the illegal structures in registration sheets. However, the Law on survey, cadaster and registration of rights on real estate clearly stated that a person cannot acquire right of ownership over the illegal structure based on the fact that the illegal structure has been registered in the real estate cadaster<sup>9</sup>. The data entered in the cadaster plans and the real estate cadaster pertaining to illegal structures was for informational purposes only, and provided no legal benefits for the persons having an illegal structure. Registration of illegal structures in public records, such as the real estate cadaster, was done so that private persons and public authorities could gain insight regarding the status of the structures erected on different types of land. The registration was also done for statistical purposes so that public authorities could evaluate the expansion and location of the illegal structures in every part of the country.

When the basic Law on ownership was drafted there was an awareness that there are a lot of illegal structures in all areas of the country due to the established practice of their registration in the real estate cadaster and the cadaster plans. There was also awareness that the information about illegal structures contained in the public records was incomplete since the registration was not mandatory. Registration was only done when the Office for Geodetic Works would come across information that there is an illegal structure while performing survey activities or registration of rights on real estate. Taking all this into account the legislator decided to include regulation pertaining to illegal structures in the Law on ownership that came into force in September of 2001. It is important to note that the Law on ownership regulates construction as an original manner of acquiring ownership over the built structure, only under the condition that the construction has been performed legally<sup>10</sup>. As for the illegal structures the Law on ownership clearly states that the person who has built a structure without a building permit cannot acquire ownership over that

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<sup>6</sup> Official Gazette of the Republic of Macedonia number 18/01, 92/08, 139/09 and 35/10.

<sup>7</sup> Official Gazette number 27/86, 17/91, 84/05, 109/05 and 70/06.

<sup>8</sup> Law on survey, cadaster and registration of rights on real estate, art. 37.

<sup>9</sup> Law on survey, cadaster and registration of rights on real estate, art. 54, par. 2.

<sup>10</sup> Law on ownership, art. 116.



structure<sup>11</sup>. On the other hand, however, the Law on ownership provides legal protection for the person having an illegal structure by stating that such person enjoys equal level of protection as owners of legal structures<sup>12</sup>. This protection according to the Law extends until such time that the illegal structure is legalized or demolished. The Law on ownership also contains provisions regarding the possible legalization of illegal structures<sup>13</sup>. According to those provisions the illegal structure may be legalized if it can be incorporated in the zoning plans and if a building permit is issued in the process of legalization and the structure gets registered in the real estate cadaster. If the illegal structure is located in an area not covered with zoning plans, then legalization is possible if authorized government body determines that ten years have passed since the illegal construction was built.

The provision of the Law on ownership regulating protection for the person having an illegal structure were proven problematic for implementation by the courts. Judges argued that they cannot provide protection for persons having an illegal structure under the same provision that they provide protection for legitimate owners. Their arguments were justified because a closer look into the provision regulating petitory protection makes it clear that the basic condition for this protection to be afforded is for the plaintiff to prove that he or she holds the right of ownership. This was not the case with people using illegal structures, they could not provide a proof of ownership simply because they had no such right. After much debating, a judicial practice was established where the courts provided possessory instead of petitory protection to the people having illegal structures. To our opinion this was a solid solution since petitory protection was not enforceable and giving no legal protection was not an option because that could have led to frivolous trespass and other types of infringements by third parties.

As for the provisions of the Law on ownership regulating the legalization of illegal structures, it is important to note that these provisions were never intended to be directly applicable. These provisions imply that a special law is required that will regulate in detail the legalization process. What is also evident from the close analysis of these provisions is that they consider the legalization process to be a process of administrative nature and therefore it should be conducted by administrative body, preferably the same administrative body or bodies authorized for issuing building permits. This direction given by the Law on ownership was not immediately followed-through. Ten years passed from the day the Law on ownership came into force (September 2001) until a special law regulating legalization of illegal structures was passed, that was the Law on legal treatment of illegally built

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<sup>11</sup> Law on ownership, art. 121, par. 1.

<sup>12</sup> Law on ownership, art. 121, par. 1

<sup>13</sup> Law on ownership, art. 121, par. 2 and 3.

structures from 2011<sup>14</sup>. Meanwhile, the courts were flooded with lawsuits from people having illegal structures. They were looking for a way to legalize the status of the illegal structure under the provisions of the Law on ownership since the Law recognized the possibility for legalization. In such cases the courts found no legal base to recognize the right of ownership over the illegal structure to the plaintiffs. The court's position was that the Law on ownership is clear - only persons who built legally can acquire ownership over the erected structure by way of construction. The courts were also reluctant to conduct a legalization proceeding rightfully arguing that it is an administrative matter and not a judicial one. However, the courts didn't fully dismiss the lawsuits of persons having illegal structures, they accepted to rule on the matter whether the person using the illegal structure is the person who has built that illegal structure. Later on, these court decisions were proven very useful in the legalization process whenever dispute emerged regarding who built the illegal structure and consequently who had the right to legalize that structure.

Analyzing the provisions of the Law on ownership regarding the legal treatment of illegal structures we come across an obvious ambiguity. The Law stands clear against illegal construction determining that illegal construction cannot lead to acquiring ownership over the erected structure. Clearly the Law on ownership aims to sanction persons who have built illegally by denying them the right of ownership over the erected structure. However, the Law on ownership also opens the possibility for the illegal structure to be legalized under specific legal condition. This unavoidably leaves the impression that people who built illegally are only temporary deprived of the right of ownership over the structure, and ultimately, they will be able to resolve the problem with legalization. To our opinion this legal ambiguity only encourages illegal construction by giving hope that any illegal structure can be turned legal over time. Further on, we consider that having provisions regarding legalization of illegal structures in the basic Law on ownership is a misstep by the legislator. If the legislator intended to regulate the issue of legalization of illegal structures, then that regulation should have been in special laws only. Legalization of illegal structures has no place in a law that is intended to set the bases for the development of a contemporary property law system such as the basic Law on ownership.

### 3. LEGAL TREATMENT OF ILLEGAL STRUCTURES BY SPECIAL LAWS

After the enforcement of the basic Law on ownership modern special laws were also passed regulating particular areas of property law. Some of these special laws have addressed the issue of legal treatment of illegal structures such as: a) the Law on

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<sup>14</sup> Official Gazette of the Republic of Macedonia number 23/11, 54/11, 155/12, 53/13, 72/13, 44/14, 115/14, 199/14, 124/15, 129/15, 217/15, 31/16, 190/17 and Official Gazette of the Republic of North Macedonia number 174/21.

construction from 2005<sup>15</sup>, b) the Law on real-estate cadaster from 2008<sup>16</sup>, c) the Law on construction from 2009<sup>17</sup>, d) the Law on legal treatment of illegally built structures from 2011, e) the Amendments of the Law on Agricultural land from 2011 and 2012, f) the Law on real-estate cadaster from 2013<sup>18</sup>. Apart from the Law on legal treatment of illegally built structures whose objective was to regulate the process of legalization of illegal structures, all the other special law contained only several provisions related to the legal treatment of illegal structures.

a) The Law on construction from 2005 was the first special law regulating construction that was based on the Law on ownership. Before the Law on construction from 2005 came into force this particular area of property law was regulated with the Law on building of investment structures<sup>19</sup> which was an old regulation inherited from the socialistic legal system. The Law on construction from 2005 implemented zero tolerance policy regarding illegal structures. According to its provisions conducting construction without a building permit, or contrary to the building permit, was strictly prohibited. The investor caught building illegally, or contrary to the building permit, by the inspectors was facing strict penal sanctions and annulment of the issued building permit (if such permit was issued), accompanied with the obligation to remove the illegal structure at his or her own expense (Art. 49 and 121). The Law went so far as to declare illegal construction as a criminal act punishable with monetary penalty that could vary from 600.000 dinars up to 30.000.000 dinars (Art. 129).

However, the Law on construction from 2005 also had provisions regulating a time limited legalization of illegal structures proclaiming that all structures built before February 15 of 1968 are to be considered as structures built with a building permit (Art. 143/1). The intention behind this provision was to afford legalization for illegal structures that have been existing for a very long time, since undertaking sanctions against the people who built them was not legally possible, nor justifiable. However, the practical implementation of this

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<sup>15</sup> Official Gazette of the Republic of Macedonia number 51/05, 44/06, 72/07, 82/08, 106/08 and 117/09.

<sup>16</sup> Official Gazette of the Republic of Macedonia number 40/08, 158/10, 17/11, 51/11 and 74/12.

<sup>17</sup> Official Gazette of the Republic of Macedonia number 130/09, 124/10, 18/11, 18/11, 36/11, 49/11, 54/11, 13/12, 144/12, 25/13, 79/13, 137/13, 163/13, 27/14, 28/14, 42/14, 115/14, 149/14, 187/14, 44/15, 129/15, 129/15, 217/15, 226/15, 30/16, 31/16, 39/16, 71/16, 103/16, 132/16, 35/18, 64/18, 168/18 and Official Gazette of the Republic of North Macedonia number 244/19, 18/20, 279/20, 96/21 and 227/22.

<sup>18</sup> Official Gazette of the Republic of Macedonia number 55/13, 41/14, 101/14, 115/14, 116/15, 153/15, 192/15, 61/16, 172/16, 64/18 and Official Gazette of the Republic of North Macedonia number 124/19.

<sup>19</sup> Official Gazette number of Socialistic Republic of Macedonia number 15/90 and 11/91 and Official Gazette of the Republic of Macedonia number 11/94, 18/99 and 25/99.

provision was very difficult since people had problem proving that their house, apartment building or other structure has been built before February 15 of 1968.

Analyzing the provisions of the Law on construction form 2005 regarding illegal construction we can deduct that the intention of the legislator was to prevent illegal construction by prescribing sanctions for investors who build illegally. To that effect the Law gave building inspectors a lot of authority and instruments at their disposal to act against illegal construction whenever they encounter it. The level of authority afforded by the Law to building inspectors actually went beyond the constitutional boundaries and as a result some of these provisions needed to be amended later on. Provisions regulating the authority of building inspectors were not the only provisions in the Law that crossed boundaries. Same can be said for the provisions of the Law that regulated illegal construction as a criminal act. These provisions were also out of place. It was not up to a special law regulating a particular area of property law to venture into the area of criminal law and to determine what is or isn't a criminal act. This mistake was corrected in 2008 when the provision regulating illegal construction as a criminal act was removed from the Law on construction from 2005. At the same time amendments were made to the Macedonian Penal code<sup>20</sup> adding a provision declaring illegal construction as a criminal act punishable with prison sentence from 3 to 8 years (Art. 244-a).

Even though, the Law on construction form 2005 had very strict provisions against illegal construction and gave building inspectors authority and instruments to combat against illegal construction, these provisions had little effect in actually preventing the phenomenon.

b) The Law on real-estate cadaster from 2008 addressed the issue of legal treatment of illegal structures in two directions, first it continued with the practice of registration of illegal structures and second it also regulated one form or legalization.

According to the provisions of the Law on real-estate cadaster from 2008 the Agency for Real-Estate Cadaster was directed to register illegal structures in a special registration sheet called *evidential sheet* for illegal structures (Art. 36). The *evidential sheet* contained information about the parcel where the illegal structure was located, basic data about the illegal structure and data about the person in possession of the illegal structure. Regarding the relevance of the *evidential sheet*, the Law clearly stated that this sheet had no value as a legal instrument and it could not serve as proof of ownership over the illegal structure. Registering changes in the data concerning the illegal structure or its possessor, were also prohibited.

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<sup>20</sup> Official Gazette of the Republic of Macedonia number 37/96, 80/99, 48/01, 4/02, 16/02, 43/03, 19/04, 40/04, 81/05, 50/06, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 51/11, 135/11, 185/11, 142/12, 143/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15, 226/15, 97/17, 170/17, 248/18 and 36/23.

This Law also regulated a form of legalization of illegal structures. This type of legalization affected illegal structures that were registered in the old land registers used before the implementation of the land cadaster (Art. 128). Since the old land registers only contained data about the surface of the land and how much of that surface is covered by some type of structure, the legalization only included the ground floor of the illegal structure. This type of legalization was conducted during the process of the official implementation of the real-estate cadaster. During this process the cadaster clerks registered right of ownership on ground floors of illegal structures in property sheets by simply transferring the data found in the land register into the property sheet, without asking for any proof of ownership over the structure.

Looking into the provisions of the Law on real-estate cadaster from 2008 regarding the legal treatment of illegal structures we notice that the Law follows the same logic as the Law on construction from 2005, meaning that it doesn't register ownership over structures in property sheets without the proper documentation (building permit and adjoining documentation). The Law on real-estate cadaster from 2008 also directs the Agency for Real-Estate Cadaster to create a separate register that will be data-base for existing illegal structures. The data-base for existing illegal structures was for informational purposes and it helped the legislator to get an insight on the number of illegal structures in existence up to that point. Considering that the data for existing illegal structures was collected during the State-wide survey it can be assumed that the collected data was more precise than the data in the old land cadaster.

Same as the Law on construction from 2005, the Law on real-estate cadaster from 2008 only recognized the possibility for legalization of old illegal structures existing before the new regulation came into force.

c) The problems in the area of construction including illegal construction persisted in the years of enforcement of the Law of construction from 2005. Since the Law didn't meet the expectations, the legislator opted for drafting a new Law on construction that came into force in 2009 and remains in force presently. The Law on construction from 2009 aims to facilitate the procedures for issuing a building permit and make construction more accessible for landowners. By making legal construction more accessible the legislator hoped to lower the rate of illegal construction. As for illegal construction, the Law on construction from 2009 maintained the strict zero tolerance policy. Any construction conducted without a building permit or contrary to the issued building permit is a reason for annulment of the building permit and issuing an order for removal of the illegal structure (Art. 134). Building inspectors are authorized to halt construction whenever they determine that the investor is building illegally and to order the removal of the illegal structure. The construction inspectors are also authorized to file for criminal charges before the appropriate authorities (Art. 132).

Analyzing the effects of the regulation implemented with the Law on construction from 2009 we conclude that this Law gave boost to the construction industry offering a fairly

easy procedure for issuing a building permit and a lot of flexibility so that the issued permit can be modified in accordance to the needs of the investors. However, in spite of this, the illegal construction continued on. The problem now are not the difficulties in filing and getting a building permit, but in other contributing factors. One of the main contributing factors is the low rate in sanctioning of illegal construction. The authorities haven't been very diligent in identifying and preventing illegal construction especially in its early stages. Usually, illegal construction is identified at the final stage during the regular supervisory control. It is very common for the supervisory body during final examination of the structure to determine that the structure is not in accordance with the construction project and the issued building permit, but at that point the structure is completely built. Removing an illegal structure that has reached the final stage of construction is very costly, and if the investor doesn't have the funds, the cost is born by the municipalities. Since nobody wants to bear the costs for demolition, the illegal structures are left standing with uncertain legal fate. Another contributing factor for illegal construction is the insufficient urban planning and development. It is logical to conclude that even the easiest and accessible procedure for issuing a building permit is of no use if the construction lands are not covered with zoning plans. It is common practice for municipalities to focus their resources into preparation and passing of zoning plans for the so called "attractive locations", meaning locations gravitating around central city areas, while leaving the other, less attractive locations, undeveloped. Eventually, people get tired of waiting for their construction lands to be covered by zoning plans, and start building illegally. Although this is no justification for illegal construction it adds to understanding all aspects of the problem. Uneven urban development represents a problem in North Macedonia and affects more people who are with limited funds. They struggle finding affordable housing, because legal construction is booming, but in areas where the construction land, construction costs, and consequently the built housing units, are more expensive. The areas where construction land is cheaper usually are not covered with zoning plans. Municipalities justify this with not having enough funds for drafting and passing zoning plans. The new Law on urbanization<sup>21</sup> that came into force in 2020 doesn't do much to resolve the issue. In fact, some provisions in this Law are more likely to widen the gap. For example, the Law on urbanization affords the opportunity for private individuals or legal entities to give initiatives for drafting new or amending old zoning plans (Art. 39). This makes the whole process of drafting and amending zoning plans to appear very open and democratic. It appears that way until one comes across the provision in article 40 of the Law on urbanization where it is stated that if a private person gives initiative for drafting a new, or amending an old zoning plan that person needs to be prepared to bear all the cost generated by the process. It is not a stretch to imagine how that will work in practice and that the rich investors will be the ones to benefit from such provisions. The fear is that municipal authorities will start passing zoning plans

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<sup>21</sup> Official Gazette of the Republic of North Macedonia number 32/20.

on demand and for profit, neglecting their duty to provide their constituents with a sustainable, clean and humane designed living environment. So, what will people who can't afford to finance a zoning plan do? They will probably build illegally.

d) The door to possible legalization of illegal structures was opened in 2001 by the Law on ownership, however, detailed regulation on legalization process came into force in 2011 with the Law on legal treatment of illegally built structures. This Law had two main objectives - first to regulate the status of illegal structures by recognizing right ownership for legalized structures and second to sanction illegal structures that could not be legalized.

Subject to legalization were both categories of structures recognized by the Law on construction (first category – structures of State relevance and second category – structures of local relevance) and also communication networks and installations (Art. 2 and 2-a) built before March 3, 2011 - the day when the Law came into force. In other words, any illegal structure or an illegal part (annex, upgrade) of otherwise legal structure could potentially be legalized if the construction works have ended before March 3, 2011. The legalization included privately owned illegal structures, state-owned illegal structures and illegal structures owned by municipalities.

The legalization proceedings were conducted by the Ministry for transport and communications (for illegal structures of the first category and communication networks and installations) and by the municipalities (for illegal structures of the second category). All legalization proceedings were initiated upon request of the interested party – the person who had the illegal structure, or the illegal part of a legal structure. If several different persons filed a request for legalization pertaining to the same illegal structure, the legalization proceedings were being halted until the courts resolved the dispute between the parties by ruling on who has the stronger right to file for legalization. In these types of disputes, the courts ruled in favor of the person who could prove that he or she actually built the illegal structure and has possession over it. The conditions for legalization included: the illegal structure or the illegal part of a legal structure to be built before March 3, 2011, the illegal structure needed to satisfy the construction and safety standards, the illegal structure needed to be apt for incorporation in the existing zoning plans, and if it was built in protected areas, it needed the approval of the appropriate authority for legalization (Art. 12). The cost for legalization was less or equal to the cost for building legally. Illegal structures purposed for individual housing where legalized for the price of 1 euro per square meter, and the rest of illegal structures were legalized for a price equal to the cost of construction fees calculated per square meter (Art. 20/2/3/4). For communication networks and installations, the price was 50 euros for length up to 1 kilometer, 100 euros for length from 1 to 10 kilometers, and 150 euros for length over 10 kilometers (Art. 20/7).

The illegal structures that hadn't met the legal requirements for legalization were to be demolished according to the provision of the Law on construction (Art. 24). The same sanction applied if the person who filed for legalization performed additional construction

work on the illegal structure after filing the request for legalization. These persons also faced criminal charges (Art. 24-a).

It needs to be noted that, the Law “on paper” sanctioned persons who continued to build illegally after filing a request for legalization by denying them legalization of the illegal structure. However, in practice this rarely occurred. For one, because it took a year or more after receiving the request for legalization for the public clerks conducting the legalization proceedings to get out on the field and document the condition of the illegal structure with pictures. Second, there was no coordination and cooperation between the building inspectors and the authorities conducting the legalization proceedings, so there was no effective supervision. What actually happened in practice is that people continued to build upgrades and annexes to the illegal structure for which they filed a request for legalization and eventually legalized everything.

Analyzing the provision of the Law on legal treatment of illegally built structures in light of its two main objectives (legalizing illegal structures built before March 3, 2011 and sanctioning structures who couldn't be legalized) we note that there are some provisions that actually defeat the purpose. For one, the provisions of article 9 which declared that documenting the condition of the illegal structure on the field with picture evidence was mandatory, but omitted to give fixed timeline for this mandatory action. As we said that gave time and opportunity for people to continue building illegally. Other, very debatable provisions, are the provisions of article 5-a of the Law. One of these provisions stated that the person who filed a request for legalization may give his or her consent for another person to step in his or her place in the legalization proceedings. What this provision actually did is give people the opportunity to “trade” with the illegal structure while the legalization proceedings were ongoing. This type of “trade” was not subject to tax payment, unlike the trade with legal structures, and gave people who had illegal structures unjust advantage. Another provision of article 5-a stated that the right of legalization will be also afforded to persons who bought a structure that is in part illegal, if it was written explicitly in the sale contract that the buyer acquires ownership over the illegal part of the structure as well. This provision is wrong on so many levels – it gives validity to a contractual provision that is null and void because it was concluded contrary to the laws (Law on ownership, Law on Obligations<sup>22</sup>) and it also legitimizes the trade with illegal structures. The provisions of article 5-a also had a domino effect, because other laws also went into legitimizing the trade with illegal structures such as the Law on enforcement<sup>23</sup> (Art. 239-a). Luckily, the article 239-a in the Law on enforcement was poorly drafted and therefore remains unapplicable in practice till this day. However, there is a lot of pressure from lobby groups over enforcers to

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<sup>22</sup> Official Gazette of the Republic of Macedonia number 18/01, 4/02, 5/03, 84/08, 81/09, 161/09 and 123/13.

<sup>23</sup> Official Gazette of the Republic of Macedonia number 72/16, 42/16, 178/17, 26/18, 233/18, Official Gazette of the Republic of North Macedonia number 14/20 and 136/20.



start applying it by putting up the illegal structures for sale if the debtor has filed for legalization. Overall, the provisions of article 5-a and article 9 of the Law on legal treatment of illegally built structures created an opportunity for people to continue building illegally even after they file for legalization and to trade with the illegal structures while the legalization proceeding are ongoing without paying any taxes. The Law is not drafted to ensure that only structures built before March 3, 2011 will be subject to legalization and it doesn't ensured effectiveness in sanctioning illegal structures that couldn't be legalized. The effect is everything, except discouraging regarding illegal construction.

One of the main shortcomings of the Law on legal treatment of illegally built structures is its disproportionality. On one hand the Law is very accommodating to persons who have illegal structures, and on the other, disregards the rights of third parties. We will give few examples to evidence the disproportionality: 1. According to this Law, property disputes over the land where the illegal structure is located are to be resolved in favor of the person who has the illegal structure<sup>24</sup>; 2. Persons who have ownership, co-ownership or right of use of the land where the illegal structure is located are to forfeit those rights in favor of the person who has the illegal structure, if that structure was built while the land was owned by the State<sup>25</sup>; 3. The Law had some provision set up to protect the rights of the State and public interest when there was danger of them being infringed with the legalization<sup>26</sup>, but no provisions for protection of rights of private individuals or legal entities; 5. Determining the price for legalization to be 1 euro per square meter for illegal structures purposed for individual housing, and by doing so, making the legalization way less costly than building such structures legally.

The Law on legal treatment of illegally built structures was in force until March 4, 2021. Sometime before this date the Government began drafting a new law on legalization of illegal structures. In the draft of a new Law on legalization a new wave of legalization was proposed that was to include all structures built before January 1, 2021<sup>27</sup>. The conditions for legalization in the Draft were more or less the same, the cost for legalization however, was intended to be higher than the price of construction fees for building legally. However, after the public backlash, heated debates in Parliament against the proposed law and the refusal of the Macedonian President to sign the decree, the proposed new Law on legalization was withdrawn by the Government in May 2021.

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<sup>24</sup> Law on Amending the Law on legal treatment of illegally built structures, Official Gazette of the Republic of Macedonia number 217/15, art. 13.

<sup>25</sup> Law on legal treatment of illegally built structures, art. 12 and Law on Amending the Law on legal treatment of illegally built structures, Official Gazette of the Republic of Macedonia number 217/15, art. 13.

<sup>26</sup> Law on legal treatment of illegally built structures, art. 12, 13, 14, 17, 18.

<sup>27</sup> Draft version of a Law on regulating the status of illegally built structures, available at: 11\_1286927793Нацрт - закон\_Закон за регулирање на статусна бес.docx (live.com).

e) Inspired by the provisions of the Law on legal treatment of illegally built structures, amendments were made to the Law on agricultural land<sup>28</sup> in 2011<sup>29</sup> and 2012<sup>30</sup> to enable legalization of illegally built structures on agricultural land. The legalization was intended for illegal structures built before February 14, 2011. The conditions for legalization of illegal structures on agricultural land mirrored the conditions of the Law on legal treatment of illegally built structures of 2011. The structure needed to be built before the February 14, 2011, it needed to satisfy the construction and safety standards and it needed the consent for legalization from the Ministry for agriculture, forests and water management. If the illegal structure was located in protected areas, consent for legalization was also required from the appropriate authorities managing the protected areas.

f) Law on real-estate cadaster from 2013, same as the Law on real-estate cadaster from 2008, continued to register illegal structures *inevidential sheet* for illegal structures without recognizing any legal right for the people registered as possessors of illegal structures (Art. 159). The Law also continued to regulate the limited legalization of the ground floors of illegal structures under the condition that data about the structure can be found in the old land registers (Art. 174/2).

The phenomenon of illegal construction is very much present during the period or intense legalization of illegal structures (2011-2021), but in a generally declining trajectory. According to the data of the State Statistical Office in the period of 2011 – 2021 there has been a continual trend of illegal construction: 1412 illegal structures were registered in 2011, 95% of which belonging to private individual or legal entities; 1403 illegal structures were registered in 2012, 94.5% of which belonging to private individual or legal entities; 1275 illegal structures were registered in 2013, 98.3% of which belonging to private individual or legal entities; 1075 illegal structures were registered in 2014, 97.5% of which belonging to private individual or legal entities; 1061 illegal structures were registered in 2015, 98.4% of which belonging to private individual or legal entities; 1037 illegal structures were registered in 2016, 97.6 % of which belonging to private individual or legal entities; 762 illegal structures were registered in 2017, 99.5% of which belonging to private individual or legal entities; 955 illegal structures were registered in 2018, 98.1% of which belonging to private individual or legal entities; 866 illegal structures were registered in 2019, 98.4% of which belonging to private individual or legal entities; 685 illegal structures were registered in 2020, 99% of which belonging to private individual or legal entities; 739 illegal structures were registered in 2021, 95.7% of which belonging to private individual or

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<sup>28</sup> Official Gazette of the Republic of Macedonia number 135/07, 17/08, 18/11, 42/11, 148/11, 95/12, 79/13, 87/13, 106/13, 164/13, 187/13, 39/14, 130/14, 166/14, 72/15, 98/15, 154/15, 215/15, 7/16, 39/16 and Official Gazette of the Republic of North Macedonia number 161/19 and 178/21,

<sup>29</sup> Official Gazette of the Republic of Macedonia number 18/11.

<sup>30</sup> Official Gazette of the Republic of Macedonia number 95/12.

legal entities<sup>31</sup>. Considering the data is collected while the Law on legal treatment of illegally built structures has been enforced it remains to be seen how the trend will progress in the following years without the possibility for legalization. Also remains to be seen whether the rise in the number of illegal structures in 2021, the year when the legalization officially stopped, is coincidental or indicative of a new rising trend in illegal construction. In times when construction costs and real-estate prices continue to rise exponentially, illegal construction could scale up.

#### 4. CONSLUSION

What we can take from the analysis of the regulation pertaining to the legal treatment of illegal structure is that the Macedonian legislator has never taken a clear position on the matter.

From one perspective the legislator stands firmly against illegal construction promoting zero tolerance for illegal construction and severe sanctions for all those who built illegally. The sanctions are of different nature: there are administrative sanctions such as nullifying the building permit if the investor starts building illegally; there are sanction affecting property rights such as denying the investor the possibility to acquire ownership by way of construction and forcing the investor to bare the demolition costs; and there are penal sanctions such as prison sentences from 3 to 8 years. Institutions have been established to identify and sanction illegal construction. Primarily, that is in the purview of building inspectors, but they are also supported by other municipal and State authorities and by the courts. Overall, the legislator has set up a legal base, institutions and mechanisms to identify and sanction illegal construction.

From another perspective the legislator has done very little in identifying and removing the main contributors for illegal construction such as: uneven urban planning and development, inaction or lack of diligence on part of the authorities that have been given the duty to combat against illegal construction, lack of substantial efforts in providing affordable housing for economically vulnerable categories of people, lack of promotion of awareness about the environmental, economic, humanitarian and other negative consequences resulting from illegal construction and etc. Finally, what is most detrimental for the efforts of eradicating illegal construction is the continued practice of legalization of illegal structures promoted in various ways and by several laws, including the basic Law on ownership. The legislator not only afforded legalization, it did so under very favorable conditions for persons that built illegally over the years. As we have noted in the text, the favorable treatment went so far as to cause disproportionality between the rights and interest

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<sup>31</sup> Reports for registered illegal structures of the State Statistical Office of the Republic of North Macedonia, available at: Државен завод за статистика - соопштение: Бесправно изградени објекти (stat.gov.mk).

of people looking to legalize illegal structures and rights and interests of third parties. All of the regulation in favor of legalizing illegal structures has left the impression that sooner or later building illegally will payout.

As a result of the ambiguous legal treatment of illegal structures in the Macedonian property law the phenomenon of illegal construction continues to represent a serious problem from legal, economic, environmental, humanitarian and urban perspective.

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## ДВОСМИСЛЕНОСТ У ПРАВНОМ РЕЖИМУ НЕЛЕГАЛНИХ ОБЈЕКТА У МАКЕДОНСКОМ СТВАРНОМ ПРАВУ

### Апстракт

У раду се анализира правни третман бесправно изградених објеката у македонском стварном праву од 2001. године, када је на снагу ступио основни Закон о својини и другим стварним правима, до данас. Анализа правног третмана нелегалних објеката ће показати да се македонски законодавац трудио да пронађе одрживо законско решење које ће решити проблем нелегалне градње. Како ће се показати, бесправна градња је вишедеценијски проблем којим су се бавили многи закони, укључујући и основни Закон о својини и другим стварним правима. Очигледно, ниједан од закона који регулише правни третман нелегалних објеката није остварио два главна циља која је македонски законодавац тежио – окончање нелегалне градње и решавање правног статуса постојећих нелегалних објеката. Сврха истраживања и анализе у овом раду је да се критички сагледа постојећа регулатива која се односи на нелегалне објекте и да се идентификују главни разлози због којих бесправна градња и даље постоји упркос стриктној регулативи чији је циљ да се она спречи.

**Кључне речи:** имовина, изградња, бесправни објекти, својина.

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## DOCTOR'S FREEDOM TO CHOOSE THERAPY, BETWEEN IDEAL AND REALITY- LEGAL CHALLENGES DURING SARS-COV-2 PANDEMIC

### Summary

The COVID-19 pandemic has brought numerous challenges for all professions. However, healthcare professionals have been under the greatest pressure. From greater exposure to the risk of infection, injury or even death in the fight against COVID-19, to the inability to adequately provide medical care to the patient due to lack of adequate therapy or time to devote to each patient individually. In a situation where patient mortality is increased and when the circumstances caused by the pandemic raised the question of timely obtaining protocols for assessment, triage, testing and treatment of patients, as well as accurate instructions on providing patients and the public with information concerning SARS-CoV-2 virus prevention, certain healthcare professionals, looking for a way to help patients fight COVID-19, made decisions that needed to be legally examined. Therefore, in this paper, the authors will use the example of the use of the drug "Ivermectin" during the pandemic to analyze the legal framework of the freedom of choice of therapy that a doctor has when treating a patient. The authors will conclude that the bottom line of responsible choice of therapy is conscientious weighing of benefits and risks in each specific case, after the general conditions of performing medical activity have been met, and that the doctor is obliged to act with due care required by the medical standard. From the legal point of view, the law does not determine what and how doctors should act, but only checks whether they act in line with what and how their profession requires.

**Key words:** ethics, COVID-19 pandemic, doctor's responsibility, Ivermectin, Serbian Medical Chamber.

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## 1. INTRODUCTION

All future books on epidemiology history will surely mention 2020, and the COVID-19 pandemic will be discussed as one of the most significant health challenges ever. According to data from the Institute for Public Health of Serbia, the World Health Organization confirmed the transmission of the SARS-CoV-2 virus between humans on January 23, 2020, and declared the pandemic on March 11, 2020 (Report on Infectious Diseases in the Republic of Serbia for 2020 of the Institute for Public Health of Serbia; 2020, 27). The first confirmed case of the infectious disease COVID-19 in the Republic of Serbia was registered on March 6, 2020, and an epidemic of greater epidemiological significance was declared on March 19, 2020. Based on the data provided by the World Health Organization, at the beginning of December 2021, over 267 million confirmed cases of the infectious disease COVID-19 and over five million deaths were registered throughout the world (Report on Infectious Diseases in the Republic of Serbia for 2020 of the Institute for Public Health of Serbia; 2020, 27 and 28). Today, three years later, although the number of infected and deceased is decreasing and many countries are lifting protective measures against covid, the World Health Organization says that "the pandemic may not end until the end of 2023" (UN News, 2022).

The suffering of millions of people around the world, death and numerous medical challenges have resulted in many lessons. We can say that the COVID-19 pandemic presented a public health crisis that made it difficult to respect the right to health (Sándor, 2021, 385). Moreover, responses to the pandemic have caused significant dilemmas in the protection of a wide range of human rights that are fundamental to the physical and mental health and social well-being of the individual. In order to draw ultimate lessons from health policy and epidemiology, it is necessary to collect sufficient data, which requires some time. Nevertheless, at least when it comes to the Republic of Serbia, some lessons had to be learned during the pandemic itself. The aim of this paper is to explain, through the example of the use of the medicine "*Ivermectin*" during the COVID-19 pandemic what the right to doctor's freedom to choose the therapy implies and limitations of that freedom.

## 2. LEGAL CHALLENGES CAUSED BY DECLARATION OF PANDEMIC

The legal situation in Serbia during the pandemic was significantly determined by the state of emergency that was declared on March 15, 2020 (Decision on Proclamation of State of Emergency, 2020). The decision to declare a state of emergency was made by the President of the Republic, the Speaker of the National Assembly and the Prime Minister, and all measures deviating from the human and minority rights and freedoms guaranteed by the Constitution were prescribed by the executive power. The Constitution of the Republic of Serbia allows that during a state of emergency, the Government can prescribe measures deviating from certain human and minority rights guaranteed by the Constitution, among



which are the right to secrecy of letters and other means of communication, protection of personal data, freedom of opinion and expression, freedom of the media or the right to information (Constitution of the Republic of Serbia, Art. 99). The decision to declare a state of emergency was preceded by the Decision to declare the disease COVID-19 caused by the SARS-CoV-2 virus an infectious disease, which the Minister of Health used to issue an Order on Prohibition of Gatherings in the Republic of Serbia in closed public spaces, based on Article 52 of the Law on the Protection of the Population from Infectious Diseases (Order on the Restriction and Prohibition of the Movement of Persons on the Territory of the Republic of Serbia dated 12.03.2020; Law on the Protection of the Population from Infectious Diseases, art. 52).

Less than two months later, on May 6, 2020, the National Assembly abolished the state of emergency in Serbia, and all measures that deviated from constitutionally guaranteed human and minority rights during the state of emergency ceased to apply (Decision on Lifting the State of Emergency, 2020). Among others, the Decree on measures during a state of emergency, which stipulated the largest number of restrictions on human rights, ceased to be valid, after which the regular legal regime continued to be fully applied.<sup>1</sup> Nevertheless, the fact that Serbia was in a state of emergency certainly influenced the way legal norms were interpreted in the given circumstances. We will mention only a few situations: the unconstitutional introduction of a state of emergency, disproportionate measures restricting freedom of movement, which in the case of elderly citizens according to international standards can be characterized as deprivation of liberty, attempts to centralize information by adopting the Conclusion prohibiting the publication of information from any source other than the official one, the limitation of rights to a fair trial, the possibility of double punishment for disobeying the movement ban measures are just some of the measures that directly violated the principles of the rule of law and human rights (Belgrade Center for Human Rights, 2020, 22). Measures that were supposed to provide clear results in suppressing the spread of the virus, but also clear and unambiguous instructions to citizens on how to behave in such a situation, were, unfortunately, more adapted to the political than to the epidemiological situation in the country, which will prove to be an extremely irresponsible move which led to a multiple times higher death toll during the pandemic (Baletić, 2022).

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<sup>1</sup> On May 6, the National Assembly adopted the Law on the Validity of Decrees passed by the Government with the co-signature of the President of the Republic during the state of emergency, which, in the first article, determines which decrees passed during the state of emergency cease to be valid. It is prescribed which decrees remain in force until the adoption of the corresponding laws. Although the decrees in question are mostly related to the economy, it is envisaged that the Decree on the Application of Deadlines in Administrative Procedures during the state of emergency will also remain in force.

According to official data, since the beginning of the pandemic in Serbia, more than two million people have been infected with the corona virus, more than 17,000 have died, and more than 12 million people have been tested (Statistical data of the Ministry of Health on the COVID-19 virus in the Republic of Serbia, p.1. ). More than 3 million people (about 47 percent) received both doses of the vaccine (Vaccination against COVID-19 in the Republic of Serbia, p.1). Although vaccination against COVID-19 was started during the pandemic, conspiracy theories, a strong anti-vaccination movement, slow distribution of vaccines, tests and great pressure on health care contributed to the rapid spread of the virus. At the beginning of the pandemic, there was talk of a lack of beds in the intensive care units, but it soon became clear that there is not so much a shortage of equipment and medicines as of experts, i.e. nurses and doctors. Only from March 2020 to February 7, 2021, 89 doctors, 13 dentists and two pharmacists died in Serbia as a result of the corona virus - 104 in total, according to the data of the Union of Doctors and Pharmacists of Serbia (Union of Doctors and Pharmacists of Serbia, 2022, p.1). These data pointed to the fact that the mortality of health professionals from COVID-19 in Serbia is higher than in the countries of the region. However, it has also been shown that a certain number of doctors not only do not want to be vaccinated, but also actively participate, via social networks, in the anti-vaccination campaign (Radio Free Europe, 2022). A certain number of doctors also decided to participate in various forums and Viber groups which promoted the use of the medicine *Ivermectin*, a medicine which, when it comes to the treatment of COVID-19, is still in the clinical phase of testing as part of COVID-19 therapy (BBC News in Serbian, 2022). Several circumstances were disputable: the fact that health professionals recommend a medicine that is primarily registered in veterinary medicine for the treatment of COVID-19; the way in which they marketed that therapy, that is, information about the use of *Ivermectin* among citizens - outside the doctor's office; and the timing - in the very midst of the pandemic. Therefore, in the following part, we will explain the limits of doctors' freedom to choose the therapy for the patient, using the example of the "*Ivermectin* case".

### 3. HOW *IVERMECTIN* BECAME LEGAL ISSUE

When the media announced that there is a Viber group "Doctors and parents for science and ethics - *Ivermectin* recommendations" which includes about 11,000 members and in which some Serbian doctors and some professors of the Faculty of Medicine of the University of Belgrade share scientifically unfounded information and advice about the use of the medicine *Ivermectin* for the treatment of COVID-19, it took almost a year for anyone from the competent institutions to react. *Ivermectin* is a medicine that is on the "D" list of medicines of the Republic Health Insurance Fund (RHIF), which means that it belongs to the group of unregistered medicines that do not have a license to be sold in Serbia, and are necessary for diagnosis and therapy (Valid "D" list of medicines RHIF, 2022). In Serbia, it is registered for both human and animal use, and *Ivermectin* tablets are prescribed to people

exclusively for the treatment of certain skin diseases, and in that case it is given only with a prescription, at the expense of the RHIF. However, during 2021, citizens of Serbia bought it "illegally", in agricultural pharmacies but also in some regular pharmacies and consumed it to treat the Coronavirus. What particularly contributed to the popularity of *Ivermectin* was the aforementioned Viber group, which included several dozen doctors and where the doctors themselves claimed that the medicine had helped them personally.

In a large number of countries, this medicine was in great demand for the treatment of Covid-19, so the health authorities in the United States of America<sup>2</sup>, Great Britain and the European Union conducted numerous studies and determined that there is not enough evidence for the use of this medicine against COVID-19, and the United States Food and Drug Administration (FDA)<sup>3</sup> (Official announcement FDA, 2021), the European Medicines Agency (EMA) (Official announcement EMA, 2021), the World Health Organization (WHO) (Official announcement WHO, 2021), and other leading scientific communities around the world unanimously appealed not to use *Ivermectin* to treat COVID-19 (Alam, M. T. et al. 2020, 2; Vučić, 2021, 1). *Ivermectin* is therefore not approved for the treatment of COVID-19 patients both in Serbia and in the world by any relevant official health institution or agency. Despite this, thousands of supporters in Serbia, including numerous doctors and many anti-vaccination activists, continued to vigorously advocate the use of *Ivermectin* without suffering consequences from the competent institutions, and certain pharmacies, for financial and other reasons, sold this medicine to citizens without requiring a prescription, and often actively participated in its promotion without any scientific grounds. Finally, in November 2021, the Faculty of Medicine in Belgrade announced that *Ivermectin* is not effective in the treatment of COVID-19, referring to the expert opinions of the officials of the Institute of Microbiology and Immunology of Serbia and the Clinic for Infectious

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<sup>2</sup> It is true that *Ivermectin* is included in various clinical trials around the world, testing its effectiveness in destroying the coronavirus. However, the US Food and Drug Administration states that none of these studies have so far confirmed its effectiveness. Some studies have even been overturned, namely the largest and most "revolutionary" one, which claimed that *Ivermectin* significantly reduces mortality. The largest and highest quality study published so far on *Ivermectin* is the TOGETHER trial from McMasters University in Canada and it showed that there is no benefit from this medicine in the fight against COVID-19. The British BBC, dealing with this issue, states that more than a third of a total of 26 large studies on the use of the medicine for the treatment of COVID-19 were found to "have serious errors or signs of potential fraud", and that none of the others show convincing evidence of effectiveness.

<sup>3</sup> The US Food and Drug Administration (FDA) has approved Ivermectin for human use to treat certain types of parasites, such as those that cause river blindness, an infection transmitted by a certain species of river fly. The FDA also points out that medicines for animals are different from medicines for human use because the concentration of the medicine used to treat animals such as horses or cows is much stronger. The FDA also lists side effects that can occur when using ivermectin: rash, nausea, poisoning, vomiting, dizziness, stomach pain, facial swelling, diarrhea, etc.

Diseases (official announcement of the Institute of Microbiology and Immunology of Serbia and the Clinic for Infectious Diseases, 2021). At the same time, the Medical Chamber of Serbia (hereinafter: MCS) initiated proceedings before the courts of honour of the MCS against 18 doctors on reasonable suspicion of advising and treating patients suffering from COVID-19 with the medicine *Ivermectin* (Official announcement of the MCS, 2021). The MCS initiated the procedure *ex officio*, following a report from the health inspection. Unfortunately, the public has not yet been informed about the outcome of that procedure. Therefore, in the following part, we will explain what was disputed in this case from a legal point of view.

#### 4. DOCTOR'S FREEDOM TO CHOOSE THERAPY AND ITS LIMITATIONS

The problem of determining a doctor's freedom to choose therapy is one of the more sensitive issues of medical law, which frequently causes serious disputes between doctors and lawyers. Each therapy aims to cure the patient. Causal therapy, which acts on the cause of the disease itself, is usually considered the most effective. When this is not possible, symptomatic therapy is applied, aimed at eliminating the symptoms of the disease. Therapeutic procedures may differ according to the causes of the disease. On the other hand, surgical treatment differs from orthopaedic treatment or the application of a specific regimen, medications, etc. (Đurđević, 1998, 227.). Which therapeutic method will give the most adequate result depends on the circumstances of the case. In principle, the freedom of a doctor to choose a therapy is based on the freedom to perform doctor's duty (Simić, 2019, 58 and 59).

The right of every citizen to health care and the right of the state to legally regulate the health care of the population, set limits to any arbitrariness of doctors. When choosing between several possible treatment methods, the doctor must, on the one hand, weigh the chances and risks, taking into account the physical, psychological and social characteristics of the patient, and on the other hand, evaluate future events, the course of which often depends on the uncertain occurrence of numerous other events, whereby experience teaches us, as Radišić states, that they are possible or even probable, but not completely certain (Radišić, 2017, 27). The nature of such extra-legal and prognostic elements does not allow their normative definition, and justifies the acceptance of the existence of a free space for the doctor to decide. The most that the legislator can objectively do is to regulate the external framework in the therapeutic freedom of the doctor, with the eventual ban of a particular possible method.

Doctor's freedom to choose therapy also has its contractual basis. The subject of that contractual relationship, except exceptionally (for cosmetic surgeries), is not the result of the work, but the work itself (Simić, 2019, 64 and 65). Therefore, by the contract, the doctor does not guarantee that the patient would be cured, or the absence of undesirable side effects, but only that they will perform the necessary medical procedures according to the

rules of the profession. The doctor proposes and implements procedures that are necessary for reliable diagnosis and treatment that is in accordance with the principles of medical ethics and the principles of humanity, conscientiously and with due care (Code of Medical Ethics of the MSC, Article 4). The freedom to choose therapy is therefore an integral part of the doctor's main contractual obligation to treat the patient. On the other hand, the Law on Health Care prescribes where the patient is treated; more precisely, that the provision of health care by a health professional is prohibited outside a medical institution, i.e. private practice (Law on the Protection of the Population from Infectious Diseases, Art. 160, Paragraph 2), and that if a health professional acts contrary to that position, the competent chamber of health professionals will revoke the health professional's license, in accordance with the law. Therefore, the prerequisite for treatment and the choice of any therapy is that the treatment, i.e. provision of health care is carried out in a health institution, i.e. private practice. The law does not recognize social networks as a place where therapy can be prescribed to a patient or as a place to treat patients.

From the point of view of modern medicine, and bearing in mind the dynamic development of medical science and technology that constantly makes new procedures and means of treatment available to doctors, it is understandable that the doctor is the one who, as a rule, determines the type and scope of their actions. Therefore, the doctor, based on their medical knowledge and experience, decides on the method of treatment. In their work, the doctor is obliged to adhere to the valid standards of medical science and ethical principles, within which they are free to choose those methods of prophylaxis, diagnostics, therapy and rehabilitation that they consider the most effective for the specific patient (Code of Medical Ethics of the MCS, Article 44, par. 2). The doctor's duty to apply only proven and scientifically proven methods does not mean that they must be guided *solely* by the ruling point of view within official medicine. Of course, this does not mean that they have the right to deviate from the standard method of treatment and not take into account the proven findings of medical science. The doctor must therefore have a real basis for the application of the method in whose effectiveness they are convinced.

Broad freedom of choice of therapy necessarily requires specific obligations of the doctor regarding their due care, which should minimize harmful effects on the patient and ensure compliance with minimum quality standards of treatment. Those standards, which depend on the rules that apply in the specific field of medicine, require taking into account both recognized professional knowledge and new medical discoveries. Every decision the doctor makes on the application of a certain therapeutic procedure implies not only their good knowledge, but also expert knowledge of other possible measures. The doctor acts with due care only if they made a decision knowing both the risks and benefits of the method they opted for, as well as the characteristics of other methods that came into consideration (especially generally recognized and attested ones). Even a doctor who gives priority to a certain therapeutic procedure must verify in each specific case whether they should choose another method of treatment, which would increase the chances of healing and reduce the

risks for the patient. If none of the more recognized treatment methods promises better chances of healing, the doctor is obliged to choose the one that is the least risky and painful, that is, in case of equally risky methods - the one that has the best odds of success. Finally, once they have already decided on a certain therapy, the doctor is obliged to carry it out without any contradictory actions.

The doctor's freedom of therapy is therefore not limitless. Jurisprudence set narrow limits to this freedom in order to guarantee a minimum medical standard and protect the patient from therapeutic adventures (Franzki, 1994, 173; Radišić, 2017, 28). True, the courts do not interfere in disputes between doctors who represent the views of different schools of medicine. However, it can still be said that the following legal point of view is valid: the more certain the knowledge of medical science, and the more reliable the successful outcome of a standard therapeutic procedure, the more the doctor is bound to it and has a stronger obligation to state the reasons why they seek to digress from it (Franzki, 1994, 173; Radišić, 2017, 28). The medical standard does not always include only one single rule of correct behaviour, but may also indicate the possibilities of different treatment methods. The doctor is free to choose those diagnostic and therapeutic measures that they believe are the most appropriate and effective for the specific patient. They do not always have to choose the "safest path," but a greater risk must have its justification in the particularities of the specific case or in more favourable prognosis of healing (Laufs, 1999, 626; Radišić, 2017, 28). The doctor's freedom of therapy has its limits where the superiority of another procedure is generally recognized. Not applying it in such a case would be a mistake that even the patient's consent could not rule out (Rumler-Detzel, 1998, 1009; Radišić, 2017, 28). In principle, a doctor can also apply new treatment methods that are still in the testing phase, if they are able to justify it by responsibly weighing the chances and risks for the patient (Steff, Pauge, 2006, 93; Radišić, 2017, 28). On the other hand, if the new method is less risky, if it burdens the patient less or offers a better chance of healing, and the medical science does not essentially dispute it, then the outdated method no longer meets the quality standard and its application should be considered a mistake (Jaziri R, Alnahdi S., 2020, 7; Radišić, 2017, 28). Also, the doctor must be aware of the limits of their professional abilities and capabilities and should not exceed those limits (Code of Medical Ethics of the MCS, Article 12). The doctor also has the right to refuse treatment and refer the patient to another doctor if they believe that they are not skilled enough or do not have the technical capabilities for successful treatment, or if the patient refuses to cooperate, except, of course, in the case when it is necessary to provide emergency medical assistance (Code of Medical Ethics of the MCS, Art. 57).

Therefore, we can say that the medical standard in the actions of doctors during the treatment of a patient does not oblige doctors to unconditionally respect the standard of treatment, because that would be incompatible with the principle of freedom of choice of therapy methods (Laufs, 1999, 627). Deviation from the standard is not characterized as an error in the case when the doctor considers that the condition of the patient requires it. Blind

adherence to a medical standard may even constitute medical malpractice. According to the German theory, the medical plausibility of the reasons for deviating from the standard is a decisive factor (Hart, 1998, 13; Radišić, 2017, 28). As Radišić states, the freedom to choose a therapy and the space for evaluation are necessary both for the protection of the patient and the doctor, because there is no standard patient, with a standard disease, who could only be cured by a standard doctor, with a standard procedure" (Radišić, 2017, 28).

As a rule, the doctor resorts to deviations from the recommended medical standard when adjusting the therapy to the established diagnosis. In order to apply an uncommon method of treatment, it is necessary that the doctor not only informed the patient about it, but also that this method of treatment became the content of the doctor-patient contract on treatment (Judgment of the German Federal Supreme Court of 23.09.1990. p. 633.). From the point of view of the doctor's responsibility, the permissibility of such deviations is assessed according to the same rules that apply to the so-called experimental treatment, i.e. the application of a new therapy that has not yet been sufficiently tested (Radišić, 2017, 28; Stjepanović, B, Čović, A., 2022, 171). The basic assumption in the admissibility of experimental treatment lies in a balanced ratio of benefits and risks. It starts from the severity of the disease and the prospects for its healing. Experimental therapy can be accessed only after examining the patient, taking anamnesis, obtaining informed consent from the patient and providing information about alternative treatment options as well as the reason and grounds for experimental therapy in accordance with the Law on Patients' Rights. Similar to the problem of experimental treatment, the freedom to choose a certain therapy is subject to special rules when it comes to the so-called comparative therapeutic studies and scientific-medical experiments. Their specificity lies in the fact that the goal of undertaking a certain therapy (in order to administer a certain medicine, or a medical procedure on a patient, etc.) is not primarily aimed at curing or reducing the pain of a specific patient, but serves to provide an answer to a certain question of "principle", that works in the general interest. The admissibility of comparative therapeutic studies and clinical trials of medicines and medical devices presupposes a whole series of conditions that are always prescribed by law (Agency for Medicines and Medical Devices).<sup>4</sup>The doctor must constantly make sure that the risk to the patient's health has not increased beyond the expected limit, and if this is the case, such treatment or research must not be continued, both for the sake of the patient and for the sake of the entire health care (Popović, 2021, 225). A

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<sup>4</sup> Medicines and medical devices, which are used in human medicine, are tested in accordance with the principles of ethics and with the mandatory protection of personal data of persons who are subjected to testing.

Medicines used in clinical trials must be manufactured in accordance with Good Manufacturing Practice guidelines and marked with the inscription: for clinical trials.

The Agency for Medicines and Medical Devices receives requests from sponsors for conducting clinical trials of medicines, namely: phases I, II, III and IV.

doctor must always be aware that any frivolous, dishonourable, humiliating and other action inappropriate for a doctor affects other doctors and health care as a whole (Code of Medical Ethics of the MCS, Art. 22).

## 5. CONCLUSIONS

Bearing in mind the described limits of the freedom to choose therapy, when it comes to the group of doctors who, through the Viber group and social networks, advised citizens to take the medicine *Ivermectin* for the treatment of COVID-19, we can conclude the following. Each doctor is free to choose those diagnostic and therapeutic measures that they believe are the most effective for a specific patient. Within the limits of their professional competence, they are autonomous and independent in the performance of their calling, and they bear personal responsibility for their work before patients and society (Article 13, Code of Medical Ethics of the MCS, Statute of the MCS, Article 195). They do not always have to choose the "safest path," but any greater risk must have its justification in each specific case and must lead to more favourable prognosis of healing. The essence of a responsible choice of therapy is a conscientious weighing of the benefits and risks in each specific case, after the general conditions of medical practice have been met. Therefore, if a new medicine is introduced, beyond the existing treatment protocol for COVID-19, the benefit and risk for each specific patient must be considered, because there is no "standard patient" who is treated with "standard therapy".

In the specific case, the doctors did so contrary to the legal obligation that the treatment of the patient must not take place outside the health institution and private practice (Article 160 of the Law on Health Care of the RS) and by doing so violated the provisions of the Statute of the Medical Chamber of Serbia on acting in accordance with the provisions of the law regulating health care, which violated the professional duty of the Medical Chamber of Serbia (Article 195 of the Statute of the Medical Chamber of Serbia). They advised treatment with a certain therapy without first taking the history of the patient/s, without conducting an examination and diagnostics; making a diagnosis; recording the prescribed medical documentation on the patient/s health condition and treatment, etc. which represents the obligations that each doctor assumes when treating a patient or advising any therapy. The Code of Medical Ethics prescribes that every doctor should influence the development of the health culture of the population, in their action in the workplace and in public life, as well as participate in the planning and implementation of measures for the prevention of diseases, and in the suppression of backwardness, superstitions and quackery (Article 10, Code of Medical Ethics of the MCS). Failure to act in accordance with the provisions of the Code of Medical Ethics entails the disciplinary responsibility of the doctor (Article 195, paragraph 1, point 2, of the Statute of the Medical Chamber of Serbia).

The duty of every doctor during the pandemic was to educate the population about the true purpose of *Ivermectin* and the reasons why it is not a prevention or an adequate remedy



against the coronavirus, instead of advising its use. If they believed that the medicine *Ivermectin* should be included in COVID-19 therapy, they should have known that all medicines and medical devices used in human medicine are examined in accordance with the principles of ethics and that the Agency for Medicines and Medical Devices is the competent institution that receives requests from sponsors for conducting clinical trials of medicines. Also, they could have addressed the Ethics Committee of Serbia.<sup>5</sup>As a competent body, it takes care of the provision and implementation of health care in accordance with the principles of professional ethics, respect for human rights and values, and the rights of the child, at the level of the Republic of Serbia. It is competent, among other things, to give opinions on disputable ethical issues that are important for the implementation of scientific, medical and public health studies in healthcare institutions in the Republic of Serbia and to give opinions on clinical trials of medicines in a procedure that is carried out simultaneously with a procedure of consideration of the request for approval of the clinical trial of a medicine before the Agency for Medicines and Medical Devices of Serbia.

And finally, if all these mistakes have already been made, the only right thing would be to make those mistakes public because it will contribute to the demystification of medicine and the strengthening of trust between doctor and patient, which is the basic assumption of treatment (Radišić, 1998, 241; Simić, 2019, 239). The feeling of guilt because of a mistake will rarely be able to suppress the fear of responsibility that does not allow the truth to be revealed. It depends, mostly, on certain characteristics in the personality of the doctor himself: on the extent of their humanity and reason, on their conscientiousness and love for the profession and the patient. However, it is rightfully said that "only a good man can be a good doctor".

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РЕАЛНОСТИ - ПРАВНИ ИЗАЗОВИ ПАНДЕМИЈЕ ИЗАЗВАНВИРУСОМ  
*SARS-COV-2*

**Апстракт**

Пандемија COVID-19 донела је бројне изазове за све професије. Ипак, здравствени радници били су под највећим притиском. Од повећане изложености ризику од заразе, повреде или чак и смрти у условима борбе против COVID-19, до немогућности да на одговарајући начин пруже медицинску негу пацијентима због недостатка адекватне терапије или времена да се посвете сваком пацијенту посебно. У ситуацији када је повећана смртност пацијената и када се због околности изазваних пандемијом поставља питање благовременог добијања протокола за процену, тријажу, тестирање и лечење пацијената, као и тачних инструкција о пружању информација о превенцији вируса SARS-CoV-2 пацијентима и јавности, поједини здравствени радници су трагајући за начином да помогну пацијентима у борби против COVID-19 доносили одлуке које је потребно правно испитати. Ауторке ће зато у овом раду на примеру употребе лека „Ивермектин“ током пандемије и анализирати правне оквире слободе избора терапије коју лекар има током лечења пацијента. Ауторке ће закључити да суштина одговорног избора терапије представља савесно одмеравање користи и ризика у сваком конкретном случају и то након што су испуњени општи услови обављања лекарске делатности као и да је лекар дужан да поступа са пажњом коју медицински стандард од њега тражи. Са правног становишта гледано, право не одређује лекарима шта и како треба да раде, него само проверава да ли раде оно и онако шта и како захтева њихова струка.

**Кључне речи:** етика, пандемија COVID-19, одговорност лекара, ивермектин, Лекарска комора Србије.



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## MUNICIPAL FEES AS A FORM OF LOCAL SELF-GOVERNMENT FINANCING IN THE REPUBLICA OF SRPSKA

### Summary

Taking into account that the jurisdiction over public functions (expenditures), and in this connection the issue of jurisdiction over public revenues required for the execution of the mentioned functions in all modern countries, especially in complex countries such as Bosnia and Herzegovina, represent one of the most significant issues, the aim of this paper is to determine the extent to which fees are used as a financing instrument for local self-government units, with special reference to the local self-government in the Republic of Srpska. The analysis process starts with a detailed analysis of existing legal solutions and requirements that are in force in the Republic of Srpska. In this sense, the paper will review the normative solutions of certain fees in the national tax system and present their significance in the context of public revenues, with the aim of giving certain recommendations to improve current practices and influence the improvement of the efficiency and effectiveness of the functioning of local self-government units through the upgrading of existing legislation in the Republic of Srpska.

**Key words:** fees, local self-government, financing.

### 1. ON THE CONCEPT AND TYPES OF FEES

The legal nature of fees is still causing certain contrasting understandings in Financial Law. Jovan Lovčević wrote about fees as parafiscalities, defining parafiscalities as tax-related public revenues, *i.e.* as payments that are not collected from all individuals with the appropriate economic power, but only from those members of the social group who are connected by a common economic or social interest, and on the basis of which the collected income is always destined, *i.e.* intended for the financing of a specific task of an economic or

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social nature (Lovčević, 69-70). There seems to be a consensus on the view that fees can be considered a type of parafiscal public revenue (Raičević, 2008, 277; Gnjatović, 1999, 93; Vukša, & Ristic, & Dinčić, & Belokapić, 2012, 73).

Generally speaking, in the literature can be found understandings about the heterogeneous legal nature of fees, and most often for several reasons. First, when imposing, collecting, and controlling the collection of fees, the law regulating the tax procedure is not always applied; instead of it, the laws regulating the general administrative procedure or the enforcement and security interest procedure are applied, which is not the case with other public duty revenues. Second, fee revenues are not always public revenues that are revenues of central government's budget, but in some cases belong to entities that do not represent institutional units of the general government sector. Thirdly, the methodology for determining the fee amount is uneven - the fee, like the stamp duty, is imposed on the basis of state *imperium* and is paid for the right that the payer receives from the state. However, when applied to the fees, it is not necessary to have a visible connection between the compensation and the costs of providing a specific public service. This argument can be contested given that even with stamp duties there does not necessarily have to be this kind of correlation. There is also an understanding that a fee amount is measured in an equivalent amount according to the costs of maintenance, revitalization, and improvement of the utility properties of public goods, for the use for which they are paid (Trklja, 1998, 285). Fourth, many fees represent, in fact, income from the lease of "non-produced state property" such as forest or water use fees, where the amount of fees is determined by the state on the basis of authority, and not on the basis of a contract with the oblige. Popović considers that fees can be classified differently depending on their public financial essence - some as taxes, others as stamp duties. If the connection between the amount of the fee and the benefit that the payer obtains from the use of the public good is weak or non-existent, regardless of its legal name, in its public financial essence the fee is a tax. (Popović, 2022, 11-14).

Therefore, the fees represent a specific type of fiscal public revenue whose appearance is related to the need to solve certain non-fiscal goals, such as environmental, urban, or economic (Bird, 1997, 36) (Kitchen & McMillan & Shah, 2019, 363-364). In this sense, fees, as already mentioned in the paper, differ from taxes on the one hand, and from stamp duties on the other hand. They can be determined as a legally established price for the use of a good of general interest, with the remark that the fee amount paid does not represent a market price, but rather an administrative price determined by state authorities or organizations entrusted with public authority (Milošević & Vasiljević Poljašević & Kulić, 2018, 352).

In addition, different conceptual determinations of fees often occur when translating the term "fee" from foreign terminology, which leads to, *grosso modo*, different understandings of fees as non-tax duties. This is the reason for a different approach to the classification of fees both in theory and in practice. According to Bird, fees can be classified into at least three categories, namely: (1) service fees, (2) public prices, and (3) specific benefit taxes (Bird, 2000, 4).



Under service fees, Bird means fees such as those for licenses (marriage, business, for keeping dogs, vehicles) and various less significant fees charged by local self-governments for performing specific services, such as, for example, registration of marriages or issuance of duplicates of certain documents. Those fees represent reimbursement of costs to the public sector.

On the other hand, public prices refer to local self-government revenues from the sale of private goods and services, such as, for example, public utility fees, fees for entry into recreational facilities, etc. Those goods and services are sold at market prices, i.e. at prices from which the subsidy element is excluded.

The third category of fees, according to Bird, are specific benefit taxes. The income collected on this basis differs from the previously mentioned two types of fees in a way they do not derive from the provision or sale of certain goods and/or services to a private individual. Unlike public prices, which are voluntary payments, special benefit taxes represent compulsory contributions to local revenues. Special benefit taxes are (at least in theory) in a certain way related to the utilities received by the taxpayer. Most of these duties are charged either on the estimated value of the real estate or on some characteristic of that property, such as surface area, frontage, or location, i.e. they represent taxes on the increase in the value of land, additional property taxes due to e.g. access to sewage or street lighting, construction fees, demarcation fees, etc. The same division is stated in (Slack & Quan Zhang, 2009, 33), a different division is given by (Boyle, 2012, 7).

In the Republic of Srpska, in accordance with the provisions of Article 7 paragraphs 2 and 3 of the Law on the Tax System of the Republic of Srpska (Law on the Tax System of the Republic of Srpska, art. 7) all compulsory, non-returnable duties for which the taxpayer does not receive a direct benefit or counter-service are considered tax duties, while non-tax duties are considered to be duties for which the taxpayer receives a direct benefit or counter-service. In further provisions of the Law, specifically Art. 7, all fees are defined as non-tax duties. The Law stipulates, among other things, that tax and non-tax duties can be imposed, abolished, and changed exclusively by law (as well as incentives, exemptions, and reductions of the base or rate).

Bearing in mind that the goal of this paper is to analyze the laws that regulate certain, different fees within the Republic of Srpska, but also to show the role and importance of fees in the financing of local self-government, in the continuation of this paper, fees in the Republic of Srpska will be presented according to two criteria, depending on the level of government that is authorized for their regulation and depending on the affiliation of the income collected on the basis of fees.

## 2. INSTITUTIONAL FRAMEWORK OF FISCAL AUTONOMY OF LOCAL SELF-GOVERNMENTS IN THE REPUBLIC OF SRPSKA

In order to understand the tax system, and consequently the system of local self-government financing in Bosnia and Herzegovina and the Republic of Srpska respectively, it is necessary to first point out certain specificities of the constitutional and legal system of

BiH. Bosnia and Herzegovina consists of four levels of administrative power, namely the joint institutions of Bosnia and Herzegovina, the Republic of Srpska, the Federation of Bosnia and Herzegovina, and the autonomous administrative unit in BiH under the international administration - Brčko District. Also, within BiH there is a different constitutional and legal organisation of the entities in such a way that the Republic of Srpska is organized as a unitary state, while the Federation of BiH is decentralized into ten cantons, i.e. it is organized as a federal state (Milošević, & Vasiljević Poljašević & Kulić, 207-218; Antić, 2008, 240-314; Jović, 2012, 262-311). Furthermore, the socio-economic, political, and territorial organization of BiH, as well as the relations between all levels of government within BiH, are regulated by the Constitution of BiH, in such a way that BiH is organized as a decentralized state with significant competences of the entities, i.e. the Republic of Srpska and the Federation of BiH, and with very competence of the state union of Bosnia and Herzegovina. In this way emerged a much stronger constitutional position of the entities in relation to the joint institutions of BiH, whereby, *de facto* and *de iure*, the entities of BiH were determined by the Constitution as bearers of original fiscal sovereignty, while BiH is the bearer of derived fiscal sovereignty. The only original fiscal sovereignty that is immanent to BiH is in the sphere of customs policy. This implies that all other tax policies, including the system of social contributions, taxes, and fees, are entirely under the jurisdiction of the entities. However, over time, the transfer of competence from the entities to the BiH level brought the entire sphere of indirect taxation under the jurisdiction of BiH.

Apart from the central and sub-central levels of government in BiH, there is also a level of local self-government. On the one hand, the Federation of BiH consists of 10 cantons with a total of 58 municipalities and 22 cities. On the other hand, in the Republic of Srpska there are 53 municipalities and 11 cities. In accordance with the constitutional competences, the regulation of local self-government and all important issues related to it in BiH is under the exclusive jurisdiction of the entities. Furthermore, it is important to point out that the local self-government in BiH has been developing following the internal organization of the entities, i.e. following two very different subsystems. That is why there is an unequal treatment of local self-government units in entities, which is reflected both in the asymmetric responsibilities they have and in their different relationship with other levels of governance.

If we analyse only the fiscal sovereignty in the Republic of Srpska, then it is evident that the Constitution of the Republic of Srpska determines the fundamental principles for regulating the tax system. It defines taxes and fees as public revenues, as well as other revenues established by law (Constitution of the Republic of Srpska Chapter III, art. 61-63). Furthermore, in Art. 68 of the Constitution, within the chapter Rights and Duties of the Republic of Srpska, is clearly stated that the competence of the Republic of Srpska is, among other things, to regulate and secure the tax system. Respecting the provisions of the Constitution, as well as the provisions of the Law on Local Self-Government (Law on Local Self-Government), we can say that the original fiscal sovereignty in the Republic of Srpska is in one part complete and indivisible, and as such is held by the Republic, while in its other

part fiscal sovereignty is divided between the Republic and local self-government units.

The Republic has delegated part of its sovereignty to the local self-government units in a way that local self-government units have the right to impose and establish certain duties, or to, for example, determine the rate that will be applied in the area of their jurisdiction within the range of rates previously imposed by the central authorities. Local self-government units have the right to independently impose and regulate the following revenues: city/municipal administrative fees, various communal fees, construction land development fees, etc. Therefore, bearing in mind the system of distribution of public revenues in the Republic of Srpska, the non-tax revenues of local self-government units include a part of the revenues from fees for changing the use of agricultural land, special water management fees, forest use fees, etc. On the other hand, non-tax revenues of local self-government units include income from interest on funds in bank accounts, income from term funds, income from own activities, income from leasing property of the local self-government unit, income from administrative, various communal and residence fees, urban construction land development fee, rent, fee for the use of forests and forest land - funds for the development of non-developed parts of the municipality obtained from the sale of forest assortments, fee for the use of communal goods of general interest, income based on fines, etc.

### 3. MUNICIPAL FEES IN THE REPUBLIC OF SRPSKA

The Law on the Budget System of the Republika Srpska (Law on the budget system of the Republic of Srpska) has regulated, among other things, the distribution of public revenues in the Republic of Srpska. In accordance with the provisions of the Law, the revenue of a local self-government unit consists of in one part of the revenue that is shared between the central and local authorities and other beneficiaries, and in the other part of the income that represents exclusively the income of the local self-government unit (Law on the budget system of the Republic of Srpska, art. 11). Taking a closer look at the provisions of the Law, it is evident that in the Republic of Srpska fees, as specific public revenues, are included in both groups of revenue. Bearing in mind the number of fees in the Republic of Srpska, and considering the possible scope of this work, the authors will analyse the basic elements of only a certain number of fees.

#### 3.1. Fees, the collected revenues of which are shared between the different levels of governance in the Republic of Srpska

Fees, the basic elements of which are regulated by the central government in the Republic of Srpska include, among others, fees for changing the use of agricultural land, fees for leasing state-owned agricultural land, water use fees, concession fees, forest use fees, legalization fees, etc.

### 3.2. Fee for changing the use of agricultural land

The obligation to pay the fee for changing the use of agricultural land is defined in the Law on Agricultural Land (Law on Agricultural Land, Art. 30 *Official Gazette of the Republic of Srpska*, no. 93/06, 86/07, 14/10, 5/12, 58/19, 119/21. and 106/22; *Official Gazette Bosnia and Herzegovina*, no. 16/20). As the fee payer is designated an investor who pays a one-time fee when submitting a request for a change of use of agricultural land, for the entire construction plot that is defined by locational and urban-technical conditions. Only in the event that the change of land use is made for an object that is subject to legalization and for which, according to the legal regulations in the Republic of Srpska, it is not necessary to obtain location conditions or prepare urban planning and technical conditions, the fee will be determined on the basis of data on the plot from the geodetic survey situations of the actual state of the illegally built object. The amount of this fee is determined by the amount of cadastral income for that land for the current year increased by 100-500 times depending on the land cadastral class. Exceptionally, in the case of a temporary change of use and when it is planned in a re-cultivation project for the land to be used as agricultural land, the fee will be determined at half the amount that would have been determined had it not been for a temporary change of use (art. 33, Law on Agricultural Land). Further, Art. 36 of the Law provides for cases when, in accordance with the exemption decision of the competent authority, the fee is not paid, i.e. in the following cases: (1) if the agricultural land of which the change of use is made is located in a rural area, i.e. when it is outside the urban zone and which will be used for the construction, reconstruction, or legalization of a family agricultural household residential building with an area of up to 500 square meters, in order to improve the living conditions of that household; (2) if the change is done in order to determine the location of the cemetery or its expansion, as well as due to the construction of religious building; (3) if the agricultural land is used for the construction of facilities that serve for flood defense, drainage and irrigation of the land; (4) in the case of watercourse regulation in the function of agricultural land development; (5) in the case of a change of use due to the construction and expansion of field roads that contribute to a more rational use of agricultural land; (6) for afforestation of arable agricultural land of VI, VII, and VIII cadastral class; (7) in the case of raising agricultural protection zones; (8) if the land is used for the construction of public road and railway infrastructure; (9) in the case of construction or legalisation of a residential facility for refugees, displaced persons and returnees, families of dead and missing combatants and war invalids of categories I and II on land with an area of up to 500 square meters; and (10) for the purposes of legalisation of buildings that are considered legally built in accordance with the special legislation on legalisation of illegally built buildings.

The law allowed the local self-government units to independently determine the obligation to pay, as well as the amount of fee for changing the use of agricultural land in the territory under their jurisdiction, but it has omit the option for local self-government units to exempt any fee payer from paying the part of the fee revenue that belongs to them (Law on Agricultural Land, Art. 32).

The revenues collected on basis of this fee have a strictly destined character and can be used for following purposes prescribed by the Law (Law on Agricultural Land, Art. 35) preparation of the Foundations of the municipality, land development of degraded agricultural lands, neglected, of poorer quality or infertile, for the repair and improvement of soil fertility, for the implementation of anti-erosion measures and melioration of agricultural land of lower quality, for land consolidation and finally for the implementation of the procedure for the lease of agricultural land owned by the Republic.

Distribution of revenue collected from the fee for changing the use of agricultural land is conducted in way that 30% belongs to the budget of the Republic and 70% to the budget of the local self-government unit according to the territorial principle, i.e. to the budget of the local self-government unit on whose territory is located the land that changes purpose.I

In addition to the previous fee, the Law on Agricultural Land imposed a fee for the lease of state-owned agricultural land. The payer of this fee is a natural or legal person who, according to the principle of lease, exploits the land owned by the Republic for the purpose of agricultural production, together with the buildings belonging to that land, equipment and perennial crops (Law on Agricultural Land, Art. 56). Revenues collected from the fee are distributed in the ratio of 50% to the central government budget, and 50% to the budget of the local self-government unit on whose territory the agricultural land is located (Law on Agricultural Land, Art. 62).

### 3.2.1. Water use fees

Water Law (Water Law, *Official Gazette of the Republic of Srpska*, no. 50/06, 92/09, 121/12 and 74/17) regulated, among other things, system of water management financing within the territory of Republika Srpska. The financing is arranged through four special water fees:(1) fee for surface and underground water extraction, (2) fee for production of electricity obtained using hydropower, (3) fee for protection of water protection and (4) fee for protection from water (Water Law, art.189).

The fee payers of the aforementioned special water fees are determined on several grounds, one of which is the division into: (1) legal and natural persons and other entities that perform the extraction of surface and underground water depending on the purpose of its use; (2) legal and natural persons engaged in the production of electricity using hydropower; (3) legal and natural persons and all other entities that pollute water; (4) legal and natural persons and all other entities that extract material from watercourses; and (5) legal and natural persons who have leased a public water asset.

Further, the fee payers can be distinguished according to the method for the base determination, i.e. whether the base is determined according to natural indicators (*e.g.* cubic metre of captured water, kWh of electricity produced, the amount of extracted material, etc.) or whether the base is determined on the basis of the equivalent number of inhabitants. The

law regulating calculation and payment of water use fees encompasses the Water Law, the Regulation on the method, procedure and time limits for calculating and paying, and delaying the payment of special water fees, the Decision on the rates of special water fees (Decision on rates of special water charges, *Official Gazette of the Republic of Srpska*, no. 53/11, 119/11 and 116/20) and the Rulebook on the methods of determining the degree of wastewater pollution as a basis for determining the water fee.

Special water fees, for certain groups of fee payers, types of resources, and polluters, are paid according to the rates determined by the Decision on the rates of special water fees, which, on the proposal of the Ministry of Agriculture, Forestry and Water Management is enacted by the Government of the Republic of Srpska, except in cases where the revenues from these fees belong to local self-government units, when they are enacted by local parliaments.

The Law provides for certain exemptions from paying special water fees for flood protection in the case that real estate directly serves: the needs of flood protection, air, rail and road traffic, for the provision of health care and social protection, education, culture, for cemeteries or for religious buildings; then for agricultural and forest land, if the owners or the beneficiaries of that land are parents, spouses or minors children of fallen soldiers, war invalids, and in the case of persons older than 65 or persons who are unable to work due to disability, provided that there is no other member in their household able to work or that the land is not leased to other persons.

The revenues collected on the basis of water fees have a strictly destined character. The spending of the revenues is decided by the Government, or the local parliament, with the aim of achieving sustainable management and maintaining the system of integral water management in the territory of the Republika Srpska.

Fees are paid to the Republic's special purpose account, after which distribution is made in the ratio of 70:30% in favor of the central authorities. As an exception, there is a variation from this distribution of income when it comes to the distribution of collected income based on water protection fees paid by the owners of means of transport that use oil or oil derivatives, then fees for the discharge of waste water, as well as fees for growing fish in submerged cages in surface waters. In this cases 55% of the collected revenues are paid into the Republic's special purpose account for water, 15% to the Special purpose account for the protection of the environment of the Republic of Srpska, and 30% to the special purpose account of local self-development.

### 3.2.2. Concession fees

Concession fees in the Republic of Srpska are regulated by the Law on Concessions (Law on Concessions, *Official Gazette of the Republic of Srpska*, no. 59/13, 16/18, 70/20 and 111/21). In this respect, the concession fee represents compensation of a monetary nature which can be expressed either as compensation for the assigned right, which is paid once upon

concluding the concession contract and as a concession fee for use (of object of the concession). The fee payer of the concession fee is the concessionaire, except in the case of the concession fee for the ceded right to perform activities in protected natural areas, and for the right to build and use facilities required for the performance of those activities, when the investor of the facility is designated as the payer, i.e. physical and legal persons who, as investors, build a new building or perform reconstruction, extension, or upgrading of an existing building or legalization of an illegally built building.

Depending on the subject of the concession, the concession fee for use is expressed as a percentage, in the range of 2%-8% in relation to the annual income collected from the performance of the concession activity and/or per unit of measure, and in the range from 0.3-6% in relation to the value of the planned investment in the case of concession fees for assigned rights (Law on Concessions, Article 29-31).

The distribution of revenues collected from concession fees depends on the type of concession fee. On the one hand, income from all concession fees for the ceded right belongs exclusively to the central authorities. On the other hand, the distribution of revenues collected on the basis of the concession fee for use is made depending on the level of government that grants the concession, so the revenue is divided between the budget of the Republic and the budget of the local self-government unit on whose territory the concession activity is performed. However, depending on the degree of development of the local self-government units, the ratio can be changed so that the distribution in developed and medium-developed local self-government units is made in a ratio of 30:70 % in favor of the local budget; for underdeveloped local self-government units 20:80%; and for extremely underdeveloped local self-government units in a ratio of 10:90% in favor of the local budget. The only difference from this model of distribution of revenue is the distribution of revenue from the concession fee for the use of electric power facilities, which is even more favorable for local self-government units, and implies that the revenue is shared between the budget of the Republic and the budget of the local self-government unit on whose territory performs concession activities in the ratio of 5:95%.

### 3.2.3. Forest use fees

With the aim of preserving and protecting forest assets and achieving long-term goals based on the principles of sustainable forest management, the Law on Forests imposed, among other things, certain fees as part of the means used for financing and valuation of forests. As such, the Law defines the following fees: (1) fees for the use of forests and forest land owned by the Republic; (2) fees for performing activities of general interest in privately owned forests; (3) fees for the improvement of general utility functions of forests; and (4) fees for leasing forest land owned by the Republic and fees for excluding land from forest production.

Within the scope of the fee for the use of forests and forest land owned by the Republic, two fees are distinguished: (1) fee for the use of forests and forest land owned by the Republic - simple reproduction; and (2) fee for the use of forests and forest land - funds for the development of undeveloped parts of the municipality realized by the sale of forest assortments.

The fee payer of the fee for the use of forests and forest land owned by the Republic - simple reproduction is the legal or natural person who uses the forest. The fee amount cannot be lower than 10% of the financial resources generated by the sale of forest wood assortments determined at the price in the forest "at stump" according to the user's price list. This fee is paid to the special account of users of forests and forest land owned by the Republic on a monthly basis, and they are used within the forestry area, that is, the forest farm where they were realized for the following purposes: (1) land preparation for natural rejuvenation; (2) afforestation; (3) filling of newly raised forest cultures, (4) care of forest cultures and forest stands; (5) first thinning of forest crops; (6) protection of forests from plant diseases, pests and fires; (7) design, construction, reconstruction and maintenance of forest truck roads; and (8) development of forestry foundations. Any unused funds beyond this purpose can be used for extended reproduction of forests. The only payers exempted from paying this fee are national parks, industrial and other plantations. However, with this exemption, these subjects are denied the right to be beneficiaries of financial resources collected on this basis.

The other fee is the fee for the use of forests and forest land - funds for the development of undeveloped parts of the municipality realized by the sale of forest assortments. As the fee payer is designated the user of forests and forest land that are owned by the Republic. The fee shall be paid quarterly, in the amount of 10% of the financial resources generated by the sale of forest wood assortments to the account of the local self-government unit from which the sold assortments originate.

These revenues, which in their entirety represent the income of local self-government units according to the territorial principle, are strictly destined and can only be used for the purpose of the development of undeveloped parts of the municipality from which the sold assortments originate, i.e. for the sustainable development of protected areas, according to the annual expenditure plan.

The fee for the improvement of the general beneficial functions of forests (extended reproduction) is paid by all legal entities that perform their activities on the territory of the Republic, and business units or parts of legal entities whose seat is outside the Republic of Srpska, with the exception of public institutions, humanitarian organizations, associations and foundations. The fee base is the total income of the aforementioned legal entities and is paid at a rate of 0.07%. The revenues collected represent the revenues of the central government.

The fee for the lease of forest land, expropriation of land, deforested forest and funds from illegally obtained benefits from the forest are paid by the lessees and the beneficiaries of the expropriation. The fee base is the amount of rent specified in the lease agreement.



Revenues collected on this basis represent the revenues of the central government, and are used exclusively for the purchase and establishment of new forests owned by the state.

The fee for carrying out activities of general interest in privately owned forests is paid by the owners of private forests, and the revenues collected on this basis are divided between PE "Šume Republike Srpske" and the local self-government units budget in the ratio of 80:20%. The market value of the net felled wood mass determined at the point of loading into the means of transport (freight truck route) according to the price list of users of forests and forest land in the ownership of the Republic is taken as the base for the calculation of fee. Compensation at the rate of 10% of the value determined in this way is paid during the remittance procedure, i.e. approval of forest cutting and issuance of the dispatch statement.

### 3.3. Fees, the collected revenues of which represent in complete the revenues of the local self-government units

In addition to the previously described incomes from fees, which, as stated in the paper, only partly belong to the local self-government units' budgets, in the tax system of the Republic of Srpska there are also fees whose incomes represent exclusively the income of the local self-government units. As such, the following fees stand out: (1) Fee for the use of forests and forest land - funds for the development of undeveloped parts of the municipality realized by the sale of forest assortments; (2) Urban construction land development fee (Law on Spatial Planning and Construction, *Official Gazette of the Republic of Srpska*, no. 40/13, 2/15, 106/15, 3/16- isp, 104/18, and 84/19; Rule book on the calculation of fee for the costs of the urban construction land development, *Official Gazette of the Republic of Srpska*, no. 34/14; Decree on conditions, method of calculation and payment of fee for legalization of buildings, *Official Gazette of the Republic of Srpska*, no. 97/13 and 23/16); (3) Fee based on the natural and locational benefits of the urban construction land and the benefits of the already built communal infrastructure that may arise during the use of that land (hereafter: rent); (4) Fee for legalization of individual residential and residential-business premises gross construction area up to 400 m<sup>2</sup>; and (5) Fee for the use of communal goods of general interest - communal fee (Law on communal activities, *Official Gazette of the Republic of Srpska*, no. 124/11. and 100/17).

Bearing in mind that fee for the use of forests and forest land - funds for the development of undeveloped parts of the municipality realized by the sale of forest assortments was discussed earlier in this paper, we will not elaborate it further in this part of the paper.

#### 3.3.1. Urban construction land development fee

The Law on Spatial Planning and Construction regulates, among other things, the method of financing the development of construction land, partly from income from construction land

development fees, and partly from income based on rent. Fee for the costs of development of the urban construction land in the case of a construction of a new and legalization of an illegally built building, reconstruction, extension, and upgrading of the building shall be paid by natural and legal persons who, as investors, build a new building or perform mentioned works.

As standardized costs that should be taken into account when calculating this fee are the actual costs related to the construction of communal and other public infrastructure, which were incurred due to the preparation and equipping of the urban construction land.

The urban construction land development fee base is the unit of useful area of the building expressed in square meters, contained in the project for which the building permit is issued. The Law allowed the fee payer who invested his own funds for the construction land development and who submitted a request with supporting evidence to reduce the amount of fee. On the other hand, in the process of legalization of illegally built objects, the investor, i.e. the owner of the object that is the subject of legalization, shall, accordingly provisions of the Law on Legalization of Illegally Built Buildings (Law on Legalization of Illegally Built Buildings, *Official Gazette of the Republic of Srpska*, no. 62/18 and 93/22) pay the urban construction land development fee and rent. In this case, both fees are paid in the amount that the investor would have paid if he had submitted the application for the building permit before the start of construction. However, in the latter case, the payer will be obliged to pay one more fee - the legalization fee in the amount of 20% of “regular” fees. All three fees, i.e. urban construction land development fee, rent, and legalization fee are determined in a decision made *ex officio* by the local self-government unit, and the funds are paid into the public revenue account of the local self-government unit (Law on Legalization of Illegally Built Buildings, art. 11).

### 3.3.2. Fee based on the natural and locational benefits of the urban construction land and the benefits of the already built communal infrastructure that may arise during the use of that land- rent

The very same fee payers who are liable for fees for the costs of arranging the urban construction land are designated as rent payers. The Law stipulated that the average final construction price of one square meter of usable area of residential and commercial premises from the previous year for the area of the local self-government unit is also used as a basis for calculating the rent. The stated average price per city zone is determined by the local self-government unit each year based on the estimate from the main project for building permits issued in the previous year. The final amount of the rent is determined depending on the zone in which the building is located and ranges from 1% to 6% in relation to the average final construction price. Exceptionally, in case the construction is carried out in the part of the first zone that is determined to be especially suitable for construction and in which the communal infrastructure is fully built, the rent is increased by up to 20%. In the same percentage, regardless of the zone, the rent can be increased for objects that can have a negative impact

on the environment, natural values, and cultural and historical assets (Law on spatial arrangement and construction, art. 82 para. 2-3).

### 3.3.2. Communal fee

In contrast to some communal activities, such as individual consumption of water, electricity, or thermal energy, i.e. for those communal activities where it is possible to determine the cost of use for each user through the price of communal services, it is not possible to do this directly with communal activities of common consumption. This is why the legislator imposed the utility fee that users of these services pay based on the average estimated utility bills of citizens in a certain area.

Law on Communal Activities (Law on Communal Activities, *Official Gazette of the Republic of Srpska*, no. 124/11 and 100/17, art. 21. para. 1. point a) foresees, among other things, the imposition of the communal fee to finance the performance of communal activities of shared communal consumption, i.e. which the taxpayer pays for the use of facilities and devices of shared communal consumption. As fee payers of communal fee in Republic of Srpska are defined owners of residential, commercial, or other premises, holders of occupancy rights, tenants of residential, commercial, or other premises, i.e. natural and legal persons who are users of premises and devices of common communal consumption (Law on Communal Activities, Art. 24-25). Other basic elements of communal fee, such as an obligation to pay communal fees, defining the fee base and criteria on the basis of which the amount of the fee is determined, prescribe local self-government units.

The Law on Communal Activities stipulates that the amount of fee is determined in relation to the unit into built-up usable areas expressed in square meters for residential, business, and other premises and for facilities of social standard (Law on Communal Activities, art. 23), and is paid in full for the benefit of the budget of the local self-government unit (Šimović & Rogić Lugarić, 2012, 149–178, 163-164). When it comes to exemptions from the payment of these fees, the accepted general rule is that the approach should be cautious, i.e. it should be done in such a way that the range of persons who are exempted from paying this fee is limited to those categories of citizens who are unable to fulfill the payment obligation for objective reasons. In addition, making a decision on persons exempted from paying communal fee should be preceded by the adoption of clearly established criteria for the aforementioned release (Šimović & Rogić Lugarić, 2012, 165).

## INSTEAD OF CONCLUSION

Taking into consideration that the local democracy strengthening, i.e. the decentralization of power, is increasingly being advocated and practiced around the world, the problem of financing the local self-government functions is gaining more and more

importance. Fees as public revenues appeared in terms of the need to solve various economic, urban, environmental and other non-fiscal goals. Fees, therefore, represent a relatively new instrument for local self-government financing and in recent decades have played an increasingly important role in many countries. I

It is stated in the paper that the fees, both in theory and in practice, can be classified on several grounds, but, grosso modo, the most common classification is that generated depending on the level of government that regulates fees, and depending on the affiliation of the income collected. This classification is represented in the tax system of the Republic of Srpska.

Based on the data of the Ministry of Finance of the Republic of Srpska which cover the period from 2010 to 2022, which are available to the authors of this paper, it is evident that the incomes collected by local self-government units in the Republic of Srpska based on all analyzed fees oscillated during the entire observed period in both their nominal and relative values. The total non-tax revenues of all local self-government units of the Republic of Srpska (expressed nominally) ranged from 148.55 million BAM in 2014 (when they were the lowest), up to 269.08 million BAM in 2022 (when they were the highest), with the annual average in that period amounted to 180.98 million BAM. The picture is somewhat different when non-tax revenues are expressed in percentage to the total revenues of all local self-government units in that period. In this way, non-tax revenues ranged from 28.87% in 2012 to 33.95% in 2017, with the average of 31.77%. Furthermore, when observing the part of the revenues from analyzed fees which represent the income of the local self-governments budgets (water and forest use fees, fees for changing the use of agricultural land and concession fees) it accounted for an average of 58.61% of the total collected incomes based on observed fees in the observed period.

On the other hand, when considering the individual share of income based on each analyzed fee belonging to local self-government units in the total income based on all four groups of fees, it is observed that forest fees have a relatively significant share, in the amount of 17.6 % average per year. On the other hand, although out of all eight forest fees, only 20% of the income from the fee for performing activities of general interest in forests in private ownership, as well as 100% of the income from the fee for the use of forests and forest land - funds for the development of undeveloped parts of the municipality realized by the sale of forest assortments belong to local self-government units, as much as 50.45% of all collected revenues based on forest fees were paid to local self-government units on special purpose accounts in the analyzed period.

Further, by analyzing the data of the Ministry of Finance, it is observed that the revenues based on the fee for changing the use of agricultural land in the part that belong to the local self-government units in the total collected revenues based on all fees analyzed during the observed period are the least significant in the context of public revenues, with annual average of about 1.6%. The third most significant fee for the budgets of local self-government units are water use fees. The revenues from this fee that belong to the local self-government units have

a constant share in the local revenues based on all water use charges, in the amount of 30%. But when the same income is observed in total incomes based on the four analyzed fee groups, then it is evident that the water use fees in the period from 2010 to 2022 participated on average with about 5.59% per year.

Concession fees represent the most significant public revenues from fees that belong to the budgets of local self-government units, and constitute approximately 76.53% of the revenues collected on the basis of all concession fees annually. Likewise, these revenues have the largest share in the total collected revenues in the period from 2010 to 2022 for all groups of analyzed fees, i.e. water and forest use fees, fees for changing the use of agricultural land and concession fees, and they ranged in the amount of 33.84 % on average per year. Therefore, looking at the data, it can be concluded that the revenues based on all analyzed fees of all local self-government units in their total revenues in the analyzed period constitute an annual average of about 9.25%. In other words, revenues based on the four analyzed fee groups contribute less than one-tenth in financing the functions of local self-government units.

Based on the above mentioned, it can, also be concluded that the fees do not have too much significance in the context of public revenues, although they do exist in the tax system of the Republic of Srpska and represent one of the instruments of local self-government units financing. However, this does not mean that the legislator should not work on improving the mechanisms that will lead to an increase in revenues collected from fees, especially those that represent the revenues of local self-government units. At the same time, one must not lose sight of the fact that the increase in income based on fees must not be at the expense of an increase in the total tax burden. The last mentioned is additionally emphasized in the case the intention of the policy makers, as is the case in the Republic of Srpska, is to ensure the equal growth and development of all local communities, and that the citizens of all local self-government units have approximately equal conditions for work and life.

In this sense, the recommendation of the authors of this paper is that the creators of macroeconomic policies should more consider the question of local self-government units financing, and to further analyse the distribution of income based on fees that is shared between local self-government units and other users, and that, if it proves necessary and justified, establish new fees that would be exclusively the income of local self-government units, or to increase the participation of local self-government units in already existing fees while simultaneously reducing other taxes.

Also, the recommendation of the authors is to provide more transparency in the spending of these strictly destined revenues, not only at the level of local communities, but also at all other levels of government. Finally, it is necessary to work on the promotion of the correlation between paid fees and the benefits for all citizens that are associated with the fees, so that the resistance to payment, i.e. evasion is as low as possible.

## LITERATURE

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## КОМУНАЛНЕ ТАКСЕ КАО ОБЛИК ФИНАНСИРАЊА ЛОКАЛНЕ САМОУПРАВЕ У РЕПУБЛИЦИ СРПСКОЈ

### Апстракт

Узимајући у обзир да надлежност над јавним функцијама (расходима), а с тим у вези и питање надлежности над јавним приходима потребним за извршавање наведених функција у свим модерним државама, а посебно у сложеним земљама као што је Босна и Херцеговина, представља једно од Најзначајнија питања, циљ овог рада је да се утврди у којој мјери се накнаде користе као инструмент финансирања јединица локалне самоуправе, са посебним освртом на локалну самоуправу у Републици Српској. Процес анализе почиње детаљном анализом постојећих законских рјешења и захтјева који су на снази у Републици Српској. У том смислу, у раду ће се размотрити нормативна решења појединих накнада у националном пореском систему и представити њихов значај у контексту јавних прихода, са циљем давања одређених препорука за унапређење досадашње праксе и утицај на побољшање ефикасности и ефективности функционисања јединица локалне самоуправе кроз унапређење постојећег законодавства у Републици Српској.

**Кључне речи:** накнаде, локална самоуправа, финансирање.



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## THE ACCESSION NEGOTIATIONS OF NORTH MACEDONIA TO THE EU: BETWEEN NEW METHODOLOGY AND OLD CHALLENGES

### Summary

Seventeen years long struggle of North Macedonia to open its accession negotiations with EU, finally resulted in the Intergovernmental Conference held on July 19<sup>th</sup>, 2022. Differently from any other candidate country, to make a procedural progress in its way, however, the country must change its constitution, which is the obligation arising from the bilateral agreement with Bulgaria, based on the proposal of French president Macron. While waiting for the outcome of such a procedure, North Macedonia has started the screening process in order to get a clear position of European Commission on the current state of play of the domestic legislation, institutional and administrative capacities as well as implementation/ enforcement track record, all against the relevant EU acquis and applicable standards. On its accession path, North Macedonia is obliged to comply with the 2020 enhanced EU accession methodology which brings a set of novelties in comparison with the “old methodology” applied to the candidate countries that have passed through the initial accession steps a decade ago, but also accepted to adapt to the new rules. Analyzing all aspects of the new, ie. enhanced negotiation methodology, and especially the specific role of Cluster 1, the authors in this paper also consider the necessary preconditions to be met by North Macedonia to hold the demanding pass of reform processes in accordance with the new methodology.

**Key words:** European Union, Accession Negotiations, Enhanced Methodology, North Macedonia, Cluster 1 “Fundamentals”.

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## 1. NORTH MACEDONIA EU PATH: TWO DECADES OF STRUGGLE

Two decades long, and still ongoing Macedonian trip to European Union (hereinafter: EU) has started twenty years ago, when the country was – along with other Western Balkans partners – identified as a potential candidate for EU membership during the Thessaloniki European Council summit in 2003. Its Stabilization and Association Agreement (hereinafter: SAA), the first in the region, is in force since 2004. (SAA, 2004) The state applied for EU membership in March 2004 and the Council decided in December 2005 to grant the country candidate status. Even since October 2009, the Commission has continuously recommended to open accession negotiations with North Macedonia, but for many years was unable to start accession negotiations due to the opposition of Greece. Namely, Greece was requesting North Macedonia<sup>1</sup>, to change its name, remove the Vergina Sun from its flag and gave up “Hellenisation” of its history. (Brzozovski, 2022) In parallel, due to the internal political and the rule of law crisis in 2015 and 2016, the recommendation to open negotiation process was made conditional on the continued implementation of the Pržino agreement and substantial progress in the implementation of the ‘Urgent Reform Priorities’. (Pržino Agreement, 2015)

A multi-annual blockade has been resolved under the Prespa agreement of 2018 (Prespa Agreement, 2018) when the country accepted to add "North" to its name. (Tidey, 2022) The Prespa Agreement, signed by then prime ministers Zoran Zaev (Macedonia) and Alexis Tsipras (Greece), stipulated not only the name change but also prohibited Macedonia from laying claim to the historical heritage of the ancient Macedonians (Vlada 2017; cf. Rohdewald 2018). In light of the progress achieved, the Commission repeated its unconditional recommendation to open accession negotiations in April 2018. In light of the significant progress achieved and the conditions set unanimously by the Council in June 2018 having been met, in May 2019 the Commission reiterated its recommendation to open accession negotiations with North Macedonia. (Commission, 2023)

However, this hasn't ended the struggle of North Macedonia since, after Prespa, France blocked the opening of accession negotiations with Skopje and Tirana until a new methodology for future enlargement was agreed at EU level. (Brzozovski, 2022) In March 2020, the members of the Council endorsed the General Affairs Council's decision to open accession negotiations with North Macedonia. (Council of the European Union, 2020) In July 2020 the draft negotiating framework was presented to the Member States. Anyway, in late 2020 Bulgaria took over the leading position in blocking the progress, insisting that ethnic Macedonian identity was based on identity-theft, which must end before North Macedonia can open its first negotiation chapter. (ESI, 2022) This Bulgarian initiative has

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<sup>1</sup> At the time: Former Yugoslav Republic of Macedonia (FYRM)

been founded on the 2019 declaration of Bulgarian Council of Ministers.<sup>2</sup> Bulgaria requested North Macedonia to change its constitution to recognize a Bulgarian minority as nation-building peoples and wanted Skopje to admit its language and culture had Bulgarian roots in bilateral protocols attached to the formal EU "negotiation framework". In order to resolve this deadlock situation, France had developed a draft proposal, signed up North Macedonia and Bulgaria in July 2022. The proposal confirmed that Macedonian will be an official language in the EU and obliged North Macedonia to change its constitution<sup>3</sup> to acknowledge Bulgarians among the nation-building peoples, protect minority rights, change textbooks with negative references to Bulgaria and introduce hate speech into the criminal code. Upon this signature, in July 2022, the Intergovernmental Conference (hereinafter: IGC) on accession negotiations was held with North Macedonia. How long waited and welcomed this moment could be the best illustrated by the statement of the President of the European Commission (hereinafter: EC, Commission) Ursula von der Leyen:

*“What a historic moment. Today, Albania and North Macedonia are opening the accession negotiations to the European Union, and I am so glad to be here with you. This is your success. It is your success and your citizens’ success. You and your citizens, you and your people have been working so hard to get here. You have shown so much enduring commitment to our values. You have demonstrated resilience. You maintained faith in the accession process. You strengthened the rule of law. You fought against corruption. You have free media. You have vibrant civil societies. You have done countless reforms and you have modernized your economies. You have made all these changes not just because they were necessary on your path towards the European Union, but above all because they are good for your countries. And they are already delivering a better quality of life for your people. We, the European Commission, have supported you all the way. And we will continue to do so.”* (Webalkans, 2022)

Nevertheless, this encouraging (and even too positive) assessment of the country’s situation against relevant EU acquis and standards is yet to be confirmed in the screening process that started in October 2022. More precisely, comprised of two stages (explanatory and bilateral screening) this process had been initiated and partially conducted in 2019 (explanatory stage), but stopped due to the earlier explained procedural obstacles. Considering this, EC decided to organize an update of explanatory screening for those chapters where a significant development in EU legislation has occurred since initial

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<sup>2</sup> On 9 October 2019, ahead of a European Council meeting where the opening of accession negotiations with North Macedonia was on the agenda, the Bulgarian Council of Ministers adopted a so-called “framework position” regarding EU enlargement. The framework position opened with a telling sentence: “Bulgaria cannot allow the integration of the Republic of North Macedonia into the EU to be followed by European legitimation of a government-sponsored ideology on anti-Bulgarian foundations” (Council of Ministers of the Republic of Bulgaria 2019). A day later, the Bulgarian parliament passed a similar declaration (Narodno sŭbranie 2019). For more see: (Brunnbauer, 2022)

<sup>3</sup> North Macedonia must ensure the two-third majority in its parliament to change its constitution.

explanatory screenings, but to do that for North Macedonia and Albania together. In order not to waste additional time<sup>4</sup>, the screening process is organized in a way allowing having in parallel explanatory and bilateral meetings for various negotiation chapters.

However, this exercise supposed to be a very first opportunity for North Macedonia administration to experience practical aspects of the new accession methodology in practice.

## 2. A NEW ACCESSION METHODOLOGY: WHAT DOES IT MEAN

Frequently mentioned but yet barely perceived in practice- this is how the new accession methodology can be briefly described. When the proposal to introduce this new approach had been brought to the public, the highlight of all the statements was that its very purpose is to re-establish a credible EU perspective for the Western Balkans and to make it very clear that for the Commission and for the EU as a whole, it is a top priority to have stability, peace and prosperity in the region. (Commission, 2020) In the statement of the Commissioner for Neighborhood and Enlargement, Olivér Várhelyi, the three points have been underlined under this goal, where of them was referring to the prompt approach to EU path of North Macedonia. Namely, the Commissioner commented:

*“The European Union enlargement to the Western Balkans is a top priority for the Commission. We are working on three tracks: Firstly, today we propose concrete steps on how to enhance the accession process. While we are strengthening and improving the process, the goal remains accession and full EU membership. Secondly, and in parallel, the Commission stands firmly by its recommendations to open accession negotiations with North Macedonia and Albania and will soon provide an update on the progress made by these two countries. Thirdly, in preparation of the EU-Western Balkans Summit in Zagreb in May, the Commission will come forward with an economic and investment development plan for the region.”*

Since such an approach has been introduced when some of the WBs countries have been already in the accession negotiation process, while others were waiting opening the negotiations, it is important to mention that the Council agreed on the application of the revised enlargement methodology to the accession negotiations with Montenegro and Serbia (already in in the process), after both candidate countries expressed their acceptance of the new methodology. This consequently required accommodation within the existing negotiating frameworks with both countries during the next Intergovernmental Conferences. In parallel, for North Macedonia and Albania, this new approach/methodology was applicable from the very beginning of the process.

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<sup>4</sup> "The screening will enable Albania and North Macedonia to get familiar with the rights and obligations of our union, from treaties to legislation to international agreements, you name it," von der Leyen said, promising that "we will proceed very quickly with that." (Tidey, 2022)

However, if we focus on the main elements of this statement, it is obvious that there are several issues regarding the new methodology to be addressed: a more credible process, a stronger political steer/monitoring, dynamics determined by the cluster approach and predictability of the process.

### 2.1. A more credible process

Even if it may, at the first glance, look like of only declaratory nature, actually the situation is quite different. Namely, credibility here refers to the **stronger focus on fundamental reforms**, starting with the rule of law, the functioning of democratic institutions and public administration as well as the economy of the candidate countries. Therefore, the EC has given the predominate status to those, vital area of a state functioning, over the others. In practice, this means that unless a country meets the objective criteria, the Member States shall not agree to move forward to the next stage of the process, respecting the merits-based approach. In practice, this also has consequences articulated in the third principle- predictability and dynamism.

### 2.2. Predictability and Dynamism: The Cluster Approach and “Fundamentals first”

How EC sees this **dynamism**? Namely, the Commission proposed to group the negotiating chapters in six thematic clusters: fundamentals; internal market; competitiveness and inclusive growth; green agenda and sustainable connectivity; resources, agriculture and cohesion; external relations. Obviously, while Cluster 1 is reserved for the abovementioned “core issues” from the specter of “fundamental reforms” or “fundamentals” the other negotiation chapters are grouped in clusters mostly based on the common/similar or connected issues that those chapters address. This grouping has also practical consequences allowing for more strength cooperation and coordination in addressing those common issues that appear to be relevant for more than one negotiation chapter.

In addition to this, the cluster organization means that the negotiations on each cluster will be open as a whole – after fulfilling the opening benchmarks at the level of whole cluster, comparing with “the old” approach based on the fulfillment of opening benchmarks on an individual chapter basis. However, not only the progress of an each and every negotiation chapter has been preconditioned by the progress at the level of the whole cluster, but also by the progress made in Cluster 1 (Fundamentals). Therefore, this requires a stronger focus throughout the accession process on the rule of law, fundamental rights, the functioning of democratic institutions and public administration reform, as well as on economic criteria. (Cekov, 2022)

More precisely, negotiations on the fundamentals are to be open first and closed last, since the progress in this chapter will determine the overall pace of negotiations. Finally,

once negotiations on Cluster 1 are open, the order of opening the other clusters shall not necessarily follow their enumeration, but it is rather based on the reform progress achieved.

However, this “**Fundamentals first**” approach should not be seen as unexpected innovation, since starting from 2012, the European Commission gradually introduced this concept for the countries of the Stabilization and Association Process, which included the rule of law, functional democratic institutions, economic management, and professional public administration, with the addition - developing and maintaining good neighbourly relations and resolution of mutual bilateral disputes. Through this idea, the European Commission aims to direct countries to implement reforms of the basic fundamental values on which the EU rests, which it is necessary to meet before joining the EU so that they are fully prepared to play their role when they become fully members of the Union (Tilev, 2020).

Such an approach has been further elaborated in the EU Enlargement Strategy and the Strategy for a credible enlargement perspective for and enhanced EU engagement with the Western Balkans, opened the door for Western Balkans countries, but introduce the pretty vague set of criteria for the evaluation of achievements made in order to strengthen the Rule of Law and to promote regional cooperation and stability. (Kolaković-Bojović & Tilovska-Kechegi, 2019)

The initial step in introducing “the Fundamentals first” approach could be found in establishing the transitional measures (Interim Benchmarks) in chapters 23 and 24 in Serbia and Montenegro, as a mechanism that will further contribute to the quality of reforms and their monitoring.<sup>5</sup> At the same stage, the EU also introduced the rule that chapters 23 and 24 have to be open at the beginning of the negotiation process, but also closed at the end of it. (Kolaković-Bojović & Petković, 2020) Therefore, even before introducing the enhanced methodology in 2020, the European Union sets these transitional measures that need to be fulfilled prior to define the closing benchmarks, but also opened the door for the continuous monitoring of the rule of law reforms in chapters 23 and 24. With this step, the EU once again underlined the importance of these two chapters. Therefore, the concept of the new methodology which established Cluster 1, was highly logical and expected additional effort of EU to ensure more effective mechanisms to foster, implement and monitor reform processes associated these, vital parts of a state functioning. (Kolaković-Bojović, 2017)

Unlike the previous waves of enlargement (2004–2007), where the political criteria were considered fulfilled before the start of the accession negotiations, partially in the case of Croatia (New approach), more emphasized in the case of Montenegro and Serbia, in the

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<sup>5</sup> See more: Matić Bošković, Marina and Kolaković-Bojović, Milica (2022) *New Approach to the EU Enlargement Process - Whether COVID-19 Affected Chapter 23 Requirements?* International Scientific Conference “The recovery of the EU and strengthening the ability to respond to new challenges – legal and economic aspects“ in Osijek, 9-10 June 2022allenges - Legal and Economic Aspects, 6. pp. 330-350. ISSN 2459-9425

new methodology, the political criteria are now inserted in the Fundamentals cluster and in the Rule of Law section and they are part of the continuous political monitoring by the member states during the negotiations, from the very beginning to the closing of the negotiations. Therefore, the Rule of Law during the negotiations should not be seen only through the prism of the transposition of European law in the section of chapters 23 and 24, but much more broadly, especially in the section of effective implementation of the legislation.

Finally, in terms of the procedural steps to be followed, once all clusters have been closed, the Commission recommends a candidate country for membership and the country signs the Accession Treaty. The date for accession is predicted in the Treaty, and by signing it, the state becomes an 'accessing country'. The treaty needs to be ratified by all 27 member states and the European Parliament where the absolute majority is needed.

### 2.2.1. Increased importance and/or valuation of combating corruption

One of the specificities of this recognition is that fundamental reforms are needed, EC is reflected through the completely new position of combating corruption as a prerequisite for the progress in accession negotiations. Namely, according to the methodology, this aspect of reform process has been granted a special status of the horizontal issue, crossing all the negotiation chapters/clusters. How it happens and where are the legal grounds and practical reasons to do that.

The legal framework for combating corruption in the European Union is based on Article 83 of the Treaty on the Functioning of the European Union, which establishes the competence of the European Parliament and the Council of the EU to adopt directives to establish minimum rules for defining and sanctioning corruption. (Cekov, 2022) So far, a legislative activity of EU has remained underdeveloped.<sup>6</sup>

However, this does not prevent the EC from efficient monitoring of reform progress in the candidate countries. (Kolaković-Bojović, 2019) Contrary, according to the new methodology, the Commission decided to, in addition the existing mechanisms to follow

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<sup>6</sup> The standards, on the other hand, in terms of the fight against corruption within the European Union, are mainly based on documents of international organizations, because in this area of the fight against corruption, it has least developed its own standards. The documents on which the anti-corruption standards are based are the following: the UN Convention against corruption, the Criminal Law Convention against Corruption, and the Civil Law Convention against Corruption, adopted by the Council of Europe in 1999, the OECD Convention against Bribery of Senior Public Officials in International Business Transactions of 1997, Council of Europe Recommendations on Codes of conduct for public officials, the UN Convention on Combating Transborder Organized Crime in 2000 and others. Of the documents that have been adopted and adopted by the European Union, it is worth mentioning the decision of the Commission on establishing an EU mechanism for periodic reporting on corruption from June 6, 2011. (Cekov, 2022)

legislative, institutional and developments in terms of the track record achieved under negotiation chapters 23 and 24, introduce this issue to the agendas for bilateral screening of almost all the negotiation chapters.

The very purpose of such decision is to ensure comprehensive and horizontal screening of anti-corruptive mechanisms in various fields of the state functioning such as education, science, health care, public administration, etc. This approach allows the Commission a comprehensive insight into all measures implemented by the candidate country to suppress corruption.

### 2.2.2.A more predictable process

How could this dynamism result in **a more predictable process**? Namely, has promised to provide the candidate countries with greater clarity on what the EU expects of enlargement countries at the different stages of the process. To what extent this has been implemented in practice cannot be unequivocally confirmed, since there are a lot of procedural issues yet to be clarified.

One of important aspect of this principle is also to allow a state to benefit from achieving a tangible reform progress thorough the accelerated integration and “phasing-in” to individual EU policies, the EU market and EU programmes, which can trigger additional efforts of the decision makers to achieve progress, but also to make the benefits of the EU accession process to the citizens.

However, the Commission assumed that a motivation and benefits cannot be the only way to make the progress more predictable, so it established, as the other side of the same coin, sanctioning any serious or prolonged stagnation or backsliding in reform implementation and meeting the requirements of accession process. What kind of sanctions are applicable here? It mostly depends on the challenges identified.

Therefore, negotiations could be put on hold in certain areas, but with no precisely determined duration of such break. Furthermore, in cases of a serious backsliding, there is a possibility to, suspended overall. This means also that already closed chapters could be re-opened, but also include the possibility to suspend/suspend/lose other benefits of closer integration. The repercussions in terms of the EU funding are also possible. (Balkanews, 2020)

### 2.3. A political engagement at the highest level

This aspect of the new methodology involves double perspective of the political level involvement: on the side of the candidate countries, but also in terms of the role of the Member States.

The European Commission has well recognized that a number of reform processes in western Balkans highly depends on the political commitment, regional cooperation and



good neighbour relationships. With this in mind, the Commission proposed to increase the opportunities for **high level political and policy dialogue**, through regular EU-Western Balkans summits and intensified ministerial contacts.

In addition to this, the Commission decided to involve the **Member States more systematically in monitoring** and reviewing the process. “All bodies under Stabilisation and Association Agreement will focus much more on the key political issues and reforms, while Inter-Governmental Conferences will provide stronger political steering for the negotiations.” (European Commission, 2020) In practice, the Member States have got the opportunity to actively engage in screening process through the direct interaction with the candidate countries’ delegations. This also means a more proactive role in monitoring the reform processes and a progress itself.

### 3. CONCLUSION

It is clear that the new methodology will require additional efforts from the candidate countries to achieve the necessary reform progress. The changed role of fundamental reforms, paired with the necessity to work simultaneously in different fields/chapters grouped in the same cluster and the fact that negotiations of several chapters can take place simultaneously, may even makes this journey looks impossible to finish with success. Finally, what needs to be beard in mind all the time is that the Copenhagen Criteria also include a fourth consideration, namely that the EU must have the capacity to absorb a new member state. (European Commission, 2023)With such EU accession perspective, the progress made so far, existing challenges and the weak capacities, what could be actual achievements of North Macedonia and whether these accomplishments could be driven by internal mechanisms, regardless EU accession processes? Namely, is it possible to keep the reform pace without visible progress in accession processes, especially taking into account delays of almost two decades so far, that resulted in obvious disappointment of professionals in public administration, but also of citizens in general? It seems that answers to these questions are strongly dependent from several factors:

- A clear focus of the EU on the real reform achievements compared strictly against EU acquis and relevant standards, isolated from bilateral political issues.
- Ensuring the state to benefit from achieving a tangible reform progress thorough the accelerated integration and “phasing-in” to individual EU policies, the EU market and EU programmes, which can trigger additional efforts of the decision makers to achieve progress, but also to make the benefits of the EU accession process to the citizens.
- Implementation of the retention policies within public administration paired with the active engagement of academic/research community and NGO, to accumulate necessary expertise.

- A strong support of the EU to the regional initiatives aimed at exchange/transfer of knowledge among WBs candidate countries to help them to benefit from lessons learned in other countries, rather than to repeat/duplicate/multiply reform challenges, actions, and processes in the region.
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## ПРИСТУПНИ ПРЕГОВОРИ СЕВЕРНЕ МАКЕДОНИЈЕ СА ЕУ: ИЗМЕЂУ НОВЕ МЕТОДОЛОГИЈЕ И СТАРИХ ИЗАЗОВА

### Апстракт

Седамнаест година дуга борба Северне Македоније да отвори приступне преговоре са ЕУ, коначно је резултирала Међувладином конференцијом одржаном 19. јула 2022. За разлику од било које друге земље кандидата, да би направила процедурални напредак на свом путу, земља мора промени Устав, што је последица билатералног споразума са Бугарском, заснованог на предлогу француског председника Макрона. У ишчекивању исхода уставних амандмана, Северна Македонија је започела процес скрининга како би добила јасан став Европске комисије о тренутном стању домаћег законодавства, институционалним и административним капацитетима, као и праксама, све у супротности са релевантним правним тековинама ЕУ и важећим стандардима. На свом приступном путу, Северна Македонија је у обавези да примењује „унапређену методологију“ приступања ЕУ из 2020. године, која доноси низ новина у поређењу са „старом методологијом“ примењеном на земље кандидате које су прошле кроз почетне кораке приступања пре деценију, а у међувремену прихватиле да се прилагоде новим правилима преговора. Анализирајући све аспекте нове, тј. унапређене методологије преговора, а нарочито специфичну улогу Кластера 1, аутори у овом раду сагледавају и неопходне предуслове које је потребно испунити да би Северна Македонија одржала захтеван темпо реформи на којим инсистира нова методологија

**Кључне речи:** Европска унија, приступни преговори, унапређена методологија, Северна Македонија, Кластер 1.



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## LOCAL OMBUDSMAN<sup>1</sup> AS MECHANISM OF PROTECTION OF HUMAN RIGHTS

### Summary

In this paper the authors would like to present the role of local ombudsman in general. Sometimes not understood well what are their role and how exactly they protect human rights at level of municipalities, local ombudsmans must often deal with prejudices of common citizens, their mistrust and also fear of local authorities. Local ombudsmans are important for raising awareness that everyone who works can make mistake and that mistakes can and must be corrected. Hiding errors in the work of public authorities has a particular effect on reducing

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<sup>1</sup> While deciding about the topic we would write for this conference, we had some thinking regarding the word-ombudsman, especially because of the second part of this word(man), which usually refers to-male. If we should use the gender-sensitive language, the title of this paper would include both ombudsmen and ombudswomen ( as there are a lots of women performing the function of ombudsman). Our first thought is that ombudsman is the word from Swedish language , meaning „representative“ as taken in Old Swedish , and protector of citizens rights, as in Modern Swedish language, and that this word should be used in its original shape. Although Swedish *Government's linguistic experts had stated that ombudsman and other similar words with the suffix -man. i.a. [sic] talman, talesman, fortroendeman, are gender neutral in the Swedish Language(cited from Tim Moore's article, listed down)-* we still had some thinking.To mention just *ombudsmen* and not *ombudswomen*, would not be correctly, so we thought that using the word-*ombudspersons*- which is gender neutral, would promote diversity of all men and women doing this important job of protection of human rights in municipalities across Republic of Serbia and that it should be used when talking about the exact person, currently performing the function of ombudsman. So, in this paper we use word ombudsman when depicting the institution, as it is also mentioned in our positive law in the same form. More about this issue: Tim Moore, *Ombudsman Gender Neutral?*, Research and Information Service Briefing Paper,Paper 81/15 9 June 2015 NIAR 323-15 (<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/8115.pdf>, 1.3.2023).

trust in the same authorities. So, it is up to local ombudsmen and their own authority and integrity to prove that mistakes are possible and not something to be ashamed of, but are a part of the learning process of all. Additionally, the authors would like to make a short overview on draft law on local ombudsman, as it is written at the end of 2022.

**Key words:** local ombudsman, new law on local ombudsman, protection of human rights.

## 1. INTRODUCTORY REMARKS

Since its first mentioning in 18<sup>th</sup> century in Sweden, ombudsman primarily as an individual and less often as an institution, has always attracted a lot of public attention. Formed with the intention of controlling the work of the state authorities and implementing the will of the king in his absence (Милков, Радошевић, 2016, 56; Davinić, 2013, 26), the ombudsman went far from the basic duties of the king's trustee to becoming an important figure in the field of human rights protection (Милков, 2020, 2).

The basic way of protecting human rights here is precisely the control of the work of administrative bodies, when they act in their daily work. A mistake in the actions of the authorities can significantly threaten someone's rights, or add an obligation for which there is no basis or establish the extent of the obligation that is inadequate. Since there is no perfect civil servant (but only those who strive to be as good as possible and to create trust in the state body they represent with their work)<sup>2</sup>, mistakes in daily behavior and work are quite likely. We should not turn a blind eye to them or hide them from the public, but face them as part of the learning process in order to achieve better and more efficient results of state bodies (Давинић, 2013, 35). In this sense, the ombudsman's pointing out of such a mistake should not be understood by every state body as an open invitation for conflict, but precisely as an invitation for their own improvement (Nešić, 18; Давинић, 2013, 45)<sup>3</sup>.

After the expansion in forming this institution on the state level, there are more than 130 countries in the world that have implemented the function of the state's ombudsman (Милков, Радошевић, 2016, 57; Милков, 2018). However, "in most cases, it is considered that the existence of a national ombudsman and/or regional ombudsman enough, meaning the local ombudsman is not necessary, although there is a recommendation from the Congress of local

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<sup>2</sup> Of course, there are some who do exactly what reduces trust in any state body - they make mistakes and cover them up, often involving many other actors in covering up their own mistakes. Often, solving certain issues, even at the local level, requires a good knowledge of the law and the legal profession, which is a quality that local ombudsmen give to the communities in which they are elected (Nešić, 2022, 18).

<sup>3</sup> "It is commendable and also desirable that officials consult the ombudsman's office whenever they are in doubt as to how to act in certain situations, and thus prevent possible irregularities" (Милков, 1990, 63).



and regional authorities about the need of the establishment of national, regional and local ombudsmans“ (Милков, 2020, 2; Milosavljević, 2022, 30)<sup>4</sup>. The aforementioned recommendation was understood and implemented differently in numerous countries. Nevertheless, a large number of countries in the world decided to establish at least a state ombudsman, because it represents one of the achievements of democratic governance and democracy as a concept itself. Also, *Principles on the Protection and Promotion of the Ombudsman Institution* (“the Venice Principles”)<sup>5</sup> emphasize that “Ombudsman Institutions have an important role to play in strengthening democracy, the rule of law, good administration and the protection and promotion of human rights and fundamental freedoms”<sup>6</sup>. As a result of that, ombudsmans may be organized at different levels and with different competences.

The Republic of Serbia is specific because it has ombudsmans at all three levels of government the state’s, the provincial’s (Autonomous Province of Vojvodina) and the local. Another specificity is that these ombudsmans are not organized hierarchically, i.e. each of them is completely autonomous and independent in their work (Nešić, 2022,17; Давинић, 2013, 31), in the territory that their powers cover, which is either the territory of the entire state, the territory of the province or the territory of the municipality. The state protector of citizens has retained this title: this person’s influence extends across the territory of the entire state. The provincial ombudsman has kept both titles as a compromise -both protector of citizens and ombudsman, and controls the work of provincial authorities and institutions when they apply provincial regulations. Frequently in ombudsman’s work, and appreciating that the subject of the complaint relates to municipal authorities, and other institutions, the provincial ombudsman assigns the case to the local ombudsman ( who changed its title from the protector of citizens’ rights in specific city or municipality to local ombudsman in 2018, after the amendments to the Law of local self-government<sup>7</sup>).

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<sup>4</sup> “The level of acceptance of the ombudsman's role and its effectiveness are considered indicators of democracy”, (Milosavljević,2022, 30).

<sup>5</sup> Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”), Adopted by the Venice Commission at its 118th Plenary Session(Venice, 15-16 March 2019) Endorsed by the Committee of Ministers at the 1345th Meeting of the Ministers’ Deputies(Strasbourg, 2 May 2019), available on: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C-DL-AD\(2019\)005-e \(01.03.2023\).](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=C-DL-AD(2019)005-e (01.03.2023).)

<sup>6</sup> Ibid.

<sup>7</sup> Zakon o lokalnoj samoupravi, „Službeni glasnik RS”, br. 9 od 26. februara 2002, 33 od 23. marta 2004, 135 od 21. decembra 2004, 62 od 19. jula 2006 – dr. zakon. This law was replaced by : Zakon o lokalnoj samoupravi: 129/2007-41, 83/2014-22 (dr. zakon), 101/2016-9 (dr. zakon), 47/2018-3, 111/2021-3 (dr. zakon). Art. 126 of previous law and now art. 97 stated the possibility of establishing a local ombudsman.

## 2. ORIGINS OF LOCAL OMBUDSMAN IN REPUBLIC OF SERBIA

The function of the local ombudsman had been implemented into the Serbian legal system in 2003, when the Law on local self-government (Zakon o lokalnoj samoupravi) first mentioned it as independent institution, that should be formed in order to help local citizens to protect their rights.

As their first name was- the protector of citizens' rights, that raised some questions, for example:

*-how can local ombudsman protect human rights on the local level, when there are no human rights to be protected on that level of power; which is wrong, human rights exist on every level of state power, even on local level. In fact, protecting human rights on the local level is the essential, and the most important way of protection itself- it is the protection of rights of an individual, or human rights in everyday practice, which is far from those solemn statements about the recognition of the existence of a human right and the need to protect it, at any cause.*

*-what kinds of activities can local ombudsman can perform at all, because there are small amount of power given even to the local authorities<sup>8</sup>. According to practice, it has been shown that they can carry out all activities and have the same powers as the provincial ombudsman, which is the first ombudsman institution formed in Serbia in general, and as the republican ombudsman. The only differences are that the local ombudsman has local authority only in the territory of the municipality for which it was elected and that it controls the implementation of local regulations.*

*-how is the protector of citizens an independent body when he is elected by the local assembly and answers to the same assembly for its work, and the latter represents the highest local political body. Each parliament, including the local one, represents the will of citizens at a certain level of government. That's because parliaments, even though they are considered as high political bodies, made up of representatives of certain political parties, represent the public and the will of the citizens. Therefore, if we leave aside the political element, the only ones to whom the ombudsman at any level is accountable for its work are the citizens, i.e. it is accountable for its work to the representatives of citizens gathered in parliaments at a certain level of government.*

It was the original way of electing ombudsmen from 19<sup>th</sup> century, when ombudsman gained its true and modern powers to control the work of administrative bodies independently. Most of the ombudsmen today belong to the category of parliamentary ombudsman- elected in special procedure in parliament, and whose election is simpler and guarantees greater

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<sup>8</sup> According to practice, it has been shown that they can carry out all activities and have the same powers as the provincial ombudsman, which is the first ombudsman institution formed in Serbia in general, and as the republican ombudsman, only at the smaller territory.

independence in work than the executive ombudsman<sup>9</sup>. In Serbian law, establishing of ombudsman was not stated as obligated by local governments, but it was up to municipalities to decide whether they would form such an institution or not. Some authors think that fear of local authorities that they would be much more controlled kept them from establishing local ombudspersons as well to select one of the trustworthy, well-legally educated persons that live on the territory of the mentioned municipality and hand over to him/her the powers of control, supervision, and initiative of taking proceedings against a local public official for a mistake made at work (Nešić, 18; ). Without a legal obligation to form this institution, but with a strong will to prove that there is nothing to hide, especially not mistakes in a democratic society, less than 30 municipalities will now have enacted local decisions about establishing the institution of local ombudspersons.

Today, there are 147 local municipalities in the Republic of Serbia, also 27 cities, and the City of Belgrade (Law on territorial organization of the Republic of Serbia, 2007), which status is regulated by special law<sup>10</sup>. Currently, the Local ombudsman has an established office in 23 local self-government units. However, if you compare the total number of inhabitants in the Republic of Serbia with the number of inhabitants in municipalities, it can be concluded that about 60% of the inhabitants of the Republic of Serbia have a local ombudsman in its territories (Popov Ivetić, 2021, 21). From 2003-2018 local decisions about establishing a local ombudsman or local ombudsman's offices were enacted in 25 municipalities<sup>11</sup>. In two municipalities- Valjevo and Loznica local ombudsman was never elected till 2018. According to the information found on the website of the Society of local ombudspersons in Serbia, in 2023 there are 21 active local ombudsman's offices<sup>12</sup>, but this list is constantly changing.

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<sup>9</sup> The executive ombudsman is elected by the executive authorities, which raises the question of its independence and autonomy. Admittedly, it is elected by those authorities whose work the ombudsman does not control, but is in a paradoxical relationship, it is just as subordinate to the executive power as other lower bodies of the executive power whose work it should control. (Давинић, 2013, 48-62). Also, informations about other specialized ombudsman can be found in: Милков, Драган. "Специјализовани омбудсмани." Зборник радова Правног факултета, Нови Сад, 3/2007, 101-121.

<sup>10</sup> Закон о главном граду "Sl. glasnik RS", br. 129/2007, 83/2014 - dr. zakon, 101/2016 - dr. zakon, 37/2019 i 111/2021 - dr. zakon), Also, *Analytical service of local self-government units* contains relevant data at the level of cities and municipalities by areas that are significant for decision-making at this level, for the period 2011-2017 : <https://rsjp.gov.rs/sr/analiticki-servis/> (1.03.2023).

<sup>11</sup> *Ibid.*

<sup>12</sup> List of municipalities with local ombudspersons could be found on: <https://www.ulos.org.rs/clanstvo/spisak-kancelarija/>, retrieved on : 1.3.2023. Although we find this list not complete: there is no mentioning local ombudsman in municipality of Kovačica (<https://www.kovacica.org/listpageincategory/11>, 01.03.2023) which is established in 2020., and has its own section on the official website of the mentioned municipality. Indirectly, we learn about the local decision on the election of the local ombudsman(<https://www.start013.rs/akcenti-sa-2-sednice-skupstine-opstine-kovacica-zlatko-simak-lokalni-ombudsman/>, 01.03.2023).

Experiences from abroad, from other countries are rather different. Local ombudspersons were established in Italy, for example, but they were soon abolished, with the justification that they are too expensive<sup>13</sup> and little effect is achieved by their work (Милков,2020,2; Милков, 2003). Besides Serbia, according to European Ombudsman Institute<sup>14</sup>, local ombudspersons exist in Belgium, Bulgaria, and Switzerland<sup>15</sup>. In many European countries and also in Russia, there are regional ombudsmen, but most of the countries have this institution on the republic- the state level. Local ombudsmen do not seem that necessary, to protect human rights, especially if there is a state protector of citizens<sup>16</sup>. The first decision regarding the local ombudsman was adopted in Subotica (in 2002), and the first local protector of citizens started working in the municipality of Bačka Topola<sup>17</sup> on April 1, 2003. After that, the expansion of the network of local ombudsmen in Serbia began<sup>18</sup>.

### 3. CONTROVERSIES ABOUT THE ROLE AND STATUS OF LOCAL OMBUDSMAN

The first controversy is about the role of protection of human rights as their first and the most important activity. “It is often thought that the ombudsman institution was created as an instrument for the protection of human rights. However, that is not true. This role of the ombudsman emerged only in the second half of the twentieth century, while this dimension is not expressed even today in many countries that have introduced the institution of the ombudsman into their legal system”( Милков,2018,432). It is important to note that the basic function of the ombudsman as an institution is to control the legality and expediency of the work of administrative bodies, at the appropriate level of government, and that the activity of

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<sup>13</sup> „From 2011..in Italy local ombudsmans has dissapeared and their functions have not been replaced by Provincial Ombudsman, leaving people in Italy less protected than before“. (Volgger, 2011,29).

<sup>14</sup> Official site of the association : <http://eoi.at/mitglieder-institutionell/>

<sup>15</sup> Local ombudsmans can be also found in Australia, Spain, Argentina,and other countries( Milenković,2022,134).

<sup>16</sup> Some authors think that especially the local ombudsman is accepted in legal systems that have a developed tradition of local self-government. Switzerland is leading in this and that is why it is the first local ombudsman in Europe and was founded precisely in the city of Zurich in 1971 (Radojević,2022,62).

<sup>17</sup> Informations about first local ombudsman can be found on: <https://www.btopola.org.rs/sr/Lokalni%20ombudsman> (01.03.2023).This is also the first local ombudsman that which regularly receives complaints and talks with citizens outside its formal seat, but also in smaller local communities.(Nešić,2022,21).

<sup>18</sup> That expansion, we can say, was used wisely - an association of local ombudsmen was founded with the aim of improving their position. The exchange of experiences, support and meeting the need for consultations are very important for the members of this association, especially because of the diversity of their positions regulated by the decisions of their municipalities (Nešić, 2022, 13-15).

protecting human rights stems from that basic activity<sup>19</sup>. Administrative bodies, especially when they enact (or fail to enact) individual legal acts, may threaten, injure or completely deprive a right of a citizen. This can happen due to the negligence of a civil servant, ignorance, insufficient information, etc. (although ignorance of the law is harmful and in particular state bodies cannot be justified by ignorance of the law they apply in their work, which ultimately means that they do not know how to perform their work and are incompetent). Therefore, the protection of human rights, i.e. control over their implementation in practice at the individual level, is the main activity of the ombudsman, which seems more receptive to citizens.

The essence of the ombudsman's activity is the control of the work of administrative bodies at the designated level of government, which, as we have mentioned, is one of the possible consequences of inadequate or improper implementation of regulations, which can endanger citizens as individuals or collectives. The non-reaction of the institutions in case of endangerment, violation, or unjust deprivation of a right collapses the trust of the citizens in the institutions, which is again the basis of relations in the state<sup>20</sup>. The existence of the ombudsman institution in a certain territory should first of all influence the administrative bodies in the sense that they direct and organize their activities in such a way that there are no omissions in their work, that there is no violation of citizens' rights and therefore the need to file a complaint.

The very existence of the ombudsman, as a control mechanism of the work of administrative bodies at the appropriate level of government, produces a certain authority that this institution and the specific holder of this function have or must have. Due to the requirement that the person in the position of ombudsman must be a lawyer with a strong understanding of rights and a certain position in the protection of human rights (more precisely, the understanding of the concept of human rights and the protection of the same, as well as previous active work on it). The ombudsman has, metaphorically speaking, the role of a (non-official) judge in a dispute between citizens and administrative bodies. In this conflict, the ombudsman, on the basis of its best interpretation of the law and appreciating all the circumstances of each individual case, determines whether there has been an intimidation, violation or deprivation of rights, as well as in what way the same damage can be rectified, but also directs and advises the citizen.

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<sup>19</sup> For example, in Art 3. of decision on local ombudsman of the City of Sombor it is stated that „the local ombudsman protects the rights of citizens from illegal and improper work of authorities, ie services, when the regulations of the city are violated”. Similar definition can be found in almost all local decision, regarding the establishing of local ombudsman. Odluka o lokalnom ombudsmanu Grada Sombora, "Sl. list grada Sombora", br. 5/2019).Website: [https://www.sombor.rs/lokalna-samouprava/lokalni-ombudsman-grada-sombora/\(01.03.2023.\)](https://www.sombor.rs/lokalna-samouprava/lokalni-ombudsman-grada-sombora/(01.03.2023.)).

<sup>20</sup> A similar claim, that the protection of human rights was not a basic role or set in perspective as the main activity of the ombudsman's work, can be found in: Драган Милков, „Настанак и развој институције омбудсмана“ Зборник радова Правног факултета у Новом Саду, 2/2018, 432.

Often, the ombudsman can react by informing the citizen that his/her internal feeling of how a certain procedure should have ended does not fully correspond to how the procedure is regulated normatively and that there was no threat, violation, or usurpation of his/her rights.

In addition to the basic role of the ombudsman to control the legality and expediency of the work of administrative bodies, the ombudsman's activities must influence greater respect for the rights of citizens. By informing the citizens of the rights they have, as well as by raising society's awareness of the need to respect human rights which are guaranteed by both international and internal regulations, the ombudsman makes an influence in a certain community. Therefore, as an important activity of the ombudsman, education about human rights is also set, which is mainly reflected in the fact that it teaches some parties how to behave in the specific case about which they filed a complaint, but also in the general education of the wider citizenry about what rights they have, to which ways they can protect them and recognize when they are threatened, injured or taken away in some way.

Transferred to the field of work of the local ombudsman, the person performing this function at the local level usually explains to the citizens: whether the local gas distribution company really violated their human rights by cutting off their gas after they did not pay one or more bills, whether the discourtesy of the counter staff official's actual violation of their rights or an ethical violation that should be resolved by the administrative body or institution where the incident occurred, etc<sup>21</sup>.

The second controversy is whether the local ombudsman is a local governmental body (Nešić,2022,17; Milosavljević, 2022, 39; Popov Ivetić,2021) or not, and if not, to which category of bodies it belongs. The positive law does not establish a local ombudsman as an organ of the local authority, although it does not define it at all.

Some authors think that, when you look at the competencies of the local ombudsman, it emerges that it is an authority by its structure because it cannot be defined differently, given that if it is defined as a separate organization, institution, administration, or any other organizational unit, it would not have the authority to control the work of official administrative authorities, considering that in this way they would be organizationally superior to the ombudsman, and in that way, control by the ombudsman would lose all meaning( Popov Ivetić,48). This means that in local governments where the ombudsman is an organ, for example, Novi Sad, the ombudsman has his section in the budget and is

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<sup>21</sup> A lot of interesting examples can be found in Annual reports of local ombudsmen. Local ombudsman in Novi Sad has all reports , hronologically listed on website: <http://zastitnikgradjana.novisad.rs/sr/izvestaj-views> (01.03.2023),while on the website of local ombudsman in Stari Grad, there are only two annual reports, because the first local ombudsman was elected in 2020, four years after the establishing of this institution: <https://www.starigrad.org.rs/skupstina-gradske-opstine-stari-grad/zastitnica-gradjana-go-stari-grad/?script=lat> ( 01.03.2023).

responsible for the money he spends, and also independently plans funds for his work<sup>22</sup>. The fact that the ombudsman cannot be classified in any of the three existing branches of government (legislative, executive, judicial) does not mean that it should be completely denied the status of a state body (or local self-government body)( Давинић,2013,41).

The interesting possibility was realized for the first time only last year. Several local self-governments can form a joint institution of the local ombudsman, according to *Zakon o lokalnoj samoupravi*<sup>23</sup>. It was realized in the City of Niš, where all local governments from the administrative district of Niš will form a joint ombudsman's office whose headquarters will be in Niš<sup>24</sup>, thus, the costs of forming this institution are shared between several municipalities, and each gets an equal opportunity to protect human rights in its territory by exercising control over the work of legality and the expediency of the work of administrative bodies. Bearing in mind the initial reluctance to form local ombudsman in general, the formation of a regional ombudsman's office is a significant step forward.

The important issue is also the scope of competence, i.e. tasks that the local ombudsman should perform. Due to the differently understood scope of work of the local ombudsman<sup>25</sup>, the conditions were met for the creation of a special law on the local ombudsman to finally standardize the very different practice, especially about certain issues that we briefly presented in this paper. In this regard, in the continuation of the work, we will comment on the last draft of the Law on Local Ombudsman, which was prepared by the Association of Local Ombudsmen of Serbia, with the support of the OSCE, and whose text we had access to.

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<sup>22</sup> Till 2019. only 7 municipalities have prescribed that the local ombudsman is kind of a governmental body, namely: Novi Sad, Pančevo, Zrenjanin, Bačka Topola, Sombor, Kovačica and Kikinda.

<sup>23</sup>According to the Art Article 88:

“The unit of local self-government, its organs and services, as well as the companies, institutions and other organizations of which it is the founder, cooperate and join forces with other units of local self-government and its organs and services in areas of common interest, and in order to achieve them, they can *pool resources and form joint authorities, companies, institutions and other organizations and institutions, in accordance with the law and statute*. The cooperation of local self-government units also implies *the assignment of certain tasks within the framework of original competences to another local self-government unit or to a company, institution and other organization of which it is the founder*”.

<sup>24</sup> More about this in news: <https://niskevesti.rs/novi-zakon-o-zastiti-gradjana-lokalni-ombudsman-u-svim-gradovima-i-opstinama/> (01.03.2023.).

<sup>25</sup> Such as: the possibility of accessing institutions for the enforcement of institutional sanctions, the possibility of submitting a petition to the constitutional court, whether and how formalized the procedure for submitting a complaint for citizens is, how local ombudsmen react when they notice irregularities in the work of administrative bodies at the local level - do they first warn or immediately issue a recommendation to eliminate irregularities, the deadline for submitting an annual report to the local assembly etc. A more detailed analysis of all these questions can be found in the master's thesis of a colleague, the local ombudsman of the City of Novi Sad, Marina Popov Ivetić, cited earlier in our paper.

#### 4. A SHORT OVERVIEW OF DRAFT LAW ON THE LOCAL OMBUDSMAN

As stated earlier, Draft Law on Local Ombudsman was initiated by the Society of local ombudsmen in Serbia a few years ago (Nešić, 2022, 15; Radojević, 2022, 70). This great effort came to an end in December 2022., when the final version of this draft was set and ready for nontechnical interventions if there would be any<sup>26</sup>.

The structure of this act is relatively well placed: after the chapter under the title of the basic provisions (within which the subject of the law is processed, the definition of individual terms, the principles of work of local ombudsman, etc), there follows a chapter dealing with the independence, autonomy and competence of the local ombudsman; the chapter on the method of election, dismissal and termination of the mandate of the local of the ombudsman; the chapter on the complaint procedure carried out by the local ombudsman; the chapter on the office of the local ombudsman, the salaries and allowances of employees and elected persons in this office; the chapter on keeping archival materials of the as well as the chapter on the formation of a joint local ombudsman.

We believe that it would be nomotechnically better if the provisions on the independence and autonomy of the work of the local ombudsman were already included in the first chapter, which deals with the basic principles of the work of this institution. The principles of the work of the local ombudsman certainly nomotechnically represent the highest basis on which this law should be addressed, so we believe that it could be acceptable to the authors of this draft.

As particularly significant, we single out the definition of the local ombudsman *as "a body that protects, promotes and promotes the rights of citizens and controls the work of local administrative bodies and public services, if it is a violation of regulations and general acts of local self-government units"* (Art. 5 of the Draft Law on the local ombudsman). So, this is a great way for the local ombudsman to receive significant funding for its work from its founder, that is, the local assembly, which will make the work itself much easier.

Because of the significance of the Art.6 of this Draft Law, which listed all activities that the local ombudsman should and must perform, we will list it in its entirety

*Article 6.*

*Local Ombudsman:*

- 1) controls respect for human rights and determines violations of rights committed by acts, actions, and inaction of local administrative bodies and public services;*
- 2) initiates a procedure based on a citizen's complaint or its own initiative, if there are facts that indicate possible violations of human rights;*

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<sup>26</sup> We sincerely thank the Association of Local Ombudsmen of Serbia for handing over this working version of the draft law on the local ombudsman. The first version is always the most difficult to make and behind it there is always enormous effort, commitment and persistence.



- 3) *participates in the preparation and implementation of the policy of equal opportunities and realization of human rights in the local self-government unit;*
- 4) *provides mediation services and gives advice and opinions on issues within its jurisdiction;*
- 5) *mediates in the peaceful settlement of disputes if he is registered for the peaceful settlement of disputes;*
- 6) *acts preventively to improve and protect human rights in the local self-government unit;*
- 7) *monitors the state of human rights in the local self-government unit;*
- 8) *submits an initiative for the initiation of a post-procedure for the evaluation of the constitutionality and legality of general acts and other regulations of the local self-government unit to the Constitutional Court, which regulates issues related to human rights, if it considers that they are not in accordance with the Constitution and the law;*
- 9) *publicly recommends the dismissal of the official who is responsible for the violation of citizens' rights, that is, to initiate the initiation of disciplinary proceedings against the employee in the local administrative body and public service who is directly responsible for the violation;*
- 10) *informs the competent authorities, if he determines that the actions of an official or employee in a local administrative body and public service contain elements of a criminal, misdemeanor, or other punishable offense;*
- 11) *adopts a plan of annual activities;*
- 12) *submits an annual report on the state of human rights and, at its own discretion, special reports to the assembly of the local self-government unit;*
- 13) *initiates the adoption and amendment of general legal acts of local self-government units;*
- 14) *passes an act on the internal organization and systematization of workplaces;*
- 15) *promotes improvement of education in the field of human rights;*
- 16) *cooperates with civil society organizations;*
- 17) *performs other tasks in accordance with the law, statute, and other general acts of the local self-government unit.*

Also, there are listed some special competencies in the field of equal opportunities policies, in Art.7 :

*Article 7.*

*The local ombudsman provides advice and good services in:*

- 1) *preparation and implementation of local action plans in the field of the policy of equal opportunities and realization of citizens' rights;*
- 2) *implementation of activities from the plan of annual activities on the realization of policies of equal opportunities;*
- 3) *preparation of reports on the implementation of equal opportunities policies by local administrative bodies and public services;*
- 4) *preparation of a gender-responsive budget in the local self-government unit.*

These two articles, with their content, fully unified the competence of local ombudsmen and harmonized the different practices resulting from different local decisions on the

establishment of the local ombudsman. In this regard, it is important to establish the possibility of the local ombudsman addressing the Constitutional Court of Serbia, in cases where it considers the constitutionality and legality of a local act or decision to be questionable, which was an uneven practice of the local ombudsman.

The recognition of the status of the authority to the local ombudsman is directly defined in Art.4 of this Draft Law and indirectly, in art. 10 of this draft law, where it is stated that

*the local ombudsman and the deputy ombudsman have the position of officials in terms of the law regulating the prevention of conflicts of interest in the performance of public functions, and the provisions of that law apply to them in their entirety.*

It is also important to be precise about the procedure for the election of the local ombudsman. Public call for the election of a local ombudsman is therefore defined in art. 12 of this draft law:

*Article 12.*

*The president of the assembly announces a public call for the election/re-election of the local ombudsman at least 6 months before the end of the mandate of the local ombudsman, i.e. from the date of entry into force of the decision of the assembly of the local self-government unit on the local ombudsman, by which the local self-government unit establishes a local ombudsman for the first time.*

*The public invitation is published on the website of the local self-government unit, simultaneously with the publication in the official newspaper of the local self-government unit<sup>27</sup>.*

According to art. 14, of this Draft Law, The Parliamentary Committee for Selection and Appointment (hereinafter: the Committee) checks the completeness of the submitted documentation, except for the one related to experience in the promotion, improvement, and protection of citizens' rights and knowledge regarding the work and functioning of local self-government bodies, which is checked during an oral interview, then schedules an oral interview with the candidates within 15 days from the end of the competition.

During the oral interview, as is stated further, the board checks the candidate's relevant experience in the promotion, improvement, and protection of citizens' rights and the candidate also presents his/her work plan to the body for the duration of the mandate. Within 15 days of the interview, the committee must submit an opinion on the candidates to the president of the assembly of the local self-government unit, who forwards the proposal of this committee to the assembly for decision

The candidate is elected by the assembly of the local self-government unit at the first following session after the submission of the proposal by the president of the assembly to the

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<sup>27</sup> We find this agreed upon the Principles on the Protection and Promotion of the Ombudsman Institution (“the Venice Principles”), where in paragraph 7 is mentioned public call as obligated part of the procedure of selection of ombudsman.

assembly. If the proposed candidate would not be elected to that session of the local assembly, the whole procedure, beginning with the public call should be repeated. If elected, the local ombudsman takes office on the day of making a solemn declaration before the councilors of the local assembly. The only thing that could be here practically problematic is the oral interview, which is carried out to determine the actual legal and other competencies and knowledge of the candidate's rights. Determining the fulfillment of formal requirements seems easier/ by looking at the diplomas of the completed faculty as well as other certificates that the candidate submits, it is possible to formally determine that he fulfills certain initial requirements. But how will the real knowledge of the legal system of the candidates be determined, because it is not defined who makes up the committee that will examine the candidates? Legal practice indicates that the members of these committees are mostly councilors in the local assembly, with the rare exception of experts from the practice areas assigned to them. How can they adequately conduct the examination and determination of the real competencies and knowledge of the candidates registered for the competition for the local ombudsman? We believe that it is important to make some additional clarification regarding the composition of the membership of this board.

We find it interesting to define making recommendations, proposals, and opinions within a reasonable period of time by the ombudsman. The advisory role of the ombudsman is here very clearly defined, otherwise, if it could change the decisions of the administrative body, it would not be different from the court:

*Article 23.*

*The local ombudsman is obliged to make its opinion, proposal, or recommendation within a reasonable time and send it to the competent administrative body or public service.*

*The administrative body and the public service are obliged to act on the recommendation, proposal, or opinion immediately and no later than within 30 days of its delivery.*

*After the expiration of the period referred to in paragraph 1 of this article, the administrative body and the public service are obliged to inform the local ombudsman in writing of the actions taken to eliminate the deficiencies identified in the recommendation, proposal, or opinion.*

*If the administrative body and the public service do not act according to the recommendation, the local ombudsman can address the public, that is, the local self-government unit, and can also recommend determining the responsibility of the head of the administrative body and public service.*

Also, we find it very important to emphasize the *anonymization* -recommendations, proposals, and opinions of the local ombudsman that are published on the web presence of the administrative body or public service of the local self-government unit to which the recommendation, proposal, or opinion was addressed, and on the web presence of the local ombudsman *must not contain real names of the complainants*, to protect their privacy.

Sometimes, those recommendations, proposals, and opinions are too important for the practice, that should be published, with this identity protection

A rather important part of this draft law is Art.33. which deals with the issue of forming a joint local ombudsman. This Draft Law, explicitly says that:

*In addition to the elements established in Article 88a of the Law on Local Self-Government, the agreement on the cooperation of local self-government units, which establishes a joint local ombudsman, also includes the method of electing and dismissing the joint local ombudsman, the number and method of nominating candidates for deputy local ombudsman, the method of advertising the competition for the election of a local ombudsman, the composition of the Commission that proposes a candidate for the local ombudsman, the method of giving a solemn declaration of the selected candidate, the method of proposing a joint budget, the work of the joint local ombudsman service, the method of keeping archival material in the event of the termination of the existence of the joint local ombudsman, the method of submitting reports to assemblies of local self-government units and determining legal followers of the joint local ombudsman in the event of the joint local ombudsman ceasing to exist.*

*The agreement from paragraph 2 of this article cannot contradict the provisions of this law related to the election and dismissal of the joint local ombudsman, the number and method of nominating candidates for deputy local ombudsman, the method of advertising the competition for the election of the local ombudsman, the composition of the Commission that nominates the candidate for the local ombudsman, the work of the joint local ombudsman service, salaries and fees, the way of keeping archival materials in the event of the termination of the existence of the joint local ombudsman, the way of submitting reports to the assemblies of local self-government units, the deadlines in which the report is submitted must not be in conflict with the provisions of this law, which these questions have been edited.*

*The cooperation agreement may determine other issues that are important for the work of the joint local ombudsman, and which are not included in paragraph 2 of this article, nor article 88a of the Law on Local Self-Government.*

*Based on the cooperation agreement, two or more local self-government units make a decision on the establishment of a joint local ombudsman, which is published in the official gazette of each local self-government unit that is the founder of the joint local ombudsman.*

*Based on the decision from para. 5 of this article, local self-government units adopt an act on a joint local ombudsman.*

*The act on the joint local ombudsman is published in the official gazette of each local self-government unit that is the founder of the joint local ombudsman.*

We hope that this possibility would be often used in the future, even if this this law would not be enacted sooner, because there is a legal possibility for this in positive law.

## 5. CONCLUDING REMARKS

The ombudsman should be understood as an intermediary between a complainant and a public authority, who tries to find an *amicable solution* to a potential conflict. In this way, new possible disputes and other proceedings that would be initiated before the courts and other competent authorities are eliminated (Radojević, 2022, 63). Searching for such compromising solutions, which of course are in accordance with the law, is more common in the work of the local ombudsman than the provincial or republican ombudsman. The small community, from which the local ombudsman himself most often originates, is more focused on maintaining good relations between neighbors than is the case on larger administrative territories (Radojević, 2022,72). Citizens have their expectations, and how they would like their complaints to be resolved, and they are often disappointed when they do not get the desired outcome (Dragin, 2022,177,189). However, the local ombudsman, as an expert in the field of law, cannot pay too much attention to such behavior of citizens, but with an extremely conciliatory tone and manner of behavior, it should always look for a solution that would suit everyone, even if not completely.

The role of the ombudsman is as much a reinforcement of the state bodies whose work it supervises as it is an educational one for both state officials and citizens (Davinić, 2013,19). It represents a bridge between wishes and legal reality. Although understood at the beginning of its existence as an institution with almost supernatural powers - because the ombudsman was expected to correct all their mistakes by controlling the work of public authorities, which made many people employed in those bodies, while the capacities of the ombudsman are quite small and inadequate to deal with so much work (Давинић,2013,33).

This paper should be also treated as *the authors' support for the adoption of a law on local ombudsmen, which would solve numerous doubts regarding their status, competence, way of acting*, etc (Popov Ivetić,2022, 208). We believe that the draft law that we have had a look at represents a solid basis for such a thing, but also that there is still a lot of work to be done on it.

The authority of each ombudsman, including the local ombudsman, should be based on his knowledge and expertise, other important knowledge from various fields, the way he was elected to this position, and finally, the influence and reputation he enjoys in the public. The word of the ombudsman should not be understood as a criticism or a call for lynching, but as a recommendation for the improvement of anyone who made a mistake in their work, or did not even make a mistake but there is a danger of it would happen.

Only in this way will human rights and freedoms, as the highest achievements of a democratic society, be fully protected, guaranteed and fully enjoyed.

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## ЛОКАЛНИ ОМБУДСМАН КАО МЕХАНИЗАМ ЗАШТИТЕ ЉУДСКИХ ПРАВА

### Апстракт

У овом раду аутори приказују укратко улогу локалног омбудсмана. Локални омбудсмани често морају да се боре са неразумевањем других њихове функције и како тачно штите људска права на нивоу локалних самоуправа, са предрасудама и неповерењем обичних грађана, али понекад и са страхом локалних власти од сопственог рада. Локални омбудсмани су важни за подизање свести да свако ко ради, може да погрешити и да се грешке могу и морају исправити, посебно када су у питању органи јавне власти. Прикривање грешака у раду органа јавне власти утиче на смањење поверења у исте органе и цео систем. Дакле, на локалним омбудсанима и њиховом сопственом ауторитету и интегритету је да докажу да су грешке могуће и да нису нешто чега се треба стидети, већ да су део процеса учења свих. Поред тога, аутори у раду праве и кратак преглед нацрта закона о локалном омбудсману, који је написан крајем 2022. године.

**Кључне речи:** локални омбудсман, нови закон о локалном омбудсману.



Dragan DAKIĆ, Ph.D\*

## THE PRINCIPLE OF THE BEST INTEREST AND UNBORN CHILD: SOME OLD DILEMMA AND NEW TECHNOLOGIES

### Summary

Does the principle of the best interest of the child covers unborn children as well or is it reserved only for personhood bearing children? This could be an example of old dilemma when it comes to the scope of the principle of the best interest of the child. To date, applicability of the Convention on the Rights of the Child to unborn children appears to remain unsettled which inspired inquiry within first part of this paper. Of course, it is not ambition of the present writing to elucidate each potential aspect of the issue. Rather, intention of this contribution is to reach out the contextualized answer that would enable us to appropriately understand correlation between child's rights and new technologies - primarily used in reproductive medicine. This has been achieved through comprehensive analysis of concerning principle itself as well as how it materializes through rights from the ambit of Article 6 of the Convention on the Rights of the Child. In this regard lawful enforcement of the principle of the best interest of the child against behaviour which is hazardous or lethal to it in prenatal stage was addressed. We have covered two possible scenarios where conflict between concerning principle and different aspects of self-determination might arise: first scenario refers to the drugs/alcohol/tobacco abuse while second scenario concerns woman's refusal to undergo medical treatment which could cause threat to the/life of the unborn. Naturally, research of those questions was conducted within theoretical frameworks of the harm avoiding approach. Since emerging technologies have potential to step beyond harm avoiding approach to the principle of the best interest of the child, it was briefly described how benefice securing approach develops. Also it was analysed how emerging technologies such as artificial gestation or artificial intelligence embryo selective software are affecting right to life, right to survival and right to development of the child. This paper as well as final conclusions of the research are not covering eventual harm risks associated to reproductive technologies.

**Keywords:** the best interest of the child, prenatal/unborn children, ectogenesis, artificial intelligence.

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## 1. INTRODUCTION

Regardless to its reach history, it still can be considered that principle of the best interest of the child introduced in the Convention on the rights of the Child (Convention), remains too vague and open to subjective interpretations, dependent upon social and political context as well as upon the subjective perceptions of the parties involved in decision making process: parents and state agents (judges, social workers, medical practitioners) (Peleg, 2019). Bearing this in mind we can say that conceptualization of the principle of the best interest is an ongoing process. Currently, the formative process occurs through three sorts of challenges or issues affecting different aspects of the child's interests. In that sense, conceptualization of the principle of the best interest occurs through the first, second and third era issues. Generally, first era issues are referring to the protection of the best interest in matters covered with Article 9 (separation from parents), Article 10 (family reunification), Article 18 (parental responsibilities), Article 20 (deprivation of family environment), Article 21 (adoption), Articles 37 and 40 (juvenile justice), and two of the three optional protocols of the Convention: Article 8 of the Optional Protocol on the sale of children, child prostitution, and child pornography and Articles 2 and 3 of the Optional Protocol on a communications procedure. Second era issues are arising from challenges arising from *in vitro* fertilization and prenatal genetic testing while third era issues are arising from techniques of genetic enhancing interventions. By their nature, second and third era issues are related to the protection of the best interest in the sphere of child's right to health (Article 24) as well as to certain guarantees of right to life (Article 6). Herein we are going to address how guarantees from latter right are affected.

First era issues elucidated that the principle of best interest is a threefold concept. It consist substantive, interpretative and procedural aspects. Substantive aspect of the concept provides that the child has a right to have her best interests assessed as a primary consideration in the decision making process. This aspect applies whenever a decision is to be made in respect to the interests of a single child, or a known group of children since it has a direct effect on the issue at stake. For this reason achieving the best outcome for the child is in the focus of the substantive aspect of the concept when applied in respect to a single child, or a known group of children. Its application is, however, different when it comes to the interests of children in general since the effects of suchlike decision are only indirect. In this regard Eekelaar argues that in the latter event there is a need to accept situations in which the nature of an outcome is of such great importance that its achievement is justified irrespective of its indirect impact on children (Eekelaar, 2016, 289-302).

Suchlike content of substantive aspects determinate the interpretative aspect of the concept in the following way. Principle of the best interest is not the only consideration, but it is a primary consideration. It means that priority should be given to this principle only when two conditions are met: there is more than one course of action is available, and its protection does not conflict with other provisions of the Convention (Tobin, 2006, 257-306). Therefore,

the principle of the best interest cannot be interpreted as if it is accorded with more weight in comparison to other considerations. Procedural aspect of the concept mandates that decision making process should include consideration about both positive and negative effects of the decision on child/children, explanation how this principle has been taken into account and how it was weight against other considerations.

In order to examine how second and third era issues are correlating to the principle of the best interest first we are going to address applicability of this principle to prenatal life. In that end, we are going to analyze if the text of the Convention can provide answer to the question posed and if not, how could we interpret the Convention in this regard. Based on the results obtained we are going to assess responsiveness of the best interest to potential conflicting situations. In that sense, first we are going to test harm avoiding approach against competing rights and interests of pregnant woman in two scenarios. First scenario refers to the drugs/alcohol/tobacco abuse while second scenario concerns woman's refusal to undergo medical treatment which could cause threat to the/life of the unborn. Significant proportion of the discussion is going to be devoted to eventual measures that could be lawfully enforced in order to safeguard the best interest of unborn. Another, benefit securing approach is going to be tested against rights from the ambit of the Article 6 of the Convention: right to life, right to survival and right to development. The idea is to maintain legal nature of ongoing inquiry and to evaluate emerging third era technologies beyond any ideological doctrine.

## 2. APPLICABILITY TO PRENATAL LIFE

If we are going to analyze how the principle of the best interest is being conceptualized through second and third era issues first we need to discuss could this principle extend to prenatal life at all. Difficulties with concerning extension are caused by the lack of the definition of the child in CRC, and vague status that is accorded to prenatal life at national and regional level. Also, practices of *in vitro* procreation appear to be incompatible with the principle of the best interest of the child. Under such circumstances it might not be clear can this principle cover an entity who is not established bearer of rights and if so, in which way.

As to the lack of the definition of a child, Art 1 of the CRC defines that *for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*. In this way upper limit of childhood as well as of the applicability of CRC provisions was introduced. But the question since when those provisions are applicable was left unanswered. This was an intentional omission given that the Convention's drafters could not reach an agreement on this question which touches upon the sensitive issues of the beginning of life and regulation of abortion. Even though Preamble consist the phrase *before as well as after birth* when indicating that the child needs to be provided with special safeguards and care, including appropriate legal protection, this is not enough to ground the claim that prenatal life is recognized as a child and accorded with full legal status under the CRC. No doubt, this

preambular paragraph is relevant for the purpose of the interpretation of the Convention taking into consideration Article 31 of the Vienna Convention. According to Article 31 of the Vienna Convention *interpretation of a treaty shall comprise, in addition to the text, including its preamble, (...)*. However, adoption of this phrase was conditioned with adoption of the following statement: ‘In adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by State Parties’.<sup>1</sup> The statement is incorporated within *travaux préparatoires* that are, according to the Article 32 of the Vienna Convention, also relevant for the purpose of the treaty interpretation.

Therefore, it is tenable to conclude that the Convention itself does not preclude unborn child from the ambit of its rights neither it extends those rights to unborn in the event of collision to national statutory of State Parties. At this point it might appear that answer to the question posed within this subsection is decided by the status accorded to unborn child under the national statutory. In this regard we can note some tendencies toward extension of the personhood construct to cover unborn within national legal orders (Dakić, 2021, 55-72). This approach implies recognition of full legal status to unborn child which leads to indisputable applicability of the Convention. However, this approach does not gaining any significant reflections in positive law yet. Some recent trends are also indicating creation of new legal category of ‘the future child’ that is subject of legal interests instead of legal rights.<sup>2</sup>

Perhaps those modern tendencies are rooted in the practices from previous periods when unborn child status was also discussed against notion of personhood with simultaneous distinction between biological and legal elements involved. Back in 1975 French Conseil Constitutionnel addressed statutory difference between human being and right holder labeled as “person”. In the same year of 1975 the German Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) found abortion within first 12 week of pregnancy to stand against human dignity and the right to life as protected in the German Constitution.<sup>3</sup> On this occasion Bundesverfassungsgericht decided that such violation does not require criminal sanction since there is no constitutional imposition forcing the law to provide to unborn human life the same legal protection foreseen to born human life (Raposo, Zhe, 2017, 205-236). This concept of recognition of right to life to unborn with simultaneous recognition of its weaker protection as compared to that afforded to the life of born human beings was followed by the Italian and Spanish constitutional courts as well (Stith, 1987, 521).

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<sup>1</sup> See Vandenhole W., Turkelli, G. E. & Lembrechts, S. 2019. Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols (Elgar Commentaries), Edward Elgar Pub (November 29, 2019).

<sup>2</sup> See ten Haaf, L. 2017. Unborn and Future Children as New Legal Subjects: An Evaluation of Two Subject-Oriented Approaches—The Subject of Rights and the Subject of Interests. *German Law Journal*, 18(05), 1091-1120.

<sup>3</sup> (1975) 39 BVerfGE

Similarly, prenatal life was situated within the regional human rights system in Europe. Interpreting bodies of the European Convention on Fundamental freedoms and Human Rights distinguished between terms “everyone” and “life”, as used in Article 2 and the European Convention.<sup>4</sup> While the term “everyone” refers to the recognition of someone’s personality before law (*personhood*)<sup>5</sup> and connotes legal capacity recognition under national statutory; the term “life” refers to a biological fact and protection conferred to it under the European Convention.<sup>6</sup> Following this line of interpretation it is tenable to consider that right to life protection safeguarded to recognized persons is inseparably inherent in biological factuality but even so, those two are legally distinguishable categories. Consequently, absolute right to life protection is afforded to persons and the “other is a lesser protection given to all human life, from conception onwards, on the basis of human dignity” (Wicks, 2012, 209). The distinction between the protection of unborn life and its personhood status was emphasised in *Vo v France* when the Court stated that unborn child ‘require[s] protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2.’<sup>7</sup>

This interpretative approach could be also well applied in respect to Article 6 of the Convention which has substantive dimension comparable to that of the Article 2 of the European Convention. Article 6 of the Convention reads:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

In his analysis Peleg notes that Article 6 of the Convention comprises three separate, but interdependent and indivisible, rights: the right to life, the right to survival, and the right to development (Peleg, 2019). According to this author Article 6 ‘protects the lifespan of the child from its beginning until the child reaches legal adulthood’.<sup>8</sup> Right to life from the ambit of this article imposes negative obligation upon the State while right to development which encompasses both the right to enjoy the process and the right to the outcome of the developmental process (Peleg, 2013), imposes positive obligations. According to Nowak, positive dimensions of the right to life requires ‘States Parties to reduce infant mortality rates, to ensure adequate nutrition for children, to provide pre- and postnatal care, and to act against infanticide’(Nowak, 2005, Article 6). Eventual deprivation of any human being of the latter

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<sup>4</sup> *Paton v The United Kingdom*, Application No. 8416/78, Decision of the Commission 1980,

<sup>5</sup> Same at: Elizabeth, W. 2012. The Meaning of ‘Life’: Life in International Human Rights Treaties, *Human Rights Law Review*: 12(2). 209.

<sup>6</sup> For critical view on such position of the Commission refer to Plomer Aurora, Foetus right to life, The case *Vo v France*, *Human Rights Law Review*, (2005): 5(2), 317 and 319.

<sup>7</sup> *Vo v France* Application No. 17004/90, Merits, 8 July 2004, para 84.

<sup>8</sup> *Ibid.*

right would require strong justification, comparable to derogative exceptions from the Article 2 paragraph 2 of the European Convention.

As to the right to survival it can be situated between positive and negative ends of the spectrum of State obligations. The right to survival is understood as if it requires tackling preventable causes of deaths, such as diseases, infections, and insufficient nutrition. Therefore, guarantees of this right are centered on physical survival and as such they are extendable to each human being, including unborn, regardless to legal status. Its effects have already materialized through different prenatal medical treatments introduced in healthcare systems to facilitate survival as well as development of the unborn child. True, those prenatal medical treatments are generally perceived as non-adversarial in respect to rights and interests of mother, but it might not be the case in all occurrences. Some of this conflicting situations are going to be discussed below. Either way, there are strong reasons to believe that along to protection of the best interest in right to life, prenatal life can also enjoy protection of it's the best interest in the right to survival, and the right to development from the ambit of Article 6. It is so mostly due to separation of legal protection from legal status which implies at least gradual protection of legal rights to unborn child.

Now, when we have described supportive argumentative line to prenatal life's agency under the principle of the best interest, it is important to discuss if this principle can be effectively safeguarded to unborn in the context of its associated rights from the ambit of the Article 6 of the Convention.

### 3. ENFORCIBILITY OF THE BEST INTEREST IN RESPECT TO RIGHTS OF PRENATAL LIFE

#### 3.1 Harm avoiding

It could anticipated that first level of the Article 6 rights protection materializes through harm avoiding efforts that might collide to the rights and interests of the mother. Beyond strictly abortion debate, protection of the right to survival, and the right to development to prenatal life is manifested through the actions designed to safeguard the interests of unborn child against the behaviour which is hazardous or lethal to the unborn child. Such behaviour might refer to drugs abuse or a refusal of medical treatment which could cause threat to the health or life of the unborn. In the comparative case law we can find examples of the state's efforts to enforce the mothers' duty to care for their fetus by compelling them to refrain from endangering and threatening acts. The case law shows that, whether on the grounds of criminal or civil laws, the measures of enforcement refer to: arrests;<sup>9</sup> incarceration in jails and

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<sup>9</sup> *In re Unborn Child of Starks*, No. 93,606

prisons;<sup>10</sup> increases in prison or jail sentences;<sup>11</sup> detentions in hospitals, mental institutions, and treatment programs;<sup>12</sup> and forced medical interventions, including surgery.<sup>13</sup> In this regard, it could be considered that the European regional framework even provides certain legitimizing grounds to support protection of the best interest against mothers' behaviour on the grounds of the "public interest" and "fair balance".

As to the "public interest", the Conventional institutions stated that the 'pregnancy and its termination do not, as a matter of principle, pertain uniquely to the sphere of the mother's private life'.<sup>14</sup> This standing was considered as it might potentially cast doubt upon the private life nature of pregnancy itself (Wicks, 2011, 560). Such non-private life nature of pregnancy could firmly support the interventions by the State towards its continuation to term/viability on the grounds of "public interest". The Conventional institutions recognized public interests<sup>15</sup> as a legitimate ground for intruding into the women's private sphere which, from its apart, requires a fair balance to be maintained. As to the requirement of "fair balance", the Court took the view that the mother's right to respect for her private life must be weighed against the other competing rights and freedoms invoked, including those of the unborn child.<sup>16</sup> In the Court's opinion, the provisions that allow abortion to "be carried out to protect the woman's health strike a fair balance between, on the one hand, the need to ensure the protection of the foetus and, on the other, the woman's interests."<sup>17</sup> When referring to the fair balance principle from *Boso*, the Grand Chamber elucidated on different occasions that "if the unborn do have a 'right' to 'life', it is implicitly limited by the mother's rights and interests."<sup>18</sup> For, even if the idea of protecting unborn the best interest against mothers' behaviour might sound unthinkable, still it could fit within the European human rights standards.

Next logical question refers to the legal measures appropriate to employ in order to enforce the best interest of prenatal life. In this regard it is useful to start with distinctive observation of two sorts of incidental misbehaviours: 1) first sort of potential misbehaviour is drugs/alcohol/tobacco abuse by pregnant woman; 2) second sort of potential misbehaviour is pregnant woman's refusal to undergo medical treatment which could cause threat to the/life of the unborn. It is so because these two sorts of misbehaviour are calling for different legal

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<sup>10</sup> *State v. Greywind*, No. CR-92-447

<sup>11</sup> *State v. McKnight* 2003

<sup>12</sup> *Pemberton v. Tallahassee Memorial Regional Medical* No. 4:98CV161-RH.

<sup>13</sup> *State v. Pemberton*, No. 96-759

<sup>14</sup> See *Brüggemann and Scheuten v Germany* Application No. 6959/75, Commission's report of 12 July 1977, DR 10, . 100.

<sup>15</sup> For instance *Boso v Italy*, Application No. 50490/99, Merits, 5 September 2002.

<sup>16</sup> *Tysiac v. Poland* Application No. 5410/03

<sup>17</sup> *Boso v Italy*, Application No. 50490/99, Merits, 5 September 2002.

<sup>18</sup> *Vo v France* Application No. 17004/90, Merits, 8 July 2004, para 12

qualification as well as for different legal measures. This distinction is crucial in deciding whether the State in its response is permitted to employ rehabilitative, educative, or punitive measures (Shalini, 2004, 39, 518). Another element to take into consideration when deciding on permissible legal measures certainly is intention. Namely, when rezoning on appropriate legal measures the European Court emphasised intention as decisive element: “if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case”.<sup>19</sup>

Now, does the drug addicted women intentionally causes harm to her child? In the most cases certainly not, her irresponsible behaviour rather results from a lack of self-control. But even so, her actions are actively threatening the unborn and her behaviour first calls for the rehabilitative and educative measures. Purpose of those measures is to enable woman to obtain the prenatal care and drug treatment. Punitive measures should be employed only as the last resort in saving the life within the scope of the above spelled positive obligations.

Another scenario is where pregnant woman refuses medical treatment of her disease and refusal is threatening (her and/or) the prenatal life. In this event, the regional frameworks are not providing clear guidance for permissible action by the State. The confusion is arising due to vague agency of parental life and ambiguity of the European case law. Namely, the Commission stated that the unborn life is inextricably interconnected to that of the mother, and it cannot be observed in the isolation from that of the mother.<sup>20</sup> Accordingly, rights and interests of prenatal life could be presumed as entirely subrogated to mother’s disposal. However, in accordance to the trends in comparative jurisdictions<sup>21</sup> the following case law of the Conventional institutions also evolved and repeatedly treated the unborn life as an autonomous victim.<sup>22</sup> In contrast to entire subrogation of unborn, those new developments are unequivocally qualifying it for the best interest protection. In line to latter approach, in virtually every case from the comparative law it was asserted that the fertilized egg, embryo, or fetus should be treated as if it were completely legally separate from the pregnant woman herself,<sup>23</sup> regardless of the gestation. So if we accept that unborn is the best interest agent, still essential question remains unanswered: whether the State could compel the woman to undergo medical treatment which is needed for the unborn development or survival?

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<sup>19</sup> *Vo v France* Application No. 17004/90, Merits, 8 July 2004, para 90.

<sup>20</sup> *Ibid* para 19.

<sup>21</sup> *See* *Jefferson v. Griffin Spalding Cnty. HosppAuth.*, 274 S.E.2d 457, 461 (Ga. 1981), (uphold-ing trial court’s decision to order a Caesarean section performed against the wishes of the mother).

<sup>22</sup> Dakić Dragan, Introduction into principles of unborn life protection under the European Convention on Human Rights, Academy of criminalistic and police studies (2014).

<sup>23</sup> Paltrow M. Lynn and Flavin Jeanne, Arrests and Forced Interventions on Pregnant US Women, *Journal of Health Politics, Policy and Law* (2013): 28, 322.



The conflict which arises herein concerns mother's right to self-determination from one hand, and from the other hand the best interest of the unborn rights associated to it. As to the right to self-determination it is in the core of the European Convention.<sup>24</sup> In general, competent persons might determine themselves to live with disease as long as they are not threatening anyone. But as soon as the conflicting right of another party appears, this right could be overridden. As to the relation between the forcible/non-consensual medical interventions that are covered with the rights from the scope of the Article 8 of the ECHR,<sup>25</sup> and self-determination which is protected through Article 3 of the European Convention, the accepted general rule reads: "a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading".<sup>26</sup> Apart from ethical consideration that the actions which involve no injustice requires no justification, I consider that compelling the pregnant woman to undergo medical treatment for the sake of the unborn wouldn't be prohibited (in the legal sense) under the Article 3 for the following reasons.

The case of *Herczegfalvy v. Austria*,<sup>27</sup> in which this general rule has been introduced, concerns the situation where the applicant had been forcibly administered food and neuroleptics. Based on the circumstances of the case and judicial reasoning, we could allocate two requirements for the application of the abovementioned general rule. First, it is the medical necessity which needs to be convincingly shown to exist. Second, the purpose of the treatment is the patient's benefit. In this regard, if the medical necessity exists, it would be hard to deny that the medical intervention is benefiting the patient. The patient's benefit is crucial for a legitimate interference with his/hers autonomy and bodily integrity.<sup>28</sup> Otherwise, the medical treatment may be regarded as prohibited under the Article 3.<sup>29</sup> The connection between the medical services, reproductive choice and Article 3 guarantees has been addressed in *R.R. v Poland*,<sup>30</sup> where the applicant was deprived of medical services and prevented to enjoy her lawful rights. On that occasion the Court stated that the unlawful deprivation of medical services to a pregnant woman which are prescribed by the law presents humiliation and causes suffering enough to disclose a level of severity falling within the scope of Article 3 of the Convention.<sup>31</sup>

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<sup>24</sup> Wicks, E. The right to refuse medical treatment under the European Convention on Human Rights, *Medical Law Review* (2001), 9, 18.

<sup>25</sup> See *Codarcea v Romania*, Application No. 31675/04, Merits, 02 June 2009, para 101 and refer to *Pretty v The United Kingdom*, Application Number 2346/02, Merits, 20 April 2002, para 61 and 63; *Trocetier v France* (dec.), Application No. 75725/01, at para 4, ECHR 2006-XIV at para 4; *Vo v France* Application No. 17004/90, Merits, 8 July 2004, para 89.

<sup>26</sup> *Herczegfalvy v. Austria* Application No. 10533/83, Merits, 24 September 1992, para 82.

<sup>27</sup> *Herczegfalvy v. Austria* Application No. 10533/83, Merits, 24 September 1992

<sup>28</sup> See *Wainwright v. The United Kingdom*, Application No. 12350/04, § 41, ECHR 2006-X

<sup>29</sup> *X v Denmark* Application No. 9974/8 2 (1983), 32 D.R. 282

<sup>30</sup> *R.R. v Poland*, Application No. 27617/04, Merits, 26 May 2011.

<sup>31</sup> See *R.R. v Poland*, Application No. 27617/04, Merits, 26 May 2011 para 161.

Considering that the medical treatment in the discussed scenario does not unlawfully deprive women of any rights, and does not adversely affect her personality (intervention is even benefiting to her), it cannot be regarded as incompatible with Article 3. The fact that she doesn't want to have health benefit cannot reach the minimum threshold of severity under Article 3 of the Convention. This shall apply even if the health improvement is psychologically or even economically burdensome to her.<sup>32</sup>

There is the possibility for moral objection that treating the mother only with the purpose of preserving the unborn life reduces her to the means to an end which infringers her dignity. But as we have seen it is not possible to isolate the mother from the medical benefits brought about by the treatment of the unborn, thus, the purpose of treatment cannot be reduced only to preserving the unborn. Even if the unborn has an inherent disease which is threatening only to it, the woman would owe a moral duty to enable the medical treatment to be provided,<sup>33</sup> which refers to invasive operations too (DeBonis, 1995, 22). Otherwise, herself-termination could raise concerns for child abuse. In this regard, Thomson considers that it is not permissible to torture someone even if an omission to do that would cost you a life (Thomson J. Judith, 1971, 53). Therefore, if the right to life cannot overturn freedom from torture, then the right to self-determination cannot do so either. Parfit also considers that we do not treat someone merely as a means if our treatment of this person is governed in sufficiently important ways by some relevant moral concern (Parfit, 2011, 33), which is the case here. He maintains that “even if we *are* treating them merely as a means, we may not be acting wrongly.”<sup>34</sup>

### 3.2 Benefit securing

Developments of Assisted Reproductive Technologies (ARTs) brought new challenges in defining the scope and protection of the best interest through associated rights. Those challenges are arising from the faculties inherent in ARTs that enabled creation of human beings at some point in time which is distinct from the beginning of gestational process. Temporal separation between the creation and gestation introduced new and widely criticized practices of pre-implantation genetic selection. Criticism to pre-implantation genetic diagnosis (PGD) is mostly rooted in the consequentialist reasoning according to which PDG and eugenic practices from the past are morally on par since both are resulting with the same consequences. However, this position is taking into account only societal perspective build upon certain moral values, while it is entirely negligent over accounts from parental and most importantly from child's perspective.

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<sup>32</sup> *A, B and C v Ireland*, Application No. 25579/05, Merits, 16 December 2010

<sup>33</sup> See also Singer, *Philosophy and Public Affairs*, (1972), 3, 229-243

<sup>34</sup> *Ibid.*

Distinctive but still consequentialist framework built upon child's perspective was developed by Savulescu who calls it 'Principle of Procreative Beneficence'. He argues that 'couples (or single reproducers) should select the child, of the possible children they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant, available information'. Furthermore, he argues that it should be allowed to select for non-disease genes (Savulescu, 2001).

Suchlike perception of the best interest steps beyond harm avoiding, and it is directed to the option which is most likely going to bring about the best outcome for a child. This principle is affirmative toward PGD but author failed to address if the harm risks associated to PGD are undermining the best outcome for a child. It is known that children born via ARTs are more likely to suffer some physical and psychological problems. Additionally, 'studies is low but indicates that children born after having cells removed from PGD may have a higher rate preterm birth and other neonatal risks, with uncertainty about links to congenital anomalies, regardless of the age or condition of the mother.' (Zillén et al 2017).

However, the Principle of Procreative Beneficence was accepted by some scholars and further advanced so it applies to the third era issues as well. For instance, Veit argues that parents are obliged to genetically enhance their embryos if that option is available. He typifies his argument as follows:

- (1) Those who want to be parents have the obligation to select the child that is expected to have the best life, or at least as good a life as the others, based on the relevant available information (= the PPB).
- (2) Application of the PPB leads to the creation of children that are expected to have the best life or a life at least as good as without the application of the PPB, based on the relevant available information
- (3) If act A and act B have the same expected consequences, then they are morally on par. (= the CP)
- (4) Genetic enhancements in embryos lead to the creation of children that are expected to have the best life or a life at least as good as without genetic enhancements, based on the relevant available information.
- (5) Therefore, those who want to be parents have the obligation to genetically enhance their embryos (Walter, 2018, 75-92).

From the perspective of benefit securing approach, significant role belongs to emerging artificial gestation technologies (AGT). Namely, AGT are expected to provide highly controlled conditions that are safer as compared to those of natural gestation. Artificial gestation is also subject to lesser risks from external interruptions and harms. Objectively speaking AGT features appear to be designed to safeguard positive dimension of child's right to life from the Convention since they are reducing infant mortality rates (that was original motive behind its invention), and as such providing required prenatal care and adequate nutrition as well as reducing possible infanticide scenarios. In that sense, AGT are even straightening negative dimension of the child's right to life (Dakić, 2017, 127-145). As to the

right to survival/development AGT are preventable against causes of deaths, eliminating diseases, infections, and insufficient nutrition. In addition AGT are also suitable to fulfill ‘Principle of Procreative Beneficence’. Accordingly, AGT are safeguarding the best interest of the child at higher level as compared to natural gestation.

Elsewhere I have argued that application of artificial intelligence software (AIS) for embryo selection is compliant to human rights requirements (Dakić, 2022). On that occasion I took into consideration only perspective of parental rights and interests safeguarded through reproductive autonomy. Bearing in mind that AIS is selecting embryos with potentially highest rate for successful implantation, survival and development, application AIS appears to be at least compliant to the principle of best interest of the child as defined within benefit securing approach. Perhaps it is not tenable to claim that AGT in combination to AIS should be obligatory or exclusive mean of reproduction for the sake of the best interest of the child since it would seriously undermine parental integrity and rights, but each of them separately or cumulatively should be considered as viable options.

#### 4. CONCLUSIONS

Investigation in this paper commenced with discussion about certain difficulties facing position according to which Convention covers prenatal life. The omission of the precise definition of the child from the text of the Convention was labeled as the most significant obstacle in this regard. Through discussion it was further demonstrated how rules of treaty interpretation can substitute missing norm, which in this particular case brought us to the conclusion that the Convention itself does not preclude unborn child from the ambit of its rights neither it extends those rights to unborn if that collides to national statutory of State Parties. Following to this conclusion it appeared necessary to briefly discuss status accorded to unborn child first of all, under the national statutory and latter under the European regional system of human rights protection. Discussion in this part resulted with findings that both, national statutory as well as European standards are distinguishing between legal notion of person, which enjoys full scope of right to life protection, and biological actuality of life, which is provided with gradual protection without necessity of making it ‘person’. Proceeding investigation proved this interpretative model to be extendable to the Convention and its Article 6. Furthermore, it was demonstrated how the principle of the best interest could cover prenatal life through normative rights from the ambit of the Convention: right to life, right to survival and right to development. This was firm inducement toward further investigation about effectiveness of the protection of the concerning principle to unborn child.

Investigation within next, central chapter, was divided in two sub-chapters focusing on different theoretical approaches in regard to the best interest protection: harm avoiding approach and benefit securing approach. Within harm avoiding approach it was investigated if there are any enforceable actions designed to safeguard the best interests of unborn child against the behaviour which is hazardous or lethal to it. At the beginning, permissibility of

suchlike measures was investigated from the perspective of regional human rights standards and it was concluded that even if the idea of protecting the best interest of unborn against mothers' behaviour might sound unthinkable, still it is compliant to human rights standards due to "public interest" and "fair balance" criteria introduced in reproductive rights discourse. Following to such findings the next logical issue was to address the legal measures appropriate to employ in order to enforce the best interest of prenatal life. In this regard it was distinguished between two sorts of misbehaviours: 1) first sort of potential misbehaviour was drugs/alcohol/tobacco abuse by pregnant woman; 2) second sort of potential misbehaviour was pregnant woman's refusal to undergo medical treatment which could cause threat to the/life of the unborn. The distinction was made since these two sorts of misbehaviour are calling for different legal qualification as well as for different legal measures. Additionally, legal significance of the intention was pointed out.

Following to the comprehensive debate which took into consideration human rights standards, especially those from the scope of the Article 3 of the European Convention as well as potential inconsistencies of the case law of the European Court, it was concluded that appropriate measures for the first scenario are the rehabilitative and educative measures purposed to enable woman to obtain the prenatal care and drug treatment while punitive measures should be employed only as the last resort in saving the life. Second, more demanding scenario is not exempted from the applicability of forcible measures. This conclusion was derived out of the guiding rule according to which a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.

As to the benefit securing approach it can be materialized only by the means of advanced technologies such as Assisted Reproductive Technologies (ARTs), pre-implantation genetic diagnosis (PGD), genetic enhancement technologies, artificial gestation technologies (AGT) and/or artificial intelligence software (AIS) used for embryo selection. Essence of benefit securing approach is that the principle of the best interest requires parents to use enumerated technologies in order to provide better future to the child. In order to keep the inquiry within legal frameworks it was discussed if application of the ATG and AIS facilitates rights from the scope of the Article 6 of the Convention and if so, how those technologies are standing in respect to the principle of the best interest of child. It was concluded that AGT are safeguarding the best interest of the child at higher level as compared to natural gestation, as well as that application of AIS is at least compliant to observed principle. However it was emphasized that it is not tenable to claim that AGT in combination to AIS should be obligatory or exclusive mean of reproduction for the sake of the best interest of the child since it would seriously undermine parental integrity and rights. Each of those technologies separately or cumulatively should be considered as viable options.

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## ПРИНЦИП НАЈБОЉЕГ ИНТЕРЕСА И НЕРОЂЕНО ДИЈЕТЕ: НЕКЕ СТАРЕ ДИЛЕМЕ И НОВЕ ТЕХНОЛОГИЈЕ

### Апстракт

Да ли принцип најбољег интереса дјетета обухвата и нерођену или је то ексклузивитет само оне дјеце која су стекла статус правне личности тј. која су се родила? Управо ово би могло да представља типичан примјер старе дилеме. Можемо рећи да осим овог и других посебних питања, ни опште питање примјенљивости Конвенције о правима дјетета на дјецу прије њиховог рођења није рјешено. Но без обзира што су у овом раду тематизирана оба, и опште и посебно питање, наша амбиција ипак није да обрадимо све повезане правне аспекте. Умјесто тога, примјеном индуктивног и дедуктивног метода настојали смо да прикажемо како се материјализује принцип најбољег интереса дјетета, кроз одредбе Конвенције, наспрам понашања труднице која су опасна или смртоносна по њега у пренаталној фази. Тако смо посматрали два могућа сценарија у којима може доћи до сукоба између дотичног принципа и различитих аспеката самоопредјелења труднице. Први сценарио се односи на злоупотребу дрога/алкохола/дувана, док се други сценарио односи на одбијање труднице да се подвргне медицинском третману. Наравно, истраживање у овом дијелу рада је спроведено у оквирима типичног правно-теоријског приступа који је означен као „избјегавање штете“. С обзиром да нове репродуктивне технологије имају карактеристике које омогућавају да се дискусија о принципу најбољег интереса дјетета не ограничава на традиционалне оквире, укратко је описано како се развија релативно нов теоретски приступ најбољем интересу дјетета који је означен као „обезбјеђивање корисности“. Ради потпуније представе о утицају нових технологија на интересе и евентуална права пренаталног живота, представљено је како нове технологије као што су вјештачка гестација или софтвер за ембриоселекцију утичу на прихваћене гаранције а тиме и на обим права дјетета из опсега права на живот, права на опстанак и права на развој. Општи закључак овог истраживања јесте да европска степенаста заштита биолошког реалитета – јединке, без обзира на њен правни статус, уводи позитиван интерпретативни модел најбољег интереса и права из Конвенције у односу на пренатални живот. Ово даље значи да би заштита интереса и права пренаталног живота која колидирају са одређеним аспектима самоопредјелења труднице, била дозвољена са аспекта људских права и проводљива са аспекта позитивног права – што и јесте првенствено због цитиране судске праксе Европског суда за људска права. Такође је закључено да увођење нових репродуктивних технологија унапређује заштиту

најбољег интереса дјетета и права из Конвенције. Овај рад, као и коначни закључци истраживања, не узимају у обзир евентуалне ризике повезане са репродуктивним технологијама.

**Кључне ријечи:** најбољи интерес дјетета, пренатална/нерођена дјеца, ектогенеза, вјештачка интелигенција.

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## SEX OFFENDER REGISTRIES - COMPARATIVE LAW REVIEW<sup>1</sup>

### Summary

In recent years, the phenomenon of sexual abuse has attracted considerable attention from the general and professional public, with a special focus on minors as victims. In order to achieve adequate protection and prevention, additional measures that could be applied in the context of the criminal justice response, but also outside of it, have been constantly considered. One of the measures is the introduction of special, both public and non-public registers for sex offenders, in which a large number of personal data of sex offenders are recorded. Bearing in mind the above, the subject of the paper is a comparative legal analysis of the laws of several European countries in the context of the creation of special registers of sex offenders. The aim of the article is to compare the aforementioned solutions with the positive legal framework in Serbia, in order to establish whether there are certain similarities and differences, which may be significant for future amendments to the Law on Special Measures for the Prevention of Criminal Offenses against Sexual Freedom against Minors of The Republic of Serbia.

**Key words:** sex offenders, register, public access, comparative review.

### 1. INTRODUCTION

A significant interest in the phenomenon of sexual abuse of children has appeared during the last decades of the 20<sup>th</sup> century. The aforementioned is undeniably conditioned by the amount of attention that the media had devoted to this topic, while knowing that sexual abuse towards children would cause disgust and an intense emotional reaction from the widest audience. Thus, it is common knowledge that intensive media coverage of the most serious crimes in the USA, along with lobbying by parents of child victims, directly contributed to the adoption of some new laws during the last years of the 20th century

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(Weatherred, 2015, 20). Although the media exerts a certain positive influence by pointing out social problems, they also focus mainly on personal stories related to cruel crimes by supporting the stereotypical perception of phenomena, and at the same time neglecting the social and ethical aspects of the problem they deal with (Nair, 2019, 40). In such circumstances, the need for the application of innovative measures stands out. Also, the state wants to demonstrate its will to protect the victims, especially the youngest ones.

In addition to the harsher penalties for sexual offenses and the introduction of new incrimination, intensive consideration has also been given to treatment options and to various measures aimed at the supervision and control of sex offenders. Thus, at the end of 20th century, the first registries of sex offenders were established, with the idea that their existence would enable the prevention and more successful detection of sexual offenses, whereby the establishment of registries at that time was met with the general approval of the general public (Connor and Tewksbury, 2017, 2). Without any doubt, the new registers would also influence the creation of a general impression of more effective protection of overall security.

In the USA The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was adopted in 1994, according to which all federal states are to keep a register of data on perpetrators of crimes against minors and on sex offenders. This law was amended in 1996 by an act known as Megan's Law, so that states have been allowed to inform the general public about the data from the registry. At this moment in the USA there is a centralized data registry of all sex offenders and, in accordance with The Adam Walsh Child Protection and Safety Act of 2006, this register can be accessed online.

In many European countries, there are also special registers of sex offenders, and it can be said that they are mainly constituted on the basis of the American model. However, in most cases in Europe, there is no possibility of open access to such bases, nor are there measures aimed at informing the public about the personal data of convicted persons. Data on sex offenders are mostly available only to the police and the judiciary, although they could be forwarded to other subjects, at their request, and under the conditions stipulated by law. In Europe, the confidentiality of data from the register of sex offenders is generally insisted upon, whereby each European country decides, according to its own circumstances and needs, whether to create a special sex offender register or not.

Although on this occasion the overall trends of sexual crimes and the recidivism of sex offenders will not be the focus of our interest, it should be emphasized that scientific research does not confirm the assumption that the introduction of registers affects the reduction of the rate of sexual crimes (Agan, 2011), while it should also be borne in mind that most of the available evaluations refer to the USA. Research points to numerous negative effects that recording data in the registry can bring, such as harassment of offenders, social isolation and the inability to find employment and home (Ellman, 2021). The mentioned negative effects make it difficult for the offender to access support and treatment, which negatively affects the possibility of reintegration into everyday activities.

However, when looking at the negative effects of registration, it should also be borne in mind that in Europe there are generally no measures aimed at directly informing the public about the movements and whereabouts of sex offenders, while the possibility of applying such measures exists in the USA in the form of hanging posters in public places, distributing flyers about sex offenders and similar.

## 2. SERBIA

In Serbia, the register of sex offenders is regulated by the Law on Special Measures for the Prevention of Criminal Offenses Against Sexual Freedom against Minors (Official Gazette RS, no. 31/2013, abbreviated: Marija's Law). The register does not include the data of all sex offenders, but only of those who have been convicted of sexual crimes against minors. Also, there is no possibility of entering the data of a minor sex offender. In Art. 3, it is stated that the data of those convicted of rape, exploitation of a minor for pornography, pimping into prostitution and other related crimes are to be recorded. However, the law does not provide for recording the data of persons convicted of incest, which has been criticized in the literature as an inappropriate solution (Miladinović-Stefanović, 2014).

It should be emphasized that Marija's Law makes a clear distinction between persons sentenced to a prison sentence and all other convicted sex offenders. Thus, several specific measures will automatically be applied to those who had served a prison sentence, such as reporting to the police and attending various treatments, along with the mandatory entry of personal data in the register. When it comes to sex offenders who have been sentenced to some other criminal sanction, the measures are limited only to entering data into the register. Therefore, sex offenders who have not served a prison sentence are not supervised after the conviction, nor are they required to report periodically to any state authority. All sex offenders bear specific legal consequences of conviction, which will not be discussed further on this occasion.

Pursuant to Art. 14 of Marija's law, a number of identification data are entered into the register, including a unique citizen's identity number, photos and DNA profile. Also, the register contains data on criminal convictions and special measures that are applied. The register is managed by the Directorate for the Execution of Criminal Sanctions within the Ministry of Justice, while all state bodies are obliged to notify the Directorate for the Execution of Criminal Sanctions within three days of obtaining information relevant to the register.

In particular, it should be emphasized that there is no possibility of erasing data from the register, and that in this respect no distinction is made between sex offenders convicted of different criminal offenses and to different criminal sanctions.

When it comes to the confidentiality of data entered in the register in Serbia, this data is available only to certain state bodies and to a limited circle of subjects. Thus, the police, the court and the prosecutor's office can access the register in connection with the conduct of

criminal proceedings or the detection of a new criminal offense. State bodies and other entities that employ persons who engage with minors must check whether the employee's data is in the register of sex offenders. Data can be given to the authorities of foreign countries in accordance with international agreements. Therefore, the general public cannot gain insight into the contents of the register.

### 3. FRANCE

In France, the Criminal Procedure Code (Code de procédure pénale) contains provisions related to the specific legal status of sex offenders, whereby the provisions of Art. R53-8-1 to R53-8-39 refer to the registration of personal data of sex offenders and the possibility of accessing the data. The data of persons convicted of rape and of other sexual offenses against minors must be registered, with offenses involving the exploitation of minors for pornographic purposes being specifically singled out. It should be emphasized that the personal data of persons convicted of minor offenses such as sexual exhibitionism are not recorded in the register. Also, the register is not only limited to recording data on sexual offenses, but it also contains data on those convicted of other serious violent crimes, such as murder.

The register contains all the personal data required for identification, as well as data on the offender's current and previous residential addresses. Data on the conviction and the criminal offense are also recorded, as well as all the obligations related to the convicted person, such as mandatory reporting to the police at certain periods. The convicted person is obliged to inform the police once a year about his address, that is, he must report the change of his residence to the police within a period of no longer than 15 days. If the convicted person ignores the mentioned obligations, he could be punished with a prison sentence of up to two years, or a fine of up to 30,000.00 EUR.

As a rule, the data is kept for 20 years, or 30 years in the case of offenders convicted to prison sentences longer than 10 years. The data must be deleted after the death of the convicted person. A convicted person may request that the public prosecutor order the deletion of data from the register if legal conditions are met.

The data in the register are confidential and there is no possibility of free access by members of the general public. The court, the public prosecutor and the police can use the data while conducting criminal proceedings and in the context of supervision of convicted persons, with the possibility for other state bodies or local self-government bodies to also access the data if conditions provided by the law are met.

### 4. IRELAND

In Ireland, the rules related to maintaining the register of sex offenders are defined by the Sex Offenders Act 2001. The court submits the personal data of convicted persons to an

authority called the Ireland Sex Offender Management and Intelligence Unit (SOMIU), which is responsible for the supervision of sex offenders. The personal data of those convicted of rape, incest, sodomy with animals and other sex crimes must be recorded, with special emphasis on crimes against minors.

In addition to recording personal data and information about convictions, the register also lists the special measures which the offender must obey. Offenders are obliged to inform the police of their place of residence after leaving prison, as well as in the event of a change of home address. They are also required to inform the police about traveling outside of Ireland for trips longer than seven days, and they must specify the location where they will be staying while outside the country. If the person whose data is recorded in the register serves a new prison sentence for any criminal offense, the prison informs the police about this fact.

As for the terms during which the data in the register is stored, it is interesting that for persons sentenced to prison terms of more than two years, the data is to be stored permanently. For persons sentenced to a prison sentence of six months to two years, the data is kept for ten years from the date of entry. If the person was sentenced to a suspended sentence or any other sentence other than prison, the data will be kept for five years. When it comes to offenders under the age of 18, the terms in which data are stored also depend on the severity of the sentence imposed on them, with the fact that the terms of storage are always shorter than for adult offenders.

The register is of a confidential nature, so citizens cannot request insight into the data, nor is the public informed in any form about the data from the register. Individuals can request to be certified that their data has not been recorded in the register (FRA, 2022).

## 5. POLAND

In Poland, the Law on Counteracting the Threat of Sexual Crime stipulates that the data of persons convicted of rape, exploitation of minors for pornography, pimping, incest and other sexual crimes against minors are entered into the Register of Sexual Offenders.

The register is managed by the Ministry of Justice and it consists of two components. One part of the register can be accessed online by all persons without any restrictions, while the other part of the register allows only limited public access. The part of the register that cannot be accessed by citizens contains a series of personal data such as name, surname, current address, criminal convictions, details of the execution of criminal sanctions and other data based on which a precise identification of a person is possible. The mentioned part of the register can be accessed only by state authorities such as the court, the prosecutor's office and the police, in connection with the detection and prosecution of criminal offenses. Also, subjects who plan to employ persons in order to work and engage with children must check whether the certain employee is in the register. Any interested

person can ask the authorities to issue a certificate stating that their data is not in the sex offender registry.

The public part of the register contains the name and surname of those convicted of the most serious crimes, such as child rape, but no other personal data is to be recorded, such as the mother's maiden name or the citizen's unique identification number. There is no home address of the convicted person, but his general location/city is in the register. The open access to register has been criticized by experts and scholars as inadequate and aimed at stigmatization to the detriment of social reintegration (Szumski, Kasparek&Gierowski, 2016).

Sex offenders are obliged to contact the police within three days of leaving prison or psychiatric hospital and also to provide the address where they will be living. They are also required to notify the police if they plan to travel abroad.

As for the terms during which the data in the register is stored, there is no time limit. However, the court can approve the deletion of data from the register. In the case of minor offenders, the data from the register is deleted after the expiration of ten years from reaching the age of 18, provided that the convicted person has not committed other criminal acts in the meantime.

## 6. NORTH MACEDONIA

In North Macedonia, issues related to the registration of personal data of sex offenders are regulated by the Law on the Special Registry of Persons Convicted for Criminal Offenses of Child Sexual Abuse and Pedophilia (Official Gazette 11/2012 and 112/2014). The register is managed by the Ministry of Labor and Social Protection, while technical activities are carried out by the Institute for Social Protection.

The data of those convicted for crimes such as: rape, exploitation of a minor for pornography, incest, human trafficking and other sex crimes must be recorded, with the requirement that a minor was harmed by the specific criminal act. All relevant personal data, as well as data related to the conviction, are recorded in the register. The register should also contain a photo of the sex offender, and upon leaving the prison, the register should be supplied with a photo showing the current physical appearance of the convicted person. Also, the photo is replaced with a new photo every 10 years.

The convicted person is entitled to request the deletion of data from the register after the expiration of 10 years from the date of serving the prison sentence, provided that during that period he did not commit a criminal offense against minors. The court decides on the application.

The convicted person is obliged to report to the court once a year, no later than five days before his birthday. The sex offender is obliged to inform the authorities about his place of residence, while the Institute for Social Protection enters the current data into the register within a period of no longer than five working days from the date of notification. If



the convicted person does not inform the authorities about changes in personal data or does not report regularly to the court, or if he visits places where minors gather, then he can be punished by imprisonment for up to one year. Citizens are authorized to inform the police about convicted persons visiting places where children and minors gather in large numbers, and the authorities are then obliged to apply measures in accordance with the law.

Although there is a possibility for personal data from the register to be deleted, the obligation to periodically report to the authorities is lifelong. This measure cannot be canceled.

What is particularly important to note is that all citizens can access the register. Also, it is significant to know that the law foresees that persons who misuse the data from the registry are to be punished, especially if they do so in order to intimidate sex offenders. In that case, there is a possibility of imposing a fine or a prison sentence of up to six months.

## 7. CONCLUSION

We can state that the solutions contained in the Serbian law on sex offender register do not differ significantly from those present in other countries whose legislation we have analyzed in this paper. In Serbia, just like in other countries, the personal data of sex offenders are recorded in a way that enables their precise identification. The primary purpose of registration is to prevent reoffending.

What is different between Serbia and the observed countries is that the entry in the Serbian register is of a permanent nature, so that the possibility of erasing the personal data once entered is not foreseen. Bearing in mind that the laws of other countries provide for automatic deletion of personal data after the expiration of a certain period or the possibility of submitting a request for data deletion, the question arises as to what was intended to be achieved with such a solution. Permanent registration is certainly not in accordance with the rehabilitative ideas on which modern criminal law is based.

On the other hand, it should be emphasized that, contrary to the laws in Poland and North Macedonia, in Serbia there is no possibility of public access to the register. We must state that such a state of affairs is fully in line with European standards and values advocated by The European Court of Human Rights. However, given that there is a category of sex offenders against whom no other measures are applied in addition to entering the data in special register, the question arises as to whether this registration can have a sufficient preventive effect.

Furthermore, it is unclear whether there was a specific strategy when creating a special sex offender register in order to prevent sexual abuse of children in Serbia. If in the case of sex offenders who have not been sentenced to prison, the purpose of the register is solely to inform employers whether the person they intend to hire has committed sexual offenses against minors, this could have easily been achieved by relying on the standard register of convicted persons under the jurisdiction of the Ministry of internal affairs.

Also, in Ireland, the sex offender registry is organized in such a way as to encourage the cooperation of SOMIU and the police, in order to supervise and also support the offender by catering to his needs. In Serbia, Marija's Law does not say anything about who is to assist the Directorate for the Execution of Criminal Sanctions and the Commissioner's Offices in carrying out complex tasks related to the supervision of sex offenders.

At the moment, we do not have any data on the effects of almost 10 years of recording the data of sex offenders in a special register in Serbia. It seems that it would not be wrong to say that the register was established with the humane intention to apply innovative and modern measures in order to combat the sexual abuse of children. However, beyond wishful thinking, it remains unclear what practical effect the sex offender register can have on the future behavior of sex offenders. Truth be told, nothing particularly positive can be said about the effects of registries in other countries around the world, so, in conclusion, we could state that Serbia does not deviate from general trends in this respect either.

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## РЕГИСТРИ СЕКСУАЛНИХ ПРЕСТУПНИКА - УПОРЕДНОПРАВНИ ПРИКАЗ

### Апстракт

Током последњих година значајну пажњу опште и стручне јавности привлачи феномен сексуалног злостављања, са посебним фокусом на малолетна лица као оштећена. Како би се остварила адекватна заштита и превенција, све више се размишља о додатним мерама које би се могле применити у контексту кривичноправне реакције, али и изван ње. Једна од мера јесте и увођење посебних, како јавних, тако и нејавних регистара сексуалних преступника, у којима се бележи већи број личних података сексуалних преступника. Имајући у виду наведено, предмет рада јесте компаративно правни приказ законодавних решења више европских земаља у контексту креирања посебних регистара сексуалних преступника. Циљ рада јесте да се наведена решења упореде са позитивноправним оквиром у Србији, како би се установило јесу ли присутне одређене сличности и/или разлике, а што може бити значајно за будуће измене и допуне Закона о посебним мерама за спречавање вршења кривичних дела против полне слободе. према малолетним лицима.

**Кључне речи:** сексуални преступници, регистар, јавни увид, компаративни приказ.

Ivana MARKOVIĆ, Ph. D\*

## ON THE SUITABILITY OF THE AVOIDANCE WILLINGNESS AS A DEMARICATION CRITERION BETWEEN INTENT AND NEGLIGENCE

### Summary

The question of the differentiation between conditional intent and conscious negligence is among the most controversial issues of the dogmatics of criminal law. One reason for that is that this border is often the fine line between punishability and impunity, hence the importance as both, a doctrinal and practical aspect, with an additional, indirect impact on criminal policy. Among many theories and doctrines that have been developed in an attempt to solve this issue, a specific one is the Theory on the Avoidance Willingness (*Theorie des Vermeidewillens*). According to this idea, a manifestation of the willingness to avoid the endangerment (by using counter-factors) would be necessary in order to confirm conscious negligence. Otherwise, the form of guilt would be *dolus eventualis*.

In this paper, the author will present the Theory of Avoidance Willingness within the context of demarcation between conditional intent and conscious negligence, further analyze its advantages and detriments, and eventually come to the final conclusion whether and to what extent avoidance willingness is an applicable criterion for the delineation between intent and negligence; here, in our case in Serbian Law.

**Keywords:** *intent, negligence, theory, avoidance willingness, counter-factor.*

### 1. INTRODUCTION

The Serbian Criminal Code (hereinafter: CC)<sup>1</sup> starts with the principle of legality, when it prescribes in Article 1 that “no one may be punished or other criminal sanction imposed for an offence that did not constitute a criminal offence at the time it was committed, nor may punishment or other criminal sanction be imposed that was not applicable at the time the criminal offence was committed“. The elements of crime, that constitute every criminal offence, are further stipulated in Article 14 of the Criminal Code (CC), and consist of: an act,

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<sup>1</sup> Krivični zakonik Srbije, (*“Sl. glasnik RS”, br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019*).

legal prescription, unlawfulness and guilt. The notion of crime is, hence, of a mixed, objective-subjective nature. The last element – guilt, is essential and (re-)occurs at various points in the dogmatic of criminal law. It does so, for example, already in Article 2 CC, albeit in a more abstract way, as it complements the legality principle by consolidating the principle of guilt („there is no punishment without guilt“); it occurs in its manifestations as a possible subjective element of the particular notion of crime; as an orientation within sentencing, etc.

Guilt is usually divided into two main forms: intent and negligence. They can be further separated, as it is the case in Serbian law, into direct intent (*директни умишљај*, Art. 25) and conditional intent (*евентуални умишљај*, Art. 25), and further into conscious negligence (*свесни нехат*, Art. 26) and unconscious negligence (*несвесни нехат*, Art. 26).

Problematic is the distinction between conditional intent (*dolus eventualis*) and conscious negligence (*luxuria*), as they have the same element of consciousness (“the perpetrator was aware that he could commit the act”), but a different element of will (“consent” for conditional intent and “reckless assumption that the offence would not occur or that he – the perpetrator would be able to prevent it” for conscious negligence). It is neither dogmatically unanimously deducted, nor judicially decided and standardized how these elements of will between the two forms of guilt should be identified.

The demarcation is at the same time practically highly relevant. It can decide over the legal qualification of an act (e.g. between murder and negligent homicide), over the existence of a criminal offence (if the respective offence does not include liability for negligence, but only for intent). More often than this, it influences the process of sentencing, as the degree of culpability usually functions as an extenuating or aggravating circumstance (prescribed in Art. 54 of the Serbian CC). Furthermore, all other institutes of criminal law that include intent (e.g. regarding recidivism, attempt, mitigation of punishment, etc), will indirectly also be affected by this division.

It is therefore practically important and dogmatically challenging to try to find an orientation point for the demarcation between (conditional) intent and (conscious) negligence.<sup>2</sup> Among teachings that have been trying to find an answer (like the cognitive and voluntative theories as the most prominent ones that include most of the relevant sub-teachings), the Theory on the Avoidance Willingness offers a particular view on this issue.

## 2. THE THEORY ON THE AVOIDANCE WILLINGNESS

According to the Theory on the Avoidance Willingness (*Theorie des Vermeidewillens*), developed by Arthur Kaufmann,<sup>3</sup> conditional intent should only be negated in cases in which

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<sup>2</sup> For an overview of the most important theories on the demarcation of conscious negligence and conditional intent see Vuković, 2022, 211, 212.

<sup>3</sup> Kaufmann was a German theoretician of criminal law and legal philosopher. He published works particularly on the issues of guilt, legal theory, legal philosophy, and the right of resistance. After not

the perpetrator imagines consequences as possible and if his controlling will(ingness) was aimed at avoiding these consequences. The more precise term for the theory should therefore be Theory on the Not Activated Avoidance Willingness (*Theorie des nicht betätigten Vermeidewillens*). Conscious negligence exists when the perpetrator uses at the same time counter-factors, with the help of which he tries to control the process in such a way that the side effect that he imagined as possible does not occur - provided he sees real opportunities for this measures („gives them a chance“) to succeed (Kaufmann, 1958, 77). He has manifested his will to avoid the consequences of the crime. This means, again on the other hand, that *dolus eventualis* is given when the perpetrator considers the realization of the criminal offence as possible, but without expressing (activating) a will to avoid it (Kaufmann, 1958, 64; Schünemann, 1975, 790). In other words, a concrete idea, vision of the consequences would suffice to confirm conditional intent.

Furthermore, it is important to annotate that the additional element „will to avoid“ does not lead to its attribution to the volunative theories of intent, because this additional will is not a constitutive element of the intent (which is the reason why merely a concrete idea of the consequence suffices), but rather only an indication of a lack of intent (Kindhäuser, 2018, 3).

The Theory of the Avoidance Willingness can be illustrated with the arguably most famous case from the German judicial practice on the demarcation between conditional intent and conscious negligence – the case of the leather belt from 1955 (*Lederriemen-Fall*).<sup>4</sup> In this case, L wants to take some valuables from N. For this purpose, he at first plans to choke him with a leather belt until N becomes unconscious. He then, however, gets concerns because he fears that such treatment could lead to N`s death, which L definitely does not want. So he decides to instead stun him by hitting him with a punching bag on the head. He considers this approach to be more gentle. But to be on the safe side, he also takes the leather belt with him, just in case. He finds N and asks if he can stay overnight at his place. When N falls asleep, L pulls the sandbag over his head. Instead of being stunned by this, N wakes up and L hits him again with the sandbag. This time the sandbag bursts. In the scuffle that follows, L manages to get the leather strap out of the bag and put it around N`s neck. He keeps tightening the leather belt until N finally stops fighting. Since he doesn't want N to die, he tries to choke him as carefully and "controlled" as possible. He ties him then up and quickly collects all the items worth taking with him. Afterwards, he looks after N. He is worried whether N is still alive, as he is not moving. A resuscitation attempt by L fails (Halbig, 2015, 76, 77).

If we now apply the Theory on the Avoidance Willingness on this case, the following would be the result. First, L considers the occurrence of the (actually secondary) consequence - death of N, to be at least possible. He simultaneously also activates counter-factors during his actions (use of punching bag instead of leather belt as an apparently more gentle tool;

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being impressed by Heidegger whom he first met during his University days, Kaufmann was later highly influenced by Gustav Radbruch, the Dean of the Faculty of Law in Heidelberg at the time.

<sup>4</sup> BGHSt 7, 363, 1955. A simplified version of the case has been used in the paper.

cautious and controlled choking of N to make him lose his consciousness, not his life), with which he tries to ensure that the consequence he imagines as possible does not occur. This indicates negligence (Halbig, 2015, 80).

Directed towards the prevention of death, this course of action shows an activated will to avoid, which according to Kaufmann's Theory would mean conscious negligence. In other words, L would be held accountable for negligent homicide (involuntary manslaughter) if we consequently apply the content of this doctrine. However, it should be pointed out that even Kaufmann, contrary to his doctrine, assumed *dolus* in this case (Kaufmann, 1958, 77). Stratenwerth criticizes this and remarks that intent could only be confirmed if he, apart from the activated avoidance willingness, would consult another criterion (1959, 62, 63). As an example of such a criterion, he mentions Welzels formula (1958, 62), after which the perpetrator acts with intent if he leaves it to chance whether he can avoid the consequence. However, such an *addendum* would unhinge the entire teaching: in problematic constellations, the perpetrator does believe in the consequence, despite his attempts to avoid this. And if this remaining possibility will be realized, it is always a matter of chance. In other words, there would also be *dolus eventualis* (Stratenwerth, 1959, 63).

This volatility of the avoidance willingness as the sole criterion is at the same time one of the biggest critiques directed towards this teaching, among various others.

### 3. CRITIQUE OF THE THEORY AND ITS APPLICABILITY TO SERBIAN LAW

#### 3.1. Critique of the Theory

One of the basic premises of this theory is correct – namely, that someone who seeks to avoid something does not want to cause it. The contrary, however, cannot be concluded – if someone does not avoid something that does not mean that he/she wants to cause it. For example, the extremely anxious hunter fears with every shot that he could shoot people that are randomly walking by, although he has no indications that there are actually people around. On the one hand, he does not use any measures to prevent injuries of people strolling by; on the other hand, he does not want to hit anyone (Kindhäuser & Zimmermann, 2022, 141). The Theory on the Avoidance Willingness hence does not make a positive contribution to the substantive specification of the *dolus eventualis* which goes beyond the Possibility Theory (*Möglichkeitstheorie*);<sup>5</sup> she just formulates a negative case of lack of intent (Kindhäuser & Zimmermann, 2022, 141).

A detriment of the Theory is also that it (wrongly) reflects and delimits the inner categories (intent and negligence) through the external manifestations of the crime (Hefendehl, 2021, 206). Yet, the assessment of subjective elements usually includes also those

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<sup>5</sup> According to the Possibility Theory, *dolus eventualis* exists when the perpetrator has recognized the concrete possibility of realizing the criminal offence and nevertheless (has continued to) act (s).



objective manifestations as an inevitable step in the procedure of taking evidence and requires particular interpretative attention. Ultimately, it is not (only) about the inner life of the perpetrator, but about a normative attribution (Hefendehl, 2021, 206). In particular, if the defendant makes use of his right to remain silent in criminal proceedings, there is no access to his mental constitution anyway (Hefendehl, 2021, 206). Therefore, intent is usually evaluated according to external circumstances.

A critical view on the Theory of the Avoidance Willingness shows further manifold shortcomings. First of all, the doctrinal background of the teaching is that of the final act in criminal law (*finale Handlungslehre*). This teleological theory of action, developed by *Hans Welzel*, is based on the idea that the main feature of human action, as the cornerstone of criminal law theory, is his will. The content of the action is seen as the aim that the actor (perpetrator) wants to achieve with his act, and is also regarded as an element of the very concept, which is the reason why it should also be the object of evaluation (Muñoz-Conde & Chiesa, 2006, 2463).

For the final theory of action, the 'intention' is a sub-category of the 'final realization will' (*finaler Verwirklichungswille*), 'namely the final will to realize (the act) in relation to factual circumstances of a legal fact' (Welzel, 1957, 10). It has often been emphasized that the intent is hereby not limited to "intention," "striving for," or even "wanting to have" (Gallas, 1955, 42). The final nexus is indeed shaped by steering toward a desired goal; but it encompasses not only the attainment of the purpose itself, but the entire causal process set in motion by the control action, insofar as this is covered by the controlling will (Kaufmann, 1958, 64, 65). That is why, as Welzel has annotated it, the realization willingness can encompass "not only the desired goal, but also the means and the side effects associated with them" (Welzel, 1958, 60).

The positive side of the final theory of action, and by this also indirectly of the Theory of the Avoidance Will, is that it depicts very well the ontological structure of the human action and its intertwining with the orders and prohibitions of criminal law (Vuković, 2012, 83). The perpetrator, as a reasonable human being, can imagine the harmful consequences of his actions; he can perceive that his doing can have some accompanying harmful effect, but he can also underestimate or ignore the proportions of the danger he creates (Vuković, 2012, 83). In other words, his ability to navigate the course of his action can be activated wrongly, not sufficiently or not be activated at all.

However, the general downside and key weakness of the final theory is the fact that it is not adequate to cover all criminally relevant behaviors with its definition of the criminal act, because not all human actions are final in this regard (Vuković, 2012, 83). Affected by this are foremost negligent criminal offences. The final theory, namely, claims that careless behavior is not characterized by actual finality as a true shaping factor that impacts reality, but rather only by potential finality. However, finality – similar to causality, cannot be potential. It either exists or it does not (Vuković, 2012, 83). Furthermore, the attempt to correct the doctrine by stating that the consequence can only be an accidental outcome of the targeted action; that it represents only a secondary phenomenon of an insufficiently directed

action - this solution does not suffice either. It cuts out other relevant factors, and includes only those parts of the causal process, which the perpetrator finally leads, and factors that lay outside of the typicality of the crime (Vuković, 2012, 84). In other words, it covers a range that tackles other elements of crime (Stojanović, 2017, 94).

At the same time, even those who do not use counter-factors to avert the consequence, can still rely on a good outcome (Hefendehl, 2021, 206). Roxin has acknowledged this as well. He rightly remarks that the human carelessness often tends to trust in one's own lucky star, even without applying particular precautionary measures (Roxin, 2006, 460). At the same time, efforts to avert it cannot rule out intent where the perpetrator himself does not trust their effectiveness (Roxin, 2006, 460). Someone who uses counter-factors and still calculates the negative outcome with a probability of 50% cannot be treated differently than someone who, right from the beginning, estimates a probability of 50% to commit the offence and still continues to act (Roxin, 2006, 460).<sup>6</sup>

### 3.2. Applicability of the Theory in Serbian Law

The first main argument against the applicability of the Theory on the Avoidance Willingness in Serbian Law stems from the fact that the very basis of this teaching – the final theory of action, is not accepted here; neither in doctrine, nor in judicial practice. The perspectives on this element of crime do vary. In the older Serbian doctrine, action was regarded as a willed bodily movement, as an objective and causal process (Vuković, 2022, 56). Modern views define the, according to Art. 14 CC, first element of crime as a socially relevant emanation of the will (Stojanović, 2017, 98), or see it as actually redundant (Vuković, 2022, 56). However, the teaching on the final action is a theory that is not accepted.<sup>7</sup>

The second main argument against the applicability is that the forms of guilt are in Serbian Law defined through consciousness and will, and that the definition of conscious negligence from Art. 26 CC is very clear about the element of will - “reckless assumption that the offence would not occur or that he – the perpetrator would be able to prevent it”. The part of the careless assumption that the offence would not occur does not entail a specific engagement of the perpetrator (contrary to the second part of the definition), which is in line

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<sup>6</sup> Structurally, the approach of the Theory on the Avoidance Willingness does not differ from the Theory of the Uncovered Danger (*Theorie der unabgeschirmten Gefahr*) of Rolf Dietrich Herzberg. According to his Theory, *dolus eventualis* occurs when the perpetrator has consciously decided on behavior that is incompatible with a risk maxim applicable in the legal system. Here, the (un)shieldedness/(un)coveredness of the risk set by the perpetrator is decisive for the objective attribution (Herzberg, 1986, 249). The only difference is that, according to Kaufmann, the perpetrator can only refer to the risk-reducing effect of his own activities, but according to Herzberg, he can also refer to the risk-reducing effect of other factors, such as the careful behavior of third parties and, above all, the victim himself. Herzberg, 1986, 260.

<sup>7</sup> More elaboration on the downsides to this see Vuković, 2022, 57.

with the argument against the Theory on the Avoidance Willingness; namely that someone who did not use counter-measures to avoid the consequence of the crime, can also trust in a good outcome.

However, despite these arguments against the Theory, it can still serve as an indicator for the respective form of guilt and in this regard be, at least, a helpful interpretative tool.

#### 4. CONCLUSION

Without any doubt, it can be concluded that the theory on the Avoidance Will, taken on its own, without further modifications, is not applicable. Nevertheless, it but can be used as an indicator in cases where the use of counter-factors occurs. It substantializes the material notion of guilt and its immanent relative indeterminism.

After all, if we accept that human action is a prerequisite of penal responsibility, as it is the case in Serbian law, then the concept of action that we need to use as the foundation and backbone of criminal liability becomes important (Muñoz-Conde & Chiesa, 2007, 2462). In this regard, the final theory of action, that underscores the Theory of the Avoidance Willingness, is at the same time one of its detriments. However, as a basically normative risk theory, it incorporates an evaluative approach, which reflects the modern (although incomplete and in the end inconsistent) view on guilt in a better way than theories that put emphasis on either the volunative or the cognitive element. All in all, it can be said that the Theory on the Avoidance Will is a refutable indication and can be a useful additional interpretative tool for the determination of the form of guilt.

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## О ПОДОБНОСТИ ИЗБЕГАВАЈУЋЕ ВОЉЕ КАО КРИТЕРИЈУМА ЗА РАЗГРАНИЧЕЊЕ УМИШЉАЈА И НЕХАТА

### Апстракт

Питање разграничења евентуалног умишљаја и свесног нехата представља једну од најспорнијих тема кривичноправне догматике. Један од разлога за то јесте што управо између та два облика кривице пролази танка линија између кажњивости и некажњивости, те је она значајна како доктринарно, тако и са аспекта судске праксе, али посредно и из угла криминалне политике. Међу многобројним теоријама и учењима која су развијена у покушају да се реши ово питање, по својој специфичности се истиче теорија о избегавајућој вољи (*Theorie des Vermeidewillens*). Према овом схватању, да би се утврдило постојање свесног нехата, неопходна је манифестација воље да се избегне опасност, користећи контра-факторе. У супротном, облик кривице би био евентуални умишљај.

Аутор ће у раду представити теорију о избегавајућој вољи у контексту разграничења евентуалног умишљаја и свесног нехата, даље анализирати предности и недостатке овог схватања, и на крају донети закључак о томе да ли је и у којој мери избегавајућа воља подобан критеријум за разграничење поменути два облика кривице.

**Кључне речи:** *умишљај, нехат, теорија, избегавајућа воља, контра-фактор.*



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## UNLAWFUL ACTIVITIES WITH WEAPONS AND AMMUNITION IN SERBIA: SOME CRIMINOLOGICAL ASPECTS

### Summary

The article examines with unlawful activities with weapons and ammunition in the Republic of Serbia in the period from 2016 to 2021. In order to carry out the research, the authors downloaded the data available to public authorities. By analyzing legislation and criminal law literature, the authors present the phenomenological forms of this felony in Serbia. The authors came to the conclusion that unlawful activities with weapons in the observed period recorded an increase like all other parameters that were monitored in time and space. The analysis of the imposed criminal sanctions concludes that the penal policy is mild towards the crime perpetrators.

**Key words:** weapon, ammunition, crime perpetrators, felony

### 1. INTRODUCTION

The restriction of the possession of weapons began at that moment of social development when society and the state realized the danger of weapons, their free possession and their misuse. Possession of firearms in Serbia and the Balkan region is conditioned by a series of historical, political, economic and geographical circumstances. The key sources are the mass recruitment system in the former Yugoslavia and the wars during the 1990s, 'leakage' from insufficiently secured weapons warehouses of security structures and numerous factories for their production, cross-border smuggling of weapons, the use of weapons as an element of crime etc. There is also a tradition of keeping weapons in the house, which relies on patriarchal culture and the custom of family inheritance of weapons from earlier liberation wars, as well as the tradition of using firearms during family celebrations holidays and sports victories (Djordjević-Lukić, Tadić & Milić, 2015, 6; Rajković, 2022).

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A significant number of citizens of the Republic of Serbia keep carry and use weapons. A significant number of citizens are also authorized to carry, hold and use weapons based on the work they perform, and the circle of persons who are authorized is wider than members of the military and the police. Some scholars talk about ‘weapon culture’ that still exists in Serbia and which is, on the one hand, a traditional heritage (where do different customs come from, such as ‘shooting in the apple’ during wedding rituals, or shooting during celebrations, especially at the birth of a male child). The absolute majority of people who own weapons and crime perpetrators committed with firearms are men. The number of women who own weapons is extremely small, and they are disproportionately more often victims of crimes committed with weapons (Stevanović-Govedarica, 2021, 15).

In the previous period, criminologists did not examine this issue, and the reason can be stated that this is a victimless crime.

## 2. DATA

2016 was taken as the starting year in the research because the Serbian Weapons and Ammunition Law (2022, hereinafter: WAL) has been in force since 2015. From the database of the Ministry of Interior ‘Felonies and Perpetrators’ statistical data on the felony Illegal Production, Possession, Carrying and Circulation of Weapons and Explosives (Criminal Code, 2019, Art. 348, hereinafter: CC) in the period 2016-2021 were downloaded. Data from the Statistical Office of Republic of Serbia related to adult and juvenile perpetrators of felonies were used to research the penal policy. Based on the obtained data, tables were created from which charts were derived.

## 3. METHOD

Taking into account the subject of the research, it was necessary to apply the methods of social sciences and humanities. Thus, the method of analyzing the content of documents containing statistical indicators on the felony of Illegal Production, Possession, Carrying and Circulation of Weapons and Explosives for the period 2016-2021 in Serbia was applied. The collected data were first processed and then presented in chart models in the article. This area was analyzed in spatial and temporal frameworks, and certain conclusions were drawn using the method of synthesis and based on the performed analyses.

## 4. PHENOMENAL FORMS OF CRIME RELATED WITH WEAPON AND AMMUNITION

Felony consists in the illegal production, alteration, sale, acquisition, exchange or possession of firearms, convertible weapons, disabled weapons, their parts, ammunition, explosive substances, mine-explosive devices and gas weapons. Phenomenal forms of this



crime can be observed in relation to the act of execution or in relation to the object of the crime.

The object of crime attack are firearms, convertible weapons, disabled weapons, their parts, ammunition, explosive materials, mine-explosive means and gas weapons. According to Article 3 of the WAL the *weapon* is any hand-held portable device designed or adapted to, by means of compressed air, gun powder, other gases, or other propellant, throw a round, ball, shot and any other projectile, i.e. spray gas or liquid, or other devices intended for self-defense, attack, hunting or shooting sport. For the purpose of the WAL, devices for humane animal slaughter, tools and replica weapons that do not use gunpowder ammunition shall not be considered as weapons. Also WAL consider *firearm* as any weapon that expels a projectile through a barrel by means of powder gas pressure; with regard to the aforementioned. The types of firearms are machine gun, light machine gun, automatic rifle, sub-machine gun, pistol, revolver, rifle with a rifled barrel (single-shot, repeating, semi-automatic), smooth-bore rifle (single-action, double-action, repeating, and semi-automatic), combined rifle (with a rifled and smooth-bore barrel), rifles, pistols and revolvers with rim fire percussion (small arms).

*Explosive substances*, in the sense of Explosive Substances, Flammable Liquids and Gases Law (2015, Art. 3), are considered: 1. commercial explosives, 2. means for igniting explosives, 3. pyrotechnic products, 4. commercial ammunition, 5. gunpowder, 6. explosive raw materials for the production of the previously listed substances. *Commercial explosives* are substances that are used to demolish or shape objects and materials with the energy released by chemical reactions of explosive decomposition. *Means for igniting explosives* are considered to be all types of caps, lighters and fuse and pyrotechnic means used in blasting. *Pyrotechnic products* are considered to be means used for fireworks, anti-hail rockets and other rockets used for scientific, economic and other purposes, as well as objects containing explosive ingredients, sprinkled ingredients with an explosive effect or other ingredients, which are used to achieve destructive, fire, light, explosion or smoke effects. Bullets, cartridges and shells equipped with a cap and filled with gunpowder are *commercial ammunition*. *Gunpowder* is black and low-smoke gunpowder intended for mining and sporting purposes. *Explosive raw materials* are considered to be substances that, by their chemical composition and sensitivity to ignition, have the properties of explosives and are capable of explosive decomposition, and are intended for the production of explosive substances.

The WAL recognizes four categories of weapons, but such categorization is not recognized in the criminal legislation. That is why the provisions of the criminal legislation are of a blanket nature, where the behavior and obligations related to weapons and ammunition are issued by the WAL, and in the criminal legislation there are penal provisions related to the felony.

The act of execution of this felony is the production, modification, sale, acquisition, exchange possession of the items of the felony and carrying of items. *Manufacturing* is such

an action that consists in the production and/or construction of a new item of a felony from raw materials and parts. According to WAL, *weapon modification* is the adaptation of weapons to other ammunition and other operations on the weapon that affect its functioning and permanently or temporarily change the original technical characteristics and construction solutions of the manufacturer. *Sale* is the exchange of criminal items for money (domestic or foreign). *Acquisition* is getting possession of a weapon in any way, for example by gift, pledge, etc. *Exchange* is the replacement of a weapon for another item or value. *Possession* of weapons is coming to the state, i.e. establishing a claim over the items of a felony and starting to dispose of them, as well as creating conditions that allow the items to be used and disposed of without hindrance and freely. It is about *de facto* authority over weapons and other items of the felony. It doesn't matter whose property they are. A crime exists even if the case is reached through the commission of a felony, e.g. theft (Stojanović, 2020, 1038; see also Marković, 2016).

*Carrying* is the act of transferring the items of a felony from one point to another, i.e. possessing the item on one's person. In theory and practice, the most important issue is the difference between holding and carrying a weapon and setting clear criteria. According to the author's opinion, possession is considered to be all those actions with weapons in the house or apartment where the residence is registered without taking it outside that area and without the intention to use it. All other actions involve carrying a weapon. Carrying is the possession of a weapon with the perpetrator, either directly in the suit, pocket, and belt, in his bag that he/she carries in his/her hand or on his/her shoulder, or in the vehicle that the perpetrator uses to drive (Simić, Isaković, 2010, 158; Lazić, 2017, 422). Carrying a weapon presupposes that the perpetrator moves in space in the sense of changing the place where he/she is and that he/she has, e.g. in his hand, pocket or purse, holds a weapon or other item that represents the object of this felony (Stojanović, Delić, 2017, 286).

The legislator issues a prison sentence of six months to five years cumulatively with a fine for the basic form of felony. The first qualified form of this felony is determined in relation to the objects of the felony. These are shot silencer, ammunition with armor piercing, incendiary, explosive projectiles, as well as projectiles containing radioactive, poisonous and harmful substances, and projectiles for such ammunition, as well as ammunition for pistols and revolvers containing explosive projectiles (dum-dum bullets), and projectiles for such ammunition (WAL, Art. 6). This also includes weapons from category A - mines and explosive devices, automatic short and long firearms, weapons disguised as other objects and firearms with silencers. For this form, a prison sentence of one to eight years is issued cumulatively with a fine.

Another qualified form of this felony is also determined in relation to the objects of the felony so that it exists if it involves a large amount of weapons, ammunition and devices or weapons or other means of great destructive power or the felony is committed against the rules of international law. What would constitute a larger quantity of weapons is a factual question that is resolved by case law. The wording 'great destructive power' means devices

that can achieve significant destruction and damage to property, endanger the life and physical integrity of a large number of people, etc. The rules of international law are contained in various conventions and protocols, such as The United Nations Convention against Transnational Organized Crime (2005) and The Arms Trade Treaty (2014). In addition to this protocol, there are other international documents such as Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (2001), International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (2005), OSCE Document on Small Arms and Light Weapons (2000), as well as numerous other acts of international organizations that refer to restrictions on trade in arms and ammunition (Leštanin, 2017, 154).

When it comes to the possession of firearms, it is unlikely that the competent state authorities will discover that a person has a weapon in illegal possession. Also, it is very difficult to detect a citizen who carries a firearm without authorization, if the weapon is well hidden. That is why, as a rule, this felony will be discovered when a person who has an illegal weapon also commits another felony (Milić, Baturan, 2019, 162-163).

## 5. RESULTS OF THE RESEARCH

Illegal activities with weapons and ammunition were explored in the period from 2016 to 2021 on the territory of Serbia through the following identified parameters: 1) Total number of felonies from Art. 348. CC; 2) Number of felony according to the phenomenal forms; 3) Spatial distribution of the felony; 4) Felony according to the time of execution during the year, month and during the day; 5) Place of discovered of the felony; 6) The most common items for committing a felony; 7) Crime perpetrators by gender and age; 8) Crime perpetrators by citizenship; 9) Crime perpetrators by education; 10) Crime perpetrators by vocation; 11) Crime perpetrators by employment; 12) Number of reported and convicted persons; 13) Pronounced criminal sanctions for adult and juvenile perpetrators of crime.

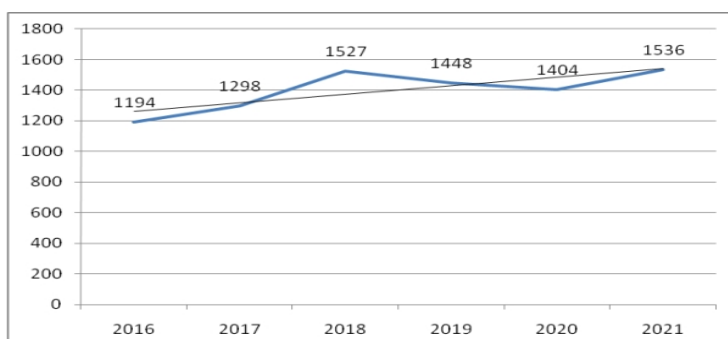


Chart 1 - Total number of felonies from Art. 348. CC

From Chart 1, we see that the number of felonies under Article 348 recorded an increase in the observed period (29%), regardless of several legalization procedures and new legislation in this area. The highest number of crimes was recorded in 2021, while the lowest was recorded in 2016. Observing the rate of this type of crime, although the number of inhabitants in Serbia is decreasing year by year, the state and trend of the crime rate corresponds to the absolute values. The lowest rate (16.87) was recorded in 2016 and the highest in 2021 (22.35).

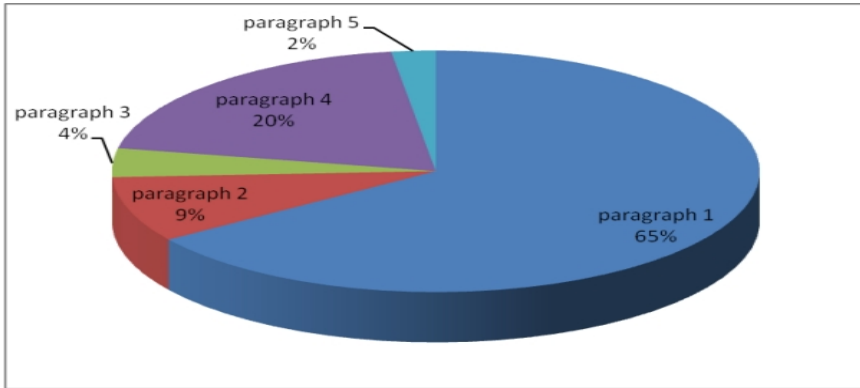


Chart 2 - Number of felony according to the phenomenal forms

Looking at the forms (Chart 2), the trend is observed that the form from paragraph 1 appears in as many as 65%, the carrying of legal weapons from paragraph 4 in 20%, and the qualified forms in less than 10% of cases.

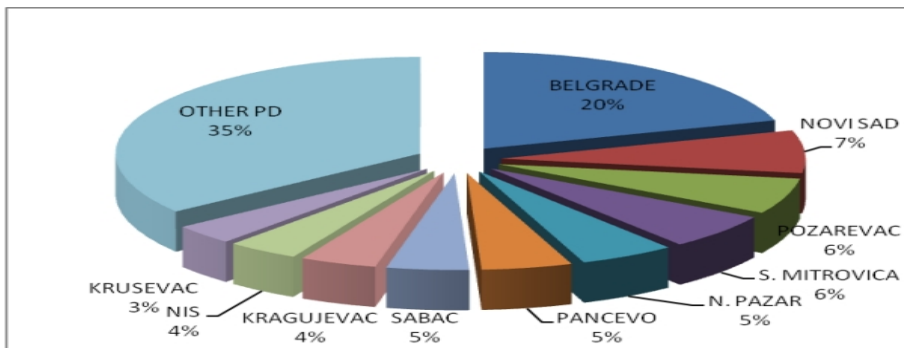


Chart 3 - Spatial distribution of the felony

Looking at the spatial distribution, if the division into police departments (PD) is taken as a criterion, we see that the most detected crimes are in Belgrade PD (20%), Novi Sad PD

(7%), Pozarevac PD and Sremska Mitrovica PD 6% each, Novi Pazar PD, Pancevo PD and Sabac PD participates with 5%, while the others police departments participate with less than 5%.

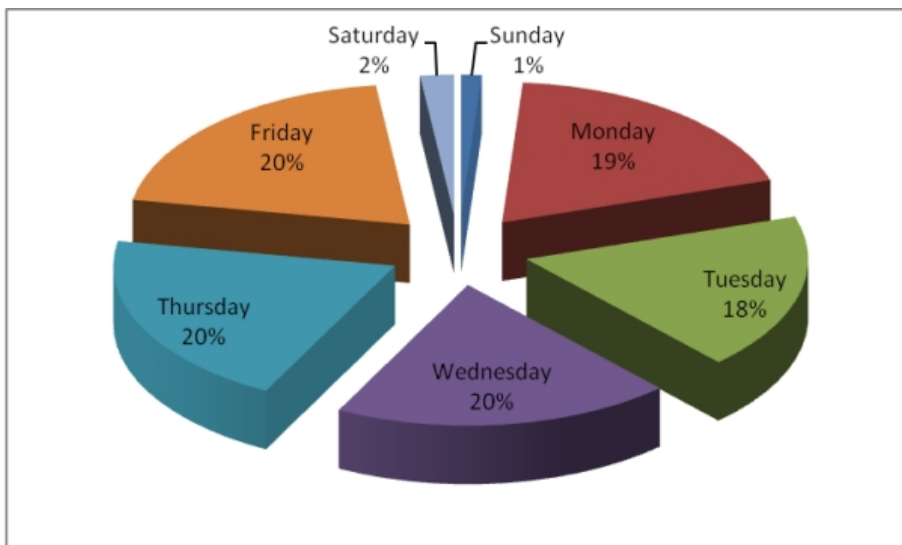
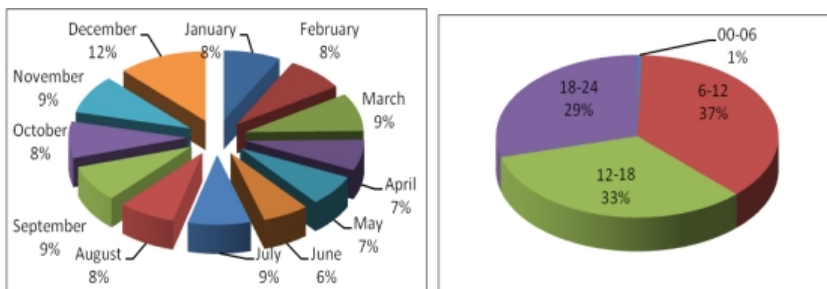


Chart 4 - Felony according to the time of execution during the year, month and day

Observing the time of execution (detection) of the felony (Chart 4), we see that the trends are relatively evenly distributed according to months of the year (with the exception of December), days of the week and hours of the day. What can be observed is that this crime is rarely detected on weekends and during the night.

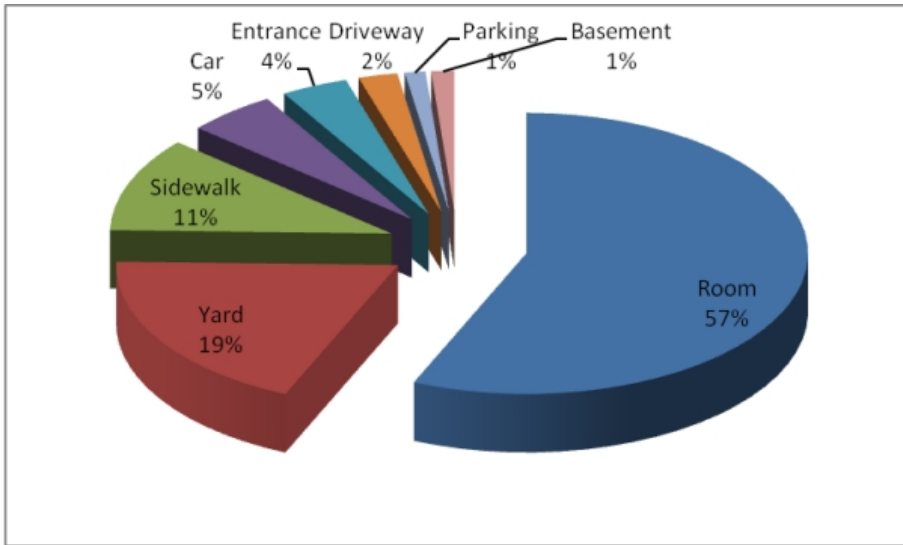


Chart 5 - Place of discovered of the felony

The most common places where illegal weapons are discovered are the room (57%), the yard (19%), the sidewalk (11%), and the car (5%), while other places account for less than 5% of the total number of crimes (Chart 5).

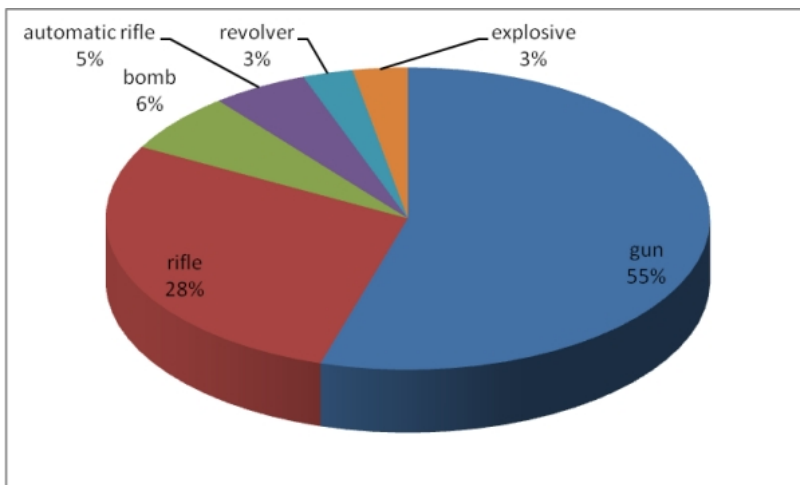


Chart 6 – The most common items for committing a felony

A gun with 55% participation is the most common item for execution, followed by a rifle with 28% of cases, a bomb with 6%, an automatic rifle with 5%, explosive and a revolver with 3% participation each (Chart 6).

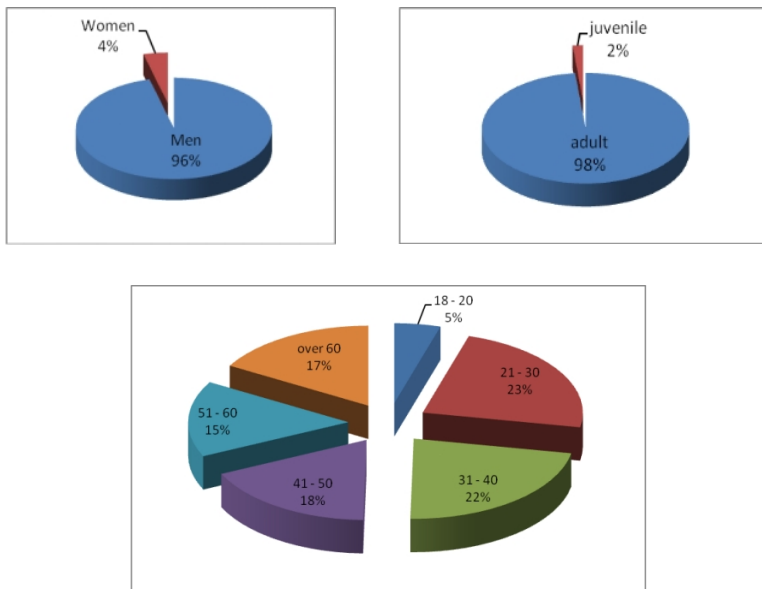


Chart 7 - Crime perpetrators by gender and age

Looking at the crime perpetrators by age and gender (Chart 7), we see that the majority are adult men between the ages of 21-40. It is a very positive indicator that younger adults 18-20 years of age minimally participate in committing these crimes (only 5%).

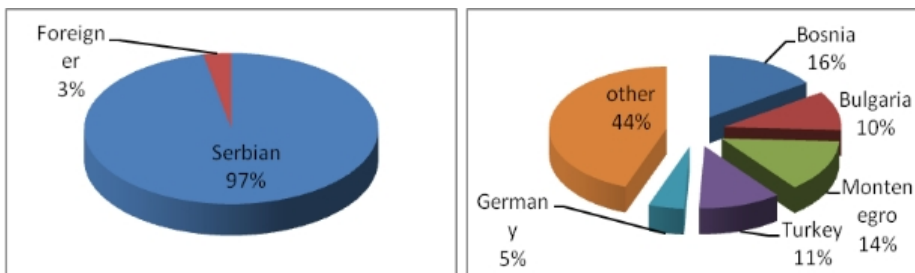


Chart 8 - Crime perpetrators by citizenship

If we analyze the crime perpetrators by nationality (Chart 8), we see that domestic citizens are the perpetrators of this crime in most cases (97%), while foreigners participate

with only 3%. Looking at foreign nationals, citizens of neighboring Bosnia and Herzegovina (16%) and Montenegro (14%) appear most often, and then there are also Turkish citizens (11%), Bulgarian (10%), German (5%), while the others appear in a smaller number of cases.

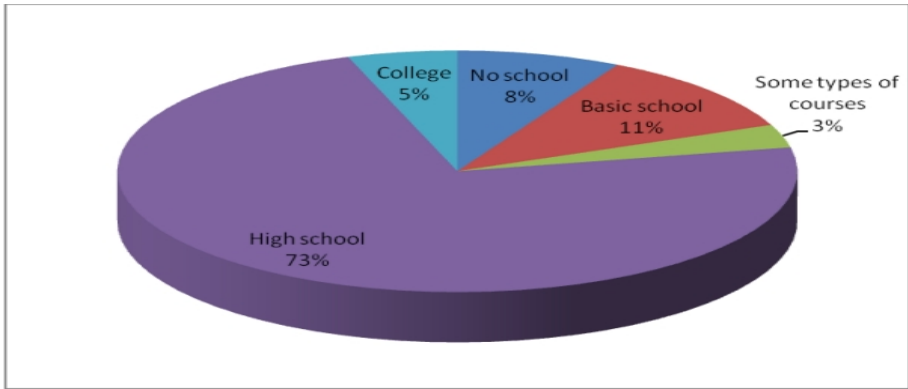


Chart 9 – Crime perpetrators by education

Data on the education of the crime perpetrators should be taken with a grain of reserve because there is a large number of undeclared. As can be seen from Chart 9, the majority have secondary education (73%).

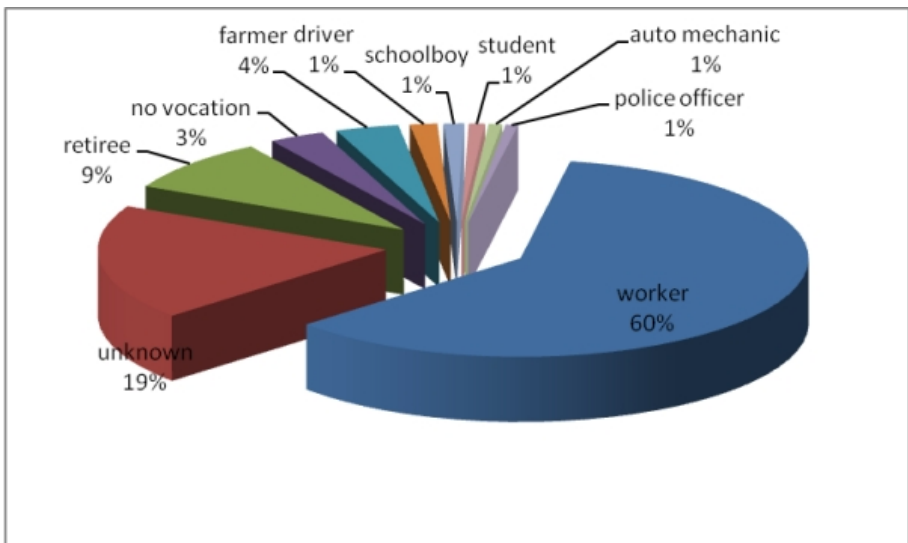


Chart 10 - Crime perpetrators by vocation



The analysis of perpetrators by vocation shows us that the majority are workers (51%), pensioners (11%) and farmers with 4% participation (Chart 10).

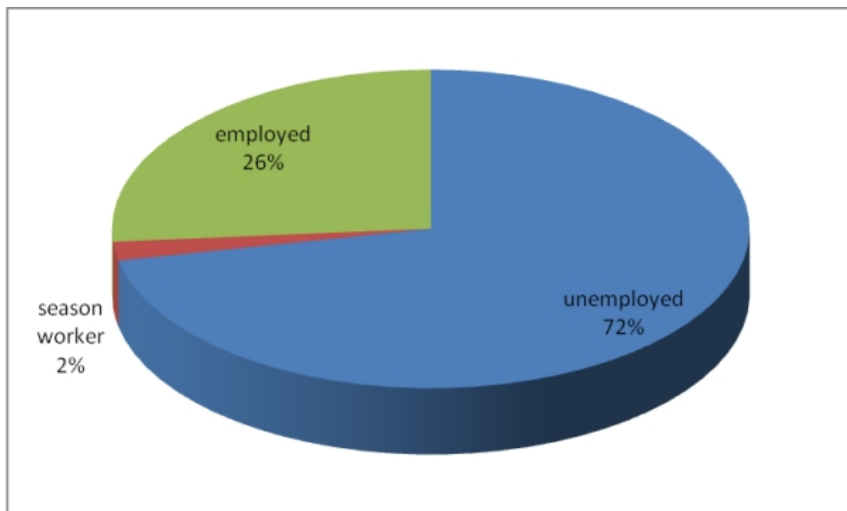


Chart 11 - Crime perpetrators by employment

In most cases, the crime perpetrators are unemployed (72%), but there are also a certain percentage of employees, and seasonal workers (Chart 11).

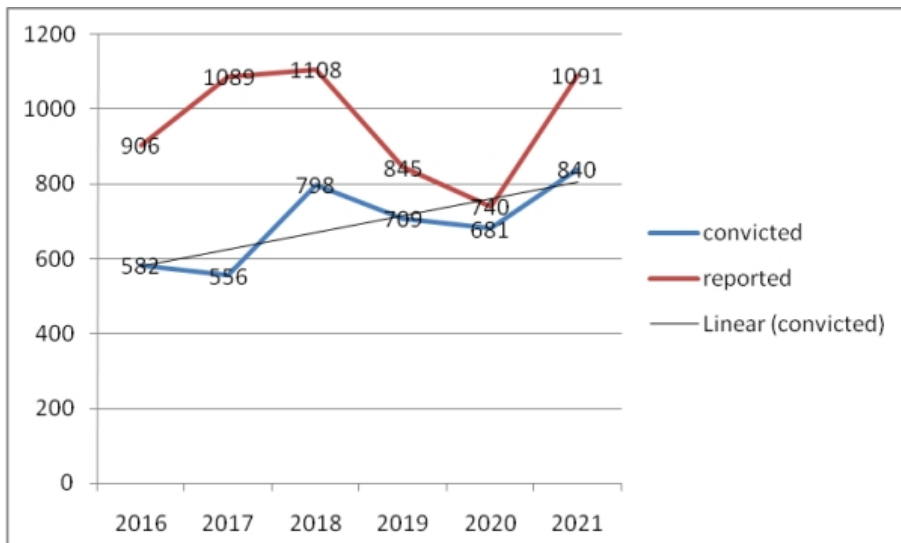


Chart 12 - Number of reported and convicted persons

The number of reported and the number of convicted persons do not have the same trends. While the number of convicted persons is increasing slightly, the number of registered persons is decreasing, and in 2019 and 2020, it is suddenly decreasing. The most reported and convicted persons were in 2021 (Chart 12). As can be seen in 2020, the difference between the number of reported cases and the number of convictions is the smallest.

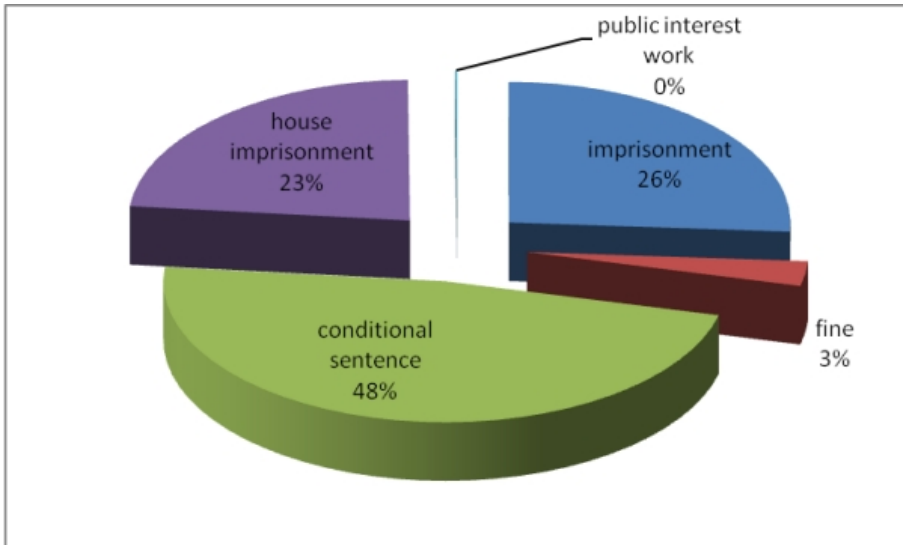


Chart 13 – Criminal sanctions imposed on adult crime perpetrators

As can be seen in the imposed criminal sanctions, 48% prefer conditional sentence (probation), 26% imprisonment, 23% house imprisonment and 3% fine. Public interest work appears in only a few cases and its participation is negligible (Chart 13).

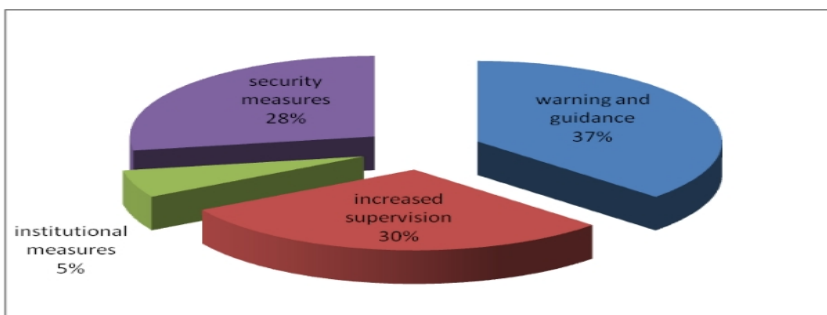


Chart 13 – Juveniles' sentences

Juveniles are sentenced to educational measures in most cases (72%) and security measures only in 28% of cases, while juvenile prison is not imposed at all for this crime. Of the educational measures, warning and guidance measures are most often imposed (37%), measures of increased supervision (30%) and institutional measures in 5% of cases (Chart 13).

## 6. DISCUSSION

Data on discovered felonies from Article 348 of the CC and the number of reported and convicted persons show a significant disparity. On the one hand, the number of detected crime in the observed period is increasing, while the number of reported ones is decreasing. The number of persons convicted for this felony is also increasing so that in 2020 it was significantly close to the number of reported persons. If we take into account that the legalization of weapons was in 2020, we see that it did not have too much impact on the number of detected crimes. Actions of illegal manufacture, alteration, sale, acquisition, exchange or possession are the most numerous (paragraph 1), followed by carrying of legal weapons (paragraph 2). Territoriality, the largest number of detected crimes is in Belgrade, where there is the largest concentration of population, economy, business and all other social activities. Weapons are most often discovered in the room during the week and during the day, and less often on weekends and during the night. This is understandable because the searching the apartment and other premises by order of the judge, which is generally carried out during the day, is used to detect this felony.

The object of the crime is a gun, which can be connected to Serbian (Balkan) customs, because holding and carrying a gun is traditional in these areas. The perpetrator of this crime is an adult male domestic citizen between the ages of 18 and 40. Citizens of neighboring countries bordering Serbia appear among the foreigners. The perpetrator is an unemployed worker with a secondary education.

The penal policy towards the perpetrators of the crime referred to in Article 348 is mild because in most cases a conditional sentence is imposed, but imprisonment and house imprisonment are significant among the criminal sanctions that are imposed. As expected, juveniles are subjected to educational measures, namely those related to warning and summarization in education in order to achieve the purpose of the educational measure.

## 7. CONCLUSION

Weapons and ammunition are part of customs not only in Serbia but also in other countries of the Western Balkans. Consequently, several legalization procedures were announced in order to reduce the number of illegal weapons (2015 and 2020). It is estimated that in the future there will be more legalization procedures announced for the same purpose. In the meantime, the police work to detect crimes that involve illegal actions with weapons

and ammunition.

Although the measures of the criminal legislation should give results in terms of general and special prevention, in the research we saw that the number of crimes is increasing from year to year. The number of convicted persons is also increasing. However, the penal policy towards the perpetrators of this crime is mild and the judiciary should consider strengthening the penal policy.

In terms of legislative intervention *de lege ferenda*, we believe that there is no need for any intervention in the field of criminal legislation because all illegal actions with weapons are issued and adequate punishments are determined for it.

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НЕЗАКОНИТЕ РАДЊЕ СА ОРУЖЈЕМ И МУНИЦИЈОМ У СРБИЈИ: НЕКИ  
КРИМИНОЛОШКИ АСПЕКТИ

**Апстракт**

Рад се бави темом незаконитих радњи са оружјем и муницијом у Републици Србији у периоду од 2016. до 2021. године. Како би спровели истраживање аутори су преузели податке са којима располажу одређени органи власти. Анализом легислативе и кривичноправне литературе аутори презентују појавне облике овог кривичног дела у Србији. Аутори су дошли до закључка да незаконите радње са оружјем у посматраном периоду бележе пораст као сви остали параметри који су праћени у временском и просторном оквиру. Анализом изречених кривичних санкција закључује се да је казнена политика блага према учиниоцима овог злочина.

**Кључне речи:** оружје, муниција, учиниоци кривичног дела, кривично дело.

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## CORRUPTION IN TRADITIONAL SPORT AND E-SPORT: IDEALS AND REALITY

### Summary

In this article the author examines the scale of corruption in professional sports, in comparison between traditional sports and e-sports. In addition to studying the forms of legal response, it should be noted that the issues of combating corruption in professional sports are studied insufficiently. Corruption in sports is difficult to measure. Most of the all-Russian and regional sports federations, physical culture and sports societies do not often recognize the existence of corruption in the respective sport or argue that corruption is under control. The authors present a systematic review of the literature that examines corruption, identifying the factors of corruption in professional sports. To search for relevant studies, the published literature was identified from Scimagojr, ResearchGate, ScienceDirect, Google Scholar, Sage Open. It should be recognized that the practice of developing recommendations for athletes in relation to a specific type of professional sport is good, where acts that are understood as corruption are determined, the procedure for their registration, assessment and taking measures to reduce and counteract such a threat is established. We have noted the specificity of motivation for corruption in professional sports, which differs from the manifestation of corruption in other sectors (for example, health care, education, public service). Professional sports are not characterized by such traditional incentives for corruption as poor working conditions and low wages, since professional athletes are highly paid individuals, and their working conditions and social guarantees are much better than that of most ordinary citizens.

**Key words:** corruption, crime prevention, e-sports, fraud, sports competitions

### 1. INTRODUCTION

Modern sport is a complex sphere, which includes, in addition to sports relations, labor relations, financial, economic, administrative, entrepreneurial and others (Popov, 2016).

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According to the All-Russian register of sports in our country, the following ones are developing: recognized (14); all-Russian (140); national (8); applied (21).

The second decade of the XXI century was marked by the exponential introduction of information technologies in almost all spheres of human life. The sports field was no exception, the boundaries of which went far beyond the scope of its traditional understanding. In 2016, “computer sport” (its synonym is “cybersport”) becomes an independent sport, the development of which is carried out at the all-Russian level and includes the following sports disciplines: combat arena, competitive puzzles, sports stimulant, strategy in real time, technical stimulator, fighting game. Unlike traditional sports games, computer sports disciplines are held remotely (virtually) using the Internet telecommunications system. Foreign authors define e-sports as “an area of sports activity in which participants develop and train mental or physical abilities using information and telecommunication technologies” (Hamari & Sjoblom, 2017).

Sports results are demonstrated during competitive activity. Sports competitions are a fascinating and popular spectacle for millions of people. In the past few years, our country has hosted international competitions. Applications for major international competitions, which are of great interest, are submitted many years in advance. E-sports competitions are also becoming an exciting and popular spectacle for millions of people. Tournaments like The International and Fortnite World Cup are streamed live to the world. Prize money in e-sports is growing at an incredible rate. According to American researchers, the e-sports industry reached a market share of more than \$ 1 billion for the first time in 2019, and significant growth is expected in the coming years (Kim & Kim, 2020).

At the federal level, a legal framework has now been established to regulate traditional sports and e-sports. Federal Law No. 329-FZ of 04.12.2007 “On Physical Culture and Sports in the Russian Federation” defines professional sports as part of social and cultural activities aimed at organizing and conducting professional sports competitions. On November 24, 2020, the Prime Minister of the Russian Federation approved the Strategy for the Development of Physical Culture and Sports until 2030, which identified 11 priority areas covering both amateur and professional sports. The mission of the state in the field of physical culture and sports in the Russian Federation, among other things, is to ensure transparency and honesty of the competitive process, and our country is seen as a leading world sports power with economically stable professional sports in the future. However, the integration of Russian sports into the international sports movement, the development of advertising in sports and sponsorship relations (which did not exist in the Soviet period), the growth of prize money gave rise to extremely negative phenomena, among which doping, fraud, and corruption should be recognized as the most socially dangerous. This article is devoted to the study of corruption in traditional sports and e-sports. Please replace this text with context of your paper.



## 2. PROBLEM STATEMENT

*The hypothesis* of our research is that actions to prevent corruption and fraud are inseparable from the definition of the essence of the concepts under consideration in relation to individual sports and professional sports in general. Many types of corruption are similar to fraud (Krasnova, 2023).

## 3. RESEARCH QUESTIONS

Since the aforementioned law does not contain special anti-corruption provisions, *the purpose of the research* is to study the correlation between corruption and fraud in professional sports, depending on who enters into corrupt relations, based on modern (over the past five years) theoretical views and provisions contained in documents of sports federations.

## 4. PURPOSE OF THE STUDY

We plan to solve the following tasks to achieve this goal: to analyze approaches to the definition of the phenomena under consideration at the disciplinary (in the relevant rules of individual federations and sports associations) and criminal law levels.

## 5. RESEARCH METHODS

An appeal to special literature indicates that a direction has been actively developed - sports criminal law in the science of criminal law in recent years. However, published works in this direction are mainly devoted to issues that relate to: the definition and disclosure of the grounds for the criminalization of acts related to doping (Henning et al, 2020; Toohey & Beaton, 2017; Fincoeur & Bongiovanni, 2021; Hurst et al, 2020; Erickson et al, 2019); the study of illegal influence on the results of sports competitions (Verschuuren, 2020; O'Shea, 2021; Petróczi et al, 2021); criminal law aspects of ensuring the safety of sports events (Tekin & Kurland, 2019; Zhang et al, 2019). Analyzing the works devoted to corruption in professional sports, we find confirmation of our hypothesis in terms of terminological uncertainty. We also draw on data provided by Transparency International in World Corruption Report: Sport.

## 6. FINDINGS

In recent years, the state has drawn attention to the need for legal regulation of existing relations in professional sports.

*Disciplinary level.* In our country, there are all-Russian and regional sports federations, as well as physical culture and sports societies. All-Russian sports federations, in turn, are divided according to summer Olympic sports (40); winter Olympic sports (12); non-Olympic sports (80). For example, the All-Russian public organization “Federation of Computer Sports of Russia” was created.

Analysis of the Strategy for the Development of Physical Culture and Sports until 2030 and the constituent documents of sports federations indicates the absence of anti-corruption rules and any moral guidelines for athletes on the prevention of corruption. As a result of a series of anti-doping scandals involving Russian athletes, the main emphasis in the statutes of national federations is placed on ensuring the integrity and medical purity of the respective sport by observing and fulfilling anti-doping requirements. We do not deny the importance of these provisions, which, along with the fight against any form of discrimination and violence, constitute the basic principles of professional sports. However, the absence of anti-corruption provisions creates a certain disciplinary “vacuum” for athletes, both experienced and beginners, since individual federations do not set themselves the task of preventing corruption, both among athletes and among coaches, referees, and federation officials. And since such a task has not been set, accordingly, no events are planned, programs are not developed to combat corruption and fraud in professional sports in general and its individual types (including e-sports).

At the same time, in recent years, individual national sports associations of foreign countries and international sports associations have included anti-corruption rules in their official documents or have developed separate anti-corruption programs. Thus, the International Tennis Federation (hereinafter - ITF) in 2020 approved the annual Tennis Anti-Corruption Program (2020). The objectives of this program are to maintain the integrity of tennis, to protect against any attempts to improperly influence the results of any competition, establishing uniform rules, an agreed framework of enforcement and sanctions applicable to all professional tennis events and to all governing bodies of the association. Moreover, the ITF has developed an information sheet for athletes, which briefly and clearly demonstrates the prohibitions in tennis (betting, fixing matches, selling inside information, providing a Wildcard in exchange for money or compensation in any form). This fact sheet also lists the responsibilities of tennis players: 1) to report any information and suspicions of corruption to the ITF; 2) declare the facts of contacting the athlete personally by persons offering money or any benefit in order to influence the result or any aspect of a tennis tournament or request for internal (insider) information; 3) fully cooperate in the event of an investigation of corruption offenses (including conversations, providing your mobile phone, other devices or relevant documents). The ITF also proclaimed the motto of anti-corruption prevention – “Inform. Educate. Protect”.

*Criminal law level.* The specificity of domestic professional sports is the high dependence of clubs in professional leagues in team sports on budgetary funds and funding by state companies, compared to the world's leading leagues that operate on a fully or

almost completely commercial basis as follows from the Strategy for the Development of Physical Culture and Sports until 2030. Therefore, in this part of the article it is necessary to discuss the problems associated with measuring the scale of corruption and fraud in Russian professional sports.

First, we should note the lack of terminological uniformity in the area under consideration. Since the above-mentioned federal law “On physical culture and sports in the Russian Federation” does not provide a definition of corruption in sports, we should be guided by the definition of corruption, which is contained in paragraph 1 of Art. 1 of the Federal Law of 25.12.2008 No. 273-FZ “On Combating Corruption”.

Another concept that is used in the study of abuse in professional sports should be mentioned (Brooks et al, 2013). It is the manipulation of sports competitions, which is determined by the norm contained in the international document – Art. 3 of the Council of Europe Convention against Manipulation of Sports Competitions – which the Russian Federation has signed but has not yet ratified. As noted in the literature, “attempts to change athletic performance at major sporting events, including the Olympics, World and European Championships, play a significant role in reducing the fairness and entertainment of sport” (Sokolova, 2019). In addition, as long as the dependence of traditional sports on state funding remains, a corruption element cannot be ruled out when spending budget funds at all levels. As for e-sports, it is highly dependent on the significant amounts of money that are invested in this sport. E-sports is supported by leading digital platforms, advertisements, sponsorships, betting on sportsbook sites, ticket sales and merchandise. As a result, sports corruption, with all its specifics, has spread to e-sports.

The gradual and very rapid professionalization and commercialization of e-sports, the rise in financial income and prize money, coupled with the relatively fast careers of the players, have led to the emergence of match-fixing at all levels of competition. In this sense, esports is not much different from traditional sports. So, in August 2019, the police in the Australian province of Victoria arrested six young people who participated in the popular online game Counterstrike: Global Offensive. They are accused of placing their own bets and then taking part in pre-determined matches, on which they bet. It is pertinent to cite here the results of a study by Australian scientists. Respondents (22 athletes and non-athletes) consider betting corruption and the involvement of transnational organized crime in their sport to be non-existent (Lastra et al, 2018). This type contradicts the opinion that has developed in the literature on the existence of a relationship between corruption in sports and transnational organized crime (Kleymyonov, 2013). In this regard, it can be argued that improving existing anti-corruption strategies to prevent the threat of corruption motivated by bets should consider the specifics of each sport, both traditional and electronic.

Both amateurs and professionals, including those from the Russian Federation, participate in fixing matches. For example, Russian Aleksey “Solo” Berezin was caught betting against himself. The amount was \$ 322. He was suspended from participation in

StarLadder tournaments for a year for this. Since then, in esports, the number 322 has served as an analogue of the negotiated match expression.

As with many traditional sports, match-fixing prevalence depends on the level of competition. But there are several factors that increase their risk. One of them is the unregulated gambling economy. In addition, the hyper-digital nature of e-sports means that players are significantly more integrated than athletes in traditional sports, and potentially easier to collude. Finally, we must not forget that, unlike traditional sports, computer games have a huge army of fans, primarily of young people, which is constantly growing, especially in the context of the COVID-19 pandemic.

We assume that one of the factors contributing to corruption in professional sports is the archaism of sports structures. It should be noted that this phenomenon is typical not only for domestic sports structures, but also for international ones. The management of sport is often controlled by former athletes with little management experience operating within very linear hierarchical organizational models as noted in a report by Transparency International (Global Corruption Reports: Sport). While these models may have worked effectively in the past, sports federations and sports organizations at various levels have not kept pace with the sector's huge commercial growth and have chosen not to adapt to protect certain interests, including high salaries, bonuses, and virtually unlimited tenure.

## 7. CONCLUSION

In the Russian Federation, the prospects for the further development of sports are being discussed at the highest level, which testifies to the state's understanding of the problems of legal regulation accumulated in traditional sports and e-sports, including by criminal legal means. During the research, we concluded that the fight against corruption in sports is one of the first places in the activities of many governments and international sports organizations. There are increasing calls today for anti-corruption measures in sports to build good governance systems. However, many of these initiatives and measures are in their infancy and require further strengthening and development.

Positively assessing the foreign experience of establishing uniform rules in the field of corruption prevention by sports associations, we conclude that it is advisable for all-Russian sports federations to start developing anti-corruption rules, considering the specifics of sports relations arising in specific sports. The developed rules could be included in their constituent documents or formalized in the form of separate anti-corruption programs and memos. The development of the cybersport sphere in the Russian Federation will inevitably exacerbate the issues of ensuring cybersecurity in the preparation and conduct of competitions in cyberspace and/or using immersive technologies. Already, there are questions about the possibility of bringing athletes to justice for various offenses in the field of esports. In this regard, there is a need for criminal legal regulation of the sphere of e-sports.

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## КОРУПЦИЈА У ТРАДИЦИОНАЛНОМ СПОРТУ И Е-СПОРТУ: ИДЕАЛИ И СТВАРНОСТ

### Апстракт

У овом чланку аутор испитује размере корупције у професионалном спорту, у поређењу између традиционалног и е-спорта. Поред проучавања облика правног одговора, треба напоменути да су питања борбе против корупције у професионалном спорту недовољно проучена. Корупцију у спорту је тешко измерити. Већина сверуских и регионалних спортских савеза, друштава физичке културе и спорта често не признају постојање корупције у дотичном спорту или тврде да је корупција под контролом. Аутори представљају систематски преглед литературе која испитује корупцију, идентификујући факторе корупције у професионалном спорту. За тражење релевантних студија, објављена литература је идентификована од Scimagojr, ResearchGate, ScienceDirect, Google Scholar, Sage Open. Треба признати да је добра пракса израде препорука за спортисте у вези са одређеном врстом професионалног спорта, при чему се утврђују дела која се схватају као корупција, поступак њиховог евидентирања, процене и предузимање мера за смањење и сузбијање таквих дела. претња је утврђена. Уочили смо специфичност мотивације за корупцију у професионалном спорту, која се разликује од испољавања корупције у другим секторима (нпр. здравство, образовање, јавна служба). Професионални спорт не карактеришу тако традиционални подстицаји за корупцију као што су лоши услови рада и ниске плате, јер су професионални спортисти високо плаћени појединци, а њихови услови рада и социјалне гаранције су много бољи од већине обичних грађана.

**Кључне речи:** корупција, криминална превенција, е-спорт, превара, спортска такмичења.





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## ROBOT LAWYER: DEMOCRATISATION OF LEGAL REPRESENTATION OR DEHUMANISATION OF JUSTICE?

### Summary

Recent technological developments have enabled robots to undertake roles that are formerly thought to be reserved for humans, including litigating, which could make legal aid accessible to everyone. Such inroads of AI into legal profession have opened an array of concerns and dilemmas as to the *legality and ethicality of AI-powered legal representation*. As some authors suggest, *AI agents do not have the authority to practice law* since state laws require professional license for lawyers, while others envisage favourable future for technology-based legal representation, especially in the area of mass speculative litigation. What additionally split the academic world was the question of the *relevance of moral judgments to the content of law*, since AI is still incapable of authentic moral thinking. In light of the most recent Joshua Browder “robot” lawyer case, this paper examines legal and ethical strengths and weaknesses of AI-powered legal representation in the American legal and ethical context, aiming at justifying the idea to create an *AI agent that would partner with, rather than substitute a human lawyer*.

**Key words:** artificial intelligence (AI), legal representation, morality, law, human lawyer.

### 1. INTRODUCTION

Artificial intelligence has demonstrated that it can outperform humans at tasks that were previously thought to require human intelligence. Computer technology has already made major steps into the practice of law. No wonder, lawyers feel threatened with being replaced by AI-powered agents. This article wants to put into focus two challenging fields: law practice and AI, with the aim to establish the extent of AI integration into the traditional American legal system. Hence, the article's main research questions are: Who can practice law in the USA? Are robot lawyers capable of moral thinking? Will robot lawyers replace human lawyers? Will AI technology eventually be applied to legal practice in a substantial way?

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What will be the future of law in the context of AI technology? and What are the challenges following AI replacing human judgment?

Extensive legal analysis of the nature and concept of law practice will reveal that many of the tasks traditionally performed by lawyers, such as reviewing large volumes of information can easily be processed by computers. In addition, it has become possible to automate routine legal work to the point of outperforming human lawyers. Machine learning (ML) and deep learning techniques have enabled the creation of more sophisticated contracts without the assistance of lawyers. Automation of non-core lawyering functions has brought considerable savings in costs to clients, but with corresponding loss of jobs by lawyers. Predictive analytics helped litigators and their clients make better strategic decisions through finding patterns in judicial decisions and predicting the odds of success in lawsuits.

Looking at the prospects of AI replacing human lawyers in the foreseeable future, will reveal reduced impact of AI on some aspects of the practice of law, such as fact investigation, client counselling, legal representation and moral judgment. The leading hypothesis of this article stands in defence of human lawyering on the ground of AI being incapable of legal reasoning and moral thinking. It will also be argued that AI technology permits computer systems to perform many lawyering tasks at a level of competency that meets or exceeds human lawyers, but is still lacks the authority to function as a lawyer.

## 2. WHO CAN PRACTICE LAW IN THE USA?

When Joshua Browder, a founder and CEO of a startup DoNotPay, announced, in December 2022, that an AI-powered bot would argue on behalf of a defendant in a speeding ticket case before the court of law in New York end of February 2023, he did not expect to stir such a commotion in the American legal industry. Alarmed by the prospect of losing their jobs to AI-powered robots, American lawyers started complaining to their Bar Associations, which resulted in Browder receiving threats with criminal prosecution for unauthorised practice of law, which made Browder drop the effort. Namely, DoNotPay announced on Tweeter that it would pay any lawyer or person \$1,000,000 with an upcoming case in front of the United States Supreme Court to wear AirPods and let their robot lawyer argue the case by repeating exactly what it says. However, according to the Rules of the Supreme Court of the USA, “it is prohibited to use electronic devices of any kind (laptops, cameras, video recorders, cell phones, tablets, smart watches, etc.) while court is in session.” (the Rules of the Supreme Court of the USA, 2019). Currently, there are a lot of similar anti-AI laws in American court legislation which do not allow bots to enter the courtroom. For example, Rule 122.1.c.(1) of the Rules of the Supreme Court of Arizona stipulates that “in a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording, unless that use is allowed under rule 122.” (Rules of the Supreme Court of Arizona, 2023, rule 122.1. c.(1)). Criminal penalties for unauthorised practice of law can range from a fine to short-term imprisonment. Hence, according to Ala. Code § 34-3-1, the penalty for unlawful practice of

law is a fine up to \$ 500 or imprisonment up to six months, or both, while S.C. Code Ann. § 40-5-310 notes that practicing law without admittance to the South Carolina Bar entails a fine up to \$ 5,000 or imprisonment up to five years, or both.

However, the question of applying AI in legal practice was raised long before Browder. Being aware that, like other technological advances, AI would dramatically affect law practice in coming years, Thomas Spahn questioned AI's essential capacity to practice law. If such technological processes were defined as law practicing, then, Spahn suggested, non-lawyers relying on AI to advise third parties may be committing the criminal unauthorised practice of law, and lawyers insufficiently involved in such a process may be guilty of assisting in such unauthorised practice of law (Spahn, 2018, 2). No one could be accused of unauthorised practicing of law if what he was doing could not be defined as law practicing. According to Spahn, American courts and other state institutions had great difficulties in defining *law practicing*, because of infinite variety of fact situations (Spahn, 2018, 5). Arguing that every jurisdiction should adopt its own definition of the practice of law, the American Bar Association Task Force offered a model definition of the “practice of law” as “the application of legal principles and judgment with regard to the circumstances or objectives of a person or entity that require minimum qualifications, competence and accountability of *the person trained in law*” (ABA, 2003). Core activities that constitute the practice of law include: appearing in court; preparing pleadings; drafting other documents that define people's rights; and providing legal advice (ABA, 2002).

Becoming a lawyer is a widely varied process around the world. However, common to all jurisdictions, including American justice system, are requirements of *age*, *competence*, and *accountability*, which makes the prerequisite of *natural personhood* a *conditio sine qua non*. In the United States there is no uniform national regulation of lawyers. They are governed by rules of professional conduct and disciplinary commissions administered by their respective state supreme courts, which regulate, inter alia, the unauthorized practice of law (ABA, 2015). Accordingly, an admission to practice law is acquired when a human lawyer receives a licence to practice law, which is preceded by obtaining a law degree, passing the bar exam, and serving in an apprenticeship. American jurisdiction also requires documentation of citizenship or immigration status (ABA, 2015).

The duty of competence is the first rule for American lawyers. It means that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation (the ABA Model Rules, 1983, rule 1.1.). Having in mind that advocacy laws were written in the 1800s and 1900s, no one could have imagined that AI would be practicing law. However, the AI-powered revolution has automated mental tasks, which were previously thought safe from automation. Accordingly, in 2012, the ABA amended Comment 8 to Rule 1.1 to read: “To maintain the requisite knowledge and skill, a lawyer shall keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*” (ABA, 2012) This still did not mean giving AI the necessary legal personhood to be

autonomously engaged in legal representation, but it was “a foot in the door” for recognising the benefits of AI in law practicing.

Requiring lawyers to have a basic degree of competence in technology has advanced from trend to majority opinion. Understanding that relevant technology has become necessary for the representation, lawyers have started investing in training and practice in order to gain technological competence. Thus, lawyers would become competent to select and oversee the proper use of AI solutions, but also to communicate to their client’s material matters in connection with the lawyers’ services. If they choose to engage providers of AI-based legal services, such as documents management companies, they must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations (ABA Model Rules, 1983, rule 5.3.).

### 3. ARE ROBOT LAWYERS CAPABLE OF MORAL THINKING?

Next to competence scrutiny, lawyers are tested in view of *the morality and ethics* of their character, including their professional responsibility. If professional skills and knowledge of the law greater than that possessed by the average citizen were a key requirement to enter the bar, then a robot lawyer would stand a good chance to soon replace a human lawyer. Namely, in January 2023, Jonathan Choi, a professor at Minnesota University Law School, gave ChatGPT the same test faced by students, consisting of 95 multiple-choice questions and 12 essay questions. The results were so good that educators warned it could lead to widespread cheating and even signal the end of traditional classroom teaching methods. ChatGPT performed better on the essay components of the exam than on the multiple choices. In writing essays, it displayed a strong grasp of basic legal rules and showed consistence in organisation and composition. However, it struggled to identify relevant issues and often only superficially applied rules to facts as compared to real law students. (Choi, Hickman, Monahan, Schwarcz, 2023). The aim of this experiment was to show that AI could understand lots of documents with great accuracy, and it could provide answers in seconds, without human intervention. Eventually, it is capable of passing the bar exam or portion of the bar exam, and engaging in some aspects of law practice, which casts a serious doubt on the statement that “limiting the practice of law to *members of the bar* meant protecting the public against rendition of legal services by *unqualified persons*” (ABA, 2018).

However, if we were to create an artificial being with mind to replace us in the practice of law, then such an AI agent would have to be capable of deeper understanding and manifesting the concept of moral justice to the extent of not causing suffering to others and showing them utmost respect. As Nicholas Agar well put it, the pragmatic motivation that stands behind our dominant interest in AI does not bring the necessary moral obligations. Furthermore, a malfunctioning AI tool may harm already existing categories of morally considerable beings (Agar, 2019, 57). If we are to understand a human mind as a data-processing system or calculation, similar to arithmetic (“computationalism”), and legal reasoning as reckoning

(Barnow, 2008) then AI-powered agent is capable of displaying *intelligence and consciousness* equal to that of a human. Another issue is whether a *moral component* is necessary in creating a legal judgment.

Proponents of normative ethics have found difficulty in reaching a consensus over a desired set of moral principles that would guide humans in moral decision-making and acting, which would then be the ground for designing an integrated artificial moral decision-making system. First, we need to understand how human moral decision-making actually works. Some moral philosophers believe that human moral judgment is subjected to intuitive and affective reacting, making machine ethics still a hypothesis (Wendel, 2019, 34-35).

The relationship between morality in law and AI has divided legal philosophers into two divergent fractions: legal positivists and iusnaturalists. Positivists, such as Hart, Kelsen, or Austin, argue that law is a social fact, and there is nothing in the nature of law that guarantees its moral worth. In other words, there is no need for moral decision making in connection to the interpretation and application of law. In support of such positivist claim, its advocates state that a norm does not have to be just, efficient, wise or moral in order to be called law (Wendel, 2019, 35). Hart's definition of law best describes it. He argues that law is comprised of primary rules of obligation and secondary rules of recognition, modification and adjudication, wherein the former are directed at citizens and purport to permit, prohibit, or regulate conduct (Hart, 1994, 94). In response to Ronald Dworkin's claim that moral principles *partly* determine the content of legal systems, positivists have divided into two major subfractions. Inclusive positivists give certain credit to moral principles when determining the legal validity of a norm, unlike exclusive positivists who claim the opposite (Waluchow, 2001). Contrary to hard-core positivistic negation of morality in law, iusnaturalists, such as Hugo Grotius, Immanuel Kant, Gotfried Wilhelm Leibniz, hold that legal norms follow a human universal knowledge on justice and harmony of relations. While positivists insist on justice in its absolute sense in the context of legal interpretation and application, iusnaturalists insist on fairness, which is a subjective face of justice, unfathomable to innovative technology. Even if AI is not capable of moral thinking, still, according to iusnaturalists, it can predict human ethical judgments, based on processed input data.

#### 4. WILL ROBOT LAWYERS REPLACE HUMAN LAWYERS?

The effort of lawyers to stop Browder's experiment could not be traced so much in the fact that they are scared of dehumanisation of justice, but rather of being eventually replaced and excluded from the legal process by AI. Namely, many scholars maintain that “professionalism” is mere cover for lawyer protectionism, since public interest urges for *computerisation of legal services, that would eventually lower costs and increase access to justice*. Human lawyers have restrictions in terms of their working capacities and neutrality of legal reasoning, unlike technology that does not need to rest, can read thousands of documents and give an objective and correct answer in seconds. Hence, AI is already being

used by prestigious American law firms to review contracts, find relevant documents in the discovery process, and conduct legal research. More recently, AI has begun to be used to help draft contracts, predict legal outcomes (predictive justice), and even recommend judicial decisions about sentencing or bail (Kirkpatrick, 2017). The potential benefits of AI in the law are real. It can increase lawyer productivity and avoid costly mistakes. In some cases, it can increase the speed of research and decision-making.

However, ChatGPT generates a vast amount of information according to informed responses, which generates *biased decisions and often fabricates information*. Though AI helps people reduce their workload, the legal and ethical side remains vulnerable regarding surveillance, privacy, discrimination or bias, and philosophical challenges. One of the greatest inherent risks in AI and Machine Learning (ML) is *implicit bias*. The data processing programmes are using input information from human-operated legal systems, increasing the chances of getting biased output results. The question remains as to what extent lawyers will be liable for using or failing to use AI solutions to address their clients' needs. Will they be liable for malpractice if they fail to use AI tool to find guiding principles or precedents making their client suffer injury as a result? Another complex issue is the apportionment of liability between the provider of AI solutions and a law firm that uses a defective software solution to the client's supposed benefit. The creator of defective AI solution can easily be hidden behind a contract limitation of liability, unlike a lawyer who is not permitted to get an advance limitation of liability from his client. When determining the extent of liability of the lawyer, the court is bound to consider whether the lawyer has taken any steps to determine the appropriateness of AI solutions for the client's matter. Lawyer's personal interactions with clients continue to require spontaneity, unstructured communication, and emotional intelligence. For example, divorce lawyers are irreplaceable with clients who are about to dissolve intimate relations, divide the consequential and inconsequential property accumulated during married life, and to resolve the painful questions that frequently arise in making child custody decisions (Sarat & Felstiner, 1995). Moreover, according to Remus and Levy, many clients agree that a lawyer's trustworthiness and ability to provide a close and personal relationship are traits they wish to find in a lawyer (Remus and Levy, 2016). For the time being, therefore, the areas of client counseling and interactions with third parties will remain in the domain of human lawyering.

## 5. WILL AI TECHNOLOGY EVENTUALLY BE APPLIED TO LEGAL PRACTICE IN A SUBSTANTIAL WAY?

A Colombian judge, Juan Manuel Padilla, recently wrote a legal ruling on the medical care of an autistic child using Open AI's chatbot Chat GPT (Stanly, 10 Feb. 2023). The judgment prompted a discussion on the authenticity and use of AI in law, with one side criticising Padilla, and accusing him of creating a moral panic in law, as people feared robots would replace judges, and others favouring the inclusion of technology into law and

advocating for urgent digital literacy training for judges. Judge Padilla defended the technology stating such programmes could be useful to facilitate the drafting of texts, but not at the expense of replacing judges as “thinking beings” (Stanly, 10 Feb. 2023). Though Colombia approved a law in 2022 that suggests that public lawyers should use technologies where possible to make their work more efficient (Ley 2213 de 2022), there is still a continuous debate over the position of AI within the existing legal categories. The question remains whether a new category with special implications should be developed or not (Ramirez, Azuero, Bejarano, Lichtenberger, 2013).

The American legal forum is supportive of having AI-powered agents engaged in the legal practice, especially lawyers who deal with serious human rights cases, such as justice Yvonne Campos from San Diego, who recognised the problem of legal representation with people who cannot afford a lawyer, which can be successfully bypassed with the help of technology (LinkedIn, 2005). Artificial intelligence has a potential to increase access to justice to people who cannot afford legal help. There are softwares developed to enable individuals to draft a will, fight traffic tickets or to assist them in small claims litigations without consulting a lawyer. Such AI solutions often rely on “expert systems”, which insert specific legal knowledge in rules and decision trees that can include calculations or factor evaluation, among other techniques.

By saving time on manual and routine legal work, lawyers can reduce estimates and costs and pass the savings onto the clients. However, the traditional partnership economic model of law firms is not fit for the use of capital for the development of innovative technological solutions. Their investments into AI are miniscule in comparison to legal publishers, accounting firms and venture capital-supported entrepreneurs within the high-tech world (Davis, 2020). Publishing companies, like LexisNexis or Westlaw, have developed software packages that enable lawyers to do a fast, efficient and cheap legal research or document management that would have taken much longer in earlier times. Clients, hard-pressed economically, are turning to the developers and vendors of AI solutions to achieve outcomes more efficiently, faster, and more cheaply than law firms can deliver. The Artificial Lawyer website offers almost daily new software packages to accomplish similar tasks. According to MarketsandMarkets annual market research report issued in March 2023, the global AI market size is estimated to register a CAGR of 36,2% to reach \$407.0 billion in 2027 and was valued \$ 86.9 billion in 2022. All this affects law firms to reduce legal costs and change the employment model to seeking lawyers who demonstrate emotional intelligence and understanding for the working of AI technology.

Truth be told, the largest law firms in the USA, with the deepest pockets, are already taking advantage of AI, especially Machine Learning (ML), as an application which uses algorithms (rules) embodied in software to learn from data and adapt with experience. Humans are training machines to learn based on data input. The machine is looking for patterns in data to draw conclusions, which it applies to new data. Such AI applications are capable of reviewing contracts more quickly and consistently, spotting issues and errors that

may have been missed by human lawyers. Startups like Lawgeex, Klarity, Clearlaw, and LexCheck provide a service that can review contracts faster, and in some cases more accurately, than humans. The AI-powered programmes automatically ingest proposed contracts, analyse them in full using natural language processing (NLP) technology, and determine which portions of the contract are acceptable and which are problematic. Large companies like Salesforce, Home Depot and eBay are already using AI-powered contract review services in their day-to-day operations (Toews, 2019). AI teams are also building ML models to *predict the outcomes of pending cases*, using as inputs relevant precedents and fact patterns. Law firms find these models beneficial since they help them proactively plan their litigation strategies, fast-track settlement negotiations, and minimise triable cases (Wilbur, 2023). Predictive powers of AI are also recognised by litigation investors who use ML models to develop more sophisticated, data-driven assessments of which cases are worth backing (Koebler, 2017). Finally, machine intelligence is recently making increasing inroads in legal research that was, until now, done manually by law students and junior firm associates. However, with the advancement of software and personal computing, this process has gone digital to the point of creating research platforms that have more sophisticated semantic understanding of legal opinions' actual meanings. The fact that over 4,500 U.S. law firms today subscribe to Casetext, speaks in favour of fast maturing of AI (Toews, 2019). In recent months, several joint ventures between traditional law firms and AI solution providers have been noted, but not enough to conclude that partnership-based law firms are ready to place venture capital at risk. Hence, law firms will have to be re-established on new management and hiring models that will meet the needs of the extraordinary changes that AI is already bringing to the forum of legal services.

## 6. WHAT WILL BE THE FUTURE OF LAW IN THE CONTEXT OF AI TECHNOLOGY?

In the future court systems will be automated. Knowing for a fact that the legal is not perfect, especially if compared to the future state the legal world is trending towards. In the United States, AI tools for identifying the key relevant precedents and authorities that are missing from the research or submission, are available for free to judges, which raises the question of possible legal malpractice by lawyers for not using such a tool before filing legal papers with the court (Davis, 2020). Furthermore, with better visibility into the economic, social, and political consequences of the current legal system, there will be more fairness and consistency in American jurisdiction, less abuse of situational power and less opportunistic behaviour (Wilbur, 2023).

The future will bring more instant class actions, but instead of them dragging on for years, with lawyers being the only benefactors, people would not even know of the existence of wrongdoing, while robot lawyers would be fighting for them in the background and eventually refunding or restituting the invisible client. A fictitious example of the future of



law in the context of AI technology is a short story “Nanolaw with daughter” by Paul Ford, which talks about the inevitability of lawsuits in the age of AI (Ford, 2011). Everyone will be in a position to be sued or to sue, without being aware of such a fact. Robotised, legal industry would create a more just world, because until now wrongdoers could get away with their wrongdoing, but technology would help consumers fight back almost instantly. For example, the United States Congress enacted in 1991 the Telephone Consumer Protection Act (TCPA) to restrict the making of marketing calls and using automatic telephone dialling systems and artificial or prerecorded voice messages (spam calls). In the event of a violation of the TCPA, a subscriber may (1) sue for up to \$ 500 for each violation or recover actual monetary loss, whichever is greater, (2) seek an injunction, or (3) both (47 U.S.C. §227 (b) (3) (a), (b)). In the event of a wilful violation of the TCPA, a subscriber may sue for up to three times the damages, i.e. \$ 1,500, for each violation (47 U.S.C. § 227 (b) (3)). The AI technology can help not only to stop these unwanted calls, but also to make money of them. It will track down the details of a spam caller that can be used as evidence before the court and ensure the subscriber wins the case. Henceforth, technology will make the law more accessible and easier to understand, but at the same time, it will make the law massively more complex. Although AI-powered law bots will require constant maintenance, care and attention, and upbuilding, clear economic benefits of robot lawyering will make people think of gradually substituting human lawyers with their artificial counterparts.

However, lawyers of today remain irreplaceable in providing functions that AI still cannot provide, those being (moral) judgment, empathy, creativity and adaptability (Davis, 2020). Since the impact of AI solutions on the legal system is inevitable, future generations of lawyers will have to adapt in terms of their training and qualifications, with primary focus on gaining skills in assessing the relative strengths and weaknesses of particular AI solutions. Such training in AI technology will require changes in current law schools' study programmes, since only a small number of law schools are developing and offering such technology training programmes. A new AI-skilled lawyer will require a new earning scheme, since they will no longer be profiting from spending hours on doing manual legal research and documents management, but will be expected to charge their clients for the judgment, empathy, creativity and adaptability they will bring to their clients. Such economic and financial changes will largely influence the structure and organisation of law firms, which will no longer be in need to recruit a number of young lawyers, but will have to make more discriminating hiring decisions in search of judgment providers.

## 7. WHAT ARE THE CHALLENGES FOLLOWING AI REPLACING HUMAN JUDGMENT?

After extensive research on machine ethics, Wendel concludes that human technology is a long way from being able to design a computer system that can satisfy the demand for *authority and accountability* that is constitutive of the core function of lawyers in a liberal

democratic political community (Wendel, 2019). It has already been noted that law industry of today is heavily relying on innovative technology to automate routine legal work. However, it is too early to expect computerisation of essential lawyer's tasks, such as advising clients, writing legal briefs, negotiating and appearing in court. In essence, the core lawyering function is providing a client with the necessary legal understanding of rights and duties in communication with other members of a political community, and offering justifications for actions that affect the interests of others. In other words, a lawyer is the connection between legal authority and moral accountability (Oshana, 2004, 255-274). American legal community is well aware that it will have to adjust to the fast-developing AI technological advancements. Hence, the California State Bar ethics committee has envisaged that the attorney's baseline duty of competence in litigation representation requires familiarity with e-discovery and may, on a case-by-case basis, require higher levels of technical knowledge and ability (CSBSC, 2015). However, lawyers should show vigilance when using software that is designed to discern patterns in input data, such as COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), since data are usually fed by a human provider, justifying the risk of *biased results*. Specifically, COMPAS risk assessments have been argued to violate 14th Amendment Equal Protection rights on the basis of race, since the algorithms are argued to be racially discriminatory (Thomas & Núñez, 2022). Machine learning risk assessments in particular are not narrowly tailored to minimise discrimination, but rather to maximise predictive accuracy by any means necessary.

In light of increasing reliance of American judges on AI tools in decision making, the question of *transparency* and *explainability* in AI has imposed itself on law practitioners. When an algorithm uses an individual's private data to make a decision, the human has a right to ask for the reasons behind that decision (Rodrigues, 2020). The process of revealing reasons an AI makes a certain recommendation may lead to better understanding of the reality and limitations of human explanations or rationalisations for their decisions. On the other hand, an algorithm that can explain how it reached a certain decision can be easier to hack.

Allowing algorithms to make decisions in criminal cases may be *unfair, biased and discriminatory*. In July 2016, the Wisconsin Supreme Court ruled that COMPAS risk scores can be considered by judges during sentencing, but there must be warnings given to the scores to represent the tool's "limitations and cautions." It can be expected in near future that ML algorithms will begin to predict when a person is likely to commit a future crime with high confidence, like the science fiction short story *The Minority Report* by Philip K. Dick (Zrnić, 2020, 410-413). Even if human lawyers retain ultimate decision authority, it will not be uncommon for them to become overly reliant on technology-based recommendations (automation bias) (Stepka, 2022). Hence, such decisions should be challenged when they produce unexpected, damaging, unfair or discriminatory results. Bayamlioglu (2018, 435) states that "a satisfactory standard of contestability will be imperative in case of threat to individual dignity and fundamental rights" and "the 'human element' of judgment is, at least for some types of decisions, an irreducible aspect of legitimacy in that reviewability and

contestability are seen as concomitant of the rule of law and thus, crucial prerequisites of democratic governance”.

## 8. CONCLUSION

This article has sought to problematise and eventually reconcile traditionalist and modern views regarding legal technologies as existing at the extremes of the American legal industry. Traditionalists are contesting the end of the legal profession with unauthorised practice of law rules, arguing that new technologies threaten client interests and undermine the core values of the profession. Modernists are strongly advocating for the automation of as many legal services as possible in an attempt to reduce legal costs and increase access to justice. It was shown that while technology is undoubtedly advancing and changing the nature of legal practice, it is displacing lawyers at a modest pace. Although approaches to professional regulation of legal technologies are ineffective and undesirable, professional regulation must not be abandoned. The benefits of AI technology are best evidenced in the performance of non-core lawyering tasks, such as e-discovery, document management, due diligence, legal research and other tedious and routine legal work. Legal tasks that require authority and moral accountability are categorised as core lawyering functions, including legal counselling, legal representation, fact investigation and other complex legal services. Maybe one day, AI will be able to emulate or model human moral reasoning, but it will never become *a free and equal person* in a relationship with another free and equal person. The nature of law being authoritative and accountable can never create obligations and reasons for actions. Despite recognised economic benefits of automating certain legal tasks to those who cannot afford legal counselling, clients as well as litigators must show utmost vigilance when relying on AI-based recommendations and decisions for fear of bias, discrimination, violation of privacy, and abuse of data. The world of robot lawyers is still not on the horizon owing to the dependency of law on authority and accountability.

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## АДВОКАТ РОБОТ: ДЕМОКРАТИЗАЦИЈА ПРАВНОГ ЗАСТУПАЊА ИЛИ ДЕХУМАНИЗАЦИЈА ПРАВА?

### Апстракт

Технолошка достигнућа су учинила да роботи преузму улоге које су иначе биле својствене човјеку, укључујући и парничење, што је омогућило да правна помоћ буде свима доступна. Такав уплив ВИ у правну професију отворио је читав низ питања и дилема у вези са *легалношћу* и *етичношћу правног заступања уз помоћ ВИ*. Неки аутори сматрају да *ВИ нема овлашћење да се баве адвокатуром* јер национални закони прописују обавезу посједовање адвокатске дозволе, док други аутори предвиђају свијетлу будућност правном заступању заснованом на овој технологији, нарочито у области колективних спекулативних тужби. Оно што је додатно подијелило академски свијет јесте питање *важности моралног суда у контексту права*, с обзиром да ВИ још увијек не може иградити аутентични морални суд. У свјетлу недавног случаја „робота адвоката“ Џошуе Браудера, у овом раду ауторка ће се бавити правним и етичким предностима и недостацима правног заступања које почива на ВИ у америчком правном и етичком контексту, с циљем афирмације идеје стварања *ВИ која ће бити партнер, а не замјена за људског адвоката*.

**Кључне ријечи:** вјештачка интелигенција (ВИ), правно заступање, моралност, право, људски адвокат.

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## APPLICATION OF THE PRINCIPLE OF EQUALITY IN THE PROCESS OF IMPACT ASSESSMENT OF REGULATIONS AND PUBLIC POLICY DOCUMENTS IN THE REPUBLIC OF SERBIA

### Summary

Impact assessment of regulations and public policy documents is regulated by the Law on the Planning System of the Republic of Serbia and the accompanying Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents. Impact assessment as an analytical process aims to determine the potential negative as well as positive effects that a regulation or a public policy document can cause on certain segments of society. In this paper, the author's focus is on the social impact assessment in connection with the implementation of the provisions of the Law on Prohibition of Discrimination which introduces the rule that a public authority, when preparing a new regulation or a public policy document of importance for the realization of the rights of socioeconomically disadvantaged persons or groups of persons, makes an impact assessment of their compliance with the principle of equality. This provision introduced by the latest amendments to the Law on Prohibition of Discrimination, as an umbrella anti-discrimination law in the Republic of Serbia, contributes to the development of the human rights impact assessment.

**Key words:** principle of equality, impact assessment, public policies, regulations.

### 1. INTRODUCTION

The Law on the Planning System of the Republic of Serbia from 2018 (hereinafter: LPS RS) for the first time uniquely regulates the elements of the planning system, which include: 1. planning documents; 2. planning system participants; 3. public policy system management process; 4. process of aligning the content of planning documents with the content of other planning documents and regulations; 5. linking public policy adoption and

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implementation process with the medium-term planning process (LPS RS, 2018, art. 2, p. 1, p. 2). One of the elements of the public policy system management process is the impact assessment as an analytical process that evaluates the impact of public policies and regulations on various segments of social life, including their preparation, implementation, and a period after their termination. The impact assessment of regulations has been carried out in the Republic of Serbia since 2004, and it has been extended to public policy documents by the adoption of LPS RS.

The Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents (hereinafter: Regulation) elaborates in detail the steps of implementing the impact assessment of regulations<sup>1</sup> and public policy documents, with a special focus on the analysis of financial and economic impact, social and environmental impact, as well as governance impact and risk analysis.

The social impact assessment<sup>2</sup> aims to explain the effects of public policy options, i.e. solutions from regulations on different categories of the population, and the Regulation emphasizes that in that process sensitive categories of individuals or groups of individuals should be taken into account (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 27, p. 1). According to the same act, this type of analysis is of particular importance in the areas of competitiveness, social protection, education, health, urbanism, spatial planning and construction, as well as in all other areas in which there is a direct or indirect impact on the population, including the area of gender equality, whereby special attention is focused on the gender that is less represented (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 27, p. 2-3), and contributes to the achievement of adaptive state intervention (Vanclay, 2003, 6). An integral part of the Regulation is Appendix 7, which contains a set of questions that enables the most precise social impact assessment.

The latest amendments to the Law on the Prohibition of Discrimination from 2021, as a part of special measures, provide: „When preparing a new regulation or a public policy of importance for the realization of the rights of socioeconomically disadvantaged persons or groups of persons, the public authority shall make an impact assessment of a regulation or a public policy in which evaluates their compliance with the principle of equality.“ (Law on Prohibition of Discrimination, 2009, art. 14, p. 4). This novelty, introduced by the Law on Prohibition of Discrimination, specifies the obligation to conduct an impact assessment through the dimension of the principle of equality/non-discrimination, which in a certain

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<sup>1</sup> Term the regulation in this context includes laws and by-laws.

<sup>2</sup> More details about different international methodologies for the social impact assessment: Bradaš & Sekulović, 2020a, 6-27.



way has been introduced previously by the LPS RS and the Regulation in the context of the social impact assessment. The significance of this provision is that this obligation derives from the umbrella anti-discrimination law, and it is applied to both central and local authorities when creating regulations and public policy documents.

The subject of this paper is the impact assessment of regulations and public policy documents regulated by LPS RS and the Regulation, in connection with the implementation of the aforementioned provision from the Law on Prohibition of Discrimination. The aim of the research is to determine, by applying the normative method through the analysis of these regulations, how the Law on Prohibition of Discrimination specifies the obligation to conduct an impact assessment in the context of protecting and improving the human rights of socioeconomically disadvantaged persons or groups of persons.

## 2. THE TERM OF PUBLIC POLICIES AND TYPES OF PUBLIC POLICY DOCUMENTS IN THE REPUBLIC OF SERBIA

In situations when certain social issues are recognized as problems and when there is a need for the action of governmental institutions in order to solve them, then the creation and implementation of specific public policies are approached (Jovanić, 2019, 20). LPS RS defines public policies as „courses of action of the Republic of Serbia, the Autonomous Province and local government unit, in specific areas, with a view to achieving desired goals in the society” (Law on the Planning System of the Republic of Serbia, 2018, art. 2, p. 1, p. 1). Based on this legal definition, we can emphasize several characteristics of public policies: 1. they represent a strategic framework for action both at the national and local levels, and all levels of the territorial organization can adopt public policy documents, while their mutual compatibility should be taken into account; 2. public policies are adopted in various areas of social life<sup>3</sup>; 3. with the help of public policies, the desired changes are achieved. The legal definition follows the theoretical considerations of public policies, through which we can also distinguish their following characteristics: they arise in the political decision-making process (Jovanić, 2014, 98); they are linked to the actions of state actors, primarily the executive power (government) (Flin & Asker, 2021, 62), although we

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<sup>3</sup> The Regulation recognizes 18 fields of planning and implementation of public policies, as a part of the Appendix 11: 1) Judiciary and the legal system; 2) Public security; 3) Defence; 4) Public administration; 5) Urban planning, spatial planning, and construction; 6) Competitiveness; 7) Mineral resources, mining, and energy; 8) Environmental protection; 9) Transport and communications; 10) Employment and social welfare; 11) Healthcare; 12) Sports; 13) Youth; 14) Education; 15) Agriculture and rural development; 16) Public information; 17) Culture; 18) Human rights and civil society (including religion and the diaspora). (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019).

should not ignore other social actors who are to a certain extent involved in the decision-making process, and through which the government intervenes and regulates certain areas of social life that are recognized as priorities (Knit & Tosun, 2021, 27).

In order to achieve the general and special goals of public policies, regulatory measures (enactment of regulations - laws and by-laws), incentive, informative-educational, institutional-governance-organizational measures, as well as a provision of goods or provision of services by participants in the planning system, can be applied. These measures can be used independently or in combination with each other. The aforementioned classification of public policy measures is in accordance with LPS RS (Law on the Planning System of the Republic of Serbia 2018, art. 24, p. 2), and the same classifications are also found in theoretical discussions on public policies (Jovanić, 2019, 20).

Aiming to simplify how public policy measures can be combined to achieve the desired goals, we will use an example of combating discrimination, with a focus on the rights of persons with disabilities. This includes regulatory measures which have been implemented through the adoption of certain anti-discrimination regulations, such as: Law on Prohibition of Discrimination (2009), Law on Prevention of Discrimination against Persons with Disabilities (2006), Law on Professional Rehabilitation and Employment of Persons with Disabilities (2009) and Law on Movement with the Assistance of a Guide Dog (2015). The Law on Professional Rehabilitation and Employment of Persons with Disabilities stipulates that an employer who does not employ persons with disabilities in accordance with art. 24 of this law is obliged to pay the amount of 50% of the average salary per employee in the Republic of Serbia, according to the last published data of the state authority responsible for statistics, for each person with a disability that he did not employ. This represents an application of an incentive measure. As an informative and educational measure, the Ministry of Labor, Employment, Veterans and Social Affairs, in cooperation with the National Organization of Persons with Disabilities of Serbia, launched the „Serbia Without Barriers“ Campaign in 2020. As an institutional-governance-organizational measure, an independent state body, the Commissioner for the Protection of Equality, was established, and as measures to ensure the provision of goods and services, we can mention the installation of appropriate ramps to ensure unimpeded access to certain facilities for persons with disabilities, the procurement of appropriate teaching materials needed in the process education, movement with the help of a guide dog for blind persons.

LPS RS introduces fourteen principles that should be respected in the process of managing public policies, namely: the cost-effectiveness principle, the fiscal sustainability principle, the realism principle, the relevance and reliability principle, the consistency and conformity principle, the planning continuity principle, the proportionality principle, the preventive and the precautionary principle, the principle of equality and non-discrimination, the coordination and cooperation principle, the transparency and partnership principle, the principle of responsibility, the time period principle and the integrality and sustainable growth and development principle.

LPS RS defines a public policy document „as a planning document whereby planning system participants set or elaborate already established public policies in accordance with their respective mandate”, and according to the degree of generality, the following types of these documents are distinguished: strategy, program, policy concept and action plan (Law on the Planning System of the Republic of Serbia, 2018, art. 10).

In addition to public policy documents, LPS RS recognizes development planning documents and other planning documents. Development planning documents include: Development plan, Investment plan, Spatial Plan of the Republic of Serbia and other spatial plans, general urban plan, and Development Plan of the Autonomous Province and development plan of local government unit. Other planning documents are: the Action Plan for the Implementation of the Government’s Programme, the Government Annual Work Plan, the National Programme for the Adoption of EU *acquis*, medium-term plans and financial plans.

### 3. TERM AND TYPES OF IMPACT ASSESSMENT

The process of planning and decision-making by individuals, business entities or the state leads to the emergence of various effects, both positive (desired) and negative (undesired). For example, a student may plan his free time so that he travels with his friends during the weekend or spends two days studying for an exam. With the first decision, the student gives himself pleasure and joy, but loses the necessary time for an exam preparation. With the second decision, the student gets the necessary time for additional study and successful passing of the exam, but will miss the opportunity to be with dear people. Transferred to the field of the state and its obligations, it is necessary to carry out a constant process of planning, analysis and making various decisions. For example, in order to suppress domestic violence, the Republic of Serbia has taken a number of measures, adopting laws, implementing campaigns and educational materials, establishing certain institutions which goal is to suppress this negative social phenomenon; as a part of the implementation of public health policy and the prevention of certain diseases, the Republic of Serbia organizes preventive examinations and conducts promotional campaigns on the harmful effects of tobacco smoking. Each of these measures of state intervention have its own effects that have been considered when making decisions on their application.

LPS RS defines the impact assessment as „an analytical process conducted during public policy and legislation planning, formulation and adoption with a view to identifying change that should be achieved, their elements and cause and effect relationship, and the choice of optimal measures for achieving public policy goals (*ex-ante* impact assessment), during and after the implementation of adopted policies and regulations with a view to evaluating performance, and reviewing and improving the public policy and/or legislation (*ex-post* impact assessment)” (Law on the Planning System of the Republic of Serbia, 2018, art. 2, p. 1, p. 7). According to this legal definition, we can extract several basic

characteristics of impact assessment: 1. it is an analytical process that is carried out continuously; 2. as a continuous process, the analysis is carried out during the preparation of public policies/regulations, during their implementation, as well as after their termination, in order to evaluate the achievement of desired goals for which they were adopted, and based on this there are *ex-ante* and *ex-post* analysis; 3. it is equally implemented in relation to public policies and regulations (Bradaš & Sekulović, 2020b, 9).

It is important to note that in the methodological sense there is no essential difference between the impact assessment of public policies and regulations, the difference is reflected only in the subject of the analysis, so that on the one hand we have a public policy document, and on the other hand a specific regulation (in accordance with LPS RS, these are laws and by-laws (only regulations as a special piece of by-laws), other types of by-laws are not subject to impact assessment) (Dimitrijević & Vučetić, 2021, 87). The time sequence of the impact assessment implementation implies that it is first done to public policy documents and then it is carried out to regulations – laws and by-laws. In this way, the impact assessment of public policy enables the evaluation of whether it is necessary to implement a regulatory measure or a desired goal can be achieved through other measures, and then, if the analysis shows the necessity for a regulatory measure, then the impact assessment can be done.

*Ex-ante* impact assessment does not have to be carried out for public policy documents if they do not have a high impact on society and/or do not represent a high priority (this assessment is carried out based on the results of the impact test which is an integral part of Appendix 1 within the Regulation), and for regulations if they do not directly affect the realization of rights, obligations and legal interests of natural and legal persons (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 6, p. 1). Also, this type of analysis is not carried out even in cases from art. 6 p. 2 of the Regulation<sup>4</sup>.

In addition to the distinction between *ex-ante* and *ex-post* analysis, the Regulation provides that according to the scope of implementation, *ex-ante* analysis can be basic and detailed. The scope of implementation depends on the level of impact and priority (determined by applying the impact test which is an integral part of Appendix 1 within the Regulation), as well as on the complexity and range of measures, including solutions contained in a public policy document and/or a regulation, while respecting the principle of

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<sup>4</sup> *Ex-ante* impact assessment will not be done in cases when the following documents are prepared: the Law on the Budget of the Republic of Serbia; public policy documents and regulations mitigating or eliminating the consequences of catastrophes, natural or other disasters, and emergency situations; public policy documents and regulations, at the national level, of importance for the defense and security of the Republic of Serbia and its citizens; regulations under the segment of their harmonization with an already adopted law, in such cases utilizing the impact analysis implemented for the given law when drafting the regulation; for an action plan implementing a planning document adopted within 90 days as of the date of adoption of the given planning documents.

proportionality and precaution (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 8, p. 1-2). If an authorized proponent assesses that the foreseen measures contained in a public policy document or solutions from regulations have significant effects<sup>5</sup> on certain segments of a society, then a detailed impact assessment is carried out (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 8. p. 3). When it comes to regulations, it is important to mention that a detailed impact assessment of regulations in relation to gender equality and micro, small and medium enterprises is carried out when the test results<sup>6</sup> indicate the necessity to carry out such an analysis (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 8, p. 5).

If no significant effects are determined that the measures of public policy documents or solutions from regulations can cause, then the impact assessment is carried out by giving

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<sup>5</sup> Based on the art. 8, p. 4 of the Regulation, significant effects at the national level shall be: 1) expenditures above 0.1% of the budget of the Republic of Serbia for the previous year that the implementation of the public policy document, and/or regulation will cause for target groups and other stakeholders (e.g. for the harmonization of their behaviour and/or work in accordance with the requirements contained in the public policy document, and/or regulation); 2) changes above 10% at the annual level to revenues and expenditures, as well as income and expense in the budget of the proposing party, and thus the budget of the Republic of Serbia, of the budget at the disposal of the proposing party during the preceding fiscal year); 3) impact on over 200,000 citizens; 4) impact on more than 5% of entrepreneurs or legal persons under a given category of classification, according to criteria determined by the law regulating accounting, or on more than 20% of such persons within a given business activity, if the measures have a predominant impact on business operations within a given business activity; 5) impact on the market and competition conditions (e.g. introduction of barriers for the entry/and or exit from the market; limitation of competition; creation of preconditions for the privileged status of a given group of companies or other legal persons; impact on productivity or innovation; establishment of the prices or level of production; impact on the quality, level or availability of certain products and services, etc.); 6) introduction of significant reform, and/or systemic changes that affect a large number of natural persons, particularly in the fields of education, competitiveness, social welfare and healthcare; 7) transfers to citizens, such as support for vulnerable categories of the population (including persons with disabilities, members of minority groups, persons living below the poverty line, unemployed persons, etc); 8) implementation of public investments, particularly capital projects in accordance with the regulation on the contents, method of preparation and assessment, and the monitoring of the implementation and reporting on the implementation of capital projects.

<sup>6</sup> Tests of impact assessment in relation to gender equality and micro, small and medium enterprises are available on the web presentation of the Public Policy Secretariat of the Republic of Serbia: <https://rsjp.gov.rs/sr/alati-za-sprovodjenje-analize-efekata/>, access: 25. 03. 2023.

precise answers to the questions contained in appendixes 2-10 which are an integral part of the Regulation, and otherwise, the impact assessment is performed through the implementation of all steps for the implementation of *ex-ante* analysis described in Chapter III of the Regulation (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019, art. 8, p. 6).

The competent state authority<sup>7</sup> that gives an opinion on the quality of the conducted *ex-ante* impact assessment, as well as on the assessment of an authorized proponent that an *ex-ante* analysis should not be carried out, or whether it is necessary to perform a basic or detailed *ex-ante* analysis, is the Public Policy Secretariat of the Republic of Serbia.<sup>8</sup>

#### 4. APPLICATION OF THE PRINCIPLE OF EQUALITY IN THE PROCESS OF IMPACT ASSESSMENT

The Law on Prohibition of Discrimination stipulates that the public authority will conduct an impact assessment of regulations or public policy documents in the context of their compliance with the principle of equality in a case when a regulation or a public policy is important for the realization of the rights of socioeconomically disadvantaged persons or groups of persons (Law on Prohibition of Discrimination, 2009, art. 14, p. 4). Concurrently, this law stipulates that the conducted analysis should contain the following elements: 1. „comprehensive description of the situation in the area that is the subject of regulation with special reference to socioeconomically vulnerable persons and groups of persons“; 2. „assessment of the necessity and proportionality of the intended changes in regulations from the aspect of respecting the principles of equality and the rights of socioeconomically disadvantaged persons and groups of persons“; 3. „Risk assessment for the rights, obligations and legally based interests of persons and groups of persons in accordance with art. 14, p. 3 of this law“ (Law on prohibition of discrimination, art. 14, p. 5). As socioeconomically vulnerable persons or groups of persons, the law recognized specifically: persons with disabilities, members of national minorities, women, men, persons of different sexual orientation, gender identity, elderly persons and others, with special emphasis on the field of work and employment (Law on Prohibition discrimination, art. 14, p. 3).

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<sup>7</sup> The opinion of the Public Policy Secretariat of the Republic of Serbia on a proposed public policy document, and/or proposed or draft regulation may contain the assessment that: the impact analysis is complete, the impact analysis is partial, the impact analysis is insufficient, and unnecessary – there is no need for an impact analysis. The criteria used by the Public Policy Secretariat of the Republic of Serbia when issuing an opinion are listed in art. 49 of the Regulation.

<sup>8</sup> The scope of work of the Public Policy Secretariat of the Republic of Serbia has been determined by the art. 38 of the Law on Ministries (Law on Ministries, 2020, art. 38).

By interpreting the provisions of the Law on Prohibition of Discrimination, we can conclude that the public authority is recognized as the bearer of the obligation to conduct an *ex-ante* analysis, which includes not only public authorities on the central level, but also authorities of autonomous provinces and local self-government units, as well as „public company, institution, public agency, other organization, or a natural person who is entrusted with the exercise of public powers, as well as a legal entity that is founded or financed by the Republic of Serbia, an autonomous province or a local self-government” (Law on Prohibition of Discrimination, 2009, art. 2, p. 1, p. 4). LPS RS stipulates that the Public Policy Secretariat of the Republic of Serbia issues an opinion on the quality of an *ex-ante* analysis done only by authorized proponents on the national rank, which does not include other authorities (autonomous provinces or local self-governments). This fact does not exclude the possibility that other authorities may contact the Public Policy Secretariat of the Republic of Serbia and/or the Commissioner for the Protection of Equality and request an opinion on the proper application of the principle of equality in the process of conducting impact assessment (Mihajlović, 2023, 43).

The Law on Prohibition of Discrimination stipulates that when analyzing the effects, a description of an analyzed situation in a specific area that has an impact on socioeconomically disadvantaged persons or groups of persons should be done. This determination is in accordance with the described steps of the implementation of the *ex-ante* analysis in accordance with the Regulation. Adequate monitoring of a concrete field by the competent public authority is extremely important for the realization of this first step of the analysis. The availability of accurate data enables a precise impact assessment which will be done successfully through the steps prescribed by the Regulation.

When considering the intended changes in regulations that may affect the principle of equality and the rights of socioeconomically disadvantaged persons or groups of persons, the Law on Prohibition of Discrimination provides that the necessity and proportionality of the changes, as well as risk assessment, should be taken into account. This rule is in accordance with the application of the principles of public policy management system prescribed by the LPS RS, which include, among others, the principle of proportionality and the preventive and the precautionary principle.

Although the Law on Prohibition of Discrimination recognizes only a case of *ex-ante* analysis, an extensive interpretation of this rule does not limit the possibility that the application of the principle of equality can also be implemented during an *ex-post* analysis. This type of analysis makes it possible to evaluate the effects of a public policy document or regulation, focusing on the assessment of their efficiency and effectiveness in achieving concrete goals. Given the fact that LPS RS is *lex generalis* in relation to the Law on Prohibition of Discrimination when it comes to the rules of impact assessment, there is no obstacles that during the *ex-post* analysis of certain policies or regulations which affect the rights of socioeconomically disadvantaged persons or groups of persons, the impact

assessment can be done through the perspective of the principle of equality (Mihajlović, 2023, 43).

The Law on Prohibition of Discrimination and the Regulation recognize socioeconomically vulnerable persons or groups of persons in a formulation of an open clause, because an explicit enumeration of concrete groups makes a possibility that certain groups of people can be left out. Within Appendix 7 of the Regulation, which contains key questions for the social impact assessment, the following social groups are recognized as vulnerable: „poor and socially excluded individuals and groups, such as persons with disabilities, children, young people, women, people over 65, members of the Roma national minority, the uneducated (illiterate or functionally illiterate), unemployed, refugees and internally displaced persons and the population of rural areas and others sensitive social groups” (Appendix 7, Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, 2019).

When applying the principle of equality/non-discrimination it is very important to mention the provisions of the Constitution of the Republic of Serbia related to the protection of human and minority rights, generally accepted rules of international law and confirmed international treaties in the field of human rights that are an integral part of the legal order of the Republic of Serbia and are directly applicable, as well as domestic anti-discrimination regulations. It is also important to emphasize the recommendations for improving the analysis of effects through a human rights perspective, which are contained in the concluding observations of the United Nations Committee on Economic, Social and Cultural Rights in connection with the Third<sup>9</sup> and Second<sup>10</sup> Periodic Reports of the Republic

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<sup>9</sup> Concluding observations on the third periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/3, 06. 04. 2022, in par. 7, the Committee on Economic, Social and Cultural Rights recommends the Republic of Serbia to systematize the application of impact assessment through the dimension of human rights in the process of preparing regulations and public policy documents in the field of economic, social and cultural rights.

<sup>10</sup> Concluding observations on the second periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/2, 10. 07. 2014, in par. 7, the Committee on Economic, Social and Cultural Rights expresses concern about the lack of systematic collection and processing of desegregated data that would enable an accurate assessment of the fulfillment of economic, social and cultural rights in the Republic of Serbia, and recommends the use of appropriate indicators that can be used to monitor the level of enjoyment of economic, social and cultural rights. The Committee also recommends the application of the methodology for developing indicators prepared by the Office of the United Nations High Commissioner for Human Rights. This publication „Human Rights Indicators – A Guide to Measurement and Implementation” is available on the following link: [https://www.ohchr.org/sites/default/files/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Human_rights_indicators_en.pdf), access: 26. 03. 2023.



of Serbia on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

## 5. CONCLUSION

The impact assessment of regulations and public policy documents is systematically regulated by the Law on the Planning System of the Republic of Serbia and the accompanying Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents. As an analytical process that examines the effects of public policy options and solutions from regulations, the analysis of effects is carried out continuously, both during the preparation of public policies or draft regulations, during their implementation, and after their termination.

The social impact assessment allows that the potential effects (positive and negative) that a regulation or public policy can have on different categories of the population can be perceived, and aims to minimize or completely eliminate negative consequences. The Public Policy Secretariat of the Republic of Serbia delivers opinions on the quality of conducted *ex-ante* analysis, based on the prescribed criteria, and gives recommendations for improvement which are addressed to an authorized proponent of a concrete document (in practice there are ministries which are mostly responsible for drafting legislation and public policy documents). In addition to prescribing the social impact assessment, LPS RS recognizes fourteen policy system management principles. The five of them are of a huge importance for respecting the principles of non-discrimination and human rights when formulating public policies and solutions in regulations, and they are: the principle of equality and non-discrimination, the proportionality principle, the preventive and the precautionary principle, the transparency and partnership principle and the integrity and sustainable growth and development principle.

The Law on Prohibition of Discrimination, as an umbrella anti-discrimination law, introduces the obligation to carry out an impact assessment when drafting public policies or regulations that may affect the rights of socioeconomically disadvantaged persons or groups of persons, in which compliance with the principle of equality is assessed, with special emphasis on the field of work and employment. The bearers of this obligation are public authorities at all levels of territorial organization, entities entrusted with the exercise of public powers, as well as legal entities that are in total or mostly financed from public funds.

This provision from the Law on Prohibition of Discrimination does not represent double rules regarding the impact assessment of regulations and public policy documents, in addition, it has a multiple advantages that are reflected in the following: it strengthens the effect of the provisions of LPS RS and the Regulation which are related to the social impact assessment, because it derives from the umbrella anti-discrimination law which goal is protection against discrimination; a wider circle of entities are recognized as bearers of the

obligation to conduct impact assessment. These entities are also on the local level of the territorial organization where the Public Policy Secretariat cannot issue an opinion on the quality of the conducted analysis; the evaluation of the impact assessment on the principle of equality can also be applied during the *ex-post* analysis, which is in accordance with the understanding of impact assessment as a continuous process of monitoring the effects of public policies and regulations.

Application of the principle of equality/non-discrimination during the preparation of public policies and regulations represents respect of a basic principle of the legal system, which means that everyone is equal before the constitution and laws and that certain personal characteristics must not be an obstacle for exercising rights and freedoms. The United Nations Committee for Economic, Social and Cultural Rights also pointed out the importance of impact assessment through the dimension of human rights through recommendations delivered to the Republic of Serbia, with special emphasis on the importance of collecting disaggregated data for better planning and monitoring the state of economic, social and cultural rights.

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## ПРИМЕНА НАЧЕЛА ЈЕДНАКОСТИ У ПРОЦЕСУ АНАЛИЗЕ ЕФЕКТА ПРОПИСА И ДОКУМЕНАТА ЈАВНИХ ПОЛИТИКА У РЕПУБЛИЦИ СРБИЈИ

### Апстракт

Анализа ефеката прописа и докумената јавних политика уређена је Законом о планском систему Републике Србије и пратећом Уредбом о методологији управљања јавним политикама, анализи ефеката јавних политика и прописа и садржају појединачних докумената јавних политика. Анализа ефеката као аналитички процес има за циљ да утврди потенцијалне негативне, као и позитивне ефекте које пропис или документ јавне политике може да изазове на одређене сегменте друштва. У раду је фокус аутора на анализи ефеката на друштво у вези са применом одредби Закона о забрани дискриминације које предвиђају да орган јавне власти приликом припреме новог прописа или јавне политике од значаја за остваривање права социоекономски угрожених лица или група лица доноси процену утицаја прописа или политике у којој процењује њихову усаглашеност са начелом једнакости. Ова одредба уведена последњим изменама и допунама Закона о забрани дискриминације, као кровним антидискриминационим прописом у Републици Србији, доприноси развоју анализе ефеката кроз димензију поштовања људских права.

**Кључне речи:** начело једнакости, анализа ефеката, јавне политике, пропис.

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The paper should be up to 16 pages of computer-processed text and should be submitted to the address **2023@pr.ac.rs**.

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Some of the reference examples are listed below.

### 3.1. In the text

If the work has only one author:

- (Stojanović, 2010, 254)
- As pointed out by Professor Orlić (1998, 254), the proposed solution was more adequate.
- Although it is possible to find a different argument in the literature (Radišić, 2006, 254-256), most of the theory accepted the idea of Professor Perović (2003, 23).

If the work has two or three authors:

- (Mayer & Bryan, 2021, 112)
- Research conducted by Perić, Milošević and Zarić (2011, 11) showed...

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- (Petrović et al., 2000, 121-124)

If the work is published under the auspices of the organization:

- (UNMIK, 2016, 22)

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- (Bečić, 2020a, 33)
- According to Jovanov (1998s, 17), there are several reasons why...

Stating regulations:

The regulations are listed by their full name, with an indication of the legal order to which they belong and with the year referred to in the work, then adding the relevant article)

- (Criminal Code, 2005, art. 20, s. 2)
- According to the letter of the Law on Obligations (2003, Art. 12)

Citation of court decisions and decisions of other authorities:

Court decisions should be listed with as complete information as possible (type, authority that made it, number of the decision, date when it was made, publication in which it was published).

- By the decision of the Constitutional Court of the Republic of Serbia, number IUo-173/2017, it was established...
- (Decision US, 2017)
- Borodin v Russia, application no. 41867/04, judgment of the ECHR, 6 February 2013, para. 166

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