Annals

of the Faculty of Law in Belgrade

Belgrade Law Review

Анали

Правног факултета у Београду

Часопис за правне и друштвене науке

Journal of Legal and Social Sciences
University of Belgrade
Year LXVIII, 2020, No. 4

ISSN 0003-2565 : UDC 34/35

Publisher:

University of Belgrade Faculty of Law

Layout Manager:

Jovan Đorđević

Cover Design, Type Setting and Layout:

Dosije studio, Belgrade

Printed by:

Birograf, Zemun

Annals

of the Faculty of Law in Belgrade

Belgrade Law Review

АНАЛИ

ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ

ЧАСОПИС ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ

Journal of Legal and Social Sciences
University of Belgrade
Year LXVIII, 2020, No. 4

ISSN 0003-2565 : UDC 34/35

The Annals of the Faculty of Law in Belgrade – Belgrade Law Review

Year LXVIII, 2020, No. 4, pp. 1–231

UDC 34/35 ISSN 0003-2565

TABLE OF CONTENTS

ARTICLES

ARTICLES

UDC 338.124(495)

CERIF: S144

DOI: 10.51204/Anali_PFUB_20401A

Athanasios Dimas, PhD[*]

Christos Genakos, PhD[**]

EXPLORING THE LONG-TERM IMPACT OF MAXIMUM MARKUP DEREGULATION[***]

Do product market reforms have a lasting impact on the market? How does the adjustment path to the new equilibrium look once these reforms are implemented? Does it matter whether reforms are conducted under weak macroeconomic conditions? We examine pricing equilibrium, three and five years after the repeal of the maximum wholesale and retail markup regulation, in an oligopolistic and vertically non-integrated market in Greece, at the beginning of its economic crisis. Using a difference-in-difference framework, we show that market liberalization led to a significant decrease in both retail and wholesale prices and a shift to the left of the whole price distribution five years after the change, corresponding to approximately €212 million of added consumer welfare per year, or €1.06 billion in total over five years.

Key words: *Markup regulation. – Focal point. – Collusion. – Ex-post policy evaluation. – Long-term impact.*

[*] Athens University of Economics and Business, Department of Economics, *athadimas@aueb.gr*.

[**] Cambridge Judge Business School, AUEB, CEP, and CEPR, *c.genakos@jbs.cam.ac.uk*.

[***] We are grateful to our colleagues and seminar audiences for useful comments. The opinions expressed in this paper and all remaining errors are those of the authors alone.

1. INTRODUCTION

Given the secular decline in productivity growth and the weakness of the economic recovery after the financial crisis in many advanced economies, increased attention is being paid to the potential role of structural reforms as a way of restoring economic growth. While structural reforms can take many forms, advanced countries have particularly focused on product market reforms (OECD 2015). Yet, despite the consensus that structural reforms boost employment and productivity in the long run, very little is known about the adjustment path to the new equilibrium once these reforms are implemented (Gal, Hijzen 2016). Moreover, there is natural concern and debate as to whether such reforms may have adverse short-run impact, especially if conducted under weak macroeconomic conditions (Caldera, de Serres, Yashiro 2016). Given the growing interest and increased concerns, robust ex-post policy evaluation is needed to measure short-term, but also med– and long-term, economic impact of product market reforms.

In this paper, we provide a detailed analysis of a product market reform by estimating the impact of the repeal of maximum markup regulation in the fresh fruit and vegetable market in Greece. First implemented right after the Second World War, markup regulation was hastily repealed in June 2011 with the objective of reducing unnecessary regulation of the Greek economy. Regulation consisted of maximum wholesale and retail markups on virtually all fruits and vegetables. Nonetheless, five products — apples, lemons, mandarins, oranges, and pears — were exempt from regulation. To identify the impact of deregulation on prices, we compare prices of products affected by regulation before and after the policy change, using unregulated products as a control group. After accounting for product and store characteristics, time trends and yearly price cycles (typical of fruit and vegetable products), deregulation provides some plausibly exogenous variation that allows us to estimate the causal impact of regulation. Moreover, this product market reform took place against the background of the Greek economy at the start of the longest recession of any advanced capitalist economy to date.

Building on Genakos *et al.* (2018), which studied the immediate impact of this deregulation, we extend their original dataset adding more products over a longer period of time, with the aim of examining the short-term (one year), medium-term (three years) and long-term (five years) effect of this reform (January 2010–June 2016). We use two main datasets: the first is weekly store level retail prices for each fruit and vegetable product category, both for supermarkets and street markets in Athens, Greece; the second are the three times per week median wholesale fruit and vegetable prices from the Athens Wholesale Central Market (henceforth Central Market).

Using the difference-in-difference methodology, we find that abolishing markup regulation led to a 5 percent average long-term retail price decrease. In aggregate, this decrease corresponds to savings of almost €212 million per year, or €1.06 billion in total over those five years. In line with Genakos *et al.* (2018), we find that deregulation had a direct effect on wholesalers and only indirectly affected retailers, who adjusted their prices in reaction to the lower wholesale prices. We also find that the drop in average prices is driven by a price drop for the majority of products and that price dispersion increased (particularly at the bottom of the distribution) in the retail and wholesale markets, as a consequence of deregulation. Finally, we confirm that the main channel through which this effect operates is that maximum markups were used as focal points for coordination in the Central Market. We traced back the causal channel and showed that the same transmission mechanism persists in the medium and long run.

This paper contributes to the existing literature in several ways. First, it adds to the growing literature of ex-post evaluation of product market reforms and their impact on efficiency along the adjustment path (see, for example, Djankov *et al.* 2002; Bertrand, Kramatrz 2002; Scarpetta, Tressel 2002; Carranza *et al.* 2015; Knittel, Stango 2003). Second, it informs the debate on recent investigations by the competition authorities (European Competition Network 2012) into suspected vertical and horizontal agreements in the food market. Finally, it adds to the growing literature looking at the causes of the crisis in Greece and the lessons to be learned (see, for example, Pelagidis, Mitsopoulos 2014; Meghir *et al.* 2017; Katsoulacos *et al.* 2017).

The remainder of this paper is organized as follows. Section 2 discusses the fruit and vegetable market and the background of the legislation in Greece. Section 3 presents data and some descriptive statistics. Section 4 provides the empirical methodology used, while Section 5 reports the results of markup deregulation on prices. Finally, Section 6 concludes.

2. BACKGROUND ON THE GREEK FRUIT AND VEGETABLE MARKET AND THE POLICY CHANGE

The Greek fruit and vegetable market consists of three layers. The first is the production layer, where the market is fragmented, compared to other EU countries.[1] The second layer is the wholesale market, which is significantly more concentrated, with the Central Market operating as a

[1] The average Greek producer cultivates just 47,000 m^2 (470 a) vs. the EU average of 126,000 m^2 (1,260 a). Moreover, around 50 percent of Greek producers own less than 20,000 m^2 (200 a) of land.

closed market in which only licensed sellers can operate. Wholesalers mainly sell to retailers (supermarkets being their largest customers), but also to street market sellers, grocery stores, and restaurants. Finally, the third layer is the retail market, which consists of supermarkets, street vendors, and grocery stores or other corner shops. Supermarkets (and grocery or corner shops) typically buy from the wholesale market. Street vendors either buy from the Central Market or they are producers themselves.

The history of regulation for fruits and vegetables dates back to the end of Second World War. After the war, the Greek government imposed various market regulations on prices and markups for essential and scarce products such as bread, meat, fruits and vegetables, and pharmaceutical products. Some years later (Law No. 3475/1955) the government created the (state-owned) Central Market, where the wholesale trade of raw agricultural products was required to take place. These policies had multiple objectives. In an economy plagued by scarcity of essential goods, they were designed to prevent wholesalers and retailers from making excessive profits. However, they were also aimed at setting specific standards of food safety and hygiene, and facilitating the monitoring of prices and markups by the competent authorities.

Markup regulation initially covered all fruits and vegetables. By 1977, however, five products (apples, lemons, mandarins, oranges, and pears) had been exempted from the application of maximum markup regulations, as they were considered available in sufficiently large supply. No change in the list of excluded products has occurred since. Maximum markup regulation remained in place for all other fruits and vegetables until 2011, although the initial conditions of scarcity had long ceased to exist. The production, trade, and consumption of these products is now widespread throughout the country.

Products exempted from markup regulation are not the output of any specific region or any identifiable set of producers, and they are statistically indistinguishable from unregulated products in terms of mean cultivation area, production quantity, and yield. Until 2011, the law provided for product-specific maximum markups ranging between 8 and 12 percent for the wholesale market, 20 and 35 percent for supermarkets, and 17 and 32 percent for street markets and grocery stores (see Table A1 in the Appendix for details). Following the 1977 reform of markup regulations, steps were gradually taken towards liberalizing the fruit and vegetable market. By the 1990s, only maximum markups were still in place.

The repeal of the maximum markup regulation was the outcome of mounting international pressure to liberalize the Greek economy in an attempt to limit red tape and government intervention in various markets.

Reactions, as reported in the newspapers at the time, were mixed and somewhat contradictory, with some expecting no change in prices to take place and others forecasting price increases. The process leading to deregulation was quick. The policy was implemented on 23 June 2011, about three weeks after the government first announced it. It is worthwhile noting that this product market liberalization took place against a background of the Greek economy entering a long and severe recession. The Greek crisis started in late 2009, triggered by the turmoil of the worldwide financial crisis, structural weaknesses in the Greek economy, and lack of monetary policy flexibility stemming from membership in the Eurozone. The crisis led to a loss of confidence in the Greek economy, indicated by a widening of bond yield spreads and the rising cost of risk insurance on credit default swaps compared to the other Eurozone countries. The government enacted twelve rounds of tax increases, spending cuts, and reforms between 2010 and 2016, which at times triggered local riots and nationwide protests. Despite these efforts, the country required bailout loans in 2010, 2012, and 2015, from the International Monetary Fund, Eurogroup, and European Central Bank, and negotiated a 50% "haircut" on debt owed to private banks in 2011, which amounted to a €100 bn debt relief. Hence, it is even more interesting, from an international perspective, to study the impact of this product market reform as it was taking place against one of the most severe economy-wide recessions.

3. DATA AND EMPIRICAL METHODOLOGY

3.1. Data Construction

We matched two different data sources for our analysis. First, we obtained weekly store-level retail prices for fruits and vegetables in Athens[2] from the Ministry of Development and Competitiveness. The data contained information on 36 products, further divided into 72 varieties, from 28 supermarkets and 28 street markets, and covered the period from 4 January 2010 to 6 June 2016. Products and varieties are reported in Table A2 in the Appendix.

Second, we also obtained the three times per week wholesale median, minimum and maximum prices of fruits and vegetables from the administration of the Central Market, for the same period. The wholesale data consisted of 44 products and 72 product varieties (of which 59 are common to the retail ones). Given that the change in regulation took

[2] We focused on Athens, as it is by far the biggest market in Greece, is well-documented in our supermarket sample, and provides reliable information on wholesale prices.

place in June 2011, we defined the period one year after the change (2010–2012) as "short term", equivalently three years after the change (2010–2014) as "medium term", and five years after the change (2010–2016) as "long term".

Figure 1 plots the time series of year-month average log prices of fruits and vegetables for the retail sector. The dashed black line shows products affected by regulation (treatment group), while the dashed grey line shows the five products not affected by regulation (control group). The average price of products not affected by the regulation (the solid grey line) practically does not change during the period following the policy change. Instead, the average price of products affected by regulation (the solid black line) shows a large drop, indicating a significant reduction in the price of these products. Figure 2 plots the corresponding figure for the wholesale market. As in the case of the retail market, the average price of products affected by the regulation significantly drops, whereas, the average price of products in the control group remains at the same level.

Figure 3 reports the distribution of retail prices for products affected by the policy change, before it (the black line), in the short run (the blue line), in the medium run (the green line), and in the long run (the red line), following its implementation. The figure shows a substantial change in distribution after the reform, with a decrease of the mean and an increase in the standard deviation, which is particularly strong in the left tail.

Almost the same picture emerges in Figure 4 for wholesale prices, where the mean price declined and variance increased. Here we see a much clearer shift of the entire distribution of prices to the left, with both the left and right tails moving significantly over time.

3.2. Empirical Methodology and Identification

We identified the impact of the policy change using a difference-in-difference empirical framework. Denoted by P_{ijt} is the retail price of product variety i, in store j, during week t. The baseline empirical specification is of the form:

$$\ln (P_{ijt}) = b_0 + b_1 Post_t + b_2 Treat_i + b_3 Post_t \times Treat_i + X_{ijt}\, d + e_{ijt} \qquad (1)$$

where $Post_t$ is an indicator variable equal to one after deregulation, $Treat_i$ is an indicator variable equal to one for products affected by the regulation (treatment group), $Post_t$ x $Treat_i$ denotes their interaction, X_{ijt} is a matrix of control variables and e_{ijt} is a random shock with E (e_{ijt}/ $Post_t$, $Treat_i$, X_{ijt}) = 0. b_3 is the parameter of interest, since it captures the impact of the policy change.

The key identifying assumption is that price trends are the same (conditional on covariates) for the treatment and control groups without any changes in regulation. This assumption became increasingly credible as we progressively added more controls in X_{ijt}. First, we controlled for changes in the VAT rates.[3] Second, we included in X_{ijt} the month indicator variables, 53 store indicator variables, and 109 product variety-specific indicator variables. We then added the interaction of month and product fixed effects, capturing the yearly price cycle of each product (we assumed that varieties of the same product follow the same cycle). Finally, we included a quadratic trend (measured in months). This captures the overall changes in the average price of fruit and vegetable products during the sample period (due, for example, to the economic recession). The analysis of wholesale prices uses the same empirical specification, with the caveat that only median (as well as the minimum and maximum) wholesale prices at a weekly frequency are available for each product variety.

4. SHORT, MEDIUM, AND LONG-TERM IMPACT OF DEREGULATION ON PRICES

Table 1 reports the results of the analysis of the retail data alone. The simple difference-in-difference estimator without any additional controls (column 1) shows a 10.1 percent decrease in the average price of the treatment group one year after the deregulation (short-term impact), in line with the results in Genakos *et al.* (2018). The impact seems to get stronger in column 2, where we enlarge the time window after deregulation to three years (medium-term impact). The positive and significant impact also seems to hold in column 3, even five years after the change in regulations (long-term impact). These conclusions seem to be robust to the inclusion of store and product × month fixed effects and a linear and quadratic trend in columns 4–6. The estimated impact five years after the regulation seems to be a robust 4.9 percent reduction on average prices.

The economic magnitude of this result is significant. A 4.9 percent decrease corresponds to yearly savings of €19 per person.[4] Aggregately, this indicates that the long-term savings from deregulation amount to €212 million per year, i.e. €1.06 billion in total over those five years.

Table 2 reports the results when we analyzed the wholesale market alone. Columns 1–3 report the difference-in-difference estimator without

[3] During our sample period, there were three changes in VAT rates, which potentially affected both regulated and unregulated products: from 9% to 10% on 15 March 2010, from 10% to 11% on 1 July 2010, and from 11% to 13% on 1 January 2011.

[4] A 4.9 percent decrease of the prices of fruits and vegetables illustrates a 0.82 percent decrease in the price of food for the typical household in Greece and a corresponding decrease of 0.13 percent of the price index. The average household in Greece consists of 2.6 persons.

any additional controls. The impact on the wholesale market seems to monotonically decrease in value from 10.8 percent after one year (column 1), to 9.9 percent after three years (column 2), and to 6.8 percent after five years (column 3). The same pattern holds true in columns 4–6 when we add all the additional controls. Column 4 shows a 10.2 percent decrease just one year after the change, which becomes 11.2 percent in column 5, three years after the deregulation. Column 6 shows that even after five years we can detect a significant and sizable 9.2 percent decrease in wholesale prices. Hence, the average prices for products affected by the reform decreased in both markets. They are greater in magnitude in the medium run and smaller in the long run, compared with the short-run effect.

4.1. The Impact on the Distribution of Prices

As we saw earlier in Figures 3 and 4, deregulation seemed to have had an effect on the entire price distribution. After deregulation, the distributions shifted to the left and became more dispersed. In Table 3 we used quantile regressions to measure the impact of markup regulation on the distribution of retail price residuals. The results indicate that although the short-term effect was mainly concentrated in the middle and left parts of the distribution, the long-term effect seems to also manifest in the right tail, hence moving the entire price distribution to the left. A similar picture emerges in Table 4, which presents the results of the quantile regressions for the wholesale market. Although initially it was the middle and left parts of the distribution that were most affected, over time all parts had a negative coefficient again indicating a shift of the entire distribution to the left.

As a robustness exercise for the wholesale market, we also looked at the changes using the minimum and maximum wholesale prices for each product. With this information, we computed the monthly relative wholesale price range for each product, $(max_{it} - min_{it})/min_{it}$. Table 5 reports the results of the difference-in-difference regressions on price range. Wholesale price variability significantly increased as a result of the reform both in the short (column 1), but also in the medium (column 2) and long run (column 3). Looking at the minimum (columns 4–6) vs. maximum prices (columns 7–9), we can see that minimum prices significantly decreased, while maximum prices were largely unaffected by the reform. Hence, the increase in price variability can be attributed to a shift of the left tail of the wholesale price distribution. Therefore, both quantile and price variability analyses show that deregulation had a permanent effect on the market by shifting the entire price distribution to the left and lowering average prices.

4.2. Product Specific Effects

The estimated impact of the reform, presented in Tables 1 and 2, is the average effect across products in the treatment group. However, we can exploit the richness of the data and estimate the impact of the reform separately for each product, while keeping the same control group. This allows us also to examine whether the benefits of the reform were concentrated on a few products or whether they were more widely spread and hence easier to pass through to final consumers.

Table 6 reports the product-specific coefficients of the interaction of $Post_t$ x $Treat_i$ in equation (1) with product-specific indicator variables, columns 1–3 refer to the retail market, whereas columns 4–6 refer to the wholesale one. While there is significant variability across products, the negative effect of deregulation is not specific to one or a small set of products: wholesale results indicate that 34 out of 39 products[5] show a negative coefficient and 30 out of 39 are statistically significant at the 5 percent confidence level in the medium-term. Comparing these results with the short run, it is apparent that the effect of policy change is stronger, since it indicates a 20 percent in the medium run increase on products with statistically significant coefficients, and a 16 percent increase in the long run. Similar results emerged in the analysis of the retail market: the drop in average prices is driven by the fall in the majority of products and this effect holds over time.

4.3. Examining the Channels of the Deregulation Impact

Our results on the negative impact of deregulation on the mean retail and wholesale prices are not consistent with the view that the sole effect of the regulation was the constraining of firms with high markups. While some firms might have been constrained by the markup regulation, another effect must have played a significant role. Genakos *et al.* (2018) shows that the main alternative explanation is that regulation facilitated collusive behavior. The economic intuition underlying this idea is that (unconstrained) firms used the maximum markup as the focal point for coordination, leading to increases in average prices. Repeal of the law destroyed these focal points and led to significant price decreases. Genakos *et al.* (2018) provides evidence that the source of collusion was the Central Market. In the rest of this paper we trace back the same causal channel and examine whether the same transmission mechanism persisted in the medium and long term.

Table 7 depicts the impact of the policy change on retail prices using pass-through regressions, which allow us to disentangle the direct

[5] There are eight more products in the wholesale market together with data availability for the watermelon. Data for watermelon is limited for the retail market, therefore it is excluded.

impact of the policy on the distribution of retail prices from the indirect impact through the effect on the wholesale price distribution. We merged the retail with the wholesale price data, excluding the varieties not included in the wholesale data set. Column 1 shows the results from our benchmark specification where, in addition to store, variety-specific fixed effects, product-specific yearly cycles and quadratic trends, we also controlled for wholesale prices. The effect of the policy now becomes statistically insignificant. Deregulation affected retail prices indirectly through wholesale prices, but there is no evidence of a direct effect of deregulation on retail prices. Hence, pass-through regressions clearly point towards collusion in the wholesale market as the cause of the overall fall in prices after the reform. The same is true for the medium (column 2) and long run (column 3).

4.4. The Heterogeneous Impact of the Reform in Supermarkets and Street Markets

The fact that the effect of the reform on prices originated in the wholesale market is also supported by the differential effect of deregulation in supermarkets and street markets. As discussed in Section 2, supermarkets typically buy all their grocery products from the wholesale market (Hellenic Competition Commission 2013). Street vendors, on the other hand, have access to a variety of small producers, or are producers themselves. Hence, collusion at the wholesale level is more likely to have a higher impact on prices in supermarkets than at street markets.

In Table 8, column 1, we find that the policy change indeed had a large and significant impact (-10.8 percent) on supermarkets, whereas street markets were relatively unaffected. The same phenomenon persists both in the medium (column 2) and long run (column 3), with the supermarkets being the main channel of transmission of lower prices.

To further confirm the key role played by the wholesale market, we analyze the differential impact of the policy change on specific products sold at street markets. In fact, even street vendors have to rely on wholesalers for their supply of some specific products. Based on information drawn from the Hellenic Competition Commission report (2013), street vendors almost never buy lettuce from wholesalers, but rely on them heavily for peaches. Hence, we could test whether the policy had a different impact on the street market price of these two products.

Table 8, column 4, reports the results of our benchmark specification using the same control group as before, but this time including only lettuce (classified as “low”) and peaches (“high”) in the treatment group interacted, with indicators for supermarkets or street markets. Column 4 shows that at street markets, deregulation had no significant impact on the price of lettuce ($Low_i \times Street\ market_j$), but had a negative impact on

the price of peaches ($High_i \times Street\ market_j$). By contrast, in supermarkets, both lettuce and peaches were affected by the policy. Hence, the decrease in prices is only evident when the wholesale market plays an important role. Remarkably, this differential effect can be traced back even three (column 5) and five (column 6) years after the original deregulation.

5. CONCLUSIONS

In this paper, we presented systematic evidence of the short-term (one year), medium-term (three years) and long-term (five years) impact of a change in maximum markup regulation on prices. The results indicate that the abolishment of markup regulation led to a significant price decrease, corresponding to an estimated €212 million in yearly consumer savings at the national level. We also provide evidence that the long-term impact of deregulation was to move the entire price distribution to the left and it was observed for most products on the market. Finally, we were able to trace back the original channel of the breakdown of the collusion in the Central Wholesale Market and examine the persistency of the transmission mechanism over time. Overall, the results of our ex-post policy evaluation highlight that deregulation in this case had a positive and unexpected effect, making the fruit and vegetable market in Greece more competitive and efficient, not just in the long run but throughout the adjustment path, against the background of an economy in severe recession. We very much hope that our findings will add an interesting case to the debate on product market reforms and whether market liberalization raises competitiveness and boosts economic growth in an equitable way across the society.

REFERENCES

Caldera Sánchez, Aida, Alain de Serres, Naomitsu Yashiro. 2016. Reforming in a difficult macroeconomic context: A review of the issues and recent literature, OECD Economics Department Working Papers, No. 1297, OECD Publishing, Paris.

Djankov, Simeon, La Porta, Rafael, Lopez-de-Silanes, Florencio, Andrei Schleifer. 2002. The Regulation of Entry, *The Quarterly Journal of Economics*, Vol. CXVII, No.1, 1–37.

European Competition Network. 2012. ECN Activities in the Food Sector.

Gal, Peter N., Alexander Hijzen. 2016. The Short-Term Impact of Product Market Reforms: A Cross-country Firm-level Analysis, IMF Working Paper No. 16/116 (also appeared as OECD Economics Department Working Paper No. 1311).

Genakos, Christos, Pantelis Koutroumpis, Mario Pagliero. 2018. The Impact of maximum markup regulation on prices, *Journal of Industrial Economics*, Vol. 66, 239–300.

Hellenic Competition Commission, Fruits and Vegetables Sectorial Study, 4 December 2013

Katsoulacos, Yannis, Christos Genakos, George Houpis. 2017. Product Market Regulation and Competitiveness: Towards a National Competition and Competitiveness Policy in Greece. 139–178 in Costas Meghir, Christopher Pissarides, Dimitri Vayanos and Nikolaos Vettas (eds.), *Beyond Austerity: Reforming the Greek Economy*, Cambridge, Massachusetts: MIT Press.

Knittel, Christopher R., Victor Stango. 2003. Price Ceilings as Focal Points for Tacit Collusion: Evidence from Credit Cards. *American Economic Review*, Vol. 93, No. 5, 1703–1729.

Laporte, Audrey, Frank Windmeijer. 2005. Estimation of Panel Data Models With Binary Indicators When Treatment Effects Are Not Constant Over Time, *Economics Letters* Vol. 88, No.3, 389–396.

Meghir, Costas, Christopher Pissarides, Dimitri Vayanos, Nikolaos Vettas (eds.). 2017. *Beyond Austerity: Reforming the Greek Economy*, Cambridge, Massachusetts: MIT Press.

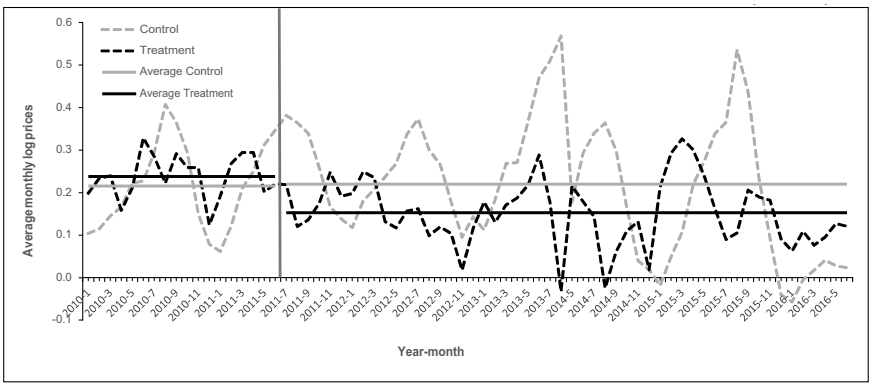
Pelagidis, Theodore, Michael Mitsopoulos. 2014. *Greece: From Exit to Recovery?*, Washington D.C.: Brookings Institution Press.

OECD. 2015. Economic Policy Reforms: Going for Growth, Paris.

Scarpetta, Stefano, Thierry Tressel. 2002. Productivity and Convergence in a Panel of OECD Countries: Do Regulations and Institutions Matter?, OECD working paper No. 342.

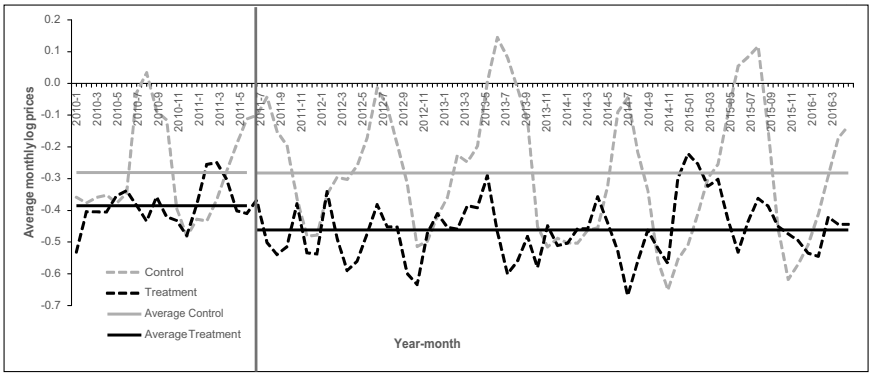
Article history:
Received: 10. 7. 2020.
Accepted: 2. 11. 2020.

FIGURE 1: AVERAGE RETAIL PRICES OF REGULATED AND UNREGULATED PRODUCTS (2010–2016)



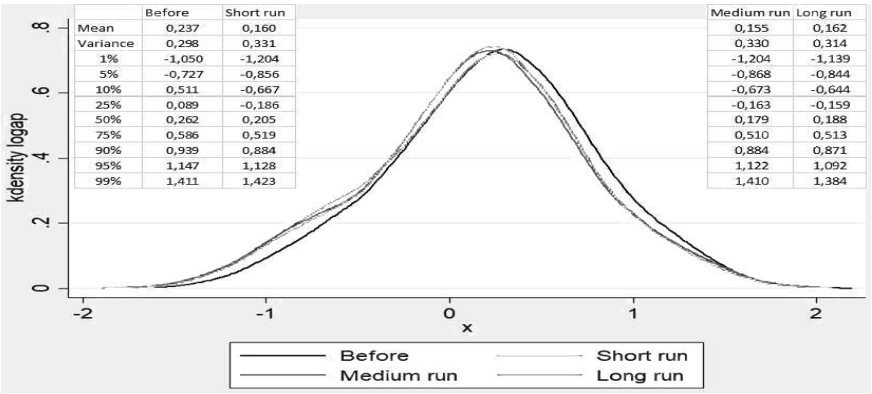
Note: The figure reports the monthly average of the logarithm of fruits and vegetables products' prices affected by the markup regulation (treatment group, black dashed line) and not affected by regulation (control group, grey dashed line) and their averages (black solid line for the treatment group and grey solid line for the control group) before and after deregulation.
Source: Authors' calculations based on data from the Greek Ministry of Development.

FIGURE 2: AVERAGE WHOLESALE PRICES OF REGULATED AND UNREGULATED PRODUCTS (2010–2016)



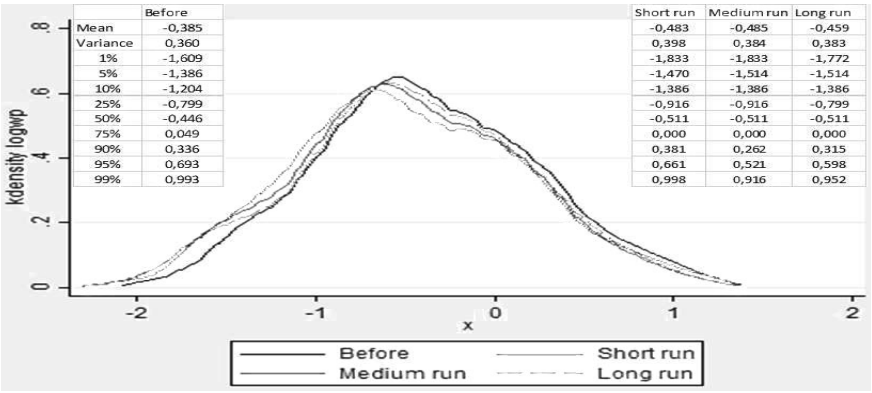
Note: The figure reports the monthly average of the logarithm of fruits and vegetables products' prices affected by the markup regulation (treatment group, black dashed line) and not affected by regulation (control group, grey dashed line) and their averages (black solid line for the treatment group and grey solid line for the control group) before and after deregulation.
Source: Authors' calculations based on data from the Central Market.

FIGURE 3: THE DISTRIBUTION OF RETAIL PRICES BEFORE AND AFTER DEREGULATION



Note: The figure plots the distribution of log retail prices of fruits and vegetable products in the treatment group one and a half years before ("Before"), one and a half years after ("Short run"), three and a half years after ("Medium run") and five years after ("Long run") the policy change. Sample statistics are reported in the top corners.
Source: Authors' calculations based on data from the Greek Ministry of Development.

FIGURE 4: THE DISTRIBUTION OF WHOLESALE PRICES BEFORE AND AFTER DEREGULATION



Note: The figure plots the distribution of log wholesale prices of fruits and vegetable products in the treatment group one and a half years before ("Before"), one and a half years after ("Short run"), three and a half years after ("Medium run") and five years after ("Long run") the policy change. Sample statistics are reported in the top corners.
Source: Authors' calculations based on data from the Central Market.

TABLE 1 – THE IMPACT OF DEREGULATION ON RETAIL PRICES

	(1)	(2)	(3)	(4)	(5)	(6)
Estimation method	OLS	OLS	OLS	FE	FE	FE
Dependent variable	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$
Sample	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment
Time period	2010-2012	2010-2014	2010-2016	2010-2012	2010-2014	2010-2016
$\text{Treat}_i \times \text{Post}_t$	-0.101**	-0.121**	-0.077**	-0.064***	-0.082***	-0.049***
	(0.045)	(0.054)	(0.036)	(0.023)	(0.021)	(0.017)
Post_t	0.024	0.039	0.002	0.005	0.019	-0.028
dummy=1 after 22 June 2011	(0.036)	(0.047)	(0.028)	(0.021)	(0.027)	(0.022)
Treat_i	0.028	0.028	0.028			
	(0.117)	(0.117)	(0.117)			
Observations	56,523	82,858	112,534	56,523	82,858	112,534
Adjusted R^2	0.005	0.006	0.003	0.859	0.858	0.845
Clusters	72	72	72	72	72	72
Store FE				yes	yes	yes
Product variety FE				yes	yes	yes
Month × Product FE				yes	yes	yes
Year-month trend and square				yes	yes	yes

Note: The dependent variable is the logarithm of the retail price of product variety *i*, in store *j*, and day *t*. All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.
Source: Authors' calculations based on data from the Greek Ministry of Development.

TABLE 2 – THE IMPACT OF DEREGULATION ON WHOLESALE PRICES

	(1)	(2)	(3)	(4)	(5)	(6)
Estimation method	OLS	OLS	OLS	FE	FE	FE
Dependent variable	$\ln(\text{Wholesale Price})_{it}$	$\ln(\text{Wholesale Price})_{it}$	$\ln(\text{Wholesale Price})_{it}$	$\ln(\text{Wholesale Price})_{it}$	$\ln(\text{Wholesale Price})_{it}$	$\ln(\text{Wholesale Price})_{it}$
Sample	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment
Time period	2010-2012	2010-2014	2010-2016	2010-2012	2010-2014	2010-2016
$\text{Treat}_i \times \text{Post}_t$	-0.108*	-0.099*	-0.068	-0.102***	-0.112***	-0.092***
	(0.059)	(0.052)	(0.050)	(0.034)	(0.024)	(0.030)
Post_t	0.009	-0.001	-0.006	-0.055	-0.014	-0.029
dummy=1 after 22 June 2011	(0.047)	(0.041)	(0.041)	(0.036)	(0.038)	(0.035)
Treat_i	-0.086	-0.086	-0.086			
	(0.134)	(0.134)	(0.134)			
Observations	12.294	20,783	28,686	12.294	20,783	28,686
Adjusted R^2	0.014	0.016	0.011	0.882	0.868	0.851
Clusters	72	72	72	72	72	72
Product variety FE				yes	yes	yes
Month × Product FE				yes	yes	yes
Year-month trend and square				yes	yes	yes

Note: The dependent variable is the logarithm of the wholesale price of product variety *i* in day *t*. All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.
Source: Authors' calculations based on data from the Central Market.

TABLE 3 – THE IMPACT OF DEREGULATION ON RETAIL PRICES (QUANTILE REGRESSIONS)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Dependent variable	residuals	residuals	residuals	residuals	residuals	residuals	residuals
		1th percentile	5th percentile	25th percentile	50th percentile	75th percentile	95th percentile	99th percentile
2010-2012	$Treat_i \times Post_t$	-0.087*	-0.067*	-0.052**	-0.063***	-0.066***	-0.038*	-0.032
		(0.044)	(0.037)	(0.020)	(0.018)	(0.019)	(0.023)	(0.053)
	Observations	56,523	56,523	56,523	56,523	56,523	56,523	56,523
2010-2014	$Treat_i \times Post_t$	-0.102***	-0.072**	-0.066***	-0.080***	-0.084***	-0.076***	-0.114***
		(0.031)	(0.029)	(0.020)	(0.017)	(0.021)	(0.027)	(0.041)
	Observations	82,858	82,858	82,858	82,858	82,858	82,858	82,858
2010-2016	$Treat_i \times Post_t$	-0.053	-0.026	-0.038*	-0.041**	-0.052***	-0.070**	-0.120**
		(0.043)	(0.039)	(0.019)	(0.017)	(0.020)	(0.030)	(0.052)
	Observations	112,534	112,534	112,534	112,534	112,534	112,534	112,534

Note: The dependent variable is the residuals of a regression of the logarithm of the retail price of product variety *i,* in store *j,* and day *t* on store, product variety, month × product fixed effects and a linear and quadratic trend measured in months including binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.
Source: Authors' calculations based on data from the Greek Ministry of Development.

TABLE 4 – THE IMPACT OF DEREGULATION ON WHOLESALE PRICES (QUANTILE REGRESSIONS)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Dependent variable	residuals	residuals	residuals	residuals	residuals	residuals	residuals
		1th percentile	5th percentile	25th percentile	50th percentile	75th percentile	95th percentile	99th percentile
2010-2012	$Treat_i \times Post_t$	-0.273***	-0.197***	-0.144***	-0.103***	-0.128***	0.031	0.385***
		(0.036)	(0.056)	(0.040)	(0.036)	(0.048)	(0.053)	(0.037)
	Observations	12,294	12,294	12,294	12,294	12,294	12,294	12,294
2010-2014	$Treat_i \times Post_t$	-0.050	-0.098*	-0.084***	-0.074**	-0.083***	-0.079**	-0.269***
		(0.047)	(0.051)	(0.025)	(0.030)	(0.031)	(0.036)	(0.047)
	Observations	20,783	20,783	20,783	20,783	20,783	20,783	20,783
2010-2016	$Treat_i \times Post_t$	-0.078	-0.092	-0.072**	-0.049*	-0.068**	-0.077	-0.151
		(0.115)	(0.100)	(0.033)	(0.028)	(0.027)	(0.092)	(0.111)
	Observations	28,686	28,686	28,686	28,686	28,686	28,686	28,686

Note: The dependent variable is the residuals of a regression of the logarithm of the wholesale price of product variety *i,* in day *t* on product variety, month × product fixed effects and a linear and quadratic trend measured in months including binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.
Source: Authors' calculations based on data from the Central Market.

TABLE 5 – THE IMPACT OF DEREGULATION ON WHOLESALE PRICES RANGE, MINIMUM & MAXIMUM

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Estimation method	FE	FE	FE	FE	FE	FE		FE	FE
Dependent variable	Wholesale Price Range$_{it}$	Wholesale Price Range$_{it}$	Wholesale Price Range$_{it}$	ln(Wholesale Min Price)$_{it}$	ln(Wholesale Min Price)$_{it}$	ln(Wholesale Min Price)$_{it}$	ln(Wholesale Max Price)$_{it}$	ln(Wholesale Max Price)$_{it}$	ln(Wholesale Max Price)$_{it}$
Sample	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment	Control & Treatment
Time period	2010-2012	2010-2014	2010-2016	2010-2012	2010-2014	2010-2016	2010-2014	2010-2014	2010-2016
Treat$_i$ × Post$_t$	0.239***	0.220***	0.215***	-0.176***	-0.184***	-0.159***	-0.048	-0.070**	-0.050
	(0.061)	(0.071)	(0.072)	(0.037)	(0.029)	(0.026)	(0.030)	(0.028)	(0.038)
Observations	12,294	20,783	28,686	12,294	20,783	28,686	12,294	20,783	28,686
Adjusted R^2	0.471	0.398	0.371	0.850	0.836	0.816	0.895	0.882	0.867
Clusters	72	72	72	72	72	72	72	72	72
Product FE	yes	yes	yes	Yes	yes	yes	yes	yes	yes
Month × Product FE	yes	yes	yes	Yes	yes	yes	yes	yes	yes
Year-month trend and square	yes	yes	yes	Yes	yes	yes	yes	yes	yes

Notes: The dependent variable (Columns 1, 2 and 3) is the wholesale price range divided by the minimum price, $(max - min)/min$ for product variety *i* in day *t*. The depentent variable Columns 4, 5 and 6 (Columns 7, 8 and 9) is the logarithm of the minimum (maximum) wholesale price of product variety *i* in day *t.* All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.

Source: Authors' calculations based on data from the Central Market.

TABLE 6 – THE IMPACT OF DEREGULATION ON RETAIL AND WHOLESALE PRICES BY PRODUCT

	(1)	(2)	(3)	(4)	(5)	(6)
Estimation method	FE	FE	FE	FE	FE	FE
Dependent variable	ln(Retail Price)$_{ijt}$	ln(Retail Price)$_{ijt}$	ln(Retail Price)$_{ijt}$	ln(Wholesale Price)$_{it}$	ln(Wholesale Price)$_{it}$	ln(Wholesale Price)$_{it}$
Time period	Short run	Medium run	Long run	Short run	Medium run	Long run
Apricot	-0.271***	-0.208***	-0.154***	-0.284***	-0.201***	-0.162***
	(0.023)	(0.035)	(0.046)	(0.027)	(0.045)	(0.046)
Artichoke	-0.028	-0.073***	0.035*	-0.146***	-0.162***	-0.063*
	(0.017)	(0.015)	(0.017)	(0.033)	(0.022)	(0.034)
Banana	-0.010	-0.030	-0.001	0.049*	0.052***	0.057**
	(0.020)	(0.020)	(0.015)	(0.028)	(0.017)	(0.021)
Beans	-0.058*	-0.075**	-0.061**	0.012	-0.043	-0.046
	(0.031)	(0.028)	(0.023)	(0.030)	(0.036)	(0.035)
Beetroot	-0.023	-0.056**	-0.002	-0.019	-0.030*	0.024
	(0.019)	(0.020)	(0.015)	(0.029)	(0.018)	(0.026)
Broccoli	-0.121***	-0.123***	-0.041**	-0.124***	-0.154***	-0.109***
	(0.019)	(0.016)	(0.017)	(0.029)	(0.018)	(0.025)
Cabbage	-0.180***	-0.194***	-0.076***	-0.136***	-0.180***	-0.059**
	(0.019)	(0.018)	(0.014)	(0.030)	(0.018)	(0.025)
Carrot	-0.110***	-0.085***	-0.042**	-0.054*	-0.006	0.026
	(0.020)	(0.020)	(0.014)	(0.029)	(0.017)	(0.021)
Cauliflower	-0.157***	-0.125***	-0.021	-0.202***	-0.181***	-0.090***
	(0.020)	(0.017)	(0.014)	(0.029)	(0.018)	(0.024)
Cherry	-0.011	-0.063**	-0.086***	-0.010	-0.109***	-0.154***
	(0.021)	(0.026)	(0.018)	(0.027)	(0.028)	(0.026)
Cucumber	0.041	-0.009	0.002	0.000	-0.036**	-0.031
	(0.027)	(0.021)	(0.015)	(0.027)	(0.017)	(0.021)
Eggplant	-0.037*	-0.066***	-0.050***	-0.048	-0.065***	-0.066**
	(0.020)	(0.019)	(0.014)	(0.030)	(0.023)	(0.030)
Fresh onion	0.012	-0.047**	0.010	0.044	-0.136***	-0.069**
	(0.019)	(0.020)	(0.015)	(0.028)	(0.018)	(0.027)
Grapes	0.014	-0.013	-0.007	0.038	-0.082	-0.053
	(0.030)	(0.031)	(0.020)	(0.046)	(0.053)	(0.044)
Greens	-0.080***	0.005	0.050***	0.151***	0.041**	0.082***
	(0.019)	(0.020)	(0.015)	(0.028)	(0.017)	(0.021)
Kiwi	-0.029	0.005	0.012	-0.105***	-0.004	-0.069**
	(0.074)	(0.075)	(0.073)	(0.030)	(0.019)	(0.031)
Leek	-0.033*	-0.081***	0.012	-0.087***	-0.111***	-0.042
	(0.019)	(0.017)	(0.015)	(0.028)	(0.018)	(0.028)
Lettuce	-0.093***	-0.098***	-0.081***	-0.163***	-0.176***	-0.150***
	(0.020)	(0.020)	(0.015)	(0.028)	(0.017)	(0.021)
Mellon	-0.167***	-0.166***	-0.155***	-0.162***	-0.201***	-0.180***
	(0.055)	(0.052)	(0.052)	(0.035)	(0.019)	(0.015)
Nectarine	-0.191***	-0.213***	-0.228***	-0.122***	-0.159***	-0.161***
	(0.026)	(0.030)	(0.020)	(0.034)	(0.019)	(0.013)
Okra	-0.057*	-0.096***	-0.077***	0.181***	0.120***	0.147***
	(0.029)	(0.033)	(0.021)	(0.047)	(0.023)	(0.015)
Onion	-0.179***	-0.222***	-0.127***	-0.218***	-0.202***	-0.111***
	(0.020)	(0.020)	(0.015)	(0.029)	(0.017)	(0.021)

	(1)	(2)	(3)	(4)	(5)	(6)
Peach	-0.172***	-0.221***	-0.251***	-0.090	-0.176***	-0.221***
	(0.025)	(0.029)	(0.019)	(0.056)	(0.026)	(0.024)
Peas	-0.151***	-0.144***	-0.120***	-0.263***	-0.412***	-0.407***
	(0.021)	(0.018)	(0.018)	(0.033)	(0.022)	(0.037)
Pepper	-0.104***	-0.123***	-0.102***	-0.068**	-0.074***	-0.062*
	(0.027)	(0.025)	(0.023)	(0.028)	(0.020)	(0.031)
Potato	-0.129***	-0.074***	-0.064***	-0.191***	-0.120**	-0.139**
	(0.024)	(0.019)	(0.020)	(0.063)	(0.047)	(0.051)
Spinach	-0.027	-0.046**	0.020	-0.013	-0.002	0.060**
	(0.019)	(0.018)	(0.014)	(0.029)	(0.017)	(0.026)
Strawberry	0.023	-0.094***	-0.037*	-0.063*	-0.116***	-0.099**
	(0.019)	(0.017)	(0.018)	(0.032)	(0.020)	(0.037)
Tomato	-0.060***	-0.074***	-0.068***	-0.221***	-0.201***	-0.167***
	(0.020)	(0.020)	(0.015)	(0.027)	(0.017)	(0.023)
Zucchini	-0.070***	-0.127***	-0.124***	-0.109***	-0.148***	-0.126***
	(0.020)	(0.020)	(0.015)	(0.027)	(0.017)	(0.021)
Watermelon				-0.094***	-0.118***	-0.085***
				(0.029)	(0.016)	(0.018)
Vlita				-0.076**	-0.074***	-0.041**
				(0.029)	(0.017)	(0.017)
Dill & parsley				-0.110***	-0.151***	-0.160***
				(0.028)	(0.017)	(0.021)
Pomegranate				-0.223***	-0.282***	-0.311***
				(0.035)	(0.022)	(0.013)
Quince				-0.075**	-0.135***	-0.151***
				(0.032)	(0.021)	(0.014)
Damson				-0.268***	-0.264***	-0.242***
				(0.036)	(0.016)	(0.027)
Fig				0.124**	-0.079***	-0.143***
				(0.046)	(0.024)	(0.016)
Loquat				-0.229***	-0.259***	-0.216***
				(0.032)	(0.018)	(0.035)
Sour cherry				0.359***	0.065***	-0.032*
				(0.047)	(0.047)	(0.015)
Store FE	yes	Yes	Yes			
Product variety FE	yes	Yes	Yes	yes	yes	yes
Month × Product FE	yes	Yes	Yes	yes	yes	yes
Year-month trend and square	yes	Yes	yes	yes	yes	yes

Note: The dependent variable in columns 1, 2, and 3 is the logarithm of the retail price of product variety *i*, in store *j*, and week *t*. The dependent variable in columns 4, 5, and 6 is the logarithm of the wholesale price of product variety *i* in month *t*. All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.

Source: Authors' calculations based on data from the Greek Ministry of Development and the Central Market.

TABLE 7 – THE IMPACT OF PASS-THROUGH ON RETAIL PRICES

	(1)	(2)	(3)
Estimation method	FE	FE	FE
Dependent variable	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$
Sample	Merged Retail & Wholesale data	Merged Retail & Wholesale data	Merged Retail & Wholesale data
Time period	2010-2012	2010-2014	2010-2016
$\text{Treat}_i \times \text{Post}_t$	-0.016	-0.026*	-0.010
	(0.013)	(0.013)	(0.010)
$\ln(\text{Wholesale Price})_{it}$	0.431***	0.440***	0.460***
	(0.021)	(0.026)	(0.025)
Post_t	0.009	0.005	-0.016
dummy=1 after 22 June 2011	(0.013)	(0.016)	(0.014)
Observations	49,286	73,688	101,108
Adjusted R^2	0.884	0.885	0.880
Clusters	59	59	59
Store FE	yes	yes	yes
Product variety FE	yes	yes	yes
Month × Product FE	yes	yes	yes
Year-month trend and square	yes	yes	yes

Note: The dependent variable is the logarithm of the retail price of product variety *i,* in store *j,* and day *t*. All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%;
***significant at 1%.
Source: Authors' calculations based on data from the Greek Ministry of Development and the Cetntral Market.

TABLE 8 – THE IMPACT OF DEREGULATION ON RETAIL PRICES (SELECTED PRODUCTS)

	(1)	(2)	(3)	(4)	(5)	(6)
Estimation method	FE	FE	FE	FE	FE	FE
Dependent variable	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$	$\ln(\text{Retail Price})_{ijt}$
Sample	Merged Retail & Wholesale data	Merged Retail & Wholesale data	Merged Retail & Wholesale data	Retail data	Retail data	Retail data
Time period	2010-2012	2010-2014	2010-2016	2010-2012	2010-2014	2010-2016
$\text{Treat}_i \times \text{Post}_t \times \text{Street market}_j$	-0.028	-0.040*	-0.009			
	(0.024)	(0.023)	(0.020)			
$\text{Treat}_i \times \text{Post}_t \times \text{Super market}_j$	-0.108***	-0.107***	-0.065**			
	(0.037)	(0.034)	(0.025)			
$\text{Treat}_i \times \text{Post}_t \times \text{Low}_i \times \text{Super market}_j$				-0.250***	-0.220***	-0.186***
				(0.031)	(0.026)	(0.017)
$\text{Treat}_i \times \text{Post}_t \times \text{High}_i \times \text{Super market}_j$				-0.238***	-0.295***	-0.333***
				(0.036)	(0.035)	(0.022)
$\text{Treat}_i \times \text{Post}_t \times \text{Low}_i \times \text{Street market}_j$				0.006	-0.014	-0.004
				(0.018)	(0.020)	(0.018)
$\text{Treat}_i \times \text{Post}_t \times \text{High}_i \times \text{Street market}_j$				-0.136***	-0.170***	-0.194***
				(0.021)	(0.027)	(0.019)
Post_t	-0.008	-0.003	-0.055**	-0.003	-0.066*	-0.061**
dummy=1 after 22 June 2011	(0.022)	(0.029)	(0.023)	(0.038)	(0.032)	(0.028)
Observations	49,286	73,688	101,108	14,075	20,521	27,667
Adjusted R^2	0.861	0.859	0.846	0.879	0.877	0.862
Clusters	59	59	59	19	19	19
Store FE	yes	yes	yes	yes	yes	yes
Product variety FE	yes	yes	yes	yes	yes	yes
Month × Product FE	yes	yes	yes	yes	yes	yes
Year-month trend and square	yes	yes	yes	yes	yes	yes

Note: The dependent variable is the logarithm of the retail price of product variety *i,* in store *j,* and day *t*. In Columns 1–3, the sample includes the 59 product varieties which are common for the retail and wholesale market. In Columns 4–6, the sample includes all the products assigned to the control group (see Table A2) but only lettuces ("Low") and peaches ("High") in the tretment group. All regressions include binary indicators for the changes in VAT rates. Standard errors clustered at the product variety level are reported in parenthesis below coefficients: *significant at 10%; **significant at 5%; ***significant at 1%.

Source: Authors' calculations based on data from the Greek Ministry of Development.

TABLE A1 – MAXIMUM WHOLESALE AND RETAIL MARKUPS

Product	Wholesale maximum markup	Retail maximum markup (supermarkets and grocery stores)	Retail maximum markup (street markets)
Potato	8%	25%	23%
Dry onions	10%	20%	17%
Artichoke, cucumber, tomatoes, vlitta*, drill & parsley*	10%	25%	22%
Zucchini, cauliflower, beetroot, lettuce, spinach, cabbage, broccoli, greens, leek, peas, carrots, fresh onions, peppers, okra, eggplant.	12%	35%	32%
Apricot	10%	35%	32%
Peach	10%	35%	30%
Grapes, beans.	12%	28%	25%
Strawberry	12%	40%	35%
Bananas	12%	30%	27%
Other fruits i.e.: cherry*, damson*, fig*, kiwi*, loquat*, mellon*, nectarine*, pomgranate*, quince*, sour cherry*, watermellon*.	10%	30%	27%

Note: Products with a star (*) did not exist in Genakos *et al* (2018) paper.
Source: Ministerial decision A2–1045 (Gazette B' 1502/22–6–2011).

TABLE A2– PRODUCT CLASSIFICATION

Treatment Group	Control Group
Apricot	**Apple**
Apricot (Diamantopoulou)*	Apple (Golden)*
Apricot (common)*	Apple (Golden-imported)*
Artichoke	Apple (Grand Smith)*
Artichoke (common)*	Apple (Grand Smith-imported)*
Artichoke (imported)	Apple (Starkin)*
Banana	Apple (Starkin-imported)*
Beans	**Lemon**
Bean Barbouni*	Lemon (common)*
Bean Barbouni (imported)	Lemon (imported)*
Bean Tsaouli*	**Mandarins**
Beetroot	Clementin mandarin*
Broccoli	Clementin mandarin (imported)
Broccoli (common)*	Mandarin (common)*
Broccoli (imported)	Mandarin (satsoumes)**
Cabbage	**Orange**
Carrot	Valencia orange*
Cauliflower	Orange (navalines-merlin)*
Cauliflower (common)*	**Pear**
Cauliflower (imported)	Pear (imported)*
Cherry	Pear Krystali*
Cherry (petrokeraso)*	Pear Krystali (imported)
Cherry (crisp)*	Pear (kontoules)**
Cucumber	Pear (kossia)**
Cucumber small*	Pear (santa maria)**
Cucumber large*	
Damson**	
Dill & Parsley**	
Eggplant	
Tsakonian eggplant*	
Eggplant (common)*	
Eggplant (imported)	
Fig**	
Fresh onion	

Treatment Group	Control Group
Grapes	
Grape (common)*	
Sultana grapes (raisin)*	
Greens	
Kiwi	
Kiwi (common)*	
Kiwi (imported)	
Leek	
Lettuce	
Lettuce (common)*	
Lettuce (kg)	
Loquat**	
Melon	
Melon (common)*	
Melon (Argitis)*	
Melon (Thrace)*	
Nectarine	
Okra	
Thick okra	
Fine okra*	
Onion	
Onion (common)*	
Onion (imported)	
Peach	
Peach (common)*	
Peach (white-pulp)**	
Peas	
Pepper	
Pepper (longish)*	
Florinis peppers*	
Green pepper (large)*	
Green pepper (large-imported)	
Pomegranate**	

Treatment Group	Control Group
Potato	
Potato (common)*	
French potato*	
Potato (imported)*	
Potato Cyprus	
Quince**	
Sour cherry**	
Spinach	
Strawberry	
Tomato	
Tomato (common)*	
Tomato (imported)*	
Vlitta**	
Watermelon*	
Zucchini	
Zucchini*	
Zucchini (imported)	

Notes: The table reports information on the classification of all the products (and their varieties) used in the estimation. A star (*) indicates the product varieties matched in the wholesale data. Two stars (**) indicates the products or product varieties appear only in the wholesale data.

UDC 349.412.3:332.334.2(497.4)

CERIF: S111, S130

DOI: 10.51204/Anali_PFUB_20402A

Ana Vlahek, PhD*

Matija Damjan, PhD**

THE UNCOMPLETED PRIVATIZATION OF FUNCTIONAL LAND IN SLOVENIA AND ATTEMPTS AT ITS RE-NATIONALIZATION

The article discusses the unsettled ownership status of many tracts of urban land in Slovenian cities that persists as a consequence of the disorderly transition from the socialist into the market institutional environment. Problems arising from the privatization of real estate, which can be detected all over the former Yugoslavia, typically affect functional land, i.e. land directly intended for the regular use and functioning of a building. Frequently, the land register does not show the rightful ownership status of such plots, leading to disputes and lengthy court proceedings for the determination of ownership. This is particularly the case with shared outdoor parts of residential neighborhoods, which are often subject to unfounded ownership claims based on obsolete entries in the land register. Even some municipal authorities have attempted to bring such land into public domain under this pretense, which would, if successful, amount to a 21st century nationalization.

Key words: *Appertaining land. – Functional land. – Nationalization. – Privatization of real estate in Slovenia. – Social property.*

* Assistant Professor, Faculty of Law, Ljubljana University, *ana.vlahek@pf.uni-lj.si*.

** Assistant Professor, Faculty of Law, Ljubljana University, *matija.damjan@pf.uni-lj.si*.

1. INTRODUCTION

The ownership status of a significant share of urban land in Slovenian towns and cities remains unsettled, which is the result of an uncompleted privatization of real estate that took place during the period of transition from a socialist into a market institutional environment. Similar problems, stemming from common historical roots, can also be generally found in other parts of the former Yugoslavia. Problems arising from the privatization of real estate in Slovenia typically affect the so-called functional land of buildings or – in todays' terms – appertaining land of buildings (Slo. *funkcionalno zemljišče*, *pripadajoče zemljišče*), i.e. land that directly enables the regular use of a residential building and without which the building cannot function. Many such plots of land are still registered in the land register as "social ownership" (Slo. *družbena lastnina*) or as "general peoples' property" (Slo. *splošno ljudsko premoženje*).

This is particularly true with outdoor common (shared) parts of apartment buildings and of other types of residential neighborhood buildings (shared playgrounds, parks, waste collection points, parking spaces, premises for residential board meetings, sheds, etc.). When buying apartments or individual (detached, semi-detached or terraced) houses in residential neighborhoods, buyers obtained, *ex lege*, the right to use such common land. This right was in many ways a functional equivalent of today's ownership; however, the entry of such rights into the land register at the time of the former Yugoslavia was all too often omitted. The legal status of such plots of land remained unaddressed for decades.

In the recent years, however, correct ownership registrations for such parcels have gained importance since outdated entries in the land register allowed the legal successors of former construction companies and other socially owned enterprises to claim ownership of such land, often evidently acting in bad faith in order to profit by selling the land either to its rightful owners or to third parties, or by encumbering it to the detriment of their rightful owners, by establishing mortgages or leases on it. Some municipalities have also relied on outdated land register entries to claim ownership of common land in residential neighborhoods, mainly under the pretense that such real estates are local public goods (Ude, Vlahek, Damjan 2016, 3–4).

The aim of the article is to explore the problems of privatization of functional land in residential neighborhoods in Slovenia and the resulting unsettled status of such plots of land, which prevents their development and their full use by their rightful owners. First, we describe the notion of the right to use land in social ownership, which was the focal concept of the socialist real estate regulation. In order to present the ongoing

problems pertaining to the legal status of privatized land in residential neighborhoods in Slovenia, we analyze the concept of functional land, and present how residential neighborhoods were constructed and legally regulated. We then turn to the typical irregularities that arose in the process of privatization of the former socially owned property and allowed ineligible persons to register as owners of former functional land. Finally, we outline several legal paths for the protection of the rightful owners' rights, which have been devised in recent decades both through special legislation and in the case law.

2. THE RIGHT TO USE LAND IN SOCIAL OWNERSHIP

In Yugoslavia, construction land in cities and other urbanized settlements was socially owned since the mid-1960s, regardless of whether it was developed or not (Finžgar 1979, 42; Zečević 1975, 175).[1] Where the land had previously been privately owned, it was nationalized, i.e. its ownership status changed to social property (Juhart, Tratnik, Vrenčur 2007, 42, 46; Kramberger Škerl, Vlahek 2016, 19; Finžgar 1979, 107; Zečević 1975, 175). Buildings, however, that were constructed on such socially owned land could themselves be either privately owned or social property (Zečević 1975, 170). This was possible because the principle of connection between the land and the building built on it (*superficies solo cedit*)[2] did not apply to social property (Juhart, Tratnik, Vrenčur 2007, 46; Vlahek, Podobnik 2014, 306–307). In any case, the owner or the legitimate user of a building that had been lawfully constructed on socially owned land automatically (*ex lege*) obtained a semi-permanent right to use the land on which that very building was located (building site, Slo. *stavbišče* or *zemljišče pod stavbo* or *zemljišče, ki ga pokriva zgradba*) as well as the land necessary for the building's regular use.[3] In case of apartment buildings, the right to use land in social

[1] For details on the evolution of the socialist economy before the implementation of the social property regime in Yugoslavia, see Kramberger Škerl, Vlahek 2016, 17–18; Juhart, Tratnik, Vrenčur 2007, 45, 46; Možina, Kovač 2014, 19; Finžgar 1979, 107.

[2] For further details on this principle, see Kramberger Škerl, Vlahek 2016, 27, 32–33, 35, 42–43, 59; Kambič 2013, 253–269.

[3] The right of use was in principle time-limited by the duration of the building (superstructure) itself. There was no right to redevelop the plot of land, but in some cases, the courts have allowed dilapidated buildings to be demolished and built anew, in accordance with the relevant urban plan. See, e.g. Art. 6/2 of the federal Act on Transactions with Land and Buildings (Slo. Zakon o prometu z zemljišči in stavbami, *Official Gazette of the FPRY*, No. 26/54 et seq.), Art. 37 et seq. of the Act on the Nationalization of Leased Buildings and Building Land (Slo. Zakon o nacionalizaciji najemnih zgradb in gradbenih zemljišč, *Official Gazette of the FPRY*, No. 52/58), and Art. 12 of the federal Act on Basic Property Law Relations (Slo. Zakon o temeljnih

ownership was held commonly by all the owners or users of the individual apartments in the building. The right to use the building site and the functional land could not be transferred separately but rather only in conjunction with the building (or the apartment in an apartment building).[4] The rights to land therefore followed the rights to buildings, rather than the other way around, following the principle of *superficies solo cedit*. This legal pattern has been retained to this date with regard to apartment buildings.[5]

The right to use social property (Slo. *pravica uporabe družbene lastnine*) was the most extensive right that could be established over socially owned assets, and gave its holder the right to use, manage and dispose of such assets. The right was effective *erga omnes* and enjoyed comparable legal protection as private property (Finžgar 1979, 51).[6] However, the legal literature of the time stressed that the right of use should not be interpreted simply as *ius in re aliena* – a subsection of entitlements arising from conventional (private) ownership right – since a qualitative and not only a quantitative difference existed between the two.[7] The social property doctrine rejected the equalization of the rights to manage, use and dispose of social property with any substantive rights of conventional property law (Sajovic, 1980, 43; Zečević 1975, 12–13, 57). Under the Associated Labor Act of 1976,[8] the central Yugoslav piece of legislation laying down the rules on social property, the workers in associated labor were both entitled and obliged to use socially owned assets under their control in accordance with the assets' nature and purpose. The user of a socially owned building plot was thus obliged to use this land in accordance with its purpose, determined in spatial planning acts, and with the specific conditions of use that were laid down

lastninskopravnih razmerjih (ZTLR), *Official Gazette of the SFRY*, No. 6/80 et seq.). For further details, see Finžgar 1967, 334; Žuvela 1985, 61, 426; Stojanovi, Pop-Georgiev, 1980, 54.

[4] Art. 12 of the ZTLR and Art. 7 of the Slovenian Act Regulating Transactions in Real Estate (Slo. Zakon o prometu z nepremičninami (ZPN), *Official Gazette of the SRS*, No.19/76 et seq.).

[5] See the Property Law Code of 2003 (Slo. Stvarnopravni zakonik (SPZ), *Official Gazette of the RS*, No. 87/02 et seq.) and the Housing Act of 2003 (Slo. Stanovanjski zakon (SZ-2003), *Official Gazette of the RS*, No. 69/03 et seq.).

[6] See also Supreme Court of Slovenia, II Ips 324/2007, 18 March 2010, para. 10.

[7] Supreme Court of Slovenia, II Ips 389/2006, 11 December 2008, para. 5. Whereas ownership right entitles the owner to use their property and appropriate its fruits solely for their private purposes, socially owned land did not have a recognized owner and was supposed to belong to the society as a whole. The right to use social property could be exercised only in a manner concordant with the interests of the society. Cf. Begović, Mijatović, 1993, 8; Finžgar, 1979, 50–51; Gams, 1968, 321.

[8] Slo. Zakon o združenem delu (ZZD), *Official Gazette of the SFRY*, No. 53/1976 et seq.

in the administrative procedure of transferring the building land for the purposes of construction (Zečević 1975, 176).[9]

3. THE NOTIONS OF FUNCTIONAL LAND AND APPERTAINING LAND

In Slovenia, the land essential for the building's regular use was referred to as "functional land" (Slo. *funkcionalno zemljišče*) whereas in other parts of the former Yugoslavia the legal regulation and practice did not make use of such term despite recognizing the underlying notion. The concept of "land required for the regular utilization of the building" (Slo. *zemljišče, potrebno za redno rabo objekta*) was introduced by Yugoslav federal legislation already by the late 1950s. The Act on Nationalization of Leased Buildings and Building Land of 1958[10] stated that where a non-nationalized building was erected on a nationalized building plot (Sl. *gradbena parcela*), the owner of the building had the right of free use of both the building site and the "land which is required for the normal utilization of the building" for as long as the building exists[11] (Juhart 2008, 22–23; Begović, Mijatović, 1993, 9).

Further federal legislative acts regulating, inter alia, expropriation, apartment construction, building land, land transactions, etc. laid down the rules for this type of land and the rights to it. After the Yugoslav constitutional reform of 1974, the competence to regulate these issues was transferred from the federation to the individual republics (Juhart 2008, 22–23). In Slovenia, the notion of "land necessary for the building's regular utilization" was, for example, applied in the 1976 Act on the Cessation of Ownership and Other Property Rights on Land Planned for Complex Construction,[12] which provided that whereas an edifice is erected on land that has been transferred into social property, the edifice itself does not become social property while its owner obtains the right to use the land under the edifice and the land necessary for the building's regular use, lasting as long as the building exists (Juhart 2008, 23). Further, the 1976 Act on Rights on Parts of Buildings[13] stated that the apartment or offices owners have a joint right to use the land in social

[9] See also Higher Court in Ljubljana, I Cp 2872/2009, 25 January 2010.

[10] Slo. Zakon o nacionalizaciji najemnih zgradb in gradbenih zemljišč (ZNNZGZ), *Official Gazzette of the FLRJ*, No. 52/58.

[11] *Ibid.* Art. 37.

[12] Slo. Zakon o prenehanju lastninske pravice in drugih pravic ne zemljiščih, namenjenih za kompleksno graditev (ZPLP), *Official Gazette of the SRS*, No. 19/76.

[13] Slo. Zakon o pravicah na delih stavb (ZPDS), *Official Gazette of the SRS*, No. 19/76 et seq.

ownership (or joint ownership where relevant) on which the building is erected, as well as the land necessary for the building's regular use.[14] Shared parking lots were, for example, explicitly listed as common parts of the building that are in joint ownership of the apartment owners (or in joint use of the persons holding the right of use the apartment).[15]

It is almost impossible to determine when exactly the notion of "functional land" was first applied in the Slovenian legal environment (Juhart 2008, 22). It has been utilized in legislation at least since 1984, when the Act on Urban Planning and Other Forms of Land Use[16] defined the building plot as "building land [(Slo. *stavbno zemljišče*)] on which a building is or is planned to be erected (building site), as well as building land required for its regular use (functional land)."[17] The Act clarified that the functional land of existing buildings and facilities in areas where the spatial plan has not yet been adopted, is to be determined by the municipal body in charge of spatial planning, on the basis of the spatial planning regulation upon the request of the owner or user.[18] The Building Land Act of 1984[19] also explicitly mentioned functional land by stipulating that where, according to the spatial plan, a building can remain on the building land that has become social property, the building is not transferred into social ownership and its owner has the right to use the building plot and the functional land (in social property) as long as the building exists.[20]

The Slovenian Housing Act of 1991[21] defined functional land of a residential building as land directly intended for the regular use of the residential building without which the building cannot function.[22] Access roads, driveways, parking spaces, waste collection areas, playgrounds, rest areas and similar areas were listed as examples of such land. Functional land that directly or indirectly served two or more residential buildings and did not have the special legal status of a public good (property in common use of all citizens) was considered shared functional land.[23] In cases of apartment buildings (or combined apartment and office

[14] *Ibid.* Art. 6.

[15] *Ibid.* Arts. 4 and 5.

[16] Slo. Zakon o urejanju naselij in drugih posegov v prostor (ZUN), *Official Gazette of the SRS*, No. 18/84 et seq.

[17] *Ibid.* Art. 42/2.

[18] *Ibid.* Art. 42/3.

[19] Slo. Zakon o stavbnih zemljiščih (ZSZ), *Official Gazette of the SRS*, No. 18/84 et seq.

[20] *Ibid.* Art. 15.

[21] Slo. Stanovanjski zakon (SZ), *Official Gazette of the RS*, No. 18/91-I et seq.

[22] *Ibid.* Art. 9.

[23] See also Supreme Court of Slovenia, II Ips 634/2007, 1 July 2007, para. 7.

buildings), functional land was expressly listed in the Housing Act as one of the common (shared) parts of the building in co-ownership of the apartment owners, and the general rules on common spaces applied *mutatis mutandis* also to functional land.[24] The Housing Act required the apartment owners to conclude a contract on the management of the apartment building and its functional land, whereas the owners of separate buildings with shared functional land had to conclude a contract on the management of this shared land.[25] The maintenance of functional and shared functional land and the care for the protection of the living environment were defined as "investments intended to ensure careful maintenance and careful handling of the surroundings of residential buildings."[26] The extent of functional land in specific parts of the city area was, as a rule, decided by the municipality in its urban planning documents. Where such planning documents were not adopted, the owner or user of a building could request the municipal administrative bodies to designate functional land pertaining to their building, based on spatial planning conditions.

After social ownership of building land was abolished in Slovenia, the term functional land was eventually omitted from the legislation, but it still appeared in case law—be it with regard to cases addressing the relationships pertaining to former functional land, or at times ambiguously even with regard to cases dealing with the establishment of relationships involving real estate within the modern property law regime, in which functional land no longer existed (Juhart 2008, 22, 25). Unlike its predecessor of 1991, the new Housing Act of 2003 did not regulate functional land. Its transitional provisions, however, provided that the functional land comprised part of the common (shared) spaces co-owned by the owners of apartments in an apartment building.[27] If the right of use was not registered in the land register in favor of the apartment owners, the holder of the right of use on the date of entry into force of the Privatization of Real Estate in Social Ownership Act (hereinafter ZLNDL)[28] was to be determined on the basis of the documents and legal acts based on which the building was constructed. If the functional land was shared by multiple apartment buildings and such determination was impossible, the rules on the contractual land consolidation set out in the

[24] *Ibid.* Art. 15 referring to Arts. 13 and 14, and Art. 28.

[25] *Ibid.* Art. 22.

[26] *Ibid.* Art. 24. The provision is somewhat unclear since investments and maintenance are two fundamentally distinctive activities.

[27] *Ibid.* Art. 190. The provision explained that the functional land need not be officially determined as long as it was land on which the apartment owners held the right of use on the date that the privatization legislation entered into force.

[28] Slo. Zakon o lastninjenju nepremičnin v družbeni lastnini (ZLNDL), *Official Journal of the RS*, No. 44/97 et seq.

Construction Act of 2002[29] applied until 2008, when special interventional legislation for the determination of such land, in the form of the Act on Establishing Divided Co-ownership and on Determining the Appertaining Land (ZVEtL-2008),[30] was enacted.

In 2008, the concept once known as functional land was reintroduced to Slovenian legislation under a different name— "appertaining land" (Slo. *pripadajoče zemljišče*) by the ZVEtL-2008. The term was retained by its successor, the Act on Establishing Divided Co-ownership and on Determining the Appertaining Land (ZVEtL-2017)[31] of 2017, which defines appertaining land as land that was directly intended or is needed for the regular use of a building and it became the property of the owner of the building on the basis of the rules valid prior to 1 January 2003,[32] such as, in particular, the rules on the privatization of real estate in social ownership, rules regulating the erection of buildings on others' land, rules on ownership in apartment buildings, etc.[33] A further notion of "shared appertaining land" corresponds to the former shared functional land and is defined, rather awkwardly, in the ZVEtL-2017 as the land that was directly intended or necessary for the regular use of several buildings at the same time and which, on the basis of the abovementioned regulations, became the property of the owners of these buildings.

4. CONSTRUCTION OF RESIDENTIAL NEIGHBORHOODS AND THE LEGAL STATUS OF LAND IN SUCH NEIGHBORHOODS

Major residential construction projects in the socialist Yugoslavia were carried out within the system of "socially directed housing construction," where the municipality provided a tract of building land in social ownership and temporarily conferred the right to use the land on the construction firm in order to build the entire planned complex of apartment buildings or single-family homes, including communal facilities and other public spaces (Zečević 1975, 175). After the Second World War

[29] Slo. Zakon o graditvi objektov (ZGO-2002), *Official Gazette of the RS*, No. 110/02 et seq.

[30] Slo. Zakon o vzpostavitvi etažne lastnine na predlog pridobitelja posameznega dela stavbe in o določanju pripadajočega zemljišča k stavbi (ZVEtL-2008), *Official Gazette of the RS*, No. 45/08 et seq.

[31] Slo. Zakon o vzpostavitvi etažne lastnine na določenih stavbah in o ugotavljanju pripadajočega zemljišča (ZVEtL-2017), *Official Gazette of the RS*, No. 34/17.

[32] This date was set because after 1 January 2003, when the current rules of the new Slovenian Code of Property Law already applied, and the anomalies regarding real estate entries should no longer occur. For further details, see Fajs, Debevec 2017.

[33] Art. 42/1 of the ZVEtL-2017.

this became the key approach to spatial planning in the cities, such as Ljubljana, which had a housing shortage (Čelih 2015; Draksler 2009, 28). It mirrored the model of residential community unit planning developed in the 1920s by American urban planner Clarence Perry, which was also implemented in England and Scandinavia and from there also in Slovenia (Čelih 2015; Draksler 2009, 6–7, 28). Following this model, Slovenian architects and urban planners aimed to construct residential neighborhoods that would offer the workers and their families better living conditions than the former cold and unimpressive industrial housing (Čelih 2015). Following this model, "functional, safe and attractive neighborhoods" (Perry 1929, 487), such as Soseska Murgle, Soseska Koseze, Bežigrajska soseska 3 – BS3, Črnuška Gmajna, and many more, were constructed in Ljubljana between the 1960s and the 1980s. These consisted mostly of a complex of apartment buildings, while in some cases, the neighborhoods consisted of a complex of detached, semi-detached or terraced houses.

The construction had to be carried out under the conditions defined in a "social compact" (Slo. *družbeni dogovor*)—a quasi-administrative contract between social legal entities (Slo. *družbene pravne osebe*)[34] which also entailed some general normative effects (Geršković 1975, 20; Zečević 1975, 238, 245–246; Kulić, 189–191). The construction firm made a commitment to hand over the constructed residential facilities to their intended users, i.e. to the municipal housing funds that funded the construction, or to individual residents who bought the apartments or individual houses (and, for example, appertaining dislocated parking spots and garages). At the same time, the local public goods, such as public roads, public parks, public playgrounds, etc., that were constructed in conjunction with the residential buildings, were to be transferred to the municipal authorities, which were in charge of their management and maintenance. Hence, the construction firm was not granted a permanent right to use social property but solely the temporary right of use for the purpose of construction of the neighborhood and with the specific requirement that the right of use be transferred to the intended users after the completion of construction.

What happened in practice, however, was that the constructed buildings were handed over to the residents (buyers of residential units) in accordance with the planned use of the buildings, however the cadastral boundaries of the functional land belonging to specific residential buildings were not drawn and the rights to use such functional land were not entered in the land register accordingly (Vlahek 2016, 104–105). This was a result of the land register being significant neglected during the socialist period, particularly with regard to the transfer of social property

[34] For further details on the concept of a social legal entity, see, e.g. Zečević 1975, 171 ff.

rights (Fajs, Debevec 2017, 18). Sometimes, the building land on which the entire residential complex was constructed was not even divided into separate plots according to their use (functional land of individual buildings, shared functional land and public areas), which further hindered the correct transfer of social property usage rights (Ude 2007, 142–144). The procedure available to the owners under the Act on Urban Planning and Other Forms of Land Use for the determination of the functional land, was complex and lengthy (Juhart 2008, 24). It was only in 1999 that a special intervention law (the Act Determining Special Conditions for Registering the Ownership of Individual Parts of Buildings with the Land Register)[35] enabled the owners to request the determination, following a simplified procedure, of the building site, i.e. the land directly under the building,[36] while the determination of the functional land was still to be carried out.

The result of such developments was that the status of the rights to land, as entered in the land register, no longer corresponded to the actual legal and factual situation, i.e. to the actual use and ownership of apartments, houses, their functional land and other socially owned land in residential neighborhoods. The land register typically continued to show construction firms or municipalities as the exclusive holders of the right to use most of the land in residential neighborhoods. In some cases, the municipalities had not even registered social ownership on the land, which had been expropriated beforehand to enable the construction of residential neighborhoods.

In the period of social property ownership, the muddled legal status of building land in residential neighborhoods was not that detrimental to its rightful owners. Namely, the rules that applied to the transfer of entitlements of social ownership of real estate were different from those governing the transfer of private property rights: the right of use of social property could be transferred merely through the conclusion of a contract, without the land registry entry, even when the land was not divided into separate cadastral parcels. Registration was not required for the valid transfer of the right to use social property, and entry into the land register was considered only declaratory (Juhart 2008, 24).[37] Most often, only the legal status of social property of the given asset was entered in the land register and the first holder of the right to use these items of social property was registered (Juhart 2008, 24). Registration of agreements on further transfers of the right of use was repeatedly neglected, particularly

[35] Slo. Zakon o posebnih pogojih za vpis lastninske pravice na posameznih delih stavbe v zemljiško knjigo (ZPPLPS), *Official Gazette of the RS*, No. 89/99.

[36] According to Art. 2 of this act, it was deemed that upon entry into force of the ZLNDL, the holders of apartment rights had the right to use the building site.

[37] See also Supreme Court of Slovenia, II Ips 634/2007, 1 July 2010, para. 7.

where the right was transferred between various social entities, wherein the assets remained social property. Frequently, only the actual handover of land possession was carried out based on relevant documentation and legal transactions, while the state of rights in the land register was not updated. In addition, the disposal of a right to use social property was not considered to be of a derivative nature, therefore it was not subject to the principle that one cannot transfer more rights than one owns (*nemo plus iuris transferre potest quam ipso habet*) (Krisper-Kramberger 1992, 705; Sajovic, 1980, 37; Kramberger Škerl, Vlahek 2016, 169). This meant that the acquirer of the right to use social property could obtain a wider range or different content of entitlements than the transferor if this were in accordance with the nature and purpose of the socially owned assets. The courts established that floor ownership (condominium) could be created simply by dividing a residential building into several independent functional units (apartments) and selling these to the residents, again without appropriate registration. Consequently, legal transactions relating to apartments were also not entered in the land registered but were concluded simply by verifying the parties' signatures before the competent authority. It should be noted, however, that even where the sales contract did not specifically mention the functional land, and even if such land had not been surveyed, the courts held that the right to use this land, as defined in the relevant legislation, was automatically transferred together with the rights to the apartment.[38]

As a consequence of the described deviations from the traditional rules of real property law, the spatial extent of functional land belonging to specific buildings was not clearly defined, the legal status of specific tracts of land as functional land was not evident from public records, and it was almost impossible to ascertain the actual holders of the right to use this land solely by relying on the land register entries.

5. DIFFICULTIES IN THE PRIVATIZATION OF REAL ESTATE

The constitutions of the newly established states on the territory of former Yugoslavia mostly omitted the notion of social property. For example, the new Constitution of the Republic of Slovenia,[39] adopted in December 1991, mentions "property" and "private property", the latter for the purposes of showing that the concept of social property has no place in the new Slovenian legal order. Despite the new regime laid down in the constitution, social property did not cease to exist with its enactment.

[38] See, e.g., Supreme Court of Slovenia, II Ips 262/2009, 9 November 2009, II Ips 259/2008, 15 March 2012, and II Cp 2452/2018, 27 March 2019.

[39] *Official Gazette of the RS*, No. 33I/91-I et seq.

The transformation of social property into private property was slow and gradual and it cannot be defined as a single point in time.

In Slovenia, provisions on the transformation of specific types of social property could be found in at least 18 legislative acts, typically among their transitional provisions. The Slovenian legislation on privatization of socially owned real estate provided different conditions for acquiring conventional property rights, depending on the type and purpose of the given real estate. In some cases, the decisive factor was who held the right to use the social property on the cut-off date; in other cases, the purpose of the real estate in question was decisive, regardless of which social entity held the right to use it.

Buildings in social ownership intended for the housing of public employees and officials became either state or municipal property, together with other residential buildings to which the state or the municipalities had the right of use. Municipalities also obtained ownership of social housing constructed by the former solidarity funds and housing funds. Other legal entities that held the right to use socially owned apartment and residential buildings became owners of these properties on the day the Housing Act of 1991 entered into force. The new owners were, however, in most cases[40] under the obligation to offer the apartments for purchase to the tenants who held the so-called housing rights on social apartments. The Housing Act regulated only the privatization of apartments and residential buildings, while building land remained social ownership. Public roads, public parks, public playgrounds and other public infrastructure later became municipal property, under the provisions of the Act on Services of General Economic Interest.[41] Functional land, however, was privatized only in 1997, under the rules of the ZLNDL.

The ZLNDL was of a subsidiary nature, adopted for the explicit purpose to bring to a close the privatization of the remaining real estate in social property, which had not yet been covered by the existing specific legislation. The ZLNDL transformed the right of use into conventional ownership rights. It simply stipulated that real estate in social ownership would *ex lege* become private property of natural persons or legal entities who held the right to use it, or their legal successors. Real estate to which the state, municipality or a city held the right to use, became the property of these public entities. Originally, the ZLNDL envisaged that this transformation of rights would be entered into the land register at the owner's request. As it turned out, the updating was very slow, an amendment to the law later mandated *ex officio* registration of the

[40] Previously nationalized apartment buildings, and custodial on-site apartments were excluded from the purchase option.

[41] Slo. Zakon o gospodarskih javnih službah (ZGJS), *Official Gazette of the RS*, No. 33/93 et seq.

ownership rights in favor of the natural or legal persons whose right to use the social property was already registered in the land register at the time.

This transformation meant that apartment owners in residential apartment buildings acquired the co-ownership rights to the functional land of their buildings, holding co-ownership shares proportional to the value of their respective apartments in relation to the total value of the building. Similar was true for owners of individual houses in residential neighborhoods with shared land and other spaces; here too, all such common spaces formed common (shared) functional land of all the individual houses. Ownership of the functional land (individual and shared) was acquired *ex lege*. In the event of an ownership dispute, therefore, the crucial question would be who held the right to use the functional land at the time that the ZLNDL entered into force. This must be assessed according the rules applicable at the time of the acquisition of rights (Juhart 2008, 22). No later piece of legislation limited the extent of building or apartment owners' rights over functional land.

However, the simplified approach to the privatization of real property, enacted in the ZLNDL, which relied primarily on the entries in the land register, caused new problems and further complicated the legal situation in all instances where the entries in the land register concerning the holder of the right to use social property were obsolete. Such situations were very frequent, particularly in residential neighborhoods. If the right to use the functional land was not entered in the land register in favor of the building's owner(s), the holder of the right of use, on the date that the ZLNDL entered into force, was to be determined on the basis of the documents and legal acts based on which the building had been constructed.[42] If the land was shared by multiple apartment buildings and such determination was impossible, the rules on the contractual land consolidation set out in the Construction Act of 2002[43] applied until the enactment of the Act on Establishing Divided Co-ownership and on Determining the Appertaining Land (ZVEtL)[44] in 2008.

5.1. Construction Firms Registered as Owners

Once the privatization of building land had been initiated, it soon became apparent that the lack of reliable records of the allocation of the right to use socially owned land in residential neighborhoods would present new problems. Under the provisions of the ZLNDL, the

[42] Supreme Court of Slovenia, II Ips 634/2007, 1 July 2010, para. 8.

[43] Slo. Zakon o graditvi objektov (ZGO-1), *Official Gazette of the RS*, No. 110/2002 et seq.

[44] Slo. Zakon o vzpostavitvi etažne lastnine na predlog pridobitelja posameznega dela stavbe in o določanju pripadajočega zemljišča k stavbi (ZVEtL), *Official Gazette of the RS*, No. 45/2008 et seq.

construction firms that remained registered as holders of the right of use on entire residential neighborhoods suddenly found themselves as registered owners of the land that was actually used as public roads or other public surfaces, or as private functional or shared functional land of apartment buildings or other residential areas (Ude 2007, 142–144). The construction firms had also been recently privatized, and their new management sometimes regarded themselves as legitimate owners of all this land or at least perceived the situation as an opportunity to gain profit by selling the land or charging for its use. A typical example where this occurred were parking lots that had been built on shared functional land in residential neighborhoods to serve their residents, but were later claimed by the construction companies as their own property and sold-off or leased to the residents or third parties.

Another problem of the outdated state of the land register was that all the property where large construction firms were still registered as owners became part of the bankruptcy estate when those companies went bankrupt. The actual owners of the functional land were thus faced with either loss of their property due to its sale in bankruptcy proceedings or with lengthy and costly legal proceedings in order to prove that they were the rightful owners. They were sometimes even not aware of the fact that their property was being sold in bankruptcy or enforcement proceedings.[45]

Although it was apparent under substantive law that the construction firms were not entitled to own functional land or public surfaces, the legal basis for the true owners to claim their rights was not immediately clear. The former social compacts or self-management agreements, which stipulated the construction firms' obligation to transfer the right of use to the apartment owners in the case of functional land and back to the municipality in case of public infrastructure, had been concluded several decades earlier. If the obligation of transferring the rights on land was treated as a regular claim under the law of obligations, the construction firms could simply defend themselves against lawsuits by arguing that the claim had already become time-barred under the general statute-barring period of five years. However, this defense should not be accepted.

The self-management agreements on the transfer of the right to use social property cannot simply be equated with present-day contracts for the transfer of property rights. Unlike conventional ownership rights, the right to use social property did not have its content fully defined in legislation but was specified in the act granting this right. The purpose for which the right of use was granted, burdened this right and became part of its content as permanently binding for the holder of the right.[46] The

[45] See, e.g., Supreme Court of Slovenia, III Ips 22/2012, 28 January 2014, and II Ips 286/2012, 28 May 2015.

[46] See Finžgar's position on social property as a dedicated property (Finžgar 1992, 6). Cf. Sajovic 1989, 30–32.

obligation to hand over the social assets and transfer the relevant rights to their use was an integral part of the obligation of the administrators of social assets to use these funds in accordance with their nature and purpose,[47] so it was not subject to statute of limitations. For this reason, the purpose for which the right of use of building land was transferred to the construction firm, should also be considered in the privatization process. The right to use social property could be converted into ownership right only where it had the nature of absolute property rights limited only by general rules on social property.[48] Consequently, land within residential neighborhoods that was intended and actually used as functional land of residential buildings or as a local public good could not become the construction company's private property solely on the basis of an obsolete entry of right to use in the land register.

Nevertheless, the construction companies, as the original sellers that received payments decades ago (or their legal successors), were oftentimes not willing to cooperate with the buyers of apartments or houses in their attempts to register as the new owners of functional land, or required additional payments for their support, particularly when the construction companies were themselves on the verge of bankruptcy (e.g. during the 2007–2009 global recession) It also occurred quite frequently that the documentation required for the registration was simply missing from the archives of both the construction companies and the municipalities that had provided them with the land for building the residential neighborhood.

5.2. Municipalities Registered as Owners

A similar problem arose in cases where outdated entries in the land register referred to municipalities as holders of the right of use. In the past decade, some Slovenian municipalities have started issuing administrative decisions declaring as municipal property (and as local public good)[49] all land in residential neighborhoods where social ownership was still registered and where the municipality was entered in the land register as its manager or the holder of the right to use social property. By relying on the legislation on the privatization of public infrastructure, which instituted the possibility of such administrative decisions, the courts duly entered the municipalities in the land register as the rightful owners of all such real estate. However, such practice lacked a valid legal basis wherever the respective real estate did not in fact consist of public infrastructure, which was typically true in cases of shared functional land in residential neighborhoods (Ude, Vlahek, Damjan

[47] Art. 189 of the Associated Labor Act.

[48] Supreme Court of Slovenia, II Ips 457/2003, 3 February 2005.

[49] The latter possibly with the aim of being exempt from paying land taxes.

2016, 4). Indeed, clear delimitation between public land and shared functional land was often difficult and the municipal officials might not have been aware of the land's actual use and legal status when they instituted the proceedings. Nevertheless, one cannot help suspect that they eventually just took advantage of the outdated entries in the land register to claim exclusive ownership of the land in question (even with the aim of selling it later) rather than first making effort to clarify its legal status and allowing the proper owners to register their rights (Ude, Vlahek, Damjan 2016, 3–4). By claiming the ownership of this land based solely on land register entries, the municipalities have effectively performed widespread nationalization of private land.

The Municipality of Ljubljana, for example, launched a special project for identifying and auctioning off all unnecessary plots of land where the municipality was registered as the owner or, in outdated terms, holder of the right of use of social property. This was a decision worthy of a prudent businessman were it not for the fact that one outcome of the project was that also functional land in private ownership was being sold off by the municipality as its own. The rightful (but not registered) owners of functional land were thus forced to repurchase their own land or see it being sold to third parties or put in general use. Plots of shared functional land (owned and already paid for by all residents of the neighborhood) were often sold to individual residents who were motivated to expand their own plots at the expense of the common neighborhood land.

It seems that today city planners generally support any manner of bringing most of the shared land in residential neighborhoods into municipal ownership in order to keep it available to the public (e.g. open playgrounds, parking places and green areas) rather than see it fenced off or built up by the owners. Although this cause might be worthwhile, the described path to it is clearly legally unfounded. Municipalities have no ownership claims over individual or shared functional land (irrespective of how useful it might seem to be for the municipality) and cannot unilaterally proclaim it their own property other than by making use of the available procedures for expropriation against compensation. In order to prevent the owners from performing inappropriate spatial interventions, the municipalities may set out conditions for such interventions for each individual neighborhood, without interfering with the ownership to the extent that the owners are expropriated or left with *nuda proprietas*. In practice, municipal authorities focus on shared functional land (not on individual functional land) since the sales contracts for individual apartments or houses typically did not explicitly stipulate shared land as the object of sale.[50] Municipal ownership claims are supported also by

[50] Contracts for the sale of houses or apartments in residential neighborhoods usually focused on the house/apartment and the right of use of its building site, while it did not necessarily list in the article defining the object of the contract the rights of use of

referring to new spatial planning acts, adopted by the very same municipalities, which unsurprisingly list these real estates as local public goods, disregarding the basic rules of the social property regime on real estate and the rules of privatization.

An example where such attempts have occurred are some residential neighborhoods developed in the municipality of Ljubljana, such as the Črnuška Gmajna suburban neighborhood of terraced houses, built in the late 1980s and early 1990s. These typically consist of smaller individual plots of land around the houses, and larger green areas and other shared plots for the use and socializing of the residents, providing both a rational use of space and a high quality of living for the residents (cf. Fajs, Debevec 2017, 16; Draksler 2009, 8, 19–21, 29; Perry 1929a, 99–100). It is mostly evident from the spatial plans from the time of the construction, the contracts for the sale of individual houses or apartments, the attached maps and other available documents that these common plots of land were intended only for the use by the neighborhood residents, in the words of Perry, for the constitution of a "face-to-face fabric" (Perry 1929a, 100). This is evident at first sight from the ground plans, the exterior and the actual use of the neighborhood. The boundaries of such neighborhoods are usually clearly defined both in the documentation and by looking at the actual state of the neighborhood. Legislation also referred to various types of shared real estate in the neighborhoods of complex construction. Despite this, the Municipality of Ljubljana now tends to claim that all land in residential neighborhoods that is not strictly below and around the individual house, is municipal property and should be available to the general public (unless eventually sold off by the municipality). The respective plots, in particular the green spaces and parking spaces in the neighborhood are now perceived by the municipal urban planners as quality surfaces that should "remain" public property, overlooking the fact that they have been clearly sold to the residents together with the individual houses or apartments (cf. Fajs, Debevec 2017, 16). Municipal urban planners may indeed limit the landowners' use of their property, e.g. by limiting the availability of land for construction purposes or by prohibiting the erection of fences above a certain height, but this should not amount to expropriation of private land without having met the conditions for the expropriation and rendering compensation to the expropriated owners.

Slovenian courts have detected these problems and have stressed, for example, that unilateral municipal decisions proclaiming land to be a

other parts of land in the neighborhood. These other real estates and the right to use them were mentioned in greater or lesser detail in other parts of the contract, as well as in the maps that were attached to the contract and/or were the basis for the construction of the neighborhood. The registered owners have thus tended to show that all real estate not listed as the object of the contract was not covered by the contract.

local public good do not preclude civil courts from determining the legal status of such real estate, and that no prior annulment of such municipal decisions is required before civil courts are allowed to assess the ownership status of the real estate.[51] To prevent the municipalities from further abusive practices, a specific legislative provision clarifying this was eventually laid down in the ZVEtL-1 (see *infra*). Upon request by the rightful owners, the courts have also nullified some contracts for the sale of appertaining land to third parties (e.g. in the Soseska business neighborhood in Ljubljana) due to them being *contra bonos mores*.[52]

Problems almost identical to the ones described in Slovenia have arisen in Croatia, particularly in tourist residential neighborhoods constructed along the coast in the 1980s and 1990s (e.g. Barbariga and Mareda in Istria), which have not yet been properly surveyed, demarcated and registered. The construction firms and their successors are in most cases still registered as owners of common areas in such tourist resorts and are selling plots of this land to either existing owners of individual houses or apartments, or to third parties. The outcome of this is that new buildings and parking lots, which are not in line with the urban design of the area, are expanding at the detriment of common residential areas intended for socializing, playing, providing greenery and all of its benefits for the entire neighborhood; the common spaces are not being satisfactorily maintained; the residents are prohibited from using their parking lots or are charged for their use, etc. Consequently, the areas once designed as modern high-quality living neighborhoods have been decaying and turning into dilapidated districts.

5.3. Expropriated Owners Registered as Owners

An additional obstacle are the situations where the former owners who were expropriated by the municipalities decades ago, for the purposes of constructing residential neighborhoods, are still entered as owners in the land register. The Yugoslav legislation authorized the municipalities to determine areas intended for residential construction, and to expropriate the landowners for this purpose. Typically, privately-owned agricultural land was nationalized for residential construction (Zečević 1975, 176–179). As the land register did not play an important role in the socialist period, such acquisition of land was sometimes not recorded in the land register. Thus, the previous owners remained registered as owners of the land on which residential neighborhoods were constructed, and this has continued even thirty or forty years later. The original owners' heirs even

[51] See, for example, High Court in Ljubljana, I Cp 251/2015, 5 May 2015, I Cp 3289/2014, 5 May 2015, and II Cp 2676/2009, 11 November 2009.

[52] High Court in Ljubljana, I Cpg 358/20166, 26 April 2016, and Supreme Court of Slovenia, III Ips 88–72016, 7 March 2017.

received court decisions on the inheritance of these land parcels even though the land had no longer been owned by the deceased.

According to Slovenian legal theory and practice, the principle of trust in the land register[53] does not apply to cases where land was not obtained on the basis of a legal transaction (Vlahek 2007, 120). This is why even in cases where an individual inherits real estate and registers in the land register as its owner, this is not detrimental to the rightful non-registered owner (Vlahek 2007, 120). Further transactions might, however, lead to *a no domino* acquisition by third persons acting *bona fide*. The actual owners are in a difficult position also in cases where the heirs have managed to mortgage the land and see it sold off to third parties in enforcement proceedings.

6. JUDICIAL PROTECTION OF OWNERS' RIGHTS TO APPERTAINING LAND

6.1. Contentious Proceedings for Determination of Ownership

Before special legislation on the determination of appertaining land was enacted in 2008, building owners could only pursue their rights in a regular contentious procedure, since the courts held that adjudication of ownership claims was not an administrative matter. The lawful (co-) owners of the former functional land could exercise their rights by bringing action against unduly registered owners before the local court, to establish the existence of their ownership rights and to have them entered accordingly in the land register. In cases where boundaries of the disputed functional land have not yet been determined, the court adjudicating such a claim must also ascertain the extent of the functional land belonging to the plaintiff, to separate it from the rest of the building land and into an individual cadastral parcel. According to a principled legal opinion, adopted by the Slovenian Supreme Court in 1988,[54] this should be done by taking into account the criteria that applied when functional land was determined by the municipal administrative body responsible for spatial planning.[55] The Supreme Court warned, however, that the concept of land

[53] The principle of trust in the land register enables acquisition of real estate *a non domino*, which means that a third party who relies in good faith on the land register data can obtain ownership of real estate from the non-owner who is wrongfully entered in the land register as owner.

[54] The "legal opinions: and "principled legal opinions" of the plenary sessions of the Supreme Court of (S)RS are binding for all panels of judges of the Supreme Court, but not for the lower instances (Kramberger Škerl, Vlahek 2016, 22).

[55] Legal Opinion of the Supreme Court of SR Slovenia adopted at the plenary session of 21 December 1988, in 88(1–2) *Poročilo o sodni praksi Vrhovnega sodišča SRS* (1988), 55.

intended for regular use of the building should be applied restrictively when extending to adjacent plots.[56]

If a person had improperly registered as the owner of functional land under the provisions of ZLNDL and subsequently legally disposed of such a land plot, the sales contract is null and void due to an illicit basis (*causa*).[57] The right to use functional land could only be transferred together with the ownership of the building. This rule effectively still applies after the privatization because apartments as individual parts of an apartment building cannot be sold without proper entitlements on common spaces, parts, appliances, and land belonging to the building. Disposing of an object that cannot be a subject of independent legal transactions is not permissible, and the contract with such an object is null and void.[58]

6.2. Contractual Land Consolidation

As the high incidence of buildings whose functional land had not been surveyed and demarcated was becoming more and more apparent, several laws were adopted in Slovenia to ameliorate the situation by providing special rules for regulating the status of functional land. The Construction Act of 2002 envisaged the possibility of using contractual land consolidation (Slo. *pogodbena komasacija*) for settling the issue of residential neighborhoods in which public areas and functional land of buildings have not yet been demarcated. Under this procedure, the extent of the land acquired for the construction must be first determined by considering all available documents and actual land use. This is followed by the new parceling of the entire area so that regular use of all buildings is possible, and the function of all public spaces is maintained. The practical problem with the implementation of contractual land consolidation is the considerable number of parties in the procedure who must agree with the new division of land—among them also the entities still entered in the land register as exclusive owners of the land. For this reason, i.e. high transaction costs, the utilization of contractual land consolidation procedure for solving the issues of functional land was exceedingly rare in practice.

6.3. Special Rules of the Building and Housing Legislation

The new Housing Act of 2003 did not regulate functional land like its 1991 predecessor. It did, however, state that functional land (be it formally established as such or not) formed part of the common (shared)

[56] Supreme Court of Slovenia, II Ips 250/2007, 18 March 2010, para. 7.

[57] For further details on the validity of contracts, see Možina, Vlahek 2019, 85–86.

[58] Supreme Court of Slovenia, II Ips 262/2009, 9 November 2009, para. 12.

spaces in the co-ownership of apartments in an apartment building.[59] If the right of use of this land was not registered in favor of the apartment owners, its holder was to be determined on the basis of documents and legal acts based on which the building was constructed. If such determination of the functional land shared by multiple apartment buildings turned out to be impossible, the rules on the contractual land consolidation, laid down in the Construction Act of 2002, would apply. Both the Housing Act and the Construction Act provided that in the case of apartment buildings, the construction parcel is a common (shared) part of the apartment building.

6.4. Special Interventional Legislation on Non-Contentious Procedure for Determination of Appertaining Land

The described rules of the Construction Act and the Housing Act achieved little in resolving the increasingly complex disputes regarding former functional land. Special legislation was adopted in 2008 to address this issue. The ZVEtL authorized the courts to assess whether and to what extent a plot of land serves a certain building, i.e. whether it constitutes appertaining land (co)owned by the building's (co)owners. This piece of legislation has turned out to be extremely important as it provided a special non-contentious procedure that proved to be much more suitable for determining ownership of appertaining land than regular litigation,[60] since it is more flexible and can accommodate a large number of parties, which is typical in disputes concerning shared functional land in residential neighborhoods. In 2017, the ZVEtL was replaced by the ZVEtL-1, which amended to some extent the rules laid down in the 2008 act, considering the experiences and particularly the problems encountered in the proceedings carried out thus far.

By adopting the ZVEtL and the ZVEtL-1, the legislator sought to introduce a more practical procedure in which the status of the land register could be adjusted to the actual legal situation related to the ownership of functional land belonging to buildings constructed prior to 1 January 2003.[61] Once a request for the determination of the appertaining land (former functional land) is filed with the local court, the court immediately notes this in the land register meaning that no subsequent entries regarding this property are allowed pending conclusion of the proceedings.[62] The procedure under the ZVEtL or the ZVEtL-1 does not

[59] *Ibid.* Art.190.

[60] The owners could still file an ownership claim in regular contentious proceedings claiming, e.g. that they acquired ownership by prescription. For further details, see Vlahek 2006, 309–332.

[61] See supra note 30.

[62] Art. 11 of the ZVEtL-2017.

entail new determination of property rights, but merely the identification or reconstruction of the existing legal status, which should be identifiable on the basis of acts adopted in the past, but which has not yet been recorded in the land register. According to this procedure, undistributed land complexes in residential neighborhoods can be divided into land intended for the private use of a particular residential building, the common (shared) land of several buildings, and land intended for general public use. This division can be performed irrespective of who is entered in the land register as the owner of the land complex. Under the ZVEtL-1, the owner of the building is deemed to also be the owner of the appertaining land,[63] which excludes the use of the general rule of the Property Code whereby the person registered in the land register is presumed to be the owner of the property.[64]

Under the ZVEtL-1, the status and scope of the appertaining land are determined by the following criteria:

1. which land was planned for the regular use of the building in the spatial planning documents, in administrative permits, or in other documentation relevant for the construction of the building;
2. which land comprised access roads, driveways, parking spaces, garbage areas, playground and resting areas, lawns, atrium land, etc.;
3. the actual use of the land in question thus far;
4. criteria defined in the spatial planning acts adopted after the building was erected, prior to the privatization of the appertaining land.[65]

In cases where it is impossible to ascertain whether a plot of land is individual or shared appertaining land, the court enjoys discretion to decide the most fair and appropriate solution, taking into account the parties' petitions and the spatial and functional nexus between the land and the respective buildings.[66] The ZVEtL-1 expressly stipulates that shared appertaining land serving multiple buildings is in joint ownership of all the owners of these buildings.[67]

---

[63] Art. 44/1 of the ZVEtL-2017.

[64] Art. 11 of the Property Code.

[65] In comparison to ZVEtL, these criteria have been importantly amended by ZVEtL-2017. See Ude, Vlahek, Damjan 2016, 6.

[66] Art. 43 of the ZVEtL-2017.

[67] Art. 55 of the ZVEtL-2017. Before this was explicitly stipulated, the proprietary status of such shared appertaining land was not entirely clear (regular joint ownership, regular co-ownership, joint ownership, or co-ownership that stems from ownership of the

A petition for the determination of appertaining land and its owner may be filed by an owner of a building or an apartment for which the appertaining land is to be determined; by the community of apartment owners of the apartment building for which the appertaining land is to be determined; by an individual registered as owner of the land that could be (deemed) appertaining land and thus the property of another person; or the municipality in whose territory the building in question is located.[68]

As a principle, the owners of a building are deemed to own the plot of land determined as the building's appertaining land. Nevertheless, the court may also determine that another person has acquired ownership of this land based on the rules on good faith acquisition, the law or a decision by a state authority. In some cases, the court may establish a right to purchase (Slo. *odkupna pravica*) in favor of one party or the other (Fajs, Debevec 2017, 20–21). The existence of the right of superficies (Slo. *stavbna pravica*)[69] may also be recognized. Moreover, the owner(s) of the building may request that the court ascertain that the rights registered as encumbrances of the appertaining land do not exist, while on the other hand, the holders of unregistered encumbrances on appertaining land may request the court to ascertain their existence.[70]

An important provision of the ZVEtL-1 concerns disputes between municipalities and building owners regarding the status of appertaining land. It stipulates that any prior municipal or other body's decision granting the status of public good to certain land does not prevent the courts from determining such real estate as privately owned appertaining land.[71] If the court finds that a plot of land is appertaining land, the administrative body that has declared it a public good, must, *ex officio* or upon request of an interested person, rescind this declaration. Appertaining land can thus return to full private ownership.

A conflict of rights could also arise in cases where (due to an erroneous entry in the land register) in the denationalization procedure, a plot of land was returned to its previous owner, although this land (or its part) had in the meantime become functional land of a certain building, which should bar its restitution in kind under the denationalization legislation. If the court finds, in proceedings under the ZVEtL-1, that the denationalized real estate is in fact appertaining land, it only rules on its territorial extent while staying the proceedings regarding ownership of the land and directs the interested party to request that the administrative decision on its denationalization be declared null and void.[72]

buildings), which posed difficulties for the courts as well as for the owners in their everyday management of this land.

68 Art. 46 of the ZVEtL-2017.

69 For further details on this institute, see Vlahek 2010.

70 Arts. 44–47 of the ZVEtL-2017.

71 *Ibid.* Art. 54.

72 For further details, see Fajs, Debevec 2017, 17.

7. CONCLUSION

The set of problems discussed in this article regarding the proprietary status of former functional land is intricately connected with the period of transition from the socialist to the market-based institutional environment. Experience thus far has shown that the complex and intertwined property relations concerning former shared functional land in residential neighborhoods elude simple solutions based on conventional rules of real property law. The unresolved property issues in such situations have typically lasted for decades and have been additionally complicated in the process of privatization of social property. Traditional litigation has proven unsuitable for resolving disputes involving a large number of parties with typically diverging interests. That is why introducing special substantive and procedural mechanisms in the ZVEtL and the ZVEtL-1 was a justified pragmatic solution, which proved to be relatively successful in practice even if (or precisely because) not dogmatically pure. Both acts could potentially serve as a useful model for resolving similar complex ownership issues arising from former social ownership in other parts of the former Yugoslavia, where such disputes have not yet been addressed suitably. The approach to addressing the issue of the legal status of shared real estate in residential neighborhoods must remain pragmatic and acknowledge the manners in which transactions concerning the transfer of real estate titles were carried out during the period of social ownership and in the course of its privatization. The courts must also be attentive to any irregularities regarding properties with unresolved status, which might harm the interests of their rightful owners and lead to the unfounded nationalization of private property. The precise criteria developed in case law for delineating appertaining land and their application in cases involving real estate in residential neighborhoods throughout Slovenia can be an interesting subject for further research. Once the issues of ownership of the functional land in residential areas are resolved, these areas can finally continue developing and offering what they were built for: a high quality of life for their residents.

REFERENCES

Begović, Boris, Boško Mijatović. 1993. The Effects of the Nonmarket Urban Land Use System in Eastern Europe: The Case of Belgrade. *Treballs de la Societat Catalana de Geografía,* 8(35), 7–15.

Čelih, Matevž. 2015. *Modernistične soseske v Ljubljani*. Ljubljana: Muzej za arhitekturo in oblikovanje, Ljubljana.

Draksler, Vesna. 2009. *Prestrukturiranje odprtega prostora stanovanjskih sosesk zgrajenih od 1960 do 1980 v Ljubljani*. Ljubljana: Univerza v Ljubljani, Biotehniška fakulteta.

Fajs, Mateja Tamara, Jure Debevec. 2017. Reševanje nekaterih odprtih vprašanj glede pripadajočih zemljišč po ZVEtL-1. *Odvetnik* 82: 13–21.

Finžgar, Alojzij. 1967. Pravni režim stavbnih zemljišč, ki so družbena lastnina. *Pravnik* XXII, 9–10: 329–338.

Finžgar, Alojzij. 1979. *Družbena lastnina*. Ljubljana: Uradni list SRS.

Finžgar, Alojzij. 1992. Preoblikovanje družbene lastnine v drugo obliko lastnine. *Zbornik znanstvenih razprav* 52: 5–16.

Gams, Andrija. 1968. *Osnovi stvarnog prava*. Belgrade: Naučna knjiga.

Geršković, Leon. 1975. Mjesto, uloga i značaj društvenih dogovora i samoupravnih sporazuma u našem društvenom i pravnom sistemu, 19–25 in *Samoupravni sporazumi i društveni dogovori*. Belgrade: Institut za uporedno pravo, Savez udruženja pravnika u privredi Jugoslavije, Udruženje društava pravnika u privredi Srbije.

Juhart, Miha. 2008. Funkcionalno zemljišče skozi čas in predpise. *Pravna praksa* 27(3): 22–25.

Juhart, Miha, Matjaž Tratnik, Renato Vrenčur. 2007. *Stvarno pravo*. Ljubljana: GV Založba.

Kambič, Marko. 2013. Odsev skupne evropske pravne tradicije v paragrafih 418 in 297 ODZ. 253–269 in *Izročilo Občnega državljanskega zakonika*, edited by Ada Polajnar Pavčnik. Ljubljana: GV Založba.

Kramberger Škerl, Jerca, Ana Vlahek. 2016. *Property and Trust Law in Slovenia*. Aalphen an den Reijn: Wolters Kluwer.

Krisper-Kramberger, Marija. 1992. Pravne praznine v lastninskopravnih predpisih: (odnos do jugoslovanske stvarnopravne za-konodaje). *Podjetje in delo* 18 (6): 705–711.

Kulić, Dimitrije. 1979. *Ustav SFRJ, Komentar*. Belgrade: Iro privredna štampa.

Možina, Damjan, Mitja Kovač. 2014. Slovenia. In *International Encyclopaedia of Laws – Commmercial and Economic Law*, edited by Roger Blanpain, Michele Colucci. Alphen aan den Rijn: Wolters Kluwer.

Perry, Clarence Arthur. 1929. The Neighborhood Unit: A scheme of Arrangement for the Family-Life Community. In *Regional Survey of New York and its Environs*, Committee on Regional Plan of New York and its Environs. New York: Russel Sage Foundation.

Perry, Clarence Arthur. 1929a. City Planning for Neighborhood Life. *Social Forces*, Vol. 8/1: 98–100.

Stojanović, Dragoljub D., Dimitar Pop-Georgiev. 1980. *Komentar Zakona o osnovnim svojinsko-pravnim odnosima*. Belgrade: Službeni list SFRJ.

Ude, Lojze. 2007. Dobra vera pri pravnem prometu z nepremičninami v obdobju lastninjenja nepremičnin v družbeni lastnini. 90–98 in *Izbrane teme civilnega prava II*, edited by Lojze Ude. Ljubljana: IPP-PF.

Ude, Lojze, Ana Vlahek, Matija Damjan. 2016. *Strokovno mnenje o predlogu Zakona o vzpostavitvi etažne lastnine na določenih stavbah in o ugotavljanju pripadajočega zemljišča (ZVEtL-1)*. Ljubljana: Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani.

Vlahek, Ana. 2016. Problematika skupnih površin in skupnosti lastnikov v vzorčnih soseskah. 104–105 in *Zbornik, 8. dnevi stvarnega, zemljiškoknjižnega, nepravdnega in izvršilnega prava*. Ljubljana: IUS Software, GV Založba.

Vlahek, Ana. 2006. Priposestvovanje lastninske pravice na nepremičninah. *Zbornik znanstvenih razprav* 66: 309–332.

Vlahek, Ana. 2010. Stavbna pravica – sedem let po njeni uveljavitvi. *Pravni letopis* 2010: 165–191.

Vlahek, Ana. 2007. Odprta vprašanja načela zaupanja v zemljiško knjigo. 111–129 in *Izbrane teme civilnega prava II*, edited by Lojze Ude. Ljubljana: IPP-PF.

Vlahek, Ana, Klemen Podobnik. 2014. Slovenia: Chronology of Development of Private Law in Slovenia. 283–329 in *Private law reform*, edited by Petr Lavický and Jan Hurdík. Brno: Masaryk University.

Zečević, Miodrag (ed.). 1975. *Ustav Socijalističke federativne republike Jugoslavije, Stručno objašnjenje*. Belgrade: Institut za političke studije Fakulteta političkih nauka – Beograd, Novinsko-izdavačko i grafičko preduzeće "Privredni pregled".

Article history:
Received: 15. 6. 2020.
Accepted: 2. 11. 2020.

UDC 342.726-056.34(091)

CERIF: S112, S114, S150

DOI: 10.51204/Anali_PFUB_20403A

Marissabell Škorić, PhD*

Sandra Fabijanić Gagro, PhD**

MENTAL HEALTH LEGISLATION THROUGH HISTORY AND CHALLENGES IN IMPLEMENTING ARTICLE 14 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The paper is divided into two parts to facilitate a clearer understanding of all aspects of the change in the position of people with psychosocial disabilities, regarding the right to liberty and security, through the historical development of national and international legal frameworks. The first part briefly presents an overview of national legislation on the protection of persons with psychosocial disabilities and the circumstances in which states adopted the Convention on the Rights of Persons with Disabilities earlier this century. The second part of the paper underscores the challenges the States Parties face in the implementation of Article 14 of the Convention. The State Parties' reports show that the processes of changing the perceptions of persons with psychosocial disabilities, when it comes to their involuntary detention, have been changing quite slowly and partially and that the realisation of their human rights is one of the Convention's greatest challenges.

Key words: *Convention on the Rights of Persons with Disabilities. – Human rights-based approach. – Involuntary detention. – Persons with psychosocial disabilities. – Social model of disability.*

* Associate Professor, University of Rijeka Faculty of Law, Department of Criminal Law, *skoric@pravri.hr*.

** Associate Professor, University of Rijeka Faculty of Law, Department of International Law, *sandra.fabijanic.gagro@pravri.hr*.

1. INTRODUCTION

The Convention on the Rights of Persons with Disabilities (hereinafter: CRPD or Convention) was adopted by the UN General Assembly in December 2006.[1] According to former UN Secretary-General Kofi Annan, its adoption marked the beginning of a new era for people with disabilities, 'in which disabled people will no longer have to endure the discriminatory practices and attitudes'.[2] Following a long history of discrimination against people with disabilities, the purpose of the CRPD is to promote, protect, and ensure the full and equal enjoyment of their human rights and fundamental freedoms, as well as to promote respect for their inherent dignity (Preamble, Art. 1). It establishes a range of measures to be undertaken by the State Parties for its implementation in a number of areas (education, training, rehabilitation, work, employment, etc.), which can be observed on a twofold level. While, on the one hand, the Convention establishes the States Parties' obligation in relation to specific rights (see Arts. 5–30), the States also assume general obligations, which are reflected in the adoption of appropriate legislation, administrative, and other measures; modification or abolishment of the existing (discriminatory) laws, regulation, custom and practice; refraining from engaging in any act or practice that is inconsistent with the Convention, etc. (Art. 4). It also encourages the involvement and full participation of civil society, persons with disabilities, and their representative organisations in the monitoring process (Art. 33). This enables further extremely active engagement of persons with disabilities and their organisations, which began during the drafting the text of the Convention,[3] all in accordance with the driving idea of 'nothing about us, without us' (UN Human Rights Office of the High Commissioner – CRPD Training Guide 2014, 39). The consultative process of drafting the Convention and its adoptions marked the possibility for silent and marginalised voices of people with disabilities to 'finally be heard' (Arstein-Kerlsake, Flynn 2016, 472). This has resulted in a perception of the CRPD as a powerful weapon in the hands of persons with disabilities, which—despite the challenges that will be underscored in this paper—undoubtedly contributes to changing the perception about them.

[1] The CRPD was adopted on 13 December 2006 by UN General Assembly Resolution A/RES/61/106. It entered into force on 8 May 2008. Considered the most swiftly ratified international human rights document, as of November 2020 the CRPD has been ratified by 182 States Parties.

[2] UN Meeting Coverage and Press Releases (2006).

[3] People with disabilities and their organizations have had a significant impact on shaping the very content of the Convention, and their role has been further strengthened over the last 12 years. On the role of people with disabilities and their representative organizations, see more in: Uldry, Degener 2018, paras. 36–44.

The CRPD concerns all persons 'who have long-term physical, mental, intellectual, or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (Art. 1). However, the aim of this paper is to analyse the States Parties' obligations regarding the one group of those persons—persons with psychosocial disabilities—their right to liberty and security, as prescribed by Article 14, and the consequent issues of their involuntary detention and deprivation of liberty. One of the most challenging tasks in this regard for the States Parties is the shift of focus from such treatments of persons with psychosocial disabilities to the realisation of their human rights on equal basis with others. Although the CRPD itself does not refer explicitly to involuntary placement, Art. 14(1)(b) provides that '*the existence of a disability shall in no case justify a deprivation of liberty'*. The Committee on the Rights of Persons with Disabilities (hereinafter: the Committee)—the body that was established by the CRPD for monitoring its implementation[4]—has argued that the deprivation of liberty based on the existence of a disability would be in contradiction to the CRPD. In 2014, when issuing its first General Comment,[5] the Committee emphasised that 'forced treatment is a particular problem for persons with psychosocial, intellectual and other cognitive disabilities'. It called on the State Parties to 'abolish policies and legislative provisions that allow or perpetrate forced treatment' and 'ensure that decisions relating to a person's physical or mental integrity can only be taken with the free and informed consent of the person concerned'.[6] According to the Committee, forced treatment violates several other rights guaranteed by the Convention, such as *the right to equal recognition before the law* (Art. 12), the right to be free from torture (Art. 15), the right to be free from violence, exploitation, and abuse (Art. 16), and the right to personal integrity (Art. 17).[7] Implementation in national legislation of some of the rights that refer to persons with psychosocial disabilities is considered rather controversial, even to the extent that individual authors call for the Convention to be ignored, reinterpreted, or amended (Appelbaum 2019, 1).

[4] The Committee was established in 2009, and since 2011 it has consisted of 18 independent experts.

[5] The Committee's general comments are intended to interpret certain provisions of the Convention in order to facilitate its implementation in the States Parties and to clarify disputed provisions. By November 2020, the Committee had published seven general comments regarding Arts. 5, 6, 9, 12, 19, 24, 4(3), and 33(3).

[6] UN Committee on the Rights of Persons with Disabilities General Comment No. 1 (2014, para. 42).

[7] Several UN bodies such as the High Commissioner for Human Rights and Special Rapporteur on the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health support the abolition of involuntary treatment of persons with disabilities on the grounds of their disabilities. See e.g. UN General Assembly (2009) and UN General Assembly (2017).

This paper argues that the States Parties have a very complex task regarding the protection of the rights of persons with psychosocial disabilities when the implementation of Article 14 is concerned. In order to better understand the challenges faced by the States Parties that need to align their legislation with the CRPD, the first part of this paper provides a brief overview of the historical development of national mental health legislation and the circumstances in which states adopted the Convention. The second part of the paper analyses the current (in)effectiveness of the Convention by elaborating on reports on its implementation in the States Parties in regard to the abovementioned provisions of the Convention. This will inevitably include the relationship between the States Parties' practices and the Committee's views, whose activities undoubtedly pave the way for a change in the perception of persons with disabilities.

2. A BRIEF OVERVIEW OF THE HISTORICAL DEVELOPMENT OF MENTAL HEALTH LEGISLATION

The legal status of persons with psychosocial disabilities was a neglected area in most European countries until the 1980s. However, the beginning of the development of legislation on mental health dates back to the 19th century, when the first laws regulating the compulsory treatment of persons with psychosocial disabilities started being adopted in some countries.[8] Since the focus of regulating the legal status of people with mental disabilities has long been directed on the regulation of their involuntary placement, it is not surprising that many authors point out that the history of mental health legislation is actually the history of the legal regulation reform on their involuntary detention and treatment. Describing this development, Allderidge (1979, 321) uses the term 'pendulum swinging' to denote the two opposing tendencies that characterize it. One, which emphasises medical discretion in deciding on involuntary hospitalisation and, the other, which seeks to limit the use of coercive powers in psychiatry to clear criteria and legal procedures. Similarly, Jones (1972) also sees the history of mental health legislation as a pendulum movement between two extremes: on the one hand, legalism and, on the other, the physician's discretionary decision. Although the primary work conducted on legalism and medicalism has focused on English mental health law, the same concept is applicable worldwide (Brown 2016, 1).

The legalism that marked the turn of the 20th century was considered a major obstacle to the effective treatment of people with psychosocial

[8] The beginnings of the development of mental health legislation can be found even earlier. Detailed historical overview of the development of mental health legislation in England see Fennel (2010).

disabilities.[9] Jones (1972) calls the transition period from the 19th to the 20th century as the triumph of legalism in the United Kingdom, criticising it for leading to extremely complex and detailed legal regulations and the prevention of an effective pursuit of what is in the patient's best interest and well-being. Legalism is considered as procedural formalism and a mechanistic approach that impedes the effective treatment and welfare of people with psychosocial disabilities. This author advocates an open-textured legislation, rather than regulatory, which would permit maximal discretion within a loose regulation framework (Jones 1972, 153).

Criticisms of legalism, on the one hand, and the significant advances in science and medicine in the second half of the 20th century, which have brought optimism also regarding the possibilities of successful treatment of mental illness, on the other, have resulted in new reforms of mental health legislation, in the direction of conferring more discretion to physicians. Physicians gained an increasingly prominent role in deciding whether to detain and treat people with mental disorders, and they have considerable power and influence over the lives of people with mental disabilities. Therefore, we can say that this period was marked by the swing from legalism towards clinical discretion and medical welfare paternalism. However, just as legalism has been subjected to much criticism because of its formalism, so has the model of wide discretionary decision-making by physicians shown shortcomings over time. People with psychosocial disabilities were abused in psychiatric hospitals and their human rights were violated in many cases, so it is not surprising that, in the second half of the 20th century, medicalism was subjected to much criticism, especially by groups fighting for the human rights of people with psychosocial disabilities.

2.1. The New Legalism Based on the European Court of Human Rights' Case Law

Strong criticism of medical paternalism has been reflected in the reform of national mental health legislation, which is returning to legalism, i.e. it is developing in the direction of increasing the legal protection of persons with psychosocial disabilities against involuntary treatment and detention. A number of provisions have been introduced in national mental health legislations, the aim of which is to prescribe in greater detail the conditions and procedures of involuntary hospitalisation and thus protect persons with psychosocial disabilities from arbitrary detention. The development of legislation in this direction was significantly influenced by the case law of the European Court of Human Rights

[9] The term *legalism* refers to a set of rules governing involuntary placement; it is often used to emphasize the importance of court decisions regarding the need for involuntary placement (Gostin 1983, 47).

(hereinafter: ECHR), especially its decision in the case of *Winterwerp v. The Netherlands* in 1979.[10] In the judgment, the ECHR prescribed the conditions under which a person with a mental disability may be deprived of liberty and it defined the mechanisms that may be applied to prevent their arbitrary detention. This marked the beginning of a new legalism based on the European Convention for the Protection of Human Rights and Fundamental Freedoms. The new legalism aimed to introduce procedural safeguards into national mental health legislation and to regulate the control of psychiatrists' treatment and increase patients' rights to challenge detention and to seek its review. In addition to the minimum standards for the legality of involuntary detention of persons with mental disabilities, established through the ECHR, the new legalism in Gostin (1983) contains additional two basic principles: the principle of the ideology of entitlement and the principle of the least restrictive alternative. The first principle assumes that a person has the right to adequate care and treatment and that access to health care should never depend on one's discretion, while the principle of minimum restraint in dealing with people with psychosocial disabilities requires the state to create a broad community assistance network, which includes medical assistance, crisis assistance, housing assistance, training and employment, etc.—all to avoid the need for their forced detention (Gostin 1983, 49–50). The focus is not only on the due process of detention, but also outside of it. While the ECHR still plays a significant role in protecting people with psychosocial disabilities from arbitrary deprivation of liberty, its role in ensuring the implementation of the right to care and an appropriate community support network—aimed at preventing or at least shortening the involuntary detention—is significantly limited (Fennel 2010, 17).

In the 1980s and 1990s a number of countries changed their existing laws, i.e. they passed new laws on mental health.[11] Although the aim of the new legislation—which was based on new legalism—was to improve the dignity and integrity of people with psychosocial disabilities, it may be subjected to significant criticism for several reasons. In the first place, it was insisted that definition of a person to whom mental health legislation applies should entail a psychiatric diagnosis based on internationally recognised medical criteria. This approach would not be disputable if, at the same time, the laws did not specify the categories of persons that are exempt from its application. Precisely the need to prescribe separately in a legal act that non-compliance with social norms must not be the basis for a psychiatric diagnosis, indicates that there is still social conditionality

[10] *Winterwerp v. Netherlands*, ECHR 6301/73, 24 October 1979.

[11] New or revised laws were passed, for example, in England in 1983, Norway in 1988, Denmark in 1989, Austria, Finland, Belgium and France in 1990, Germany, the Netherlands, Greece, Sweden and Portugal in 1992, and Croatia in 1997.

of diagnostic categories and their close connection with prevailing social norms. Once a psychiatric diagnosis has been established, further treatment of a person with a psychosocial disability depends on an assessment of their danger. The existence of danger is related to the diagnosis of mental illness and, in most legislations, it is the legal foundation for involuntary hospitalisation. While empirical evidence shows that there is a weak link between violence and mental illness, this is often neglected and leads to the stigma and discrimination of persons with psychosocial disabilities (Weller 2010, 57). As many authors rightly point out, the danger-based criterion is fundamentally problematic (Large 2008, 877–881; Callaghan, Ryan 2014, 751–752).

Another criticism of the new legalism is related to the circumstance that people with psychosocial disabilities can essentially be treated without their consent. The exclusion of the possibility for a person participating in the decision-making process limits the possibility for the physician to be informed of their wishes, preferences, and experience of mental illness. This approach differs significantly from the generally accepted principle of informed consent, under which an individual has the right to participate in the decision-making concerning their health. Therefore, it is not surprising that the ability of people with psychosocial disabilities to make their own decisions appears to be a central theme in all the discussions regarding their human rights that ensued in the late 20th century (Weller 2010, 59).

Although the new legalism aims to protect the rights of people with psychosocial disabilities, this model has been shown to have certain shortcomings that have significantly contributed to such persons experiencing stigmatisation, discrimination, and exclusion from society. It can already be seen from this brief overview that the development of mental health legislation was primarily aimed at regulating the involuntary detention and treatment of persons with psychosocial disabilities and preventing their arbitrary detention. Legal norms specify the category of persons that can be forcibly hospitalised, the conditions under which this can be done, and the necessity of judicial review of the decision on involuntary treatment in order to prevent the abuse of psychiatry as a means of political and social control. Yet, another extremely important segment related to ensuring the conditions for the exercising of the rights to adequate medical care and assistance in the community by persons with psychosocial disabilities was almost completely neglected. It is, therefore, not surprising that there is widespread dissatisfaction with restrictions on new legalism and demands to remove barriers in society that make it impossible for people with psychosocial disabilities to enjoy their rights. This dissatisfaction refers to the focus of legalism on procedural rules instead of addressing ‘broader questions of social justice,

or recognise and facilitate claims to access supports to enable rights to be valuable' (Clough 2014, 67). Mental health legislation has been limited mainly to regulating certain procedural issues aimed primarily at preventing the arbitrary detention of persons with mental disabilities—highlighted in *Winterwerp*—but modern advancements in human rights development have much greater requirements that necessitate its reshaping.

2.2. New Tendencies – Social Model of Disability and Human Rights-Based Approach

Restricting new legalism primarily to the involuntary detention and treatment of people with psychosocial disabilities and the dominance of the medical model of disability are considered by many authors to be major obstacles to the realisation of the fundamental human rights of this group. Therefore, contemporary debates on the rights of persons with psychosocial disabilities have shifted focus from the medical model of disability to the social model of disability and from new legalism to the human rights-based approach to regulating their rights.

The term 'social model of disability' dates back to the early 1980s and is associated with Oliver (2013, 1024–1026). According to the idea behind this model, people with disabilities are not disabled because of physical damage, but because of barriers that exist in society that limit their life opportunities (Lawson, Priestley 2016, 4; Clough 2014, 64–66). Unlike the medical model, according to which problems arise from a person's physical or mental disabilities and which is aimed at medical intervention and rehabilitation, the social model sees the cause of the problem in the obstacles posed by society and, therefore, requires society to adopt new legislative, educational, cultural, and social policies that will remove barriers that prevent the specific needs of these individuals from being met (Bartlett 2012, 758–760). Although this model has a number of positive effects, it can be criticized as well. The social model rests, on the one hand, on the difference between impairment as an attribute of the body or mind and, on the other, on the perception of disability as the relationship between a person with a disability and society. It starts from the fact that the social structure and institutions, and not the impairment, cause disability (Blanck, Flynn 2017, 5). Such an approach, which denies any causal link between impairment and disability, has been the subject of numerous debates emphasising the need for a broader view of disability. Namely, if we deny the existence of impairment, then we do not deal with it or eliminate it. Insisting only on the removal of obstacles that are outside the impairment is just as wrong as insisting only on repairing the impairment through medical intervention. Shakespeare, Watson (2002, 9–28) rightly points out that disability cannot be viewed from a single

angle, whether medical or social, and that the social theory of disability should include all dimensions of the experience of people with disabilities: physical, mental, cultural, and social.

Nevertheless, the transition from the medical to the social model of disability has encouraged positive changes in the position of people with disabilities. First of all, this transition has encouraged the process of shifting the focus from the needs of people with disabilities to their (human) rights. On the one hand, persons with disabilities have shifted from being passive recipients of active assistance to subjects able to demand the fulfilment of their rights (rights-holders), and, on the other hand, the state and its institutions have become responsible for creating conditions for fulfilling the rights of persons with disabilities (duty-bearers). This conceptual framework is referred to in the literature as the human right-based approach. It emerged in the mid-1990s as a reaction to the segregation, abuse, discrimination, and oppression to which certain groups of people were exposed, perceived by society as passive subjects for whom others would determine what was in their best interest. By adopting the human rights-based approach, those who were seen as 'shrunken wretches begging for our help' are now becoming people with dignity who demand what they are entitled to (Pogge 2007, 4).

The human rights-based approach does not introduce or prescribe any new additional rights for certain groups of persons, but it rather insists on the realisation of the existing rights. Its primary objectives are ensuring the right to liberty of every person, protection of the dignity of all human beings, prevention of discrimination, and enabling every individual to exercise economic, social, and cultural rights. Presuming that human rights are indivisible and interdependent, it is necessary for the economic, social, and cultural rights of persons with disabilities to be respected, protected, and realised in the same way as civil and political rights. At the same time, the human rights-based approach is not only aimed at achieving these objectives; at its core is the empowerment of more vulnerable and marginalised social groups to participate in creating policies that will enable the realisation of their human rights. It is on the principles of participation, equality and non-discrimination, the empowerment of marginalised groups, and the connection with human rights standards that the human rights-based approach rests.[12] In practical terms, the implementation of such a model can and should change the role that people with disabilities have played in society so far, which in turn leads to the establishment of a different system, tailored to their needs.

[12] For more about the human right-based approach see Office of the UN High Commissioner for Human Rights (2006).

3. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND ITS ATTAINMENT WITH REGARDS TO THE IMPLEMENTATION OF ARTICLE 14

A significant number of authors rightly points out the dominance of the social model of disability in the drafting of the CRPD text. Some authors therefore note that 'social model has had an enormous influence in the development of the CRPD' (Kayess, French 2008, 7), while others conclude that it was 'adopted by the CRPD' (Szmukler, Daw, Callard 2014, 247; Bartlett 2012, 758). Undoubtedly, it was the intention of the Convention's drafters to consider disability not as an inherent attribute of a person, but rather as a consequence of the interaction between the person and their surroundings, environment and external barriers. By using the social model, disability is not perceived as a mistake on the part of society, but as an important element of its diversity. It requires restructuring various social components (practices, policies, legal provisions, etc.) in order to achieve full and equal participation of persons with disabilities. This model was also taken as an argument against using disability, impairment, and diagnosis as justifications for involuntary detention. Namely, the World Network of Users and Survivors of Psychiatry argued that depriving persons with disabilities of their liberty because they are 'a danger to society' is discriminatory because people without disabilities are not subject to the same standard. Such practice imposes 'a social disadvantage', which—according to the social model—is perceived as discrimination.[13]

It should be pointed out that since the CRPD entered into force in 2008, the social model of disability has been explicitly mentioned in only a few of the Committees' concluding observations,[14] the fact being that the Committee much more frequently refers to the human rights model of disability or the human rights-based approach. Reference to the human rights model is often made in connection with concerns about deprivation of liberty and institutionalisation of people with disabilities (Lawson, Beckett 2020, 12).

The literature provides different opinions on the nature of the relationship between the social model of disability and the human rights-based approach. Thus, Degener (2016, 1) reasons that the human rights model of disability improves the social model of disability. On the other hand, Lawson, Beckett (2020) emphasizes that 'the human rights model must work alongside the social model.' Therefore, it is 'complementary to

[13] Third session of the Ad Hoc Committee, Landmine Survivors Network, Vol. 4, 26 May 2004.

[14] See, for example, UN Committee on the Rights of Persons with Disabilities – Peru (2012, paras. 6, 47) and Turkmenistan (2015, para. 10).

the social model and not an improvement upon it'. According to these authors, the social model of disability defines disability as a form of social oppression, while the human rights model provides requirements on policy responses to disability. Consequently, the social model is viewed as a model of disability, while the human rights model is a model of disability policy (Lawson, Beckett 2020, 16–17, 24). However, regardless of the different understandings of the relationship between these models, it is indisputable that both have played a significant role in the creation and interpretation of the Convention's provisions. At the same time, their implementation has proved to be quite challenging, especially in relation to certain provisions; the practice of States Parties clearly indicates that Article 14 is among them.

3.1. Theoretical Challenges in Implementation of Article 14

All persons with disabilities enjoy the right to liberty and security pursuant to Article 14, the right that is perceived by the Committee as 'one of the most precious rights to which everyone is entitled' (UN Committee on the Rights of Persons with Disabilities Guidelines 2015, para. 3).[15] Persons with disability enjoy that right on equal basis with other members of society and must not be deprived of liberty, unlawfully or arbitrarily.

Most of the Article 14 is not controversial. However, para. (1)(b) which requires States Parties to ensure 'that the existence of a disability shall in no case justify a deprivation of liberty', is considered challenging by many (Bartlett 2012, 772). It is precisely this part of the provision that is of particular importance to persons with psychosocial disabilities, due to the fact that mental disorders have historically been used as a justification for separating people from society and detaining them in institutions (Freeman *et al*. 2015, 3). Art. 14. (1)(b) was also contentious during the negotiations. The main stumbling block was the question whether this provision should ensure that disability could not be the *sole* or *exclusive* basis for deprivation of liberty. Some states favoured the inclusion of one of these terms into the text of Article 14, believing that the existence of a disability together with the risk of harm to self or others could justify deprivation of liberty. On the other hand, many states and civil society associations strongly opposed the proposal to include the terms *solely* or *exclusively* in text of Article 14. Opponents of the inclusion argued that it could allow deprivation of liberty on the basis of actual or perceived impairment in conjunction with other criteria, such as danger to oneself or to others, which, in their opinion, is unacceptable. In the end,

[15] In the Committee's work, guidelines are considered as useful tools intended for persons with disabilities, their representative organizations, and States Parties for the purpose of their better understanding of the subject matter and purpose of the CRPD.

their efforts have come to fruition and as a result, Art. 14 (1)(b) requires States Parties to ensure that the existence of a disability shall in no case justify deprivation of liberty. In other words, Article 14 prohibits all deprivation of liberty where the existence of disabilities is a factor in justifying the detention (Flynn 2016, 81). This requires fundamental changes and replacement of most of national mental health legislations in which the presence of a serious mental disorder, together with a risk of harm to the person with the disorder or to others, is common and deeply entrenched criteria for involuntary detention.[16]

Article 14 has presented major challenge for States Parties. Moreover, General Comment No. 1 and Guidelines issued by the Committee in 2014 and 2015 have additionally deepened the challenges of its implementation into national legislations. According to the General Comment No. 1, the detention of persons with disabilities without their consent or with the consent of a substitute decision maker, constitutes arbitrary deprivation of liberty. Regarding involuntary treatment, States Parties have an obligation to require all health and medical professionals (including psychiatric professionals) to obtain the free and informed consent of persons with disabilities prior to any treatment and not to permit substitute decision-makers to provide consent on behalf of persons with disabilities (UN Committee on the Rights of Persons with Disabilities General Comment No. 1 2014, paras. 40 and 41). The most recent interpretation of Article 14, which the Committee gave in its Guidelines (2015), stated that the practice of State Parties, according to which persons may be detained on the grounds of their impairment (provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others), is incompatible with Article 14 and discriminatory in nature (UN Committee on the Rights of Persons with Disabilities Guidelines 2015, para 6). Therefore, the Committee does not permit any exception whereby persons may be detained on the grounds of their actual or perceived impairment.

These interpretations by the Committee have been unreservedly supported by numerous international organisations of mental health service users, psychiatric survivors, and people with psychosocial

[16] Persons with psychosocial disabilities are very often considered dangerous to themselves or others in situations when they do not consent to or oppose therapy or certain medical treatment. The Committee clarifies this situation by referring to the fact that 'like persons without disabilities, persons with disabilities are not entitled to pose danger to others. Legal systems based on the rule of law have criminal and other laws in place to deal with those matters'. However, when the danger to others is associated with a person with a mental disorder, that person is denied equal protection under these laws by being derogated to a separate track of law, i.e. mental health laws. In the Committee's view, these laws commonly have a lower standard when it comes to human rights protection, which is why such conduct is considered contrary to Art. 14. See more in UN Committee on the Rights of Persons with Disabilities Guidelines 2015, para. 14.

disabilities (Open Letter to WPA 2019), but the reactions of the professional public remain divided. Thus, some authors consider this interpretation of Article 14 as indefensible (Freeman *et al*. 2015, 844), radical, and inconsistent with the CRPD text (Dawson 2015, 70). Some authors agree that mental health law discriminates against persons with psychosocial disorder, but it is uncertain to what extent the solutions they offer are in line with the Committee's views. Thus, Szmukler, Daw, Dawson (2010) considers the existence of separate legislation that allows for involuntary placement of a mentally disordered person as unnecessary and discriminatory, and suggests its replacement by new comprehensive legislation that would govern the non-consensual treatment of both the mental and physical condition. This new scheme, which is described as the 'fusion' proposal, would apply to all persons with impaired capacity to make a decision about treatment, regardless of the cause of their incapacity (Szmukler, Daw, Dawson 2010, 11). If all involuntary treatments are brought under a single legislative scheme, this would not be discriminatory for people with mental disorders because the regulation would cover all people, whether or not they have a mental illness. Involuntary treatment would be allowed in all cases where a person is incapable of making a decision on their own or with the help of another person (supported decision making), regardless of what damage is the cause of that incapacity. In this case, the patient's decision-making incapacity would be the main criterion for involuntary treatment. This proposal is intended not to remove persons with psychosocial disabilities into a separate group and therefore such legislation would certainly reduce unjustified discrimination of those persons. However, it is quite doubtful whether this proposal is in line with the Committee's interpretation. Namely, according to Szmukler, Kelly (2016, 453), 'impaired decision-making capability is a 'disability' under CRPD every bit as much as 'mental disorder', if not more so.' Because of that the fusion proposal may only be considered as fundamentally inconsistent with Article 14. Flynn (2016, 84) also states that the Committee ruled out the possibility that disability neutral criteria for detention could be in conformity with Article 14. Instead, the Committee states that the 'involuntary detention of persons with disabilities based on risk or danger, alleged need for care or treatment or other reasons relating to impairment or health diagnosis, such as severity of impairment, or for the purpose of observation, is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty' (UN Committee on the Rights of Persons with Disabilities 2015, para. 13).

An additional challenge in the implementation of Article 14 is the fact that the Committee's view is not in line with the view of another UN body—the Human Rights Committee, the treaty-body of the International Covenant on Civil and Political Rights. In its 2014 General Comment No.

35, it allows the possibility of involuntary placement and treatment, provided that 'the existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.'[17]

The UN High Commissioner for Human Rights (UN General Assembly 2009, 49) also concluded that the provision of Art. 14(1)(b) 'should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.'

The interpretation of the CRPD Committee is also contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 5) and current practice of the ECHR.[18] It should be pointed out that psychiatry's response to the solutions adopted in the CRPD was largely critical and aimed at defending the need for coercion in psychiatry. Nevertheless, that approach was not unique. The departure of mental health care from coercion and the construction of a support-based system is seen as the future of mental health care, conceptualised as a system for mental health care based on support only (Zinkler, von Peter 2019, 1–10). Yet, the lack of clarification of the serious incompatibility, regarding forced detention, in the Committee's view, on the one hand, and the opinions of the Human Rights Committee and High Commissioner, and the ECHR's case law, on the other, can jointly diminish the CRPD's role and influence, and consequently thwart its purpose, general acceptance, and its practical implementation (compare Brown 2016, 6).

3.2. The Role of the Committee in Encouraging the Effective Implementation of Article 14

The importance and significance of each international document, including the CRPD, is assessed not only through the number of ratifications (which in this case is substantial), but primarily through the implementation of its provisions 'in the field'. In order to encourage State

[17] UN Human Rights Committee (2014, para. 19).

[18] In many cases the ECHR stated that detention under Art. 5 of the European Convention may be justified for reasons of dangerousness or interests of the individual's health (for example, *N. v. Romania*, 59152/08, 28 November 2017, para. 151). At the same time, the ECHR cited the CRPD as part of international law. Thus in 2009, for the first time, in the *Glor v. Switzerland* judgment, the ECHR found that a person with a disability was discriminated solely on account of their disability, thereby paving the way for the application of CRPD in the ECHR case law (Clifford 2011, 20).

Parties in the fulfilment of that goal, the Committee is making continuous efforts. Its main tasks are to examine and review States Parties' periodic reports (Art. 35), to establish and publish so-called guidelines and general comments, and to examine individual communications and inquiries relating to violations of CRPD provisions. In its work, the Committee seeks to establish a constructive dialogue with States Parties, with the aim of helping them to better implement the Convention. Such communication involving State Parties' reports and Committee's concluding observations identifies issues of particular concern and very clearly indicates the degree of applicability of the Convention in a particular State at a given time. As already pointed out, its implementation has proved challenging in some segments and, by having in mind a number of Committee's recommendations on measures that have to be implemented on national levels, it would be an exaggeration to claim that the challenge has already been overcome.

For the purpose of this paper, the focus is given on the Committee's opinions and recommendations in order to point out the specific challenges faced by States Parties regarding the need to overcome the practice of forced detention and forced treatment of persons with psychosocial disabilities. It is clear that the application of the Convention by the States Parties that still allow compulsory treatment based on a person's psychosocial disability—poses a specific challenge for their mental health system and practice (Szmukler, Daw, Callard 2014, 246). This part will also reflect on the close connection between the violation of Article 14 and the related CRPD provisions referred to by the Committee in its documents.

Since the beginning of the observation processes, the Committee has been issuing recommendations and proposing various measures for the effective and comprehensive application of Article 14, in a manner that contributes to the full exercise of the rights set forth in that article. Therefore, the Committee required the State Parties to fully harmonize their legislation with Article 14 and the Committee's Guidelines, to review the provision in legislation that allows for the deprivation of liberty on the basis of disability, including mental, psychosocial or intellectual,[19] or to revise or repeal all legal provision in order to prohibit institutionalisation, forced internment and non-consensual psychiatric treatment or placement in institutions and treatment on the ground of disability.[20] It also required States Parties to increase the availability of community-based mental health services (Latvia 2017, para. 25b) and develop recovery-oriented and community-based rehabilitation services

[19] See for example Spain 2019, para. 27a; India 2019, para. 24a; Greece 2019, para. 22; Malta 2018, para. 26; Slovenia 2018, para. 23a.

[20] See Ecuador 2019, para. 30; Greece 2019; Croatia 2015, para. 20, etc.

for persons with psychosocial disabilities (Poland 2018, para. 24c). The Committee's recommendations addressed more effective involvement of organisations representing persons with psychosocial disabilities in development of new legislation (see for example Lithuania 2016, para. 31b). The Committee also proposes the adoption of measures aimed at ensuring that all mental health care services are based on the free and informed consent of the person concerned (Hungary 2012, para. 28;), i.e. that mental health provisions are human rights-based (Spain 2019, para. 27a). It requested States Parties to ensure the integrity, security or free movement of persons with disabilities residing in institutions and hospitals, with full respect for their dignity.[21] To this end, states have also been instructed to develop monitoring mechanisms for public and private care and mental-health facilities (see for example Ecuador para. 30; Poland 2018, para. 24d), and to use collected data for the eradication of all forms of involuntary hospitalisation and treatment of persons with psychosocial disabilities.[22]

As pointed out previously, forced treatment by psychiatric and other health and medical professionals constitutes a violation of multiple CRPD provisions (UN Committee on the Rights of Persons with Disabilities General Comment No. 1 2014, para. 42). Involuntary commitment of persons with psychosocial disabilities is closely connected with the denial of their legal capacity to decide about care, treatment and admission to a hospital or institution, and leads to a violation not only of Article 14 but also of Article 12 (UN Committee on the Rights of Persons with Disabilities 2015, para. 10). The Convention further prohibits subjection to torture or to cruel, inhuman, or degrading treatment or punishment (Art. 15). This also includes eliminating the use of isolation, seclusion, and various methods of restraint in medical facilities, including physical, chemical, and mechanic restrains. However, the existence of such a practice has been confirmed in the reports of States Parties. Therefore, the Committee has repeatedly instructed the State Parties to abolish the use of physical, chemical and other medical non-consensual measures and non-consensual electroconvulsive therapy on the basis on any form of impairment; to repeal laws that allow legal guardians to consent to medical experimentation on behalf of persons with disabilities, and to encourage the strengthening of the national preventive mechanism in the direction of combating such practices.[23]

[21] E.g., Slovenia 2018, para. 23b; Poland 2018, para. 24b; Latvia 2017, para. 25c.

[22] See for example Myanmar 2019, para. 28c; United Kingdom 2017, para. 35b; Lithuania 2016, para. 31c.

[23] See Ecuador 2019, para. 30; India 2019, para. 32c; Australia 2019, para. 30a; United Kingdom 2017, para. 37d; Luxembourg 2017, para. 31; Serbia 2016, para. 28; Italy 2016, paras. 40, 42; Slovakia 2016, paras. 45, 46; Czech Republic 2015, para. 32; New Zealand 2014, para. 32; Denmark 2014, para. 39, etc.

A close connection with Article 14 can be found in the implementation of Article 16. Namely, the Convention guarantees freedom from exploitation, violence, and abuse, thereby imposing on States Parties the obligation to take all appropriate measures to protect persons with disabilities, both within and outside the home, from all forms of such practice. Measures focused on collecting data and implementing independent human rights-based monitoring in order to eliminate any risk of violence or abuse in mental health institutions, can contribute to the elimination of such bad practices.[24]

The Convention also guarantees the protection of the physical and mental integrity of a person with a disability (Art. 17). Disability is not the loss of physical or mental integrity, but a condition in which a person possesses their own integrity, which deserves respect equally with others (Minkowitz 2007, 412). This right is close to issues of medical treatment and research, as well as the right to protection from degrading and cruel treatments, and is best understood in a way that it restricts certain practices, such as seclusion or restraint (McSherry 2008, 121). When it comes to the protection of persons with psychosocial disabilities, it also complements the legal recognition of the right to autonomy and self-determination of a person with disability from Article 12 and provides another basis for understanding forced psychiatric interventions as a human rights violation (Minkowitz 2007, 412). In its concluding observations the Committee pointed to the existence of a practice of forced sterilisation of persons with disabilities, without their free and informed consent (Czech Republic 2015, para. 37), forced intervention or surgery (United Kingdom 2017, para. 41), and non-consensual contraception or treatments when consent is given by a third party (Luxembourg 2017, para. 35). Therefore, it instructs Parties States to ensure that all persons with disabilities provide free and informed consent to admission procedures and all forms of treatment (Slovakia 2016, para. 50).

The Committee has also emphasised the relationship between Articles 14 and 19 on involuntary institutionalisation on the grounds of impairment or associated circumstances such as presumed 'dangerousness'. Implementing Article 19 (on the right to live independently and be included in the community) will thus ultimately prevent violation of Article 14. In the direction of effective application of Article 19, the Committee recommended taking all necessary measures to ensure that no person will be detained in any facility on the basis of actual or perceived disability (see for example Denmark 2014, para. 37). It also required that States Parties adopt deinstitutionalisation strategies and programmes

[24] See for example Spain 2019, para. 32e; Poland 2018, para. 29a; Lithuania 2016, para. 31.

(principal in its recommendations under Art. 14) and warned States Parties of the need to undertake all measures necessary so that policy processes for deinstitutionalisation have a clear timeline and concrete benchmarks for implementation (Luxembourg 2017, para. 37b; Czech Republic 2015, para. 40). However, various deinstitutionalisation programmes have shown that the closure of institutions is not enough. Such reforms must be accompanied by comprehensive service and community development programmes, including awareness programmes. Structural reforms designed to improve overall accessibility within the community may reduce the demand for disability-specific services.[25]

We can conclude that the role of the Committee in relation to assessing the successful implementation of the CRPD provisions related to the complete ban of forced measures against persons with psychosocial disabilities, is invaluable. Its great engagement and continued efforts are not at all surprising, given that most of its members are precisely people with disabilities (Degener 2017, 153).[26] Its activities undoubtedly contribute to the acceptance of a new perception of the human rights of people with psychosocial disabilities. As shown by elaborating on the concluding observations, the Committee has adopted a critical approach to the State Parties' established practices. It is obvious how the application of Article 14 still represents one of the major challenges for the States Parties, followed by regular warnings of the Committee on the need to align the State Parties' legislations with this provision. The Committee's objective to eliminate discrimination against persons with psychosocial disabilities and to pay special attention to involuntary detention, and other forced measures against them, should be commended. However, by failing to produce a more comprehensive analysis of the possible consequences of an absolute prohibition of involuntary treatment under current circumstances in State Parties, the Committee's interpretation seems incomplete.

4. CONCLUSION

In line with new trends—according to which people with psychosocial disabilities are no longer perceived as passive recipients of assistance, but as active members of society able to take care of themselves

[25] UN Committee on the Rights of Persons with Disabilities (2017, para. 33).

[26] The Committee's commitment to the protection of the human rights of persons with disabilities has resulted in its opposition to the acceptance of the Additional Protocol to the Oviedo Convention on Human Rights and Biomedicine, with the explanation that it is 'contrary to the letter and spirit of the CRPD'. The Draft of the Protocol conflicts the human rights of persons with disabilities recognized by the CRPD, and violates several of its provisions, Art. 14 among others.

and protect their own rights—the CRPD is perceived as a driving force in changing the nature of legal regulations of mental health detention. Unlike models of medicalism, legalism, and new legalism, which do not call for a prohibition of mental health detention, the CRPD states that psychosocial disabilities cannot justify deprivation of liberty. According to the Committee's view, a psychiatric diagnosis should not be used to justify detention, nor lead to disadvantages concerning restrictions of liberty of people with psychosocial disabilities. Decisions concerning a person with a psychosocial disability cannot be made without that person's free and informed consent. A change to the health care system, where the emphasis would no longer be on coercion and involuntary treatment, but on adequate support for people with psychosocial disabilities that would enable them to make their own decisions, is required for the future of mental health care. The Committee's views and recommendations are undoubtedly heading in that direction.

This tendency, however, is in stark contrast to States Parties' practice. Twelve years after the Convention entered into force, the States are irrefutably aware of the incompatibility of their national frameworks with the Convention. The history of the development of the legal status of persons with psychosocial disabilities is in fact the history of the distribution of powers between the courts and psychiatrists with regard to involuntary detention of such persons and other coercive interventions against them. States apparently find it difficult to abandon the established practice and are slow in shifting their focus from the legal rules regarding forced treatment to legal rules that encourage a broad spectrum of positive and non-discriminatory rights for those who are the subject of mental health detention. An additional burden is certainly the fact that the bodies within the UN have not reached a unified position on this issue, as well as the fact that the ECHR case law deviates from the requirements of Article 14.

The discussion above confirms that psychosocial disabilities remain one of the most challenging and misunderstood areas of disability (Deany 2016, 1), and it is uncertain in which direction the development of forced detention regulations will go. Nevertheless, a hint of optimism for incoming changes in this field can be based on several grounds. First, past experiences in implementing the Convention's solutions for other important issues show that States Parties, despite their initial resistance, have nevertheless begun to reform their national legislations, so we can expect progress to be made in this area as well.[27] Second, the Committee's role and work, which continuously encourages States Parties to harmonize

[27] The abandonment of the institute of complete deprivation of legal capacity in some State Parties is one of the immediate consequences of aligning the national legislation with the CRPD's provisions.

their national legislation with the provisions of the Convention, is an extremely important link in the implementation of the CRPD. Additional optimism that these small steps can lead to big changes is based on the fact that the main bearers of change are precisely persons with psychosocial disabilities and their respective organisations. People with psychosocial disabilities have finally organised themselves and showed the public that they are determined to insist on the respect and implementation of their rights. This is a force that should not be ignored. Instead of standing up to them and blindly insisting on maintaining the status quo, in the 21st century, we should turn—together with them—toward thinking about ways to change the legislation regarding forced detention and treatment of people with psychosocial disabilities. The CRPD offers new avenues for progressive development in this field.

REFERENCES

Allderidge, Patricia. 1979. Hospitals, Madhouses and Asylums: Cycles in the Care of the Insane. *British Journal of Psychiatry* 134: 321–334.

Appelbaum, Paul S. 1/2019. Saving the UN Convention on the Rights of Persons with Disabilities – from itself. *World Psychiatry* 18: 1–2.

Arstein-Kerslake, Ana, Eilionóir Flynn. 4/2016. The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law. *The International Journal of Human Rights* 20: 471–490.

Bartlett, Peter. 5/2012. The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law. *Modern Law Review* 75: 752–778.

Blanck, Peter, Eilionóir Flynn. 2017. *Routledge Handbook of Disability Law and Human Rights.* London: New York: Routledge.

Brown, Jennifer. 2016. The changing purpose of mental health law: From medicalism to legalism to new legalism. *International Journal of Law and Psychiatry* 47: 1–9.

Callaghan, Sascha Mira, Christopher Ryan. 5/2014. Is there a future for involuntary treatment in Right-based Mental Health Law. *Psychiatry, Psychology and Law* 21: 747–766.

Clifford, Jarlath. 2011. The UN Disability Convention and its Impact on European Equality Law. *The Equal Rights Review* 6: 11–25.

Clough, Beverley. 1/2014. "People like that": Realising the Social Model in Mental Capacity Jurisprudence. *Medical Law Review* 23: 53–80.

Dawson, John. 2015. A realistic approach to assessing mental health laws' compliance with the UNCRPD. *International Journal of Law and Psychiatry* 40: 70–79.

Deany, Paul. 2016. Psychosocial Disability: one of the most misunderstood areas of disability. *Panel at the 9th session of the Conference of States Parties to the CRPD. https://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/* (last visited 2 November 2020).

Degener, Theresia. 3/2016. Disability in a Human Rights Context. *Laws* 5: 1–24.

Degener, Theresia. 3/2017. 10 years of Convention on the Rights of Persons with Disabilities. *Netherland Quarterly of Human Rights* 35: 152–157.

Fennel, Philip. 2010. Mental Health Law: History, Policy, and Regulation. 3–70 in *Principles of Mental Health Law and Policy*, edited by Gostin Lawrence, Peter Bartlett, Philip Fennel, Jean McHale, Ronald MacKay. Oxford: Oxford University Press.

Flynn, Eilionóir. 2016. Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches. *International Journal of Mental Health and Capacity Law* 22: 75–101.

Freeman, Melvyn Colin, Kavitha Kolappa, Jose Miguel Caldas de Almeida, Arthur Kleinman, Nino Makhashvili, Sifiso Phakathi, Bernedetto Saraceno, Graham Thornicroft. 9/2015. Reversing hard won victories in the name of human rights: a critique of the General Comment of Article 12 of the UN Convention on the Rights of Persons with Disabilities. *The Lancet Psychiatry* 2: 844–850.

Gostin, Larry. 1/1983. Contemporary Social Historical Perspectives on Mental Health Reforms. *Journal of Law and Society* 10: 47–70.

Jones, Kathleen. 1972. *A History of Mental Health Service*. London: Routledge and Kegan Paul.

Kayess, Rosemary, Phillip French. 1/2008. Out of Darkness into Light: Introducing the United Nations Convention on the Rights of Persons with Disabilities. *Human Rights Law Review* 8: 1–34.

Large, Matthew, Christopher James Ryan. 12/2008. The danger of dangerousness: why we must remove the dangerousness criterion from our mental health acts. *Journal of Medical Ethics* 34: 877–881.

Lawson, Anna, Angharad E. Beckett. 2020. The social and human rights models of disability: towards a complementarity thesis. *The International Journal of Human Rights* 24: 1–32.

Lawson, Anna, Mark Priestley. 2016. *The social model of disability, Questions for law and legal scholarship?* 1–13 in *Routledge Handbook of Disability Law and Human Rights,* edited by Peter Blanck, Eilionóir Flynn. London; New York: Routledge.

McSherry, Bernadette. 2008. Protecting the Integrity of the Person: Developing Limitations on Involuntary Treatment. 111–124 in *International Trends in Mental Health Laws,* edited by Bernadette McSherry. Sydney: Federation Press.

Minkowitz, Tina. 2/2007. The United Nations Convention of the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Intervention. *Syracuse Journal of International Law and Commerce* 34: 405–428.

Office of the UN High Commissioner for Human Rights. 2006. *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*. New York and Geneva: United Nations Publication. *http://www.ohchr.org/Documents/Publications/FAQen.pdf* (last visited 2 November 2020).

Oliver, Mike. 7/2013. The social model of disability: thirty years on. *Disability & Society* 28: 1024–1026.

Open Letter to World Psychiatric Association. 2019. *http://enusp.org/wp-content/uploads/2019/03/Open-Letter-to-WPA.pdf* (last visited 2 November 2020).

Pogge, Thomas. Introduction. 2007 in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* edited by Thomas Pogge. New York: Oxford University Press.

Shakespeare, Tom, Nicholas Watson. 2002. The social model of disability: An outdated ideology? *Research in Social Science and Disability* 2: 9–28.

Szmukler, George, Rowena Daw, Felicity Callard. 2014. Mental health law and the UN Convention on the rights of persons with disabilities. *International Journal of Law and Psychiatry* 37: 245–252.

Szmukler, George, Rowena Daw, John Dawson. 2010. A model law fusing incapacity and mental health legislation. *Journal of Mental Health Law* 33: 11–22.

Szmukler, George, Brendan D. Kelly. 6/2016. We should replace conventional mental health law with capacity-based law. *The British Journal of Psychiatry* 209: 449–453.

Third session of the Ad Hoc Committee, Landmine Survivors Network, Vol. 4. 26 May 2004.

Uldry, Marine, Theresia Degener. 2018. *Toward Inclusive Equality: 10 years Committee on the Rights of Persons with Disabilities*. *https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/1_Global/INT_CRPD_INF_21_28325_E.pdf* (last visited 2 November 2020).

UN Committee on the Rights of Persons with Disabilities. 2014. *General Comment No. 1: Article 12: Equal recognition before the law*. CRPD/C/GC/1.

UN Committee on the Rights of Persons with Disabilities. 2015. *Guidelines on the right to liberty and security of persons with disabilities.* A/72/55 Annex.

UN Committee on the Rights of Persons with Disabilities. 2017. *General Comment No. 5, on living independently and being included in the community.* CRPD/C/GC/5.

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: Australia* (CRPD/C/AUS/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2014. *Concluding observations: Croatia* (CRPD/C/HRV/CO/1). 2014.

UN Committee on the Rights of Persons with Disabilities. 2015. *Concluding observations: Czech Republic* (CRPD/C/CZE/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2014. *Concluding observations: Denmark* (CRPD/C/DNK/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: Ecuador* (CRPD/C/ECU/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: Greece* (CRPD/C/GRC/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2012. *Concluding observations: Hungary* (CRPD/C/HUN/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: India* (CRPD/C/IND/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2016. *Concluding observations: Italy* (CRPD/C/ITA/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2017. *Concluding observations: Latvia* (CRPD/C/LVA/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2017. *Concluding observations: Lithuania* (CRPD/C/LTU/CO/1). 2016.

UN Committee on the Rights of Persons with Disabilities. 2017. *Concluding observations: Luxembourg* (CRPD/C/LUX/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2018. *Concluding observations: Malta* (CRPD/C/MLT/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: Myanmar* (CRPD/C/MMR/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2014. *Concluding observations: New Zealand* (CRPD/C/NZL/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2012. *Concluding observations: Peru* (CRPD/C/PER/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2018. *Concluding observations: Poland* (CRPD/C/POL/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2016. *Concluding observations: Serbia* (CRPD/C/SRB/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2016. *Concluding observations: Slovakia* (CRPD/C/SVK/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2018. *Concluding observations: Slovenia* (CRPD/C/SLO/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2019. *Concluding observations: Spain* (CRPD/C/ESP/CO/2–3).

UN Committee on the Rights of Persons with Disabilities. 2015. *Concluding observations: Turkmenistan* (CRPD/C/TKM/CO/1).

UN Committee on the Rights of Persons with Disabilities. 2017. *Concluding observations: United Kingdom of Great Britain and Northern Ireland* (CRPD/C/GBR/CO/1).

UN General Assembly. 2009. *Annual report of the United Nations High Commissioner for human rights and reports of the Office of the High Commissioner and the Secretary-General*. A/HRC/10/48.

UN General Assembly. 2017. *Report of the Special Rapporteur on the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health*. A/HRC/35/21.

UN Human Rights Committee. 2014. *General Comment No. 35, Article 9 (Liberty and security of person)*. CCPR/C/GC/35.

UN Human Rights Office of the High Commissioner. 2014. *UN Convention on the Rights of Persons with Disabilities: Training Guide, Professional Training Series No. 19.* New York/Geneva: United Nations Publication.

UN Meeting Coverage and Press Releases. 2006. *Secretary-General Hails Adoption of Landmark Convention on Rights of Persons with Disabilities. http://www.un.org/press/en/2006/sgsm10797.doc.htm* (last visited 2 November 2020).

Weller, Penelope. 2010. Lost in Translation: Human Rights and Mental Health Law. 51–72 in *Rethinking Rights-Based Mental Health Laws*, edited by Bernadette McSherry, Penelope Weller. Oxford and Portland, Oregon: Hart Publishing Ltd.

Zinkler, Martin, Sebastian von Peter. 3/2019. End Coercion in Mental Health Services – Toward a System Based on Support Only. *Laws* 8: 2–10.

Article history:
Received: 31. 10. 2020.
Accepted: 6. 12. 2020.

UDC 368.212.032.5; 347.5

CERIF: S137

DOI: 10.51204/Anali_PFUB_20404A

Nataša Petrović Tomić, PhD*

LIABILITY INSURANCE AS A (SOCIAL) RESPONSE TO THE CHANGING REGULATORY FRAMEWORK: FROM PROHIBITED TO COMPULSORY

The article analyzes the relationship between the institutions of liability and liability insurance, aimed at identifying the modalities of their interaction. Insurance indisputably affects the development and scope of tort law, but this influence is not one-sided. At the present development level it has been noted that liability insurance also plays an indispensable role in indemnity litigation. The development path of liability insurance shows that the developed legal order entails two mutually compatible systems. Whilst objective liability for damages is the response to numerous activities that render realistic the possibility of causing damage to others, regardless of whether the damage could have been avoided through cautious behavior, liability insurance is the response to the changed regulatory framework, which leads to liability reaching unprecedented proportions. Therefore, the author concludes that insurance does not threaten to substitute the principle of compensatory damages with the logic of loss-spreading.

Key words: *Liability insurance. – Indemnity. – Regulatory framework. – Professional liability.*

1. OVERVIEW OF THE HISTORICAL DEVELOPMENT OF LIABILITY INSURANCE

Liability insurance is one of the younger branches of insurance and recorded its greatest expansion during the 20th century. It is a subtype of property insurance and differs significantly from the insurance of

* Associate professor, University of Belgrade Faculty of Law, *nataly@ius.bg.ac.rs*.

belongings, even though both are in the same category of insurance. With liability insurance, the insurer protects the property of the insured from compensation claims by third parties (protection of the insured) and at the same time guarantees payment of compensatory damages to the injured party (protection of injured parties).[1] This reflects the *superiority* of liability insurance, as an insurance product with a dual-target function. The idea of this insurance consists of the insurer assuming the financial consequence of a certain event that caused injury to another party (Sanz Parilla 2010, 817–825; Lambert-Faivre 1981, 193–201). In other words, the insurance covers the risk of compensation for damages to third parties (Ćurković 2015, 8). This protects the property of the insured from potential liability, i.e. decrease, due to the obligation of indemnity to third parties (which, in addition to damages, commonly includes interest). Therefore, the Law of Obligations of the Republic of Serbia stipulates that in the case of liability insurance, the insurer is liable for damages caused by the insured event only if the third injured party demands compensation. Unlike other insurances, civil liability insurance *per definitionem* implies the involvement of three parties (Bonnard 2012, 10). Therefore it converts a bilateral relationship, which stems from the rules on liability for damages (*injurer–injured party*) into a trilateral relationship, including the insurer, who assumes the financial consequences of the harmful events.

The development of this type of insurance exploded in the late 19th century and experienced a renaissance in the early 20th century in economically developed countries. Why is this? The prevailing system of subjective responsibility rendered the purpose of liability and liability insurance incompatible. If liability is based only on culpability, the purpose of its existence is brought into question if the insured can be acquitted of it by concluding an insurance agreement. In fact, a liability insurance agreement was perceived as a means of securing immunity from liability; something similar to clauses on exemption from liability. In this sense, liability insurance was labeled as being immoral and socially unacceptable. Legal theory shared this view (Fontaine 2016, 515; Groutel *et al.*, 235; Jankovec 1977, 6).

Liability insurance may apply to the liability risk that threatens the private sphere (the best example is the insurance that the average insured encounters most commonly: motor liability insurance) or the risk of liability that affects businesses (corporate liability insurance). Namely, the consequences of the liability of business entities may jeopardize their further operation. By paying out compensation instead of the businesses who are responsible for the damages, the insurer allows for the unimpeded

[1] The originality of this type of insurance is reflected precisely in the fact that there must be debt of the insured to a third party, based on tort law. See: Abravanel-Jolly, 309; Groutel *et al.* 2008, 1081.

continuation of all economic activities and unimpeded economic growth. In this sense, insurance is discussed in the context of not only economic importance but also broader social significance. It has undoubtedly contributed to the acceleration of technological development, which is the most important factor in further progress. Nowadays environmental pollution liability insurance, product liability insurance, transport liability insurance in all industries of the transportation sector, etc., make insurance a top economic and social priority.

2. DEPENDENCE OF INSURANCE DEVELOPMENT ON THE SYSTEM OF LIABILITY

The significance of liability insurance was recognized only with the development of objective liability for damages.[2] Moving from a system of culpability to a system of liability, based on the produced risk, opened the door for the introduction of insurance that ensures transfer of the risk conceived in this manner. Actually, one could claim that these two systems developed in parallel with businesses, professions and activities that come with an increased risk (Karanikić Mirić 2013, 7). The changes that occurred during the second half of the 19th century in the system of liability for damages led to the development of liability insurance. With awareness of the need to accept another basis for damage liability, the idea started developing of a system that would serve to ensure compensation for all damages that are incurred even without anyone's culpability. Since its first appearance, liability insurance has remained inseparably linked to liability. It is our opinion that insurance should be perceive as the *public/social response to risk*. The moment that awareness developed of the justification for introducing other grounds for liability for damages, conditions were met to develop a system whose target function was linked to the amended rules of tort law (Merkin, Steele 2013, 3). The introduction of objective liability for damages provided conditions for the creation of purely objective liability risk, which is very insurable due to its qualities. Contemporary economics has developed over the decades, based on providing a diverse spectrum of services, which contributes to a sense of exposure to risk and fuels the development of liability insurance.[3]

Based on the general rules of tort law, the party that causes damages to another is required to provide indemnity. Since life in modern society

[2] The emergence of objective liability for damages did not imply the curtailment of subjective liability. In Serbian law—as is the case in other legal systems—both systems of liability exist, as does liability based on fairness. See: Konstantinović, 1154.

[3] Ćurković uses the term *vulnerability* to indicate increasing insecurity as an accompanying phenomenon of the modern way of life and conducting business. See: Ćurković 2015, 7.

includes participation in numerous activities that may lead to liability for damages or incurring damages, where most of these activities (working, driving a car, consuming food products, using dangerous devices, keeping animals, doing sports, using certain implements, etc.) is necessary, it is clear that the risk of liability falls on a large number of parties, both causing and suffering damages. Actually, all sources of increased hazard—as potential risks that are covered by liability insurance—can be generally classified into two groups: 1) owning (dangerous) items, and 2) performing (dangerous) activities.[4] Ultimately, when damages represent realization of the increased risk that was created by a party (by possessing certain items, keeping animals, or performing certain activities), a well-established legal order is recognized by the institutions that channel liability and direct it toward solvent debtors (such as insurers). Therefore it is no surprise that there is a proliferation of liability insurance, which is perceived as *a response to the growing risk of liability* in contemporary society (Konstantinović 1992, 1153–1163; Josserand 1992, 1164–1178; Stojanović 1992, 1179–1190). In so-called *claims society*, the question is no longer whether liability insurance is necessary, but rather which coverage is most auspicious. As pointed out by Ćurković, what was excluded from coverage until a few decades ago is now being insured at least as additional risk (Ćurković 2015, 14).

To summarize: *liability insurance varies within the limits of the civil liability of the insured*. Causing damages is the source of liability of both the insured and the insurer to the injured party. This is why theory recognizes that the civil liability of the insured is also the limit of the obligation of the insurer (Karanikić Mirić 2011, 687). If the liability of the insured is the assumption of the insurer's liability, they will not be liable if there is no party to whom the insured is liable. This does not imply that a relationship of equivalence exists between the liability of the insured and the obligation of the insurer. Departure from the rule that liability of the insurer implies the liability of the insured is introduced by law. The force of law in certain situations produces the liability of the insurer, even though an agreement has not been concluded (e.g. motor liability insurance kicks in even when the insured has not fulfilled their legal obligation to conclude an insurance agreement). Furthermore, an insurance agreement often includes limitations regarding the scope and breadth of the coverage, which is why insurance does not cover all the consequences of the civil liability of the insured (Šulejić 1992, 2261–2267). The effects of these limitations may lead to the insurer not covering all the damages for which the insured is liable or providing limited coverage. Therefore, it is not excluded that the obligation of the insurer may be lesser than the obligation of the insured to the injured party

[4] The greatest number of injuries that are the source of increased risk can be classified in one of these two groups.

(Konstantinović 1982, 496–505). These limitations are adjusted to the subject of the insurance, i.e. the type of liability covered. For this reason *liability insurance is considered an institution that to a certain extent releases from responsibility, which remains its conceptual basis*. This is primarily apparent in the case of compulsory insurance, where the insurer's obligation to the injured party is influenced to a lesser extent by the relationship that exists between the insurer and the insured.

Actually, liability for damages is a type of insurance.[5] This especially applied during the period prior to the emergence of liability insurance, as well as today, if conditions for the activation of the insurance are not met. If these conditions are met, liability is the gateway that leads to insurance (Merkin, Steele 2013, 251). Compensation and insurance embody different ideologies and the choice between them is not only a practical issue (conditioned by the level of development of the legal order), but also an issue of ideological approach. We undoubtedly advocate a combination of these systems. Only their complementary effect can adequately protect the interests of the injured party and ensure implementation of the principle of integral compensation.

3. AMENDMENTS TO THE REGULATORY FRAMEWORK: INTRODUCTION OF PROFESSIONAL LIABILITY AS AN INCENTIVE FOR THE DEVELOPMENT OF INSURANCE

It is our opinion that the current regulatory framework influences the development modalities of liability insurance to a great extent. In fact, the characteristics of the existing system of liability define the regulatory potential of liability insurance. As we have pointed out, this insurance appears as a response to the increasing liability risk in different occupations and activities. By constituting the level of responsibility for different professions, *the regulatory framework plays a decisive rule in defining/ quantifying the damages that should be covered by insurance* (Merkin, Steele 2013, 37). The best example of the influence of the regulatory liability framework on the physiognomy of insurance is professional liability insurance. Today there are numerous types of such insurance, whose common denominator is increasing confidence in professional advice– and service-providing individuals (and companies) as well as protection of the consumers of their services.

The fact that liability insurance today includes not only tortious, but also contractual liability, best speaks of how much it has changed

[5] Furthermore, it can be claimed that the institution of liability for damages is the predecessor of insurance. Its target function matches that of insurance, therefore the historical acceptance of this system opened the door to the development and subsequent expansion of (liability) insurance.

under the influence of the concept of professional liability. This change occurred as a response to the enormous liability risk that comes with certain professions. Historically viewed, liability insurance developed as an instrument for transferring risk from tortfeasor to the insurer, in the domain of non-contractual (indemnity) liability. It was believed that only this type of liability possesses the qualities necessary for insurance. Namely, it is based on general regulations on liability for damages (it is within the boundaries of the legal framework) and as such is aleatory. It was only over time, i.e. when standards of professional attention and the related concept of professional liability started developing, that the subject of liability insurance extended and started encompassing contractual (professional) liability.[6] This is why today it is incorrect to say that the subject of liability insurance is only non-contractual liability. Contractual professional liability is spreading at such a pace that certain professions have survived primarily due to insurance. Considering the fact that professional oversights (mistakes) are an integral part of different professions (i.e. contracts on performing certain jobs or providing certain services) and that they consist of the nonperformance of the assumed contractual obligation, the interest of the legal order to enable an extensive understanding of liability insurance is clear. It is for this reason that most legal systems include a significant number of compulsory professional liability insurances. It is the legislator's assessment that the protection of potentially injured parties—who use the services of various professionals—can be efficient only if professional risk insurance is compulsory.

4. MUTUAL INFLUENCES OF LIABILITY AND INSURANCE: INSURANCE AS THE COMPANION OF LIABILITY RISK

A historical approach to the study of liability insurance reveals not only that its development is directly linked to the development of objective liability for damages, but also that these two instruments are mutually linked and intertwined.

Even though indemnity is pushed into the foreground—as opposed to liability—insurance does not dismiss the idea of liability, even though it may happen that it changes or dislocates its meaning in the context of civil law. The links between liability and insurance run deep. "The responsible behavior of assured parties is of evident importance to insurers, and the subject of much industry attention." (Merkin, Steele 2013, 30). One of the fundamental rules in liability insurance is coverage for negligence. This emphasizes the significance of adhering to the standard of good faith, i.e. good business practices. This provides a meaningful and targeted connection between the rules on liability and

[6] For an overview see: Ćurković 2015, 40–44.

insurance. Furthermore, insurance enjoys its own legality in the sense of morality, which is closely linked to the correct basement on liability.

Over time, this branch of insurance started being perceived as an *instrument that provides a new dimension to civil liability for damages* (Eliashberg 2006, 17–32; Šulejić 1992, 2253–2267; Besson 1992, 2268; Sokal 1992, 2325–2338). It is no exaggeration to claim that civil liability insurance *increases* the reparative function of the rules on liability for damages.[7] However, its authority in contemporary indemnity does not end there (Fagnart 2013, 225–250). As pointed out by French theorist Andre Besson, there are three notable types of interference of insurance and liability (Besson 1992, 2257–2264).

First, the *development of liability through insurance*: this was especially the case with new forms of professional risk insurance, which were introduced at the same time as professional liability. In other words, *insurance meets the needs of new forms of liability*. The logic of the legal order was that it is easier to "tackle" new types of liability if insurance is introduced in parallel with them. Such an approach has proven to be justified in the case of compulsory insurance (such as motor liability insurance and various professional risk insurances). Regardless, objective liability for damages, as the general norm, was created in most legal systems in parallel with liability insurance. Also, the liability system improved thanks to the existence of insurance and the indemnity options.

Secondly, *development of insurance through liability*: "Every change in the system of liability has its reflection in insurance." This has proven true in the case of professional liability insurance. Due to consumerism and under the influence of consumer society, the legislators in many states kept extending professional liability. In the cases of certain professions such a legislative policy has led to excessive liability risk, which could be managed most efficiently through the introduction of compulsory liability insurance. Therefore, the legal regime of liability represented a direct incentive for the development of insurance. In most legal systems there is a significant number of compulsory professional liability insurances. It is the legislator's assessment that the protection of potentially injured parties—who use the services of various professionals—can be efficient only if professional risk insurance is compulsory.

[7] Even through insurance and liability are two separate categories (Ger. *Trennungprinzip*), they affect each other and become inseparably linked. The emergence of liability insurance is linked to the so-called *socialization* of liability, as an instrument that allows for the true application of rules on liability for damages, with the aim of protecting not only the injured parties, but also the entire community. The concept of the socialization of liability means transferring the burden of liability to all persons that make up the community, in the sense of being involved in the same business, using vehicles, etc. See Konstantinović 1952, 303; Šulejić 1967, 14–15; Besson 1992, 2269; Bonnard 2012, 11; Fagnart 1988, 419–448; Tunc 1982, 343–357; Delpoux 1992, 79–85; Frison-Roche 2000, 79–84; Mayaux 2011, 257–275.

Thirdly, the *corrective effect*, i.e. limitation of liability through insurance: liability is limited through liability insurance. Namely, insurers are not prepared to accept to cover a risk liability that is unlimited in scope or lasts excessively long, therefore they limit the duration of the risk in the terms of insurance. One of the common clauses in professional liability insurance is the claims-made clause (Petrović Tomić 2019, 520–522). This method of determining the insured case (only in liability insurance) developed out of the need to provide a time limit to the obligation of the insurer, who therefore conditions the acceptance of coverage of certain risks (e.g. consequences of environmental pollution, consequences of radiation, defective product damages, etc.) The claims-made clause was developed as a response to the extensively broad definition of professional (contractual) liability. Namely, insurers were not prepared to accept coverage of professional liability risks that last 10 or more years. By limiting the risk to the contractual period, the insurers could more easily assess the risk and calculate the premiums, which made insurance coverage more accessible.

Liability insurance devised in this manner can be observed not only as a corrective, but also as a counterbalance to the broadly defined liability. A good funded legal system features instruments whose combined effects provide a fine balance of mutually conflicting interests. Owing to such practices, in many occupations there have been legal interventions in the form of limitation of liability.

It is our belief that the list of interactions between liabilities and insurance does not end here, but that contemporary insurance law identifies several more modalities of interaction between insurance and liability.

Coverage for ordinary negligence based on liability insurance has influenced the interpretation of numerous duties that specify the standard of professional conduct in different activities. The significance of insurance is apparent from the fact that duties are always formulated as a legal standard, i.e. in an abstract manner and that their content is interpreted on a case-by-case basis (Merkin, Steele 2013, 214). It is evident that the mere existence of insurance is not sufficient to claim that there is a duty; duties are introduced by law and operationalized in practice. However, the role of insurance becomes prominent in the procedure of determining the content of such duties, because the courts rely on excluded damages and other limitations in order to determine the content of the specific standard of conduct.

The risk of common negligence is crucial in liability insurance: it establishes the limits of acceptable professional conduct in different professions. The insurance is in effect to the extent to which a party has abided by the professional standard, even in the event of an oversight and

despite all due caution. Since every party providing professional advice may experience an oversight due to negligence, the example of coverage of this risk shows the connection between the due attention of professionals providing advice or services and insurance. In our opinion, the treatment of this risk in insurance confirms the compatibility of tort and insurance law ("Negligence and insurance fit closely together", Merkin, Steele 2013, 62). In many cases parties that are professionally engaged in providing services or advice will not be held liable for common negligence (for example CEOs and members of corporate bodies). Insurance law follows the same logic in providing coverage for common negligence: if professionals are expected to act with due attention, then in the assessment of their liability it is crucial to separate common negligence from dereliction of duty. Insurance plays a significant role in this process.

As a consequence of the above mentioned, owing to the impact of insurance, the domain of illegal action is separated from acting in accordance with the rules of a given profession. This is closely linked to the notion of risk insurability. The acceptance and prevalence of liability insurance was affected by the fact that it covers all types of distorted behavior, with the exception of intent (Ćurković 2015, 9). Any form of conscious (intentional) violation of the law stems from the definition of risk as a crucial notion of insurance. Intent is excluded from coverage in all types of insurance.

Also, there is a noted combined effect of tort law and liability insurance in regard to the prevention of damages (Wandt 2010, 353). Insurance liability has evidently influenced the prevention of damages, since the terms of insurance stipulate in advance the prevention measures that the insured must abide by—under threat of sanction of compensation.

For understanding the preventive role of liability insurance, it is crucial that it is not comprehensive, i.e. that it does not cover the entire scope of liability of the insured, and therefore that it does not bring into question the preventive function of liability. Very prominent elements of the prevention of liability risk (insured's obligations, excluded damages, coverage limit, the *bonus malus* system, contraction of self-adherence, etc.) make liability insurance not only an instrument of protection, but also an efficient means of preventing high-risk business practices (Petrović Tomić 2011, 58). At the same time, liability insurance does not cover the entire field of the insured's civil liability, but also preserves the felony, administrative, disciplinary, status liabilities, etc.

This type of insurance is therefore an unavoidable factor of the financial security of natural and legal persons.[8] The need for liability insurance has started to increase with development of the culture of

[8] The philosophy of tort law has evolved significantly since the beginning of the 20th century. The primary target is no longer sanctioning of the tortfeasor, but rather

compensation in the 21st century (Ćurković 2008, 27). It is beneficial to all parties who may cause damage to someone, due to the activities they are involved in, to transfer the burden of compensation to the insurer. The reason for this is that the proceedings that the injured party may initiate against them, as well as the awarded compensation, may cause their ruin. It is clear that in this context liability insurance becomes a factor that determines the extent of the risk that the average citizen, service provider, or company may assume.

Even though there is, in a way, historical conditionality of the development of objective liability for damages and insurance, there is a line of thinking that states that the expansion of insurance gradually leads to the jeopardizing/reduction of the significance of the principle of tort. According to this reasoning, insurance threatens to substitute the principle of indemnity with the concept of spreading damages, which *in ultima ratio* "will reduce the law of tort to an empty shell." (Merkin, Steele 2013, 4). Our reasoning is quite different: we believe that insurance is part of a wider set of risk-related rules, which cannot be reduced solely to the principle of loss-spreading. What is common for all types of insurance is the reduction of insecurity. In this sense it is possible to distinguish a link between insurance and rules on liability for damages. Objective liability developed at the moment when the protection of the injured parties required that the issue of the culpability of the tortfeasor be put on the back burner and instead for the legal system to address the issue of who created the risk. Even though this purely technical principle is undoubtedly an important part of the insurance target function, we cannot view it separately from a private legal arrangement (agreement). Liability insurance is therefore inseparably linked and conditioned by the law of obligations (and tort law). It cannot be equated to the loss-spreading logic, nor is the function of loss-spreading free of the influence of tort law. Actually, insurance is the embodiment of the growing paradigm of risk management at all levels. Insurance law as such indicates to us the development trend of private law, aimed at it surviving and remaining an efficient means of protecting injured parties, as well as liable parties (who many not necessarily also be culpable, *ipso facto,* for the occurrence of the harmful event).

Liability insurance is the part of the legal order that contributes to the balanced functioning of the institution of private law.

compensating the injured party. See: Fagnart 1988, 135–157; Lambert-Faivre 2018, 438–441.

5. THE ROLE OF INSURANCE IN TORT LAWSUITS: THE DEEP-POCKET PHENOMENON

Insurance is able to affect the development of private law through a wide range of influences. Currently it is notorious that the influence of liability insurance is manifested most tangibly through the shaping of disputes pertaining to compensation.

Specifically, several regularities have been noted regarding the influence of liability insurance on the outcome of insurance disputes. Firstly, the presence of the insurer in the lawsuit is not a conceptually irrelevant factor (Merkin, Steele 2013, 7). They can appear in the lawsuit in different roles, which stems from the way that the dispute clause is formulated (Petrović Tomić 2020, 19–30). Thanks to it, a relatively swift conclusion of the settlement or acceptance of the indemnity claim by the insured is possible. The insurer may join the lawsuit as an intervener and ensure the intervention effect of the ruling. The insurer may therefore influence the outcome of the initiated lawsuit and render it more efficient than in the case when proceedings are held for the same matter, but without their participation.

Secondly, liability insurance plays an indispensable role in providing financial assistance to the insured, in the role of the defendant. Namely, in most cases the insured, based on this insurance, achieves not only coverage of the sum that is to be paid to the injured party, but also the costs of the defense. Consequently, the insured can count on a large fund and better-quality defense of their interests. Liability insurance traditionally is linked to an *indemnity function* that manifests itself differently than is the case with other property insurances. The protection that the insurer provides the insured consists of payment of the compensation for damages to the injured party, instead of the insured. Therefore, the assets of the insured are protected from compensation claims by parties who had been caused damages by the insured. Presently, however, the significance of liability insurance cannot be assessed without pointing out another function that it performs: the *legal protection of the insured*.

It is indisputable that the primary function of liability insurance is related to tort law and that it consists of protecting the insured's assets from compensation claims against them. However, in addition to economic protection, the insured also counts on legal protection. This is supported by the fact that the protection that insurance provides consists of the insured not having to bear the costs of the defense from the claims against them, as well as the indemnity that might be included in the ruling against them.[9] It is extremely important for the comprehensiveness of their

[9] When speaking of the function of liability insurance as the insurance of legal protection, we take into consideration legal costs and other justified costs of determining

protection that the policy includes a clause according to which the insurer is required to pay for the insured's defense costs in the course of the proceedings. This means that the insurer is required to cover the costs, regardless of the outcome of the proceedings.

In our opinion, the economic significance of liability insurance stems significantly from its character as a *passive insurance of legal protection* (Petrović Tomić 2011, 111). Even though it is indisputably predominantly liability insurance, this nature will not be evident in all cases. The indemnity nature of liability insurance is not manifested solely through the payment of compensation from insurance, but also through the financing of the costs of the insured's defense. Since the successful defense of the insured very often is concluded when judgment dismissing the claim is passed, it is appropriate to discuss the function of the insurance of legal protection. The Serbian Law of Obligations mentions "the expenses of litigation over the liability of the insured person", which the insurer covers within the limits of the insurance amount.

Thirdly, the "deep pockets" phenomenon, i.e. ruling on higher indemnity if it is known that the tortfeasor is backed by an insurer, is debatable. Namely, the issue of whether the defendant is insured is a private matter between them and their insurer.[10] The *inter pares* nature of liability insurance is taken into consideration in the case of voluntary insurance, while in the case of compulsory insurance the injured party has the option of choosing the defendant. Theory draws the conclusion that the existence of insurance often leads to lawsuits and conviction in order to ensure that the plaintiff receives indemnity precisely from the insurance. As far as the first instance is concerned, the filing of a lawsuit is influenced by numerous factors—including insurance. Insurance is viewed as something that parties may decide to invest in or they must obtain in certain situations, in order to facilitate the way that risk liability is managed. In this sense, knowledge that the tortfeasor is insured may induce the injured party to first attempt to reach an out-of-court settlement with them or their insurer. In well-established legal systems there are mechanisms that lead the injured party to follow a certain sequence of steps. It is only when this procedure proves inefficient that the injured party can initiate court proceedings. It is our opinion that insurance does not contribute to the taking of legal action any more than other factors do.

---

the liability of the insured. Insurance also includes the costs of the third injured party pertaining to the litigation against the insured. Speaking of the latter cost category, they too are covered by the insurance, but we will not be discussing them within the scope of the legal protection of the insured.

[10] Presently there are no legal systems that include the obligation for the insured (defendant) to notify the injured party (plaintiff) of the existence of liability insurance. This information may be relevant only in the context of optional insurance. If such a risk is covered by compulsory insurance, this is known in advance. V.: Merkin, Steele, 384.

However, when it comes to the amount of compensation awarded, the role of insurance is certainly more prominent. Even though one might point out, as an argument against this view that damages claims have been tried in the past regardless of insurance, today the question whether the tortfeasor has insurance may be viewed as a circumstance that defines their financial situation.

For proper assessment of the "deep-pockets" phenomenon and its scope, one should start from the fact that the insurer will not, in any case, "pay the bill, whatever its amount." (Merkin, Steele 2013, 384). Insurers protect themselves from unlimited liability through two types of financial limitations. The first one is the insurance sum, which represents the coverage limit. The insurer will not want to make payment to the injured party beyond the insured sum. For any possible restitution that is not covered by the insurance, the injured party can only address the tortfeasor/ insured. The second type of limitation of the insurer's obligation consists of deductibles and franchises, which stipulate the insured's stake in the restitution (Petrović Tomić 2019, 457–459). Hence, the role of the insurer in compensation claims is complex and depends on the context.

Fourthly, when liability insurance policy clauses are interpreted, the court strives for this to be within the spirit of liability regulations. However, this influence of indemnity law is not straightforward. This is why when interpreting insurance policies, the courts are "conflicted" between two contradictory aspirations that are specific to the nature of this insurance. Namely, liability insurance is the only insurance product with a dual target function: it should not only reduce the insured's exposure to liability but also ensure funds for compensation of the injured party. The challenge is to interpret the policy in light of the hybrid nature of liability insurance, therefore it may happen that the courts take a different course, i.e. deviate from the rules on liability with the aim of acknowledging precisely the particularities of this insurance. Nonetheless, this is in the spirit of releasing liability insurance from tort law and the knowledge that when appraising insurance compensation, it is possible to deviate from the rules of this branch of law. An insurer who compensates the insured by deviating to a greater or lesser extent from tort law has at their disposal institutions that allow them to recuperate part of the funds.

However, even if the tortfeasor has liability insurance, this does not guarantee that it will be of use to the injured party, in the role of plaintiff. There are circumstances that compromise compensation by the insurer (Merkin, Steele 2013, 385). Firstly, the insurer may enter certain objections against the injured party as well as against the insured, which may lead to a reduction of the compensation from insurance.[11] Secondly, many

[11] In legal systems that don't recognize *action directa* as a general institution of liability insurance, the possibility of limiting compensation by entering an objection are

liability insurance policies contain a limit for the compensation (intended for the injured party) and a limit for defense costs. Finally, there must be a context of the claim and the subject insurance. The injured party cannot count on that coverage of the claim that extends beyond the limit of the tortfeasor's liability insurance.

However, a feedback effect is noted that insurance has on liability risk. Every insured risk evolves under the influence of insurance, and this is most apparent in judicial practice. Namely, in developed insurance markets it is noted that liability insurance has been leading to new trends in judicial practice in the past several decades. This by no means implies that someone will be found liable because they are insured. The influence of insurance on judicial practice is more subtle: conditions of liability will be assessed less rigorously if the defendant is insured (Bigot, Kullman, Mayaux 2017, 508). One should also not neglect the *effect of avoidance or mitigation of excessively strict legal solutions through insurance*. Liability no longer has the weight that it had prior to the development of liability insurance. Filing a subrogation request, even though in principle prohibited against members of the insured's family, becomes permitted as a result of insurance.

Over time insurance has led to the relocation of claims from the responsible party to the insurer, as the more solvent debtor (Fuchs, Pauker, Baumgärtner 2017, 363–370). In addition to allowing the risk bearer to sleep soundly, this trend has also led to certain negative consequences, e.g. certain forms of deformation of liability. Such influences have been noted especially in legal systems where determining the indemnity has been left up to the courts, as well as in cases when compensation is determined according to the principle of fairness (Ćurković 2015, 20). Even though the courts most often do not mention insurance even in the rationale of the decision, its influence is quite noticeable.[12] Furthermore, the knowledge that there is liability insurance is used by the courts to appraise the financial situation of the tortfeasor (the liable party), and the court might not reduce the sum owed by the liable party, even though their financial situation meets the requirements for the implementation of this instrument, solely because they are insured.

For this reason, we believe that liability insurance merits special treatment, compared to other insurances, and we propose the introduction of a special branch of insurance law: liability insurance law.

---

much greater than in legal systems where the injured party cannot enter an objection that occurred after gaining the right to directly address the insurer.

[12] In countries such as Germany judicial practice is based on the principle of fairness, and the Federal Constitutional Court has confirmed that the existence of insurance is a relevant fact for deciding liability and determining the indemnity. See: Ćurković 2015, 22.

6. CONCLUSION

It is our conclusion that liability insurance, in its current form, was created and has endured as a response to the request for protection from increased risk. Historically viewed, liability is an older response to risk than risk transfer and over time there was a struggle over the issue of whether to allow the transfer of risk to insurers. For a long time, insurance was viewed with suspicion. The social climate and insufficient grounds and clarity of the institution of liability led to the favoring of liability over indemnity. In this sense, it is possible to divide the genesis of liability insurance into three phases. The first features the ban of such insurance, based on negating the moral qualities of transferring risk from the party that caused the injury to the insurer. This phase coincides with the period when the system of subjective liability for injury prevailed. The second phase is linked to the gradual acceptance of liability insurance, which was the consequence of understanding that the effectiveness of the legal order would increase if it accepted a system that accents compensation, while not negating responsibility. Finally, the third phase in the development of liability insurance was the introduction of certain forms of compulsory insurance, which occurred precisely in the domain of liability insurance. There is a notable overlap between the occurrence of new forms of insurance and significant commercial and technical progress. It is impossible to separate the allocation of risk that is generated based on regulations on liability and the increase in insurance, because many new types of insurance have emerged as a response to the changed legal landscape.

The development path that liability insurance has covered tells us that the founded legal order implies two mutually compatible institutions. While objective liability for damages is the response to numerous activities that render realistic the possibility of causing injury to others, regardless of whether the injury could have been prevented by caution, liability insurance is the response to the imposed regulatory framework, which enables liability to assume unprecedented proportions. The introduction of objective liability for damages meant creating liability risk, to which the regulatory framework responded by introducing compulsory insurance of that risk. Liability insurance supports the system of liability in achieving the set goals. In the 21st century this significant part of the legislation creates the conviction that the insurance market is a guarantee that efficient indemnity will be provided. Since the early 20th century, the risk of liability has become one of the most common risks, which creates a significant level of financial insecurity, whose compensation, in turn, is attempted through a system with the vocation of providing legal security. The culture of compensation—which can concisely be explained through the formulation that everyone seeks

opportunities to receive some form of compensation and which exposes service providers to potentially great liability—requires (compulsory) liability insurance.

It is undoubted that insurance is a factor that the parties take into consideration when deciding whether to file litigation for compensation, what their defense will be, whether and when they will conclude a settlement agreement, as well as how to exercise indemnity rights. Insurance is indisputably a procedural factor by its nature. Even though primarily a substantive legal institution, insurance today is a recognized procedural factor, whose scope under certain conditions may be limited by the circumstances of the specific case.

In conclusion, insurers that are involved in liability insurance, through their practices and indemnity litigation, are creating trends of the development/transformation of the institution of liability for damages. This leads to the creation of a type of indemnity insurance law, which is rather Americanized even in the European Union member states. It remains to be seen in which direction it will develop.

REFERENCES

Abravanel-Jolly, Sabine. 2017. *Droit des assurances.* Paris: Dalloz.

Besson, André. 1992. Osiguranje i građanska odgovornost. *Pravni život*, No. 9–10: 2268–2276.

Bonnard, Jérôme. 2012. *Droit des assurances.* Paris: LexisNexis.

Ćurković, Marijan. 2015. *Osiguranje od izvanugovorne i ugovorne (profesionalne) odgovornosti.* Zagreb: Inženjerski Biro.

Delpoux, C. 1992. Assurance et responsabilité: un couple en crise. *Risque*, 79–85.

Eliashberg, Constant. 2006. *Responsabilité civil et assurance de responsabilité civile,* Paris: L'Argus de l'assurance.

Fagnart, Jean-Louis. 1988. La socialisation des risques par les mécanismes de la responsabilité civile et de l'assurance. in: *Les assurances de l'entreprise*, Vol. I. Bruxelles: Bruylant, 419–448.

Fagnart, Jean-Louis. 2013. La compensation du domagge, Entre le droit de nuire et la réparation de l'irréparable", *Évaluation du dommage, Responsabilité civile et Assurance,* Liber Amicorum Noël Simar, Limal: Anthemis: 225–250.

Fagnart, Jean-Loius. 1994. Recherche sur le droit de la réparation. *Mélanges R. O. Dalcq: Responsabilité et assurance*, Bruxelles: Larcier, 135–157.

Fontaine, Marcel. 2016. *Droit des assurances.* Bruxelles: Larcier.

Frison-Roche, Anne-Marie. 2000. La dialectique entre responsabilité et assurance. *Risque*, 79–84.

Groutel, Hubert, Fabrice Leduc, Philippe Pierre, Maud Asselain. 2008. *Traité du contrat d'assurance terrestre.* Paris: LexisNexis.

Jankovec, Ivica. 1977. *Obavezno osiguranje za štete od motornih vozila.* Beograd: Savremena administracija.

Josserand, Louis. 1992. Evolucija odgovornosti. *Pravni život,* No. 9–10: 1164–1178;

Konstantinović, Mihajlo. 1992. Osnov odgovornosti za prouzrokovanu štetu. *Pravni život*, No. 9–10, Vol. I: 1153–1163.

Konstantinović, Mihajlo. 1982. Odnos između prava na naknadu štete i prava na osiguranu sumu. *Anali*, No. 3–4: 496–505.

Karanikić Mirić, Marija. 2013. *Objektivna odgovornost za štetu.* Belgrade: University of Belgrade Faculty of Law.

Karanikić Mirić, Marija. 2011. Odgovornost vlasnika motornog vozila kao preduslov odgovornosti osiguravača. *Pravni život,* No. 10: 685–707.

Lambert-Faivre, Yvone. 1981. Réflexions sur la nature juridique des assurances de responsabilité. 193–201 in *Mélanges dédiées à Jean Vincent*. Paris: Dalloz.

Lambert-Faivre, Yvonne, Laveneur Laurent. 2018. *Droit des assurances.* Paris: Dalloz.

Mayaux, Luc. 2011. *Les grandes questions du droit des assurances.* Paris: L. G. D. J.

Merkin, Robert, Jenny Steele. 2013. *Insurance and The Law of Obligations.* London: Oxford University Press.

Petrović Tomić, Nataša. 2019. *Pravo osiguranja,* Sistem, Knjiga I. Belgrade: Službeni glasnik.

Petrović Tomić, Nataša. 2011. *Osiguranje od odgovornosti direktora i članova uprave akcionarskog društva za osiguranje.* Belgrade: Faculty of Law.

Petrović Tomić, Nataša. 2020. Klauzula o vođenju spora u modernom osiguranju od odgovornosti. *Evropska revija za pravo osiguranja,* No. 2: 19–30.

Sanz Parilla, Milagros. 2010. Art. 68. Definicíon del seguro de responsabilidad civil, Comentario al Anteproyecto de Ley de Contrato de Seguro. *Revista Española de Seguros,* No. 143–144: 817–825.

Sokal, Vojislav. 1992. Štete pokrivene osiguranjem i njihova naknada. *Pravni život,* No. 11–12: 2325–2338.

Stojanović, Dragoljub. 1992. Istorijski razvoj i ciljevi građansko-pravne odgovornosti za prouzrokovanu štetu. *Pravni život,* No. 9–10: 1179–1190.

Tunc, André. 1982. Responsabilité civile et assurance, *Hommage à René Dekkers*, Bruxelles: Bruylant, 343–357.

Wandt, Manfred. 2010. *Versicherungsrecht*, 5th ed. Köln: Carl Heymanns Verlag.

Article history:
Received: 31. 10. 2020.
Accepted: 6. 12. 2020.

UDC 346.546.4

CERIF: S144, S180

DOI: 10.51204/Anali_PFUB_20405A

Ivana Rakić, PhD*

MONOPOLIZATION STANDARDS IN US COMPETITION LAW: EVOLUTION AND EVALUATION

The aim of this article is to provide a short overview and analysis of the US antitrust law. Section 2 of the Sherman Act stipulates that it is unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. The article presents case law that reflects the evolution of monopolization standards and provides some interpretations of undertakings' behavior that can be defined as monopolization. US practice shows that monopolization standards have changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which may lead to reduced innovation and other behaviors of undertakings that increase economic efficiency and improve competition, which is a type I error.

Key words: *Monopolization. – Antitrust law. – Sherman Act. – Competition law. – Abuse of dominance.*

1. INTRODUCTION

One of the major differences between competition law in United States of America (US) and European Union (EU), that is highlighted in the literature when conducting comparative analysis, is that there is no prohibition of abuse of a dominant position in US antitrust law. US law does not recognize the legal concept of abuse of dominance (the so-called

* Special Adviser, Commission for Protection of Competition of the Republic of Serbia; Research Fellow and External Associate, Institute of Comparative Law in Belgrade, *ivanarakic12@gmail.com*.

second pillar of the EU competition policy), but rather stipulates that undertakings will be punished for market *monopolization* or *attempted monopolization*. However, both legal institutes were introduced for the same purpose: to prohibit single-firm conduct (unilateral behavior) by undertakings that have a dominant position, i.e. that have significant market (monopoly) power and can undermine competition in the market.[1]

The prohibition of monopolization was introduced into US antitrust law as early as 1890, with the adoption of the Sherman Antitrust Act. Section 2 of the Sherman Act stipulates that it is unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. Attempted monopolization is regarded as the use of improper business strategies to attain monopoly position and monopolization as the use of such strategies to attain or maintain a monopoly, or to extend it still further, which means that the improper strategies are prohibited even when the accused undertaking is not the only market participant, i.e. when the undertaking does not have 100 per cent market share (Canoy, Rey, van Damme 2004, 254).

Monopolization is not regulated by special rules, so the interpretation of this prohibition is left to the courts, which have, for many years, by implementing the widely laid down Section 2 of the Sherman Act, built practice in the application of monopolization standards. The standards have changed over time, without the adoption of any guidance for their implementation, so the question of their interpretation has often been raised in practice, especially because the Sherman Act did not specify what is implied under the term "market monopolization".

This paper presents case law that reflects the evolution of monopolization standards and provides some interpretations of undertakings' behavior that can be defined as monopolization. US practice shows that monopolization standards have changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which may lead to reduced innovation and other behaviors of undertakings that increase economic efficiency and improve competition, which is a *type I error*.

After the adoption of the Sherman Act, the *(specific) intent test* was implemented until 1945, but following *Alcoa* in 1945,[2] the courts started to implement the *balancing test*, rejecting the specific intent test.[3] The

[1] Market power is defined as the ability of an undertaking to raise prices above the competitive level, i.e. to set prices above marginal cost (Landes, Posner 1981, 937 and 939; Motta 2009, 41).

[2] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[3] The literature on monopolization standards still points out that specific intent approach has re-emerged, especially since 1975, when the predatory pricing cases began

main difference between these two approaches is that the intent test is applied to demonstrate that the intention of dominant undertaking is only to destroy competition, whereas the balancing test is based on assessment of the effects of that undertaking's behavior on competition, i.e. on balancing the negative and positive effects of such behavior (Hylton 2010, 82).

It is indisputable that an undertaking cannot be punished only because of its monopoly position on the market, and such a definition of monopolization is not applicable. In particular, this means that the undertaking with the highest or high market share cannot be accused of monopolization simply because of this. The mere monopoly position is not unlawful *per se* and cannot be regarded as an abuse or a breach of the antitrust rules.

Only *certain behaviors* of undertakings acquiring or attempting to acquire a monopoly position are prohibited, i.e. to monopolize the market, for example, by destroying competitors.[4] Therefore, the violation of the Sherman Act is monopolization – not the existence of the monopoly itself. This interpretation was confirmed in *Standard Oil*, where the Supreme Court of the United States unambiguously determined that the purpose of Section 2 of the Sherman Act is not the direct prohibition of monopoly.[5] Judicial practice early confirmed that "normal" or "ordinary" conduct does not offend the Sherman Act, even if such conduct leads to or protects a monopoly (Meese 2005, 744). The courts also held that "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices [i.e. prices above marginal costs] at least for a short period is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct* [emphasis in original]."[6]

---

to develop after the publication of an academic paper on predatory pricing. It is paper by Phillip Areeda and Donald F. Turner: "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", *Harvard Law Review* 4/1975, 697–733 (Hylton 2010, 87).

[4] As in the US, under EU law, an undertaking cannot be punished because of its dominant position but only if it *abuses* that position.

[5] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911). Likewise, under Article 102 of the Treaty on the Functioning of the European Union (TFEU), it is not illegal or prohibited to hold a dominant position. However, abuse of a dominant position is prohibited.

[6] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872, 879 (2004).

2. EVOLUTION OF MONOPOLIZATION STANDARDS

2.1. Standard Oil Company of New Jersey v. United States

In *Standard Oil*, the oil company Standard Oil was accused for monopolization and the Supreme Court ruled that the company was liable due to the excluding of competitors from the market through predatory pricing. The company had a 90% market share, so the question raised in the proceedings was not whether the company had attained a monopoly position and the corresponding market power, nor whether the similar position was achieved, for example, in a price war, but rather whether such practice can be established as a behavior that hinders competition. Thus, the court required a finding of specific intent to monopolize, which could be reasonably assumed based on conduct that cannot be justified on the basis of legitimate competitive goals, conduct that can be understood only as an effort to destroy competition (Hylton 2010, 84–85).

The question raised before the Court whether the activities of the *Standard Oil* company were illegal *per se* or only deemed illegal if viewed as unreasonable or undue – led to the Court's position that Section 2 of the Sherman Act prohibits only unreasonable restraint of trade, conductive to creating monopolies.[7] The Court believed that the Act only prohibits the abuse of monopoly power or its unduly influence,[8] leading to the ruling in *Standard Oil* to be known in literature as the *theory of abuse* and the adoption of *abuse* as a standard of monopolization (Hylton 2010, 84; Hylton 2003, 187).[9]

The implementation of this standard requires a finding of a specific intent to monopolize, which implies an objective fact-based investigation to infer a conclusion on the conduct of the undertakings concerned.[10] This means that the standard of abuse is comprised of two elements: establishing the *conduct*, and establishing the specific *intent to monopolize*, which is

[7] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62.

[8] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61. Similar arguments are also given in *United States v. American Tobacco Co.*, 221 U.S. 106, 177–81 (1911). See Meese 2005, 750–753.

[9] For the criticism of the *Standard Oil* case, see McGee 1958.

[10] The specific intent to monopolize should not be equated to the subjective intent, which is used in other areas of law and which requires evidence of the defendant's actual state of mind. Instead of directly ascertaining the defendant's minds (subjective intent), the objective approach analyzes the state of mind that can be reasonably attributed to the defendant's conduct (Cass, Hylton 2001, 659). For similar, see Meese 2005, 753–756. This is the manner in which the evidence on the undertaking's monopolistic intent to destroy competition and create a monopoly is sought, either as direct evidence (e.g. in the form of company documents) or indirect evidence (e.g. business strategies that are only rational as part of a plan to eliminate competition) (Canoy, Rey, van Damme 2004, 259). For more about intent in US antitrust law, see Cass, Hylton 2001, 657–745.

based on the intent to exclude competitors, without any credible efficiency justifications for the defendant's conduct (Hylton 2003, 187).[11] Courts actually determine whether the undertakings' conduct is based on a credible increase in economic efficiency or improvement of competition, and if so, the undertaking concerned should not be found liable of unlawful monopolization (Hylton 2010, 85).

The standard established in *Standard Oil* is confirmed in *United States v. United States Steel Corp.*, in which company U.S. Steel was found not liable for monopolization. Although the U.S. Steel company was the largest market player, controlling 80 to 95 percent of domestic production, the Court deemed the fact insufficient to establish the infringement of competition since the Act does not punish undertakings for their size in itself.[12] U.S. Steel was not applying aggressive techniques to foreclose rivals in the market, but its growth resulted from the economies created by vertical integration and specialization within subsidiary units.[13]

2.2. United States v. Alcoa

The ruling in *Alcoa* found that it is not necessary to prove the specific intent to monopolize in each individual case since "no monopolist monopolizes unconscious of what he is doing."[14] With this, the practical use of the hitherto applicable intent test was altered. The *Alcoa* company was accused of monopolizing the aluminum market under Section 2 of the Sherman Antitrust Act, as it was held that the company's intent was to maintain the market monopoly through its conduct. Although the Court believed that the *Alcoa* company had violated the Act, it nonetheless rejected the claims that it was necessary to establish the intent to monopolize (Hylton 2003, 190–193; Meese 2005, 796).

The Court held that the violation of the Act must be established by balancing the procompetitive and anticompetitive effects of the defendant's conduct. The defendant's behavior needs to be justified by a substantial efficiency for its conduct (i.e. credible efficiency justification) that simultaneously neutralizes the negative effects of the conduct on competition (Hylton 2010, 85), while – in order to establish monopolization

[11] The Court found that it can be assumed that the intent to monopolize and preserve market dominance exists if the defendant's conduct is not a result of normal methods of industrial development, but different new methods with the purpose of excluding competitors from the trade. See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75.

[12] See *United States v. United States Steel Corp.*, 251 U.S. 417, 450–451 (1920). The Court said that the "law does not make mere size an offense" (*Ibid.*, 451).

[13] *Ibid.*, 442–445.

[14] *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (1945).

– it is necessary to demonstrate the existence of monopoly power, as well as that the effects of the distorted competition caused by the defendant's conduct outweigh the consumer benefits and efficiency gains (Cass, Hylton 2001, 672). Underlining the existence of monopoly power, as a condition for monopolization, does not imply that monopoly power must exist *ex ante*, i.e. before the potential or actual monopolist engaged in alleged anticompetitive conduct. It is necessary that obtaining or maintaining monopoly power is an *ex post* result of such conduct, i.e. that it was gained only after the defendant had been engaged in improper business strategies. Therefore, the courts ask whether this monopoly power was acquired or maintained through improper conduct, i.e. whether these unreasonable methods resulted in monopoly.[15]

This practice was soon confirmed in *United States v. Griffith* since the Supreme Court held that the specific intent to monopolize does not have to be demonstrated.[16] However, it is maintained that only in the case of attempt to monopolize is it necessary to prove the existence of a specific intent – the intent to eliminate competition or build a monopoly.

2.3. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

The *Alcoa* criteria were used decades later, for example in *Aspen Skiing*, in which the *Grinnell* criteria were also confirmed,[17] although today the majority of federal courts reject the views presented in *Alcoa*.

In *Aspen Skiing*, the Supreme Court held that the specific intent to monopolize cannot be equated to an intent to drive competitors from the market through legitimate means. The evidence of irrational business conduct (conduct not related to any apparent efficiency) can be taken as indirect evidence of a specific intent to monopolize.[18] This practice can be considered reasonable, seeing that the intent to eliminate competitors is in the very nature of competition, where only the fittest can survive, and that the goal of every (dominant) undertaking is to become a monopolist, i.e. a market leader. Based on the case law and literature, penalizing undertakings for their intent to do their best to be more efficient than their competitors (for example, by reducing prices), would turn into

[15] This is a difference between US and EU law, because in the EU only an already dominant firm can be liable of unlawful abuse of dominance, in accordance with the Article 102 TFEU. EU law prohibits abusive conduct only by companies that hold a dominant position *ex ante* in the relevant market.

[16] *United States v. Griffith*, 334 U.S. 100, 105–06 (1947).

[17] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n. 19, 603 (1985).

[18] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609 n. 39 (1985).

the penalizing competition itself, i.e. penalizing the motive forces of competition.[19]

Aspen Skiing is also significant because of the Supreme Court held that the exclusionary conduct refers to a practice whose purpose is to exclude or restrict competition and which is not based on the increase of economic efficiency,[20] thus the conduct of a dominant undertaking that makes economic sense and increases economic efficiency (i.e. valid business reasons) cannot be regarded as behavior that falls within the scope of Section 2 of the Sherman Act. The Court explained that the question whether certain conduct may be properly characterized as exclusionary cannot be answered by simply considering the effects of such conduct on competitors, but it is relevant to consider the impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[21] The Court also showed that an undertaking, even a monopolist, does not have an obligation to cooperate with its rivals, thus the case is considered one of the most important cases that establish the practice of providing options to undertakings to refuse cooperation with competitors.

2.4. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. and United States v. Microsoft Corp.

Brooke and *Microsoft* introduced a broader shift toward the specific intent formulation, considering that the courts focused on conduct when addressing intent. This new approach reflects modern jurisprudence, which generally rejects the criterion of anticompetitive intent and instead requires a heavier burden of proof of market effect (Werden 2006, 426). The courts were not concerned with subjective motivation but rather merely asked whether the conduct would be considered rational when assessed by objective criteria, such as unreasonable business methods or legitimate business justification. In *Brooke* it is stated that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[22] In *Microsoft*, it is stated that in considering whether the defendant's conduct was

[19] See *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986); *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–1402 (7th Cir. 1989); Werden 2006, 426, fn. 57; Kolasky 2002, 16.

[20] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). In its ruling, the Court supported its position by relying on academic papers on competition for sources and quotations, such as Robert Bork's *The Antitrust Paradox* (1978) and Phillip Areeda and Donald Turner's *Antitrust Law* (1978).

[21] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

[22] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

exclusionary, for the purposes of Section 2 of the Sherman Act, the focus was on the effect of that conduct, not on the intent behind it.[23]

2.5. United States v. Grinnell Corp. and Verizon Communications Inc. v. Law Offices of Curtis V. Trinko

In *Grinnell*, the Supreme Court determined two cumulative conditions for monopolization, making very important progress in the implementation of Section 2 of the Sherman Act, given that all criteria (the so-called elements of monopolization) established in this case are also applicable today. The Court held that monopolization means a willful acquisition or maintenance of monopoly power by exclusionary practices of undertakings or illegal conduct directed at foreclosure of rivals from competition. Therefore, monopolization defined as such corresponds to conduct that in EU practice is regarded as exclusionary abuse of dominance.

The Court established that the monopolization consists of two elements: 1) the possession of monopoly power in the relevant market, and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[24]

The ruling was reaffirmed in *Trinko*, changing the evaluation of monopoly power. It particularly emphasized that the possession of monopoly power will not be found unlawful unless it is accompanied by elements of anticompetitive conduct.[25] Thus, monopoly power is a necessary element of monopolization, accompanied by exclusionary conduct, i.e. conduct that is not simply competition on the merits, and that would make no economic sense but for its tendency to eliminate competition (Werden 2006, 421).

3. EVALUATION OF MONOPOLIZATION STANDARDS

Today it is a well-established that obtaining or maintaining a monopoly is an antitrust violation only in cases when the potential or actual monopolist has engaged in exclusionary conduct. The courts examine whether companies have "monopoly power" in the relevant market as well as whether that position was gained or maintained through

[23] *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam).

[24] *United States v. Grinnell Corp.,* 384 U.S. 563, 570–571 (1966).

[25] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S.Ct. 872, 879 (2004).

improper conduct, i.e. through unreasonable methods. In order to evaluate the anticompetitive and procompetitive effects of the conduct, the courts must determine whether the conduct has a legitimate business justification.

It is not always easy to distinguish between conduct that should be allowed and conduct that should be prohibited, because the monopolization standards used to assess whether conduct is forbidden under US antitrust law are vague (Elhauge 2003, 255). The standards have changed over time, because they were not specified in the Sherman Act. The law offers the courts some general principles, but the courts ultimately explain and distinguish which conducts should be deemed undesirable or illegal. This is why the US courts play an important role in the implementation and interpretation of these standards and their evolution; they help the understanding of the general concept of monopolization and define precisely the standards. Still, it is clear that a company is allowed to hold or attempt to achieve monopoly, even by certain aggressive methods. This is because the essence of the US system is that honest, tough competition is never forbidden (Canoy, Rey, van Damme 2004, 259).

The US antitrust law is not regulatory but allows monopolists to exploit their monopoly position and exercise monopoly power vis-à-vis the consumers. For instance, such "monopolistic exploitation" is not allowed in EU competition law because exploitative abuse are considered anticompetitive conduct. In other words, in US law no attempt is made to address exploitative conducts because the US approach is aimed at preventing "monopolization" of markets; it is primarily focused on preventing companies achieving a monopoly or a dominant position, not on constraining monopolies in their conduct, which is what is reflected in EU competition law (Canoy, Rey, van Damme 2004, 259).

In the US it is believed that the law should not stand in the way of companies using regular means to maximize their profit by trying to become monopolist through improper methods to suppress competition on the merits. The law is not concerned with actual behavior once a monopoly has been established (Canoy, Rey, van Damme 2004, 223), because it protects the openness and competitive structure of the market where the competition process is responsible for determining price and output levels (Schweitzer 2008, 144). The US law does not control the exercise of monopoly power but only its acquisition or maintenance which, in contrast, seems to be proof of the regulatory approach embraced by EU competition law (Schweitzer 2008, 143). According to judicial practice in Europe, dominant companies have a "special responsibility" not to allow their conduct to impair genuine undistorted competition in the market, i.e. to not abuse their powerful market position by distorting competition. In Europe, dominant companies must ensure that competition is maintained by rivals, while in the US, large companies are entitled to

compete aggressively and to be freewheelingly focused on their own success as soon as they attain monopoly on their competitive merits.

This could be the reason why the US economy has changed in the last twenty years in terms of experiencing a growing concentration of economic power in large corporations. As a model of competition for the world and the land of free markets, the US has allowed the great expansion of firms and increase of market concentrations to such an extent that some authors even claim that it has been transformed into the land of market power (Philippon 2019). Due to the these changes, there is an idea that competition in the US has decreased because the industry leaders increased productivity, which in turn leads to their competitive advantage and the lack of competition (Philippon 2019). However, high concentration does not necessarily imply market power and negative effects on consumer welfare, nor should market concentration be confused with competition. A small shift towards more monopolistic structures (i.e. increased market concentration) – which is an inevitable consequence of market forces such as technological development, globalization, and economy of scale – does not necessarily mean a decrease in competition. The increase in market concentration is beneficial as there are more large firms and economy of scale occurs. This means that higher market concentration could be caused by increased as opposed to decreased competition, since competition is about incentives for the firm. Therefore, it should not be ruled out that the US still has a freer and more competitive economy than Europe.

This is the most important difference between the US and the EU approaches to monopolization, which could affect companies' incentives to innovate and invest. The EU competition law reaches more broadly to regulate abuses by a dominant firm, taking an interventionist approach, while the US courts have taken a relatively conservative approach toward monopolization, in the sense of showing reluctance to penalize a firm simply because of its monopoly status (Hylton 2005, 7). While the US courts are mainly concerned with preventing a market structure where anticompetitive practices are likely (with emphasis on the behavior of the monopolist), European competition authorities are more concerned with the status of the company, asking whether it is dominant or not. Additionally, dominance is easier to establish under EU competition rules than monopoly power under US antitrust law. The US law is demanding, passing down a hard burden after *Trinko*, as it is difficult to prove a monopolization violation (Fox 2014, 142). This means that monopolistic conduct prohibited by US law is likely to constitute an abuse of dominance under EU law, although not vice versa (Fox 2014, 150).

The EU underestimates the ability of markets to self-correct and it is concerned more with avoiding type II (false negative) errors, while the

US approach believes that efficiency drives companies' choices and it tends to put more emphasis on reducing type I (false positive) errors in order not to chill competition (Kolasky 2004, 42). Such error-cost analysis provides justification for the US approach because too much intervention runs the risk of destroying competition in the name of saving it. Therefore, competition law should not intervene where the markets tend to be self-correcting and where the competition can restore or create competitive conditions. This is why antitrust intervention that may chill or stop efficient transactions far costlier than allowing harmful transactions to proceed and relying on the market to correct the problem (Fox 2008, 72).

It is often said that US antitrust law protects competition and does not protect competitors from hard or rough competition, from unfair, even fraudulent, competition; it protects consumer welfare by not intervening in the marketplace (Fox 2008, 69, 70). The basic concept of the US antitrust law is that prices should be controlled by the free market because if the firm prices at monopoly levels, the high price itself may invite new entry and expanded competition, and market forces would gradually wear away the monopoly power (Fox 1986, 993). Considering that "efficiency" is the watchword of the US antitrust law, it is understandable why the courts are prepared to apply the antitrust law only to improve efficiency (Fox 1986, 983).

Therefore, there is no need for expansive applications of antitrust law, which may reduce innovation. Therefore, the EU should not repeat the early US mistakes by protecting competitors instead of competition. EU competition policy should not be an obstacle to innovation and growth. This is why there are proposals for additionally improving and properly defining US monopolization standards, in order to assess whether the alleged exclusionary conduct is successful in furthering monopoly power solely by the monopolist improving its own efficiency or by impairing rival efficiency, regardless of whether it enhances monopolist efficiency (Elhauge 2003, 253).

REFERENCES

Areeda, Phillip, Donald F. Turner. 1975. Predatory Pricing and Related Practices under Section 2 of the Sherman Act. *Harvard Law Review* 4: 697–733.

Canoy, Marcel, Patrick Rey, Eric van Damme. 2004. Dominance and Monopolization. 210–289 in *The International Handbook of Competition*, edited by Manfred Neumann and Jürgen Weigand. Cheltenham/Northampton: Edward Elgar.

Cass, Ronald A, Keith N. Hylton. 2001. Antitrust Intent. *Southern California Law Review*. 74(3): 657–745.

Elhauge, Einer. 2003. Defining Better Monopolization Standards. *Stanford Law Review*. 56(2): 253–344.

Fox, Eleanor M. 1986. Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness. *Notre Dame Law Review* 61(5): 981–1020.

Fox, Eleanor M. 2008. Abuse of Dominance and Monopolisation: How to Protect Competition Without Protecting Competitors. 69–77 in *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, edited by Claus-Dieter Ehlermann, Mel Marquis. Oxford/Portland: Hart Publishing.

Fox, Eleanor M. 2014. Monopolization and Abuse of Dominance: Why Europe is Different. *The Antitrust Bulletin* 59(1): 129–152.

Hylton, Keith N. 2003. *Antitrust Law: Economic Theory and Common Law Evolution*. New York: Cambridge University Press.

Hylton, Keith N. 2005. Section 2 and Article 82: A Comparison of American and European Approaches to Monopolization Law. Boston University School of Law Working Paper No. 06–11. *https://ssrn.com/abstract=902655* (last visited 31 October 2020).

Hylton, Keith N. 2010. The Law and Economics of Monopolization Standards. 82–115 in *Antitrust Law and Economics*, edited by Keith N. Hylton. Cheltenham/Northampton: Edward Elgar.

Landes, William M, Richard A. Posner. 1981. Market Power in Antitrust Cases. *Harvard Law Review* 94(5): 937–996.

Kolasky, William J. 2002. What is Competition? U.S. Department of Justice, Antitrust Division. *https://www.justice.gov/atr/file/519761/download* (last visited 26 October 2020).

Kolasky, William J. 2004. What is Competition? A Comparison of U.S. and European Perspectives. *The Antitrust Bulletin* 49(1–2): 29–53.

McGee, John S. 1958. Predatory Price Cutting: The Standard Oil (N. J.) Case. *Journal of Law and Economics* 1: 137–169.

Meese, Alan J. 2005. Monopolization, Exclusion, and the Theory of the Firm. *Minnesota Law Review* 89(3): 743–847.

Motta, Massimo. [2003] 2009. *Competition Policy – Theory and Practice*. New York: Cambridge University Press. Reprint.

Philippon, Thomas. 2019. *The Great Reversal: How America Gave Up on Free Market*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press.

Schweitzer, Heike. 2008. The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC. 119–164 in *European Competition Law Annual 2007: A Reformed Approach to*

Article 82 EC, edited by Claus-Dieter Ehlermann, Mel Marquis. Oxford/Portland: Hart Publishing.

Werden, Gregory J. 2006. Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test. *Antitrust Law Journal* 73(2): 413–433.

Article history:
Received: 31. 10. 2020.
Accepted: 6. 12. 2020.

UDC 336.227.1/.2; 341.231.14:336.225.3

CERIF: S141

DOI: 10.51204/Anali_PFUB_20406A

Lidija Živković, LL.M.*

RESOLUTION OF DUAL RESIDENCE INSTANCES IN THE CASE OF COMPANIES

The application of double taxation treaties presupposes that the potential cases of dual residence have been previously resolved. For this purpose, the major model-conventions on the basis of which double taxation treaties around the globe are negotiated contain the so-called tie-breaker rule. In the wake of the recent revision of the international tax system resulting from the OECD's Base Erosion and Profit Shifting Action Plan, the existing tie-breaker rule for companies has been thoroughly amended. Instead of determining companies' residence based on the place of the effective management criterion, the new approach stipulates that such cases will be decided through the application of the Mutual Agreement Procedure, between the competent authorities of the relevant contracting states. After outlining the historical development of the said mechanism in the context of dual residence resolution, this article purports to critically assess its desirability, with a special focus on its implementation in Serbia.

Key words: *Fiscal Residence. – Dual Residence. – Tie-breaker rule. – Mutual Agreement Procedure. – Place of Effective Management.*

1. THE CONCEPT OF FISCAL RESIDENCE AND ITS RELEVANCE FOR THE APPLICATION OF TAX TREATIES

The concept of fiscal residence lies at the very core of the international tax system. It is by far the most commonly utilised personal connecting factor, the purpose of which is to signalize the fiscal attachment

* Teaching Assistant, University of Belgrade Faculty of Law, *lidija.zivkovic@ius.bg.ac.rs*.

of a taxpayer to a specific taxing jurisdiction (Knechtle 1979, 35–36; Popović 2017, 246). It is not only crucial for the application of national tax laws, but also for the functioning of international tax conventions (tax treaties).[1] Namely, in order for a tax treaty to be applicable in a specific case, the interested taxpayer needs to fall under the personal scope of the tax treaty in question, which is determined by having recourse to its articles 1 – *Persons covered* and 4 – *Resident* (Berglund, Cejie 2018, 55).

In line with Art. 1 of the OECD Model Convention, a tax treaty is applicable to a person who is a resident of one or both of the contracting states. The term 'person' shall be understood to include an individual, a company, or any other body of persons.[2] Pursuant to Art. 4 of the OECD Model Convention the term 'resident of a contracting state' means any person who, under the laws of that state, is liable to tax therein by reason of their domicile, residence, place of management or any other criterion of a similar nature.[3] Accordingly, it may be concluded that no specific definition of a resident for tax treaty purposes exists (Živković 2017, 18). The term is defined by referencing the contracting states' domestic tax laws and is, therefore, reliant on the residence criteria used therein. Consequently, tax liability under the national tax law of one of the contracting states is a necessary precondition for treaty residence. The provision stipulates *exempli causa* several commonly used residence criteria, therefore leaving it open for any other similar criterion to also be taken into account. The crucial characteristic of the enumerated as well as any other potentially utilised criteria is that they generate comprehensive tax liability for the taxpayer—liability regarding the taxpayer's worldwide income.[4]

Jurisdictions are completely free to deem residence using whatever criterion they find appropriate (Obuoforibo 2018, 7). Depending on the criteria that they apply in determining the fiscal residence of companies, jurisdictions can be divided into three groups. The first group consists of

[1] Currently there are approximately 3,000 tax treaties concluded between various tax jurisdictions around the world. They are predominantly based on the two main model conventions, which serve as guiding templates in the course of treaty negotiations. They are published by the Organisation for Economic Cooperation and Development (hereinafter: OECD Model Convention) and the United Nations (hereinafter: UN Model Convention). Although the provisions cited in this paper refer to the OECD Model Convention, they do not differentiate significantly from those contained in the UN Model Convention. In addition, the existing discrepancies are not relevant from the point of view of the topic of this paper.

[2] Article 3(1)(a) Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing, 2017.

[3] The term also includes the contracting state and any political subdivision or local authority thereof as well as a recognised pension fund of the state in question.

[4] Para. 8, Commentary on Article 4 of the 2017 OECD Model Convention.

jurisdictions applying a formal criterion, such as the place of incorporation or the place of registered seat. The second group encompasses countries prescribing a subjective criterion that presupposes that residence is determined on a case-by-case basis by considering all relevant facts and circumstances. Examples of such criteria are the place of management, the place of effective management, and the place of central management and control. The last and the largest group of jurisdictions applies both formal and subjective criterion, alternatively. Serbia belongs to the latter group.

2. RESOLUTION OF DUAL RESIDENCE AS A PREREQUISITE FOR TAX TREATY APPLICATION

Due to the fact that residence for the purpose of tax treaty application is dependent on the definition of a resident as stipulated by the national tax laws of the contracting states in question, it is possible for a taxpayer to be considered a resident of both of the contracting states concurrently. The described circumstance is referred to as a case of *dual residence*. With respect to corporate taxpayers, dual residence may arise in the following situations (Živković 2017, 25). Firstly, it can follow from the contracting states applying different criteria for the determination of residence under their national tax laws. More specifically, if one jurisdiction applies a criterion of a formal nature, whereas the other applies a criterion of a factual nature, concurrent application of those two criteria may easily lead to each of the contracting states considering the taxpayer to be their resident and, consequently, a dual resident in terms of the treaty. Secondly, dual residence may result if both contracting states apply the same factual criterion for the determination of residence in their national tax laws, but interpret that criterion differently. This could cause a taxpayer to be deemed, for the purpose of national law application, a resident of each of the states in question, and accordingly, a dual resident for the purpose of treaty application.

However, the nature of the majority of tax treaty provisions is such that they are applicable only if the taxpayer is a resident of exclusively one of the contracting states for the purpose of tax treaty application (Lang 2013, 83). Therefore, in order for the treaty distributive rules[5] as well as the methods article[6] to be applicable, the potential case of dual residence must be resolved beforehand.[7] For this purpose, a separate

[5] Tax treaty provisions modelled upon articles 6–22 of the OECD Model Convention.

[6] Tax treaty provisions drafted on the basis of article 23A and 23B of the OECD Model Convention.

[7] This is because each of these provisions refers to one of the contracting states as being the residence state and the other contracting state as being the source state.

provision directed at the resolution of dual residence cases of companies—the so-called *tie breaker rule*—is provided in Art. 4, para. 3 of the OECD Model Convention. The application of a tie-breaker rule has as a result that a person who qualified as a resident of both of the contracting states in line with treaty provision patterned after Art. 4, para. 1 of the OECD Model Convention, will be regarded, for treaty purposes, as a resident of exclusively one of the states in question. Nevertheless, the said provision does not in itself affect the residence status of that person for the purpose of national tax law (Sasseville 2006, 45).[8]

3. THE EVOLUTION OF THE TIE-BREAKER RULE

3.1. The Development of the Factual Criterion

Throughout much of its existence, the OECD Model Convention remained unchanged with respect to the tie-breaker rule for companies. According to the 1963 OECD Draft Model Convention, Art. 4 para. 3 stipulated that '*Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated'*.[9] The provision was adopted in virtually identical form in the 1977 OECD Model Convention and, apart from one minuscule amendment in 1995, remained intact until 2017.

The idea of a factual criterion as a tie-breaker rule in the case of companies precedes the work of the OECD.[10] It can be traced back to the so-called London Draft Model,[11] published by the League of Nations in

[8] There are, however, jurisdictions whose national tax laws specifically presuppose, with the aim of limiting opportunities for abusive practices, that a taxpayer which was deemed to be their non-resident, for the purpose of treaty application on the basis of a tie-breaker rule, ceases to be their resident for the purpose of national tax law as well. It is interesting that Serbian tax authorities follow this approach in practice, although nothing in the Serbian tax legislation requires them to do so, causing a significant level of legal uncertainty (Popović, Kostić 2009, 71).

[9] Although the provision refers to dual residence of persons other than individuals, it is the cases of dual residence of companies that are the most numerous and, in an economic sense, the most relevant. It is for this reason that the author will use the phrases 'dual residence of persons other than individuals' and 'dual residence of companies' interchangeably.

[10] During the previous half a century, the OECD established itself as the dominant body outlining international tax policy and the design of double tax treaties. However, work on this matter was first initiated by the League of Nations during the 1920s. It was not until the late 1950s that the predecessor of the OECD, the Organisation for European Economic Co-operation (OEEC), took over the work on the development of a model tax treaty. Initially consisting of 18 European countries, the OEEC transformed into the OECD in 1961, following the accession of the United States and Canada.

[11] The London Draft Model and the Mexico Draft Model resulted from the work of the League of Nations Fiscal Committee, undertaken from 1940 to 1946, on the matter

1946, which presupposed in its Art. II, para. 4 that '*The fiscal domicile of a partnership, company and any other legal entity or de facto body shall be the State in which its real centre of management is situated*'.[12] However, the cited model provision was not endorsed by a considerable number of jurisdictions in the course of subsequent treaty negotiations. For this reason, the OEEC later decided to base its future model tie-breaker rule on a criterion that was better represented in treaty practice. As a result, in its 1957 Report the OEEC Fiscal Committee suggested substituting the real centre of management criterion with the place of company's management and control criterion. Although it had its origin in the United Kingdom's national tax law,[13] the suggested criterion was also widely accepted among continental European countries in their treaties with the UK (OEEC Fiscal Committee 1957b, 6). The choice of a more frequently used criterion should be understood in the context of the objective of the new model convention, which was to establish uniform and widely accepted principles, definitions, rules, and methods on which the future double tax treaties would be based (Holmes 2014, 61).

The switch to the place of effective management (POEM) criterion ensued the following year, with the intention of harmonising the terms used in various parts of the future model convention (OEEC Fiscal Committee 1958, 6). Namely, the POEM criterion was already present in the provision allocating taxing rights in the case of profits from shipping, inland waterways transport, and air transport (OEEC Fiscal Committee 1958, 6). Last but not least, the UK delegate to the Fiscal Committee confirmed that in this regard the place where the business is managed and controlled basically means the POEM of the enterprise (OEEC Fiscal Committee 1957a, 11).

The prevailing assumption at that time was that, unlike in the case of individuals, instances of dual residence of companies are fairly rare,[14] for which reason the tie-breaker rule was thought to have little practical importance. Consequently, the definition of the POEM criterion was not provided in the Draft Model nor in any of the subsequent versions of the Model Convention. So as to be able to apply the said criterion, tax practitioners relied heavily on the interpretation of similar criteria

of juridical double taxation. They are commonly referred to as the predecessors of the OECD Model Convention and UN Model Convention, respectively.

[12] Protocol of the Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property (London Draft). *https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-15.xml;chunk.id=item-15;toc.depth=1;toc.id=item-15;database=;collection=;brand=default* (last visited: 1 November, 2020).

[13] For an elaborate analysis of the evolution of and the case law on the central management and control criterion see: Couzin 2002, 55–102.

[14] OECD. 2019. *Model Tax Convention on Income and on Capital 2017 (Full Version)* Paris: OECD Publishing, C(4)-23.

contained in the respective national tax laws (Burgers 2007, 378). Therefore, during four decades of POEM test application, numerous uncertainties appeared regarding its interpretation, rendering it one of the most controversial aspects of the model conventions and, consequently, the double tax treaties patterned upon them. In an attempt to introduce some clarity into its meaning, the OECD repeatedly amended the Commentary on Art. 4 of the Model Convention (Jones 2009, 186).

The 1992 amendment removed the reference to the UK's treaty practice, as well as the clarification that the POEM has the same meaning as the initially advocated common law criterion—the place of management and control. The said removal voided the referencing of the settled case law on the interpretation of the latter criterion for the purpose of defining the POEM, leaving its meaning completely vague. It is for this reason that in 2000 the Commentary on Art. 4 of the OECD Model Convention was supplemented with certain guidelines on the interpretation of the tie-breaker rule for companies. It was specified that the POEM refers to a place where key management and commercial decisions necessary for the conducting of the entity's business are in substance made. It was identified that this will ordinarily be the place where the most senior person or group of persons (e.g. board of directors) make their decisions, or the place where actions to be taken by the entity as a whole are determined. Therefore, it seemed that the OECD supported the idea that the place of the top management of the company is crucial. The Commentary further underlined that all relevant facts and circumstances need to be evaluated in each specific case in order to determine the POEM. This statement was intended to reinforce the substance over form principle as the basis of the said provision (Burgstaller, Haslinger 2004, 387). Finally, it asserted that although an entity may have more than one place of management, it can only have one POEM at any given point in time.[15]

At the turn of the 21st century, it became apparent that the development of information technology, global transportation systems, and the ever-growing complexity of the organisational structures of companies would deprive the POEM of its potency as a tie-breaker rule (Burgstaller, Haslinger 2004, 377). All too often this criterion was not able to resolve cases of dual residence, as it became quite common for a company to have POEM in more than one jurisdiction at the same time. This is why in 2003 the OECD Technical Advisory Group issued a discussion draft suggesting two alternative solutions to the existing problem (OECD TAG 2003). The first proposal was intended to refine the POEM test by expanding the Commentary explanations on how this concept should be interpreted, while the second presupposed replacing

[15] OECD. 2019. *Model Tax Convention on Income and on Capital 2017 (Full Version)*, Paris: OECD Publishing, C(4)-26.

the existing tie-breaker rule with a hierarchy of tests, similarly to the approach followed in the case of dual residence of individuals.[16]

Due to the opposition by the majority of the OECD member states, none of the specific solutions suggested in the discussion draft were adopted. However, additional clarifications were added to the Commentary in 2008. Surprisingly, the sentence specifying that the POEM ordinarily means a place where the most senior person or group of persons (e.g. board of directors) makes its decisions was removed (OECD 2008, 7). The question was therefore raised whether the said amendment represents a new stance of the OECD, that the POEM does not relate to the place where the company's top management makes decisions, but rather to the place from which actual day-to-day management is carried out. If the latter were to be true, the POEM could be interpreted in line with the continental European approach, based on which focus is placed on the location from which everyday management of the company is conducted, instead of the location where top strategic decisions are made, on which the Anglo-American approach is based (Burgers 2007, 385).

The evolutionary path of the POEM concept shows that its introduction to the Model Convention was not thoroughly though out. Although the rationale of a tie-breaker rule implied using a criterion that is autonomous and, as such, independent of influences from tax laws of various contracting states, this was not possible to achieve due to the absence of precise guidelines for its interpretation. Relying on the fact that dual residence of companies rarely occurred at the time of the inception of the tie-breaker rule, its creators imprudently linked the meaning of the POEM criterion to a similar but not identical concept already present in certain national tax systems. Moreover, the inconsistency and contradictions between what were supposed to be clarifications of the concept, brought about by subsequent amendments of the Commentary, considerably contributed to the confusion. To this day, the problem in interpreting the POEM test boils down to the fact that contracting states tend to identify its meaning with the meaning of similar criteria present in their national laws (e.g. the place of management and control in common law jurisdictions or the place of management in continental European jurisdictions).[17] The described problem has only been exacerbated by the technological advancement of the business environment (OECD TAG 2001, 8).

[16] Compare to Article 4(2) of the OECD Model Convention.

[17] For an overview of different approaches to the interpretation of POEM, see: Sasseville 2009, 297–299.

3.2. The Shift towards the Mutual Agreement Procedure

The financial crisis of 2008 and its consequences substantially affected the international tax landscape. The ensuing budgetary constraints in countries around the world urged the launching of an international action plan by the G20 and the OECD, directed at combating tax planning structures used by multinational enterprises for the purpose of minimising their tax liabilities. The resulting Base Erosion and Profit Shifting Plan (BEPS Action Plan) encompassed 15 actions, each of which set forth various recommendations presupposing the amendment of national tax laws, or of the existing double tax treaty network, intended to prevent or at least limit the opportunities for aggressive tax planning and tax avoidance (OECD/G20 2015a, 5). The BEPS Action 6 contained, among others, recommendations regarding the tie-breaker rule for persons other than individuals (OECD/G20 2015b, 72–75).

The stance on dual residence of companies taken by the OECD in the BEPS Action Plan differs substantially from the one advocated during the several preceding decades. While maintaining the view that cases of dual residence of companies are relatively rare, the OECD emphasised that these often involve abusive practices, which call for the introduction of a specific anti-abuse measure aimed at preventing them (OECD/G20 2015b, 69, 72). The solution was found in addressing cases of dual residence on a case-by-case basis by the competent authorities of the contracting states.[18] In order to include the recommendations put forward by the BEPS Action Plan, the OECD Model Convention was revised in 2017. Subsequently Art. 4, para. 3 reads 'Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.'

The idea of dual residence cases being resolved through mutual agreement of the contracting states' competent authorities is far from new; with respect to dual residence of individuals, it has been a part of the OECD Model Convention since the very beginning.[19] However, in respect of dual residence of companies, its inclusion into the text of the Model Convention was not as straight-forward.

[18] Para. 23, Commentary on Art. 4 of the 2017 OECD Model Convention.

[19] See: art. 4(2)(d) of the 1963 OECD Draft Model Convention.

Already in 1957, the OEEC Fiscal Committee voiced concerns about the potential inefficiency of the factual tie-breaker rule (OEEC Fiscal Committee 1957b, 2). It suggested that the cases of dual residence that cannot be resolved through the application of a factual tie-breaker rule—at that time the place of management and control—should be settled by mutual agreement of the competent authorities (OEEC Fiscal Committee 1957b, 2). In substance, the recommendation presupposed the supplementary application of the two mentioned mechanisms. Surprisingly, the Fiscal Committee quickly changed its approach. It decided to omit the provision referring the case to the competent authorities, stating without any further explanation that 'it will hardly ever be required' (OEEC Fiscal Committee 1957c, 10). The said change in approach coincided with the substitution of the place of management and control criterion with the POEM criterion. The reasoning behind the omission of the supplementary mechanism is even harder to grasp if we take into account that at the same time the Fiscal Committee observed that the two factual criteria have, in substance, the same meaning (Jones, 2009: 185).

More than four decades later, the OECD reconsidered the idea of mutual agreement as a tool for the resolution of dual residence instances in the case of companies. The reason was an indication by a number of its member states that they had already began adopting bilaterally a different approach compared to the long-standing POEM test: handing over the decision on dual residence of companies to their respective competent authorities.[20] Consequently, in 2008 mutual agreement was included in the Commentary on Art. 4 of the OECD Model Convention as an alternative provision to the factual tie-breaker rule. Contracting states were, therefore, given the option of introducing the Mutual Agreement Procedure (MAP) into their treaties instead of the default tie-breaker rule at the time—the POEM test—which remained part of the OECD Model Convention. In comparison to the earlier OEEC suggestion regarding the MAP, the newly-proposed provision was not supposed to serve as a last resort, i.e. in the case of unsuccessful application of the factual criterion, but instead of it. The alternative provision added to the Commentary was identical to the current Art. 4, para. 3 of the OECD Model Convention.

4. CASE-BY-CASE DECISION OF THE COMPETENT AUTHORITIES INSTEAD OF A TIE-BREAKER RULE

It is evident from the current wording of Art. 4, para. 3 that the OECD Model Convention no longer provides a tool capable of definitely resolving potential cases of dual residence of companies (Bräumann,

[20] OECD Centre for Tax Policy and Administration, *Draft Contents of the 2008 Update to the Model Tax Convention*, 21 April to 31 May 2008, 8.

Tumpel 2016, 306). As such, it cannot be regarded as a tie-breaker rule in the true sense of the word because, in substance, it does not actually 'break a tie'. The provision does not impose a duty on the competent authorities to reach an agreement on the resolution of dual residence, but requires them only to *endeavour* to agree on the issue. As a result, the application of this provision may easily leave a case of dual residence unresolved. Moreover, the provision does not lay down any deadline for the competent authorities to finalize the MAP (even if the case of dual residence is to remain unresolved). It is interesting to note that in the case of individuals, the OECD Model Convention does not leave room for a case of dual residence to remain unsettled. Art. 4, para. 2 explicitly requires the competent authorities to settle the issue by mutual agreement (Bräumann, Tumpel 2016, 317 n. 54). It is far from clear what could justify such considerably less favourable tax treatment of companies compared to individual taxpayers. After all, one of the overarching principles of tax policy—the principle of tax neutrality—presupposes that tax law should not interfere with the taxpayer's economic choices (Kahn 1990, 11), one of which is the choice of form in which they will conduct their business activity.

The Commentary clarifies that the mutual agreement referred to in this provision should be initiated following the rules of the MAP stipulated under Art. 25, para. 1 of the OECD Model Convention. Consequently, the settlement of a case of dual residence must be initiated by the dual resident taxpayer. The request may be made as soon as it becomes probable that the taxpayer will be considered a resident of each of the contracting states pursuant to Art. 4, para. 1 of the OECD Model Convention.[21] If, however, the taxpayer fails to submit a request within the deadline generally prescribed for the initiation of a MAP, the competent authorities will not address such a case. In other words, the competent authorities are not obliged to address cases of dual residence *ex officio*, regardless of the fact that they might be aware of them.

Once the procedure has been initiated, the competent authorities should take into consideration certain factors when determining the single state of residence. These include the place of effective management, the place of incorporation, the place where the company is constituted, as well as other relevant factors. The manner in which the provision is drafted implies that none of the cited criteria is given priority. As the list is non-exhaustive, the competent authorities are free to consider any other criteria they deem relevant. In the same vein, the Commentary lists additional suitable criteria that the competent authorities may take into account. Bearing in mind that the Commentary does not provide any

[21] Para. 24.2 of the Commentary on Art. 4 of the 2017 OECD Model Convention.

further guidance on the hierarchy[22] or on the interpretation of the stated criteria—among which is the long-disputed POEM—it might be reasonable to question the future efficiency and consistency of the decisions reached by the competent authorities. Their diverging views on the relevance and interpretation of the various criteria, combined with the inherent interest in attaching the residence of a taxpayer to their own jurisdiction (Nenadić 2016, 140)[23] could easily render the resolution of dual residence cases unfeasible. On the other hand, the fact that taxpayers cannot anticipate which criteria may be considered by the competent authorities nor how they might be interpreted means that it will be difficult, if not even impossible, for them to roughly predict their future tax burden (Bräumann, Tumpel 2016, 313).

Yet the change of utmost importance lies in the last sentence of the new Art. 4, para. 3, which stipulates that, until the mutual agreement is reached, the taxpayer is not entitled to 'any relief or exemption from tax provided by the respective treaty, except when and to the extent that competent authorities agree otherwise. This essentially means that, subject to the contrary decision of the competent authorities, dual residence companies remain outside the scope of the treaty in question. While waiting for the mutual agreement to be reached, the taxpayer will have to endure a period of time in which it will be subjected to unlimited tax liability in each of the contracting states concurrently. In practice, this implies double tax filing, double tax consultancy and double tax payments (Bräumann, Tumpel 2016, 314). The simple instruction included in the Commentary—that the competent authorities should address taxpayers' requests expeditiously—cannot be expected to contribute much to the resolving of issues inherent in the MAP. On the other hand, even if the case is successfully resolved, a possible change of the facts that are basis on which the competent authorities reached their decision would require *de novo* negotiation between them.

Having in mind the above outlined deficiencies of the new Art. 4, para. 3 of the OECD Model Convention, it is no surprise that almost all public commentators criticised its proposal as a part of the BEPS Action Plan (OECD 2015d). The fact that the OECD did not give up on it may have to do with the insistences of several of its member states who already abandoned the POEM criterion in their treaties in favour of the mutual

[22] For an elaboration on the absence of the order of importance of the stated factors and their relevance, see: Maisto, Austry, Jones, *et al*. 2018.

[23] As a rule, the state of taxpayer's residence is able to tax taxpayer's worldwide income, i.e. not only income sourced within its territory, but also income sourced anywhere else in the world. Moreover, the distributive rules contained in the OECD Model Convention are tailored in such a way that they predominantly allocate to the residence state the jurisdiction to tax different types of income.

agreement mechanism, among which the most notable advocate was the US (Bräumann, Tumpel 2016, 319). As an illustration, the latest US Model Convention does not even stipulate a mechanism supposed to resolve dual residence of companies. It simply presupposes that a dual resident company shall not be treated as a resident of either of the contracting states for the purpose of treaty application.[24] For dual residence companies this means double taxation, or at best, reliance on unilateral measures for relief from double taxation (Sanghavi 2016, 522).

5. ACCEPTANCE OF THE NEW MECHANISM FOR THE RESOLUTION OF DUAL RESIDENCE IN TREATY PRACTICE

In order to facilitate the inclusion of the amendments related to double tax treaties recommended by the BEPS Action Plan, the OECD formulated the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument, MLI). It was signed on 7 June 2017, in Paris, by 68 jurisdictions, one of which was Serbia. To date, the total number of signatories has reached 94, with four more jurisdictions expressing their commitment to sign the MLI in the near future.[25]

5.1. General Overview

Art. 4, para. 1 of the MLI reproduces the provision of Art. 4, para 3 of the OECD Model Convention. This provision was not designated as the so-called minimum standard, for which reason signatories were allowed to opt-out of it.[26] Analysing the official positions of the jurisdictions that signed the MLI, we may conclude that only 35.1% of them agreed to modify their treaties by substituting the POEM with the mutual agreement mechanism.[27] Taking a look at the EU Member States exclusively, that number is even lower—22.2%. Additionally, the MLI provides the signatories with the option of introducing into their treaties an even stricter provision, under which the competent authorities would not have the authority to agree to permit the granting of certain treaty benefits to the

[24] Art. 4(4) of the US Model Convention. 2016.

[25] Signatories and Parties to the MLI. *https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf* (last visited 25 July, 2020).

[26] For a detailed elaboration on the minimum standard concept and its relevance in the context of the BEPS Action Plan, see: Langer 2018.

[27] The following tax jurisdictions: Argentine, Armenia, Australia, China, Colombia, Costa Rica, Egypt, Fiji, India, Indonesia, Ireland, Israel, Jamaica, Japan, Kazakhstan, Kenya, Mexico, the Netherlands, New Zealand, Norway, Oman, Papua New Guinea, Peru, Poland, Romania, Russia, Senegal, Serbia, Slovakia, Slovenia, South Africa, the United Kingdom, and Uruguay. Status as of 22 July 2020.

taxpayer whose dual residence could not be settled previously.[28] Only a minor number of jurisdictions opted for this provision.[29]

5.2. Serbia's Approach

Serbia accepted to amend all its double tax treaties to include the mutual agreement mechanism in place of the previously predominantly used POEM criterion. Leaving aside the generally keen attitude of the Serbian policymakers regarding the modifications introduced by the MLI (Popović, Ilić-Popov, Živković, 2020a), this approach could have been anticipated, bearing in mind that already in 2005, in its position regarding the OECD Model Convention,[30] Serbia reserved the right to replace the POEM test in its tax treaties with a provision referring to the MAP.[31] Thereafter, a number of Serbian treaties presupposed the MAP as a mechanism for resolving dual residence of non-individuals.[32] Nevertheless, only a few of them stipulated that, in the absence of an agreement of the competent authorities, dual resident taxpayer would be denied treaty benefits.[33] Interestingly, several treaties presupposed the application of the MAP as an alternative only, for cases in which the application of the POEM criterion is unsuccessful.[34]

Since a treaty may be modified by the MLI only to the extent that both of its contracting parties agree to the modification in question, the reach of Serbian policy choice regarding the mechanism for the resolution of dual residence of companies is expected to be limited. Namely, after matching Serbia's position on Art. 4 of the MLI to those of its contracting parties, it follows that only 15 treaties will be modified accordingly. These are the treaties with Armenia, China, Egypt, India, Indonesia, Ireland, Kazakhstan, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, and the UK. Nonetheless, it appears that the described change in treaty practice is here to stay. This may be inferred from the fact that even the treaties that Serbia negotiated after signing the MLI (with San Marino and Israel) follow Art. 4, para. 3 of the 2017 OECD Model Convention.

---

[28] Art. 4(3)(e) of the MLI.

[29] Australia, Fiji, Indonesia, Japan, Papua New Guinea, and Peru.

[30] As a non-OECD member, Serbia is only allowed to place a position and not a reservation or observation to the OECD Model Convention.

[31] OECD. 2019. *Model Tax Convention on Income and Capital 2017 (Full Version)*, Paris: OECD Publishing, P(4)-7.

[32] Treaties with: Armenia, Azerbaijan, Bulgaria, Canada, Estonia, Latvia, Lithuania, Norway, and Turkey.

[33] Treaties with: Azerbaijan, Latvia, Norway, and Turkey.

[34] Treaties with: China and India.

5.3. Future Relevance of the POEM Criterion

Although the POEM will not serve as the decisive criterion under the OECD Model Convention,[35] it will still remain relevant, for several reasons. Firstly, a majority of existing treaties will not be modified by the MLI in this respect, for which reason the POEM will continue to be the predominantly used tie-breaker rule. Secondly, even for the modified treaties, the POEM will be one of the factors that the competent authorities may take into account when deciding on dual residence of non-individuals. Lastly, amendments added to the Commentary in 2017 presuppose that that negotiating parties may still opt for the POEM test as a tie-breaker rule, provided that they agree on the manner in which this criterion will be interpreted, and are of the view that it may be interpreted in such a way that prevents it from being abused.[36] To what extent this opportunity will be chosen by the contracting parties is yet to be seen.

6. CONCLUDING REMARKS

The manner in which the new Art. 4, para. 3 of the OECD Model Convention is drafted seems to imply an irrebuttable presumption that, when it comes to companies, dual residence is a result of aggressive tax planning. Numerous authors, however, agree that dual residence of companies may fairly often, if not in a majority of cases, be motivated by non-tax reasons (Bräumann, Tumpel 2016, 310; Sanghavi 2016, 523; Maisto *et. al* 2018, 44). This is why the presupposed denial of treaty benefits in the case of unsettled dual residence seems rather excessive.

However, the core issue with the new mechanism for the resolution of dual residence of companies stems from the fact that the MAP, on whose functionality this mechanism is entirely dependent, is plagued with deficiencies. The absence of the obligation for the competent authorities to reach an agreement, the omission of time constraints for the competent authorities to end the procedure even if unsuccessfully, the complete absence of taxpayer's participation, and the utter lack of transparency make this mechanism an unfortunate choice for the resolution of dual residence. Being a matter of such fundamental value, on which treaty application is dependent, the resolution of dual residence deserves a carefully considered tailor-made mechanism, appropriate for today's rapidly changing world. The above presented arguments show that the MAP could considerably jeopardize legal certainty and block taxpayers'

[35] In addition to being abolished as the deciding tie-breaker criterion, it was removed from Art. 8, which allocates taxing rights with respect to profits from shipping, inland waterways transport, and air transport.

[36] Para. 24.5 of the Commentary on Art. 4 of the 2017 OECD Model Convention.

access to treaty benefits even in *bona fide* situations, i.e. situations that do not involve aggressive tax planning.

Granted, the OECD Model Convention does contain an additional tool intended to increase the efficacy of the MAP and protect the rights of taxpayers—the so-called mandatory binding arbitration, stipulated under Art. 25(5). As a result, if a resolution of a case of dual residence takes more than two years, the taxpayer may initiate the arbitration process. This means that, theoretically speaking, under a treaty entirely corresponding to the OECD Model Convention, the chances of unresolved dual residence are virtually non-existent. However, the situation in practice is very different. Only a small portion of tax treaties concluded around the world actually contain mandatory binding arbitration. And even those that do, often explicitly exclude cases of dual residence of non-individuals from their scope.[37]

On a final note, it may be concluded that the POEM criterion indeed deserved to be removed from the model conventions. However, it is clear that, under the circumstances in which the OECD faced an extremely short deadline for formulating BEPS measures,[38] the MAP was only a 'quick fix' to the problem. It was an already developed solution that was familiar to many of the OECD members, the introduction of which did not necessitate thorough deliberation. The core issue with the described choice is that the matter of treaty residence is a preliminary question for the application of treaty provisions, and as such it predetermines the role in which contracting states will find themselves in the course of their application. Specifically, it designates one of them as the residence state, leaving the other acting in the capacity of the source state. Leaving such a fundamental question to be addressed by a mechanism that is overly unreliable shakes the very foundations of tax treaties.

Just as it was in the case of other amendments to the treaty network that were introduced through the MLI, Serbia's choice to substitute the MAP for the POEM was not subject to public discussion, nor was any assessment carried out regarding its expected impact on the tax administration and the MAP caseload (Popović, Ilić-Popov, Živković

[37] See for example: Italy's position regarding Art. 28(2)(a) of the MLI. *https://www.oecd.org/tax/treaties/beps-mli-position-italy.pdf* (last visited 1 August, 2020); Art. 23(7) of the treaty between the United Kingdom and Canada; Art. 25(6) of the treaty between United Kingdom and Albania; Art. 24(6) of the treaty between the United Kingdom and Lichtenstein; Art. 25(6) of the treaty between the United Kingdom and Japan. *https://www.gov.uk/government/collections/tax-treaties* (last visited 1 August, 2020).

[38] The Final Report on the BEPS Action Plan was published in 2015, only two years after the project was initiated.

2020a, 703). In general, the experience of the Serbian competent authorities in conducting MAP is as yet rather sparse, so the decisiveness with which the policy makers embraced this tool might seem surprising. Though, as previously mentioned, a handful of Serbian tax treaties already provided for the MAP as a tool for resolving cases of dual residence of companies, the Serbian competent authorities have never had the opportunity to negotiate this matter in practice. Another difficulty lies in the fact that Serbia resolutely opposes the inclusion of mandatory binding arbitration to its tax treaties. It not only refuses to include a provision patterned upon Art. 25(5) of the OECD Model Convention, but it abstains from agreeing to tailor-made arbitration clauses as well (Popović, Ilić-Popov, Živković 2020, 707). Although BEPS Action 14 proposes measures intended to mitigate legal uncertainty and undesirable double taxation by improving various features of the MAP (OECD/G20 2015c), Serbia has only recently undertaken the very first steps in this direction. There is a long way to go, which has been confirmed by the OECD in its MAP Peer Review Report for Serbia, published in early 2020 (OECD 2020, 53–56). Taxpayers are left with the hope that the procedural framework, as well as resources made available to the competent authorities for the conduct of MAP, will be improved before the caseload starts increasing.

REFERENCES

Berglund, Martin, Katia Cejie. 2018. *Basics of International Taxation: From a Methodological Point of View*. Uppsala: Iustus Förlag.

Bräumann, Peter, Michael Tumpel. 2016. Dual Resident Companies, Intercompany Dividends, Real Estate Companies. 303–325 in *Base Erosion and Profit Shifting (BEPS): The Proposals to Revise the OECD Model Convention,* edited by Michael Lang, Pasquale Pistone, Alexander Rust, Josef Schuch, and Claus Staringer. Vienna: Linde Verlag.

Burgers, Irene. 6–7/2007. Some Thoughts on Further Refinement of the Concept of Place of Effective Management for Tax Treaty Purposes. *Intertax* 35: 378–386.

Burgstaller, Eva, Katharina Haslinger. 8–9/2004. Place of Effective Management as a Tie-Breaker Rule – Concept, Developments and Prospects. *Intertax* 32: 376–387.

Couzin, Robert. 2002. *Corporate Residence and International Taxation*. Amsterdam: IBFD.

Holmes, Kevin. 2014. *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application*. Amsterdam: IBFD.

Jones, John A. 5–6/2009. 2008 OECD Model: Place of Effective Management – What One Can Learn from the History, *Bulletin for International Taxation* 63: 183–186.

Kahn, A. Douglas. 1990. The Two Faces of Tax Neutrality: Do They Interact or Are They Mutually Exclusive? *Northern Kentucky Law Review* 18: 1–19.

Knechtle, Arnold. 1979. *Basic Problems in International Fiscal Law*. Deventer: Kluwer.

Lang, Michael. 2013. *Introduction to the Law of Double Taxation Conventions*, Vienna: Linde.

Langer, Andreas. 2018. The Legal Relevance of the Minimum Standard in the OECD/BEPS Project. 89–110 in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects*, edited by Michael Lang, Pasquale Pistone, Alexander Rust, Josef Schuch, and Claus Staringer. Alphen aan den Rijn: Wolters Kluwer.

League of Nations. 1946. *Protocol of the Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property – London Draft*. *http://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-15.xml;chunk.id=item-15;toc.depth=1;toc.id=item-15;database=;collection=;brand=default* (last visited 10 July 2020).

Maisto, Guglielmo, Stephane Austry, John A. Jones, Philip Baker, Peter Blessing, Robert Danon, Shefali Goradia, Johann Hattingh, Kiochi Inoue, Jürgen Lüdicke, Toshio Miyatake, Angelo Nikolakakis, Frank Pötgens, Kees van Raad, Richard Vann, Bertil Wiman. 2018. Dual Residence of Companies under Tax Treaties. 1–84 in *International Tax Studies*, edited by Pasquale Pistone. Amsterdam: IBFD.

Nenadić, Sara. 2016. Tie-Breaker for Dual Resident Companies. 127–145 in *Preventing Treaty Abuse,* edited by Daniel W. Blum and Markus Seiler. Vienna: Linde Verlag.

Obuoforibo, Belema. 2018. Residence. 1–15 in *Roy Rohatgi on International Taxation: Volume 1 – Principles,* edited by Ola Ostaszewska and Belema Obuoforibo. Amsterdam: IBFD Online Books.

OECD TAG. 2001. *The Impact of the Communications Revolution on the Application of "Place of Effective Management" as a Tie-Breaker Rule*, Discussion Paper from the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits. Paris: OECD Publishing.

OECD TAG. 2003. *Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention*. Paris: OECD

Publishing. *http://www.oecd.org/tax/treaties/2956428.pdf* (last visited 14 July 2020).

OECD. 2008. *The 2008 Update to the OECD Model Tax Convention*, Paris: OECD Publishing. *https://www.oecd.org/ctp/41032078.pdf* (last visited 14 July 2020).

OECD Centre for Tax Policy and Administration. 2008. *Draft Contents of the 2008 Update to the Model Tax Convention*. Paris: OECD Publishing. *http://www.oecd.org/ctp/treaties/40489100.pdf* (last visited 24 July 2020).

OECD/G20. 2015a. *Explanatory Statement: Base Erosion and Profit Shifting Project*, *Final Reports*. Paris: OECD Publishing. *https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf* (last visited 24 July 2020).

OECD/G20. 2015b. *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, *Action 6 – Final Report.* Paris: OECD Publishing.

OECD/G20. 2015c. *Making Dispute Resolution Mechanisms More Effective, Action 14 – Final Report.* Paris: OECD Publishing.

OECD. 2015d. *Comments Received on Revised Public Discussion Draft, Follow-up Work on BEPS Action 6*. Paris: OECD Publishing. *https://www.oecd.org/ctp/treaties/public-comments-revised-beps-action-6-follow-up-prevent-treaty-abuse.pdf* (last visited 20 July 2020).

OECD. 2017. *Model Tax Convention on Income and on Capital: Condensed Version*. Paris: OECD Publishing.

OECD. 2020. *Making Dispute Resolution More Effective – MAP Peer Review Report, Serbia (Stage 1): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project*, Paris: OECD Publishing. *https://www.oecd-ilibrary.org/docserver/c65f36fb-en.pdf?expires=1596285406&id=id&accname=guest&checksum=74ABB0322ADBD1FEE26D03C4B4D8A05E* (last visited 20 July 2020).

OEEC Fiscal Committee. 1957a. *Report on the Taxation of Income and Capital of Shipping and Air Transport Enterprises and of their Crews*, Working Party 5, 6 May 1957. *https://taxtreatieshistory.org/* (last visited 15 July 2020).

OEEC Fiscal Committee. 1957b. *Report on the Concept of Fiscal Domicile*, Working Party 2, 23 May 1957. *https://taxtreatieshistory.org/data/html/FC-WP2(57)1E.html* (last visited 15 July 2020).

OEEC Fiscal Committee. 1957c. *Fourth Report on the Concept of Fiscal Domicile*, Working Party 2, 5 November 1957 *https://taxtreatieshistory.org/data/html/FC-WP2(57)3E.html* (last visited 15 July 2020).

OEEC Fiscal Committee. 1958. *Final Report on the Concept of Fiscal Domicile*, Working Party 2, 9 January 1958. *https://taxtreatieshistory.org/data/html/FC-WP2(58)1E.html* (last visited 15 July 2020).

Popović, Dejan. 2017. *Poresko pravo*. Belgrade: University of Belgrade Faculty of Law.

Popović, Dejan, Svetislav V. Kostić. 2009. *Ugovori o izbegavanju dvostrukog oporezivanja Republike Srbije – Pravni okvir i tumačenje*. Belgrade: Cekos in.

Popović, Dejan, Gordana Ilić-Popov, Lidija Živković. 2020. Serbia. 699–719 in *Tax Treaty Arbitration,* edited by Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch, Claus Staringer, and Alfred Storck. Amsterdam: IBFD.

Popović, Dejan, Gordana Ilić-Popov, Lidija Živković. 2020a. Serbia. 691–709 in *Reconstructing the Treaty Network,* edited by David Duff and Daniel Gutmann. IFA Cahiers Vol. 105A. Amsterdam: IBFD.

Sasseville, Jacques. 2006. A Tax Treaty Perspective: Special Issues. 37–61 in *Tax Treaties and Domestic Law,* edited by Guglielmo Maisto. Amsterdam: IBFD.

Sasseville, Jacques. 2009. The Meaning of "Place of Effective Management". 287–302 in *Residence of Companies under Tax Treaties and EC Law* edited by Guglielmo Maisto. Amsterdam: IBFD.

Sanghavi, Dhruv. 9/2016. The Proposed Tie-breaker Rule in OECD/G20 BEPS Action 6: A Critical Examination of the Possible Motives and Means, and a Potential Alternative. *Bulletin for International Taxation* 70: 520–525.

U.S. Treasury Department. 2016. *United States Model Income Tax Convention*. Washington D.C. *https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf* (last visited 26 July 2020).

Živković, Lidija. 2017. *Rezidentstvo pravnih lica*, Master's thesis, University of Belgrade Faculty of Law.

Article History:
Received: 22. 8. 2020.
Accepted: 6. 12. 2020.

UDC 341.6

CERIF: S150, S144

DOI: 10.51204/Anali_PFUB_20407A

Dragana Nikolić, LL.M. (Cantab.), LL.M. (Belgrade)*

AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

Within the traditional framework of international arbitration, an arbitral tribunal produces a final and binding award, which can be only exceptionally annulled based on the narrowly tailored grounds available under the law of the seat. However, parties sometimes seek to limit or expand the grounds for annulment, hoping to increase the chances for successful resolution of their dispute. As the clauses modifying the scope of judicial review become more popular, important questions come to the fore with respect to their validity, application and usefulness. This paper will analyse the compatibility of these clauses with the nature of arbitration, by examining their compliance with the principles of party autonomy and finality. Main characteristics and application of these arbitration clauses will be also discussed. In addition, the author will explore how the stipulation of these clauses affects the quality of awards, integrity of arbitral proceedings and enforceability of awards abroad.

Key words: *Annulment of arbitration awards. – Expanded judicial review. – Finality of arbitration awards. – Limited judicial review. – Party autonomy.*

1. INTRODUCTION

Arbitration is a contractual method of resolving disputes by which parties themselves charter a private tribunal to render a final and binding decision in accordance with neutral procedures affording each party an

* Attorney at Law in cooperation with the Law Office Miroslav Stojanović, cooperating law office of Wolf Theiss, *draganat.nikolic@gmail.com*.

opportunity to present its case. A central feature of international arbitration is party autonomy, which enables parties to adopt flexible procedures and tailor them to their business needs. Other equally important attraction of international arbitration is the finality of the arbitral process.

In accordance with the principles of party autonomy and finality, the arbitral tribunal produces an arbitral award, subject only to narrow grounds for annulment[1] available under the law of the seat. Nevertheless, parties sometimes seek to modify the statutory grounds for setting aside arbitration awards. They may wish to reduce the number of available post-award challenges or to preclude judicial review altogether. Oppositely, they may agree to expand the grounds on which an award may be set aside in order to mitigate the risk of a tribunal falling into error.

As arbitration agreements increasingly include clauses reducing, excluding or expanding possibilities for judicial review, important questions come to the fore with respect to the nature, application and usefulness of these clauses. Is party autonomy wide enough to completely preclude post-arbitration review of awards? Can parties agree on any type of additional grounds of review? Do national laws recognise contractual provisions modifying the grounds for annulment as valid? If so, what language should be used when drafting such provisions and how do courts interpret them? How would exclusion and expansion provisions affect the quality of arbitral awards, integrity of arbitral proceedings and enforceability of awards abroad if they become regular ingredients of arbitration agreements?

This paper will attempt to answer these questions by discussing policy, regulatory and practical aspects of the contractual provisions whose purpose is to alter the statutory grounds for judicial review. In order to gain an overview of the existing annulment mechanisms, section 2 of the paper will focus on the prevailing law on judicial review of arbitral awards worldwide. Section 3 will explore whether arbitration clauses modifying the statutory set-aside mechanisms are compatible with the nature of arbitration. This will be measured by analysing the compliance of these clauses with the principles of party autonomy and finality. In order to further analyse the validity of agreements limiting or expanding grounds for setting aside, section 4 will discuss the current position of national laws on such agreements. Section 5 will canvas the main characteristics of agreements limiting or expanding grounds for setting aside, focusing on their language, scope and impact on other parts of arbitration agreements. Section 6 asks what the main benefits and

[1] In this paper, the terms ‘annulment’, ‘setting aside’ and ‘vacatur’ will be used interchangeably.

drawbacks of customised judicial review of arbitral awards are when it comes to the quality of awards, integrity of arbitral proceedings and enforceability of awards. Finally, the discussion on validity, availability, enforceability and utility of arbitration agreements modifying judicial review of arbitral awards will be concluded in section 7 of this paper.

2. ANNULMENT OF INTERNATIONAL ARBITRATION AWARDS

Annulment of international arbitration awards presupposes a decision of a local court to invalidate an award rendered by a tribunal on grounds available under the law of the seat of arbitration, in order to eliminate defective awards from the legal system. On a wider level, the possibility of judicial sanction of improper conduct of arbitrators enhances the integrity of arbitration and promotes confidence within the business community that arbitration will not become 'a lottery of erratic results' (Park 2001, 599).

In principle, each country enjoys the unrestrained freedom to decide what standards of judicial control over awards will be applicable within its territory. However, as a result of the efforts to harmonise international commercial arbitration, the majority of national jurisdictions permit actions to vacate international arbitral awards only on a limited set of grounds, analogous to those prescribed in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') and, indirectly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').[2]

With the ultimate goal of 'combin[ing] party autonomy in international arbitration with minimal judicial intervention in international arbitration as well ensuring the independence of the arbitral tribunal and fairness of procedure' (Raghavan 1998, 123–24), Article 34 of the UNCITRAL Model Law, titled 'Application for Setting Aside as Exclusive Recourse against Arbitral Award', contains the following list of grounds for annulment:

(1) Validity of the arbitration agreement and capacity of parties to conclude an arbitration agreement[3]

[2] Up to the present, arbitration laws based on or influenced by the UNCITRAL Model Law have been adopted by 84 states, in a total of 117 jurisdictions, including Serbia. For a detailed list of legislations based on the UNCITRAL Model Law see: UNCITRAL 2020.

[3] UNCITRAL Model Law, Art. 34(2)(a)(i): 'a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under

(2) Denial of the opportunity to present case[4]

(3) Excess of authority[5]

(4) Irregular procedure or irregular constitution and appointment of the tribunal[6]

(5) Non-arbitrability of the dispute,[7] and

(6) Violation of public policy.[8]

As it can be seen, the UNCITRAL Model Law provides an exhaustive list of grounds, the first four of which must be proven by a party. In contrast, the arbitrability and compliance with public policy are examined *ex officio* by judges.

Although the global trend has been towards mirroring the list of grounds enumerated in Article 34 of the UNCITRAL Model Law, which represents 'a sort of a global consensus on what seems to be the "golden middle" of permissible scope of control over the award' (Pavić 2010, 136), this pattern has not been followed unanimously.

One of the most controversial grounds for judicial vacatur absent from the UNCITRAL Model Law is substantive review of awards.[9] In general, national laws that allow judicial review of merits stipulate very

the law to which the parties have subjected it or it or, failing any indication thereon, under the law of this State'.

[4] UNCITRAL Model Law, Art. 34(2)(a)(ii): 'the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.

[5] UNCITRAL Model Law, Art. 34(2)(a)(iii): 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside'.

[6] UNCITRAL Model Law, Art. 34(2)(a)(iv): 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law'.

[7] UNCITRAL Model Law, Art. 34(2)(b)(i): 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State'.

[8] UNCITRAL Model Law, Art. 34(2)(b)(ii): 'the award is in conflict with the public policy of this State'. Public policy is to be understood as 'serious departures from fundamental notions of *procedural* justice' (emphasis added). See UNCITRAL Secretariat 2008, para. 46.

[9] Other commonly encountered grounds for annulment not contained in the UNCITRAL Model Law are mostly related to procedural and jurisdictional issues whose application is far less controversial than annulment on the ground of error of law (e.g. uncertainty or ambiguity of award, violations of form requirements for award, criminal acts of parties or arbitrators).

strict requirements that could be satisfied only in the event of particularly egregious errors of law made by arbitrators.[10] Section 69 of the English Arbitration Act, governing an appeal on point of law in arbitration, is a perfect example of a 'long-stop provision' that should be exercised only extraordinarily.[11] New Zealand,[12] Hong Kong,[13] the British Virgin Islands,[14] and the Cayman Islands[15] have adopted similar restrictive appeal mechanisms. The probability of a success in the United States of America ('US') is equally narrow.[16] More extensive judicial review of the merits is generally permitted only in less developed national arbitration laws. For example, the arbitral award in Libya may be appealed in accordance with the rules applicable to appeals against court judgments.[17]

In contrast, more arbitration-friendly countries have adopted statutory grounds for vacatur narrower than those set forth by the UNCITRAL Model Law. In particular, Switzerland and France have created a very favourable legal environment in which courts cherish the tradition of accepting challenges for annulment only exceptionally.[18] A more drastic approach was taken by Belgium in 1985, when the government adopted the law that automatically and imperatively precluded any kind of judicial review of international awards in disputes between

[10] It is also possible that in jurisdictions which do not explicitly allow for substantive review of awards courts effectively engage in such practice when assessing other grounds for annulment (e.g. public policy or excess of authority).

[11] Firstly, Section 69 of the English Arbitration Act only applies to matters of English law. Secondly, it cannot be invoked without the agreement of all parties to the proceedings or without the leave of the court. Thirdly, the court must be persuaded that the contested issue substantially affects the rights of at least one party in arbitration and that the question is one which the tribunal was asked to determine. Fourthly, the facts should show that the decision of the tribunal on the issue is obviously wrong, or that the issue is one of general public importance and that the decision of the tribunal is at least open to serious doubt. Finally, the court must find that it is 'just and proper' to rule on the issue despite the agreement of the parties to resolve the matter by arbitration.

[12] New Zealand Arbitration Act (1996), Schedule 2, Section 5.

[13] Hong King Arbitration Ordinance (2013), Schedule 2, Provisions 5–7.

[14] British Virgin Islands Arbitration Act (2013), Schedule 2, Part IX, Art. 79(1).

[15] Cayman Islands Arbitration Law (2012), Art. 76.

[16] In an attempt to subject arbitration awards to substantive review, the US courts have come to recognise several common law grounds for vacatur, including the 'manifest disregard' standard, the 'completely irrational' standard, the public policy ground, and the 'essence of the contract' test. However, it is very seldom that the courts actually vacate arbitral awards on the basis of these grounds.

[17] Libyan Code of Civil and Commercial Procedure (1953), Art. 767.

[18] See Art. 190(2) of the Swiss Private International Law Act (1987) and Art. 1520 of the French Code of Civil Procedure (2011). Note that in France a domestic arbitration award can be challenged on the merits if parties agree to pursue the appeal. Such possibility does not exist in regard to international arbitration awards. See French Code of Civil Procedure (2011), Art. 1489.

non-Belgian parties.[19] The purpose of abolishing the annulment stage was to attract foreign companies to arbitrate in a newly-formed 'arbitration nirvana' in Belgium (Hulea 2003, 346). However, these expectations had proven to be over-optimistic because, in effect, multifaceted policy concerns and practical problems created an 'arbitral anarchy' in Belgium (Park 2006, 18). As a result, the government relaxed its position in 1998, when it provided the option for parties to freely decide on limitation of the right to seek annulment.[20] After further amendments were made in 2013, the applicable provision of the Belgian Judicial Code now reads as follows: 'By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium'.[21]

3. COMPATIBILITY OF AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULMENT WITH THE NATURE OF ARBITRATION

As explained above, national arbitration laws generally permit parties to challenge arbitral awards only on a limited number of statutory grounds, which typically deal with jurisdiction, procedural irregularities, and public policy issues. Even if permissible, the challenges to arbitral awards, based on their merits, are rarely successful.

This classic dispute resolution model—consisting of separate arbitration and judicial stages, with limited possibilities of courts to set aside arbitration awards—is a result of the compromise between the parties' choice to avoid protracted judicial proceedings and the state's desire to exercise at least some control over arbitration. If the parties want to exclude, reduce or expand the scope of review of awards available under the law of the seat of arbitration, the question arises as to whether this right would disturb the established balance between arbitral and judicial powers in the current international arbitration system. In order to answer this question, it is essential to assess the compatibility of the agreements limiting or expanding grounds for annulling arbitration

[19] Belgian Judicial Code (prior to 1998 amendment), Art. 1717(4): 'Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation'.

[20] See Belgian Judicial Code (prior to 2013 amendment), Art. 1717(4).

[21] Belgian Judicial Code (2013), Art. 1718.

awards with two core principles of arbitration: the principle of party autonomy and the principle of finality of arbitration awards.

3.1. Compliance with the Principle of Party Autonomy

The consensual nature of arbitration agreements has been widely perceived as a cornerstone of arbitration. Nearly all arbitration law bodies have recognised the crucial importance of party autonomy in arbitration.[22] The parties' freedom to mould arbitral procedures as they see fit provides a significant advantage over litigation and other forms of dispute resolution. In fact, such freedom is widely perceived to be the driving force behind the parties' decision to arbitrate.

The parties' freedom to fashion a system of judicial review by changing the codified grounds for annulment may be explained away on grounds of party autonomy. Simply stated, if parties have absolute confidence in the arbitration process and decision-makers of their choice and want to avoid any judicial interference in their dispute, or they simply want to avoid the time waste, additional costs and publicity deriving from the post-award court proceedings, there is no principal reason why they should be prohibited from putting themselves entirely at the mercy of arbitrators. Indeed, if parties can freely agree to arbitration *ex aequo et bono* and to arbitration without a reasoned award, both of which effectively exclude any meaningful right of judicial review, it is unclear why parties would not be allowed to forego any review in annulment proceedings, save in the most extreme circumstances (Born 2014, 3368).

Similarly put, if parties want to introduce a heightened judicial review of an award, including a substantial review, they should be allowed to do so. As Gary Born argues, 'it is difficult to see why parties should not be permitted as a matter of policy to contract for "ordinary" judicial review, of the sort that would apply if the arbitral award was a first instance judgment. This accords with principles of party autonomy, and does not detract from (but enhances) the parties' "judicial" protections ... [R]espect for party autonomy and the basic objectives of the arbitral process argue decisively for permitting parties to contract for heightened judicial review of arbitral awards (provided that this does not impose undue or inappropriate obligations on national courts)' (Born 2014, 3376–78).

There is a noteworthy opposite view that party autonomy has its limits and that it cannot serve as a basis for unrestricted modifications of the judicial review process. As suggested by Vikram Raghavan (1998, 122–23), the parties' ability to agree on arbitral proceedings is confined to the arbitration process itself, excluding the post-arbitration conduct of

[22] See, for example, Art. 19(1) of the UNCITRAL Model Law and Art. V(1)(d) of the New York Convention.

courts, which is an entirely separate and different process. Therefore, while parties may enjoy relative 'free play in the joints' with respect to arbitral proceedings, party autonomy should not stretch as far as to change the statutorily determined role of courts in the arbitral process. This is because arbitration does not proceed in a legal vacuum. Instead, its very existence, validity and effectiveness are grounded in the legal order determined by the state. This order expects arbitral tribunals to resolve disputes in accordance with the principle of finality.

3.2. Compliance with the Principle of Finality of Arbitration Awards

It is no secret that parties especially value the efficiency, expediency and finality of arbitration. When parties choose arbitration over litigation, they primarily want to avoid the costs and delays typical for litigation. They tend to favour the straightforward annulment process in arbitration, based on a limited number of grounds, over the burdensome appeal proceedings in litigation offering a plethora of possibilities to challenge a judgment often leading to lengthy *de novo* trials. In other words, parties choosing arbitration over litigation are willing to put a high value on the finality of the arbitral award at the expense of the right to appeal against badly wrong arbitral decisions on the merits.

The right of the parties to limit or completely preclude annulment of arbitral awards seem to be in accordance with the principle of finality. Without the additional layer of protection available in the annulment process, parties would expeditiously proceed to the enforcement stage after obtaining the award. However, as discussed below, the stipulation of clauses limiting judicial review does sometimes comes with a price, because, for the award to be truly final, parties would have to ensure that the award would be executed outside the seat of arbitration without objection.

On the other side, expanded judicial review has the potential to seriously undermine the principle of finality and even blur the line between arbitration and litigation. In effect, the comprehensive judicial redress regime would transform at least some arbitrations into a form of ordinary first instance litigation proceedings. Therefore, parties would face those problems that they probably wanted to avoid when opting for arbitration in the first place. What is more, if expanded review were to become ordinary practice, the most pessimistic predictions (Hulea 2003, 353) envisage that the standard one-stop arbitration might transform into lengthy multi-step adjudication system, thus completely subverting the arbitral process and impairing confidence of the business community in the ability of arbitration to efficiently produce final and binding awards.

3.3. Effects of Interplay Between Party Autonomy and Finality

It is indisputable that party autonomy is and should remain an essential feature of arbitration. At the same time, the equally important principle of finality of arbitral awards enhances the efficiency of arbitration as one of its key features. It also ensures that, once an award has been rendered, it will be enforced swiftly and without additional expenses. However, according to the prevailing view in literature, when parties contract modified judicial review, these two bedrock principles of arbitration clash with each other and create the tension between the parties' desire for the substantial correctness of awards with the equally powerful desire for the effectiveness of arbitration, threatening to undermine the use and popularity of international arbitration as a viable alternative to litigation.

Regarding reduced judicial review, excessive deference to the decision-making of arbitrators, based on party autonomy, may bring into question the value of finality of arbitral awards. In particular, if the losing party would be prevented from obtaining any redress in the seat of arbitration when the first and final decision is obviously defective, the winning party may experience difficulties in enforcing the award abroad, and, in extreme cases, it would be unable to use the arbitral award at all. In this way, the advantages of the straightforward and expeditious arbitration process would be neutralised by the inability to execute an award outside the seat of the tribunal. In the case of expanded review, as argued above, the unrestrained freedom of parties to expand the grounds for annulment, including the freedom to contract review on the merits, is in contravention with the principle of finality to the extent that it may endanger the current international arbitration system.

In contrast, some other authors insist that the tension between party autonomy and finality is a mere illusion and that those elevating the value of efficiency above freedom are 'putting the cart before the horse'. From their perspective, efficiency and finality are not the ultimate goals of arbitration, but rather its by-products (Mitzner 2009, 189). Therefore, the contractually tailored mechanisms for judicial review should not be regarded as 'Procrustean bed[s] to which the parties must adapt themselves even at the cost of amputated limbs' (Rau 2006, 480). Rather, both limited and expanded judicial reviews should be legitimate choices that could help parties to resolve their disputes in accordance with their needs. Thus, fast and final decisions may be a desirable effect of arbitration if parties so choose in a concrete case. In contrast, if they want to hedge against the risk of gravely erroneous arbitration awards when choosing arbitration, they should enjoy the right to a more elaborate review process.

4. VALIDITY OF ARBITRATION AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS UNDER NATIONAL LAWS

The Gordian knot of party autonomy and finality has resulted in a split among countries regarding whether parties to an arbitration agreement can contractually exclude or vary grounds for judicial review of an arbitral award and, if so, to what extent.

4.1. National Legislations Based on the UNCITRAL Model Law

In the absence of any explicit rule in national laws based on the UNCITRAL Model Law on the parties' freedom to modify the instances according to which an award may be set aside, the main dilemma is whether these statutory provisions may be interpreted as being outside the realm of arbitration agreements.[23] National courts in the UNCITRAL Model Law jurisdictions have come to divergent conclusions regarding the validity of agreements limiting or expanding the grounds for annulment. Although some national courts found these agreements to be acceptable,[24] judges in a large number of cases have refused to give effect to these agreements.[25]

In general, it appears that the application of Article 34 of the UNCITRAL Model Law is mandatory and incapable of modification by private agreement. The history of negotiations indicates that the original intent of its drafters was to draw the line with respect to the matters that cannot be narrowed down by private parties and set this rule in stone (Várady 2006, 460). Similarly, the language of Article 34 of the UNCITRAL Model Law clearly states that the grounds for annulment are mandatory and exclusive.[26]

---

[23] Please note that Article 62 of the Serbian Arbitration Act (2006) explicitly prohibits exclusion agreements: 'The parties may not waive in advance their right to apply for setting aside of the arbitral award'. To the best of the author's knowledge, to date no case law exists pertaining to whether parties may agree to expand the scope of judicial review under the Serbian Arbitration Act.

[24] See, for example, *Noble China Inc. v. Lei Kat Cheong*, (1998) 42 O.R.3d 69, [1998] O.T.C. LEXIS 2175 (Ontario Superior Court of Justice); and *Methanex Motunui Ltd v. Spellman*, [2004] 3 NZLR 454 (Court of Appeal in Wellington).

[25] See, for example, *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, [2006] 2 SCC 628 (Supreme Court of India); *Tang Boon Jek Jeffrey v. Tan Poh Leng Stanley*, [2001] 3 SLR 237 (Court of Appeal of Singapore); and *Uniprex S.A. v. Grupo Radio Blanca*, Case No. 178/2006–4/2004 (Madrid Court of Appeal).

[26] UNCITRAL. Secretariat 2008, paras. 45–46: 'The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside ... As a further measure of

Another strong argument in favour of a conservative interpretation is the unambiguous position of the UNCITRAL Model Law regarding the possibility of modifying the recommended judicial review mechanism. Specifically, Article 5 of the UNCITRAL Model Law strictly prohibits the intervention of national courts except in cases where provided in the UNCITRAL Model Law itself.[27] This rule excludes any residual powers that courts may have in arbitrations, including the power to annul awards on the grounds outside Article 34 of the UNCITRAL Model Law.

For all these reasons, it may be expected that the prevailing practice in jurisdictions inspired by the UNCITRAL Model Law—in which this issue has not been regulated by legislators and have not yet been considered by the courts—will be that contracts limiting or expanding the grounds for setting aside awards are not compatible with the rules stipulated in the UNCITRAL Model Law and that the recognition of the parties' capacity to alter the standard of review would undermine the balance between the bedrock principles of arbitration achieved in the UNCITRAL Model Law.

4.2. National Legislations Allowing Parties to Limit Statutory Grounds for Annulling International Arbitral Awards

Despite the considered attempt by the UNCITRAL to create universal rules for setting aside of awards, a considerable number of countries have allowed parties to, at least to some extent, customise national legal standards of judicial review. These countries either intend to bolster their well-established image of arbitration-friendly jurisdictions or want to experiment with their arbitration laws to gain a more prominent role in international arbitration.

One group of national arbitration statutes explicitly permit parties to waive their right to set aside an award before or after arbitration proceedings, either partially or entirely, provided that the beneficiaries of this possibility are not nationals of the country in which the award is made. This rule has been applied in various jurisdictions across the globe, including Switzerland and France. Other jurisdictions (e.g. Germany, England) are supportive of arbitration agreements limiting only specific grounds for annulment, while keeping others out of the reach of parties to arbitration.

As mentioned previously, Switzerland has long been recognised as a prominent example of an arbitration-friendly jurisdiction. This attitude has been strongly reflected in the rules governing annulment of international

improvement, the Model Law lists exhaustively the grounds on which an award may be set aside'.

[27] UNCITRAL Model Law, Art. 5: 'In matters governed by this Law, no court shall intervene except where so provided in this Law'.

arbitration awards. Specifically, Article 192 of the Swiss Private International Law Act ('PILA') expressly allows non-Swiss parties either to entirely exclude the means of recourse against any international award or to limit the recourse to one or more grounds enlisted in Article 190 of the PILA.[28] Tunisian,[29] Swedish,[30] and Columbian[31] laws also allow foreign parties to preclude or narrow down the application of statutory grounds for setting aside an award. As noted above, this right is also available in Belgium, whereas the law explicitly mentions only total waiver of annulment. Similarly, the parties to international arbitrations seated in France can waive at any time their right to bring an action to set aside an arbitral award.[32] In contrast to Swiss and Belgian laws, the right to renounce annulment, can be executed by any party, whether foreign or not.

Another group of countries is content to leave matters solely in the hands of arbitrators as long as they do not affect the rights and interests of third parties. For example, in Germany, Austria and Liechtenstein, parties are precluded from eliminating non-arbitrability and public policy grounds either before or after the conclusion of the arbitration. Other grounds can be waived only after the rendering of the arbitral award (Kroll, Kraft 2015, 6–7; Weber, Kitzberger 2019, 10.2; Walser, Sartor 2020, 10.2).

English law does not permit waivers of the right to set aside an award due to lack of substantive jurisdiction (under Section 67) or serious irregularity affecting the tribunal, proceedings or award (under Section 68). However, the English Arbitration Act permits parties to prohibit, prior to the dispute, the court to review an arbitral award on issues of law in accordance with the above-mentioned Section 69 of the Arbitration Act.[33] The identical option is available in other jurisdictions that allow the appeal on the merits.[34]

[28] PILA, Art. 192(1): 'If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)'. Note that Article 192 was confirmed by the European Court of Human Rights as being compatible with the European Convention on Human Rights. See *Tabbane v. Switzerland*, [2016] Case No. 41069/12 (E.C.H.R.).

[29] Tunisian Arbitration Code (1993), Art. 78(6).

[30] Swedish Arbitration Act (2019), Section 51(1).

[31] Columbian Arbitration Law (2012), Art. 107.

[32] French Code of Civil Procedure (2011), Art. 1522(1): 'By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside'. Please note that if the parties have waived their right to challenge the award, they can appeal the order granting recognition or enforcement of the award in France, on the grounds for annulment.

[33] *Ibid.* Section 2.2.2.

[34] *Ibid.* Section 2.2.2.

Finally, it is worth mentioning that the US courts are split on the issue of whether parties may agree to narrow down the grounds for judicial review of awards. Several decisions have held that waivers of vacatur are unenforceable under the US Federal Arbitration Act ('FAA')[35] because the integrity of the judiciary and the arbitration process as a whole would be compromised.[36] Otherwise, the US courts would become a mere 'rubber stamp' that could be required to enforce the awards tainted by partiality, a lack of elementary procedural fairness, corruption, and similar misconduct.[37] Other courts have permitted parties to restrict judicial review, citing the parties' freedom to contract the arbitration procedure they desire, provided they do so clearly and explicitly.[38]

4.3. National Legislations Allowing Parties to Expand Grounds for Annulling International Arbitral Awards

In contrast to agreements that purport to restrict or eliminate set-aside proceedings, agreements expanding grounds for annulling awards are regarded with disfavour by most jurisdictions, irrespective of whether they adopted the UNCITRAL Model Law rules. Only a small number of countries allow contractual stipulations expanding the grounds for annulment, primarily to include merits review. A separate category of jurisdictions provides for solutions that are comparable to expansion agreements. Finally, for a long time the US courts were split on the issue of whether parties can agree on non-statutory grounds for review, but it appears that the predominant view today is that the expansion agreements are invalid under federal law.

In accordance with the trend of further limiting the control function of the courts in international arbitration, broad models for expanded judicial review are not a commonplace, although they do exist in less developed arbitration jurisdictions. For example, the default rule in Angola is that arbitral awards rendered in the context of international arbitration are not appealable, unless parties have agreed on the possibility of appeal and have set the terms of that appeal.[39]

Other arbitration laws allowing expansion of judicial review accept that party autonomy should prevail over the principle of finality of arbitration awards, but do not accept that the parties' freedom should be

[35] The list of grounds for vacatur is stated in Section 10 of the FAA.

[36] See, for example, *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003).

[37] *Ibid*, 64.

[38] See, for example, *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973); *Swenson v. Bushman Inv. Props., Ltd*, 870 F.Supp.2d 1049 (D. Idaho 2012); and *Kim-C1, LLC v. Valent Biosciences Corp*., 756 F.Supp.2d 1258 (E.D. Cal. 2010).

[39] Angolan Voluntary Arbitration Act (2003), Art. 44.

limitless. An illustrative example is Italian law, which allows a challenge of an award for violation of the rules of law on a contractual basis: '[T]he recourse [for nullity] for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law'.[40]

Another country that allows expansion agreements is Israel, where the parties who have agreed that arbitrators should be bound by the law may additionally agree that an award would be subject to appeal before a court 'if a fundamental error had occurred that has the potential of a miscarriage of justice'.[41] In cases where an appeal has been filed, the court cannot simultaneously entertain an application for setting aside the award, but in the appeal the parties may raise arguments concerning the setting aside pursuant to any of the grounds for annulment.[42] However, Israeli judges hear and approve appeals on awards only exceptionally, as their general tendency is not to interfere in arbitration (Kapeliuk-Klinger 2019, 35).

Although many jurisdictions do not allow parties to broaden the scope of annulment of awards, they provide parties with an additional layer of control of awards through which they may achieve a similar effect. For example, parties may have the right of appeal before a second arbitral tribunal (e.g. in The Netherlands[43]) or an arbitral institution offering an appeal mechanism (e.g. the American Arbitration Association[44]). If parties agree to this type of appeal clauses or clauses allowing for referral to a second tribunal in jurisdictions that offer two-tier arbitration systems, they may face additional delays and costs.

Another, far more controversial alternative is offered in Germany, where the grounds for vacatur do not allow for any merits review of awards. However, parties may agree upon *de novo* litigation, rendering any preceding arbitration baseless. In particular, the German Supreme Court found that a clause according to which an award would become final and binding only under the condition that parties do not start *de*

[40] See Italian Code of Civil Procedure (2006), Art. 829(3). According to Art. 829(4) of the Italian Code of Civil Procedure, the review based on an error of law is always admitted in employment disputes and in cases where the violation of the rules of law concerns the solution of preliminary matters which are not arbitrable (e.g. matter concerning the status of individuals).

[41] Israeli Arbitration Act (2008), Art. 29(B)(a): 'Parties to an arbitration agreement which stipulated that the arbitrator should rule according to the law, may agree that the arbitration award could be appealed, with the Court agreement if a fundamental error had occurred that has the potential of a miscarriage of justice'.

[42] *Ibid*, Art. 29(B)(c).

[43] See Code of Civil Procedure of The Netherlands (2014), Arts. 1061a–1061l.

[44] See Optional Appellate Arbitration Rules of the American Association Arbitration (2013).

novo litigation within a prescribed period of time is an expression of party autonomy that should be respected by both arbitrators and judges.[45] In *de novo* proceedings, where both the law and facts would be reviewed, an award debtor may submit arguments and evidence that would otherwise be rejected in annulment proceedings, therefore, indirectly achieving a similar effect to the effect of the expansion agreements.

Finally, whether parties can contractually customise the legal standard of review for arbitration awards by giving more power to the courts was an issue of sharp contention in the US, where the court practice perfectly illustrates the tension between arbitral and judicial powers, as well as party autonomy and finality of arbitration awards. The courts—on one end of the spectrum—have upheld the parties' efforts to expand the standard of judicial review, holding that the legislative intent of the FAA is to ensure that arbitration agreements are enforced according to their terms, i.e. in accordance with party autonomy.[46] However, other US courts refused to recognise the right to expand judicial review of arbitral awards because the parties' freedom to expand the grounds for annulment would allow private individuals to illegally grant the jurisdiction to federal courts.[47] The opponents of contractually expanded judicial review also argued that this option would sacrifice the simplicity, expediency and cost-effectiveness of arbitration.[48] They warned that, 'rather than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation'.[49]

The US Supreme Court was given an excellent opportunity to resolve this direct split among the courts in the famous *Hall Street* case.[50] The Court in this case departed from its historic preference of the freedom-of-contract rationale by deciding that the grounds for vacatur under the FAA are mandatory and exhaustive, and that any agreement expanding the reasons for annulment would be declared invalid under the FAA. Finality trumped autonomy because any other outcome would not be acceptable due to the fact that it would endanger the institution of arbitration itself and transform it into 'a prelude to a more cumbersome and time-consuming judicial review process'.[51] Not unexpectedly, this

[45] See Judgment of 1 March 2007, III ZB 7/06 (German Supreme Court).

[46] See, for example, *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), 6; *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995), 995; *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F.Supp. 240 (S.D.N.Y. 1984), 242; and *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (U.S. S.Ct. 1989), 489.

[47] See, for example, *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), 1505.

[48] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), 936 n.7.

[49] *Ibid*.

[50] See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (U.S. S.Ct. 2008).

[51] *Ibid*, 563.

ground-breaking case has been the subject of a substantial number of scholarly articles and comments calling for its immediate reassessment (see, for example, Rau 2006). Until this has been done, the parties wishing to forego the *Hall Street* ruling may choose to arbitrate their dispute under the laws of the US states that provide for a more *laissez-faire* standard of review (e.g. New Jersey,[52] California[53]). Alternatively, the *Hall Street* judgment left open another venue to achieve the effects of expansion clauses in the US: '[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award'.[54] This approach resembles the above-discussed two-tier arbitration model.

5. MAIN CHARACTERISTICS OF AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

As demonstrated in the above overview of national arbitration legislation, there is no clear-cut solution regarding the desirability and utility of contractual variations of the grounds for annulling international arbitration awards. As businesses continue to experiment with the language and scope of their arbitration agreements, the dichotomy between freedom of contract and finality in arbitration may become further pronounced. To prevent such negative outcomes, courts should engage in a process of legal fine-tuning of what parties require from them, how much they can interfere in their mandate, and, finally, whether arbitration agreements may survive the invalidity of clauses modifying statutory grounds for review.

5.1. Language of Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards

In jurisdictions that consider agreements to modify judicial review of awards as valid, the first question arises as to what language parties should use to ensure that such agreements are be enforceable. In general, national courts have required clear language in order to give effect to absolute or partial waivers of the right to challenge an award.

[52] See New Jersey Statute, 2A:23B-4(c): '[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record'.

[53] See *Cable Connection, Inc. v. DirecTV, Inc.* 190 P.3d 586 (Cal. 2008). The Supreme Court of California ruled that parties may provide for review of the merits in the arbitration agreement under the state arbitration statute. The court concluded that policies favouring efficiency in arbitration should be outweighed by the freedom of contract, which is fundamental to arbitration.

[54] *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), 1505.

For example, the Swiss courts only accept the express language of agreements. A mere declaration of compliance with an award, in the arbitration agreement, does not constitute a valid waiver.[55] Similarly, the references to an award being 'final' or 'final and binding' are not enough to exclude the possibility of vacatur.[56] In contrast, an express reference to the specific arbitration rules or the provision contained therein providing for a waiver should suffice.[57] The express reference to the relevant provisions of the PILA is also desirable, but 'it is not essential ... that the parties cite such or such provision or that they use such or such expression'.[58] If parties want to exclude judicial review only partially, they must explicitly state the specific grounds for challenge that they want to exclude, either by indicating the corresponding sub-paragraph of Article 190(2) of the PILA, by reproducing its content, or by any other formulation that allows clear identification of the excluded grounds for challenge.[59] Similar rules have been applied by the English courts.[60]

In contrast to Swiss and English approach, some Canadian courts have held that the parties' agreement on 'final and binding' award is deemed an acceptable waiver.[61] The better view is that implied waivers should not be admitted. Born (2016, para. 134) suggests that a clause along the following lines can be used to exclude judicial review: 'The arbitrators' award will be final and binding. The parties expressly exclude any and all rights to appeal, set aside, or otherwise challenge any award by the arbitrators, insofar as such exclusion can validly be made'.[62]

---

[55] See Judgment of 10 October 2008, DFT 4A_224/2008 (Swiss Federal Tribunal).

[56] See Judgment of 2 June 2004, DFT 4P.64/2004 (Swiss Federal Tribunal); and Judgment of 15 February 2010, DFT 4A_464/2009 (Swiss Federal Tribunal).

[57] See Judgment of 19 December 1990, DFT 116 II 639 (Swiss Federal Tribunal). Note that the majority of institutional arbitration rules, including ICC Rules, SIAC Rules and LCIA Rules, contain limitations on judicial review of arbitral awards.

[58] See Judgment of 4 February 2005, DFT 131 III 173 (Swiss Federal Tribunal), 4.2.3.1.

[59] *Ibid*.

[60] In England, the exclusion agreement may be implied through the selection of a set of procedural rules containing the limitations on judicial review of awards. At the same time, a statement that an award shall be 'final, conclusive and binding' does not suffice to preclude the application of Section 69 of the English Arbitration Act. See *Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd* [1984] 2 Lloyd's Rep. 77 (English Ct. App.); and *Shell Egypt W. Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm) (English High Ct.).

[61] See *Labourers Int'l Union of N. Am. v. Carpenters & Allied Workers*, (1997) 34 O.R.3d 472 (Court of Appeal for Ontario).

[62] In its landmark decision, the Swiss Federal Court upheld an arbitration agreement having the similar wording: 'All and any awards or other decisions of the Arbitral Tribunal shall be made in accordance with the UNCITRAL Rules and shall be final and binding on the parties who exclude all and any rights of appeal from all and any

Alternatively, McIlwrath, Savage (2010, 331) proposes the following clause: 'The award will not be subject to any right of appeal, challenge, or action to set aside, which the parties hereby irrevocably waive'.

An example of a partial waiver, valid under Swiss law, reads as follows: 'The parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL tribunal itself or before any national courts'.[63]

In contrast to partial and absolute waivers, the interpretation of agreements expanding judicial review is less controversial. In general, parties may either ensure the general right to seek expanded judicial review in accordance with the rules applicable to challenges to judicial judgements or they may state specific grounds in their agreement.

Born (2016, 137) provides an example of the agreement limiting the expansion of judicial review to the reasons of appeal before a court: 'The arbitrators' award shall be final and binding, but any party hereto shall have the right to seek judicial review of such award in the courts of the place where the award is made in accordance with the standards of appellate review applicable to decisions of courts of first instance in that place'.

If parties want to challenge the award because of errors of law, which is the most common ground for judicial vacatur of arbitral awards not contained in the UNCITRAL Model Law, they can include the following clause in their arbitration agreement: 'The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error'(Hamlin 1998, 51).

These and similar clauses should not instil doubt in parties, arbitrators and judges as to their meaning.

---

awards insofar as such exclusion can validly be made'. Judgment of 4 February 2005, DFT 131 III 173 (Swiss Federal Tribunal), para. 4.2.3.2.

[63] The full text of the limitation clause reads as follows: 'The parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL tribunal itself or before any national courts. For the avoidance of doubt, the parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the parties will not do so on the ground that the UNCITRAL Tribunal lacked jurisdiction to consider one or more of the issues before it'. Judgment of 10 November 2005, DFT 4P.98/2005 (Swiss Federal Tribunal), 148.

5.2. Scope of Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards

As seen above, some countries allow parties to completely exclude their right to challenge awards in advance, despite the threat of potential misuse of arbitration by one of the parties. Others allow only those waivers that do not endanger the interests of the public or third parties. An even more protective approach has been suggested by some commentators. They argue that stricter control over agreements excluding review of decisions on jurisdiction is advisable because it is difficult to accept that arbitrators would be able to make an award without any possibility of judges to review their status (Born 2014, 3371). Others suggest that, in addition to the jurisdiction, parties should not be allowed to waive the grounds concerning the fundamental procedural fairness and international public policy (Park 1989, 707). Although these proposals have been made in the interest of integrity of the arbitral system, they have not been accepted by the national legislatures that recognise exclusion agreements, who tend to primarily protect non-partisan interests when limiting the right of the parties to deviate from statutory grounds for annulment.

In sum, the Swiss arbitration law and court practice may serve as a prototype for other countries if they decide in the future to grant parties the right to partially or completely exclude the statutory grounds for annulment. If they wish to protect not only their national interests, but also the interests of third parties, they may follow in the footsteps of Austria. Others, who would prefer to take a less lenient approach towards annulment of awards, may, perhaps, provide additional safeguards aimed at preserving the jurisdictional and procedural correctness of arbitration.

On the other side, giving parties the absolute freedom in crafting expanded grounds for annulment would be overwhelming because private entities should not be allowed to require judges to apply unfamiliar standards of judicial review. Such unrestricted interference with judicial independence should not be tolerated. As famously stated by a US court, any request to a court to review an arbitral award 'by flipping a coin or studying the entrails of a dead fowl' should be decisively rejected by any court.[64]

A better solution is to only allow agreements stipulated to facilitate expanded review of the sort which would apply if an arbitral award was a first instance judgment. At least in theory, such a measured approach not only accords with the principle of party autonomy, but it may also enhance the judicial protection available to parties before local courts. However, as described above, only less developed arbitral jurisdictions

[64] *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), 891.

provide for such a model. Instead, practice has shown that national arbitration laws mostly allow parties to agree only upon a limited number of grounds for appeal regularly available in litigation proceedings, of which the review on the merits has primacy over other available reasons for annulment.

5.3. Impact of Invalid Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards on the Remaining Elements of Agreements

Another legitimate concern regarding agreements providing for customised judicial review is their impact on the survival of entire arbitration agreements in cases of their impermissibility. Namely, following a court ruling that the parties' agreement for judicial review is invalid, a dissatisfied party can argue that it agreed to arbitrate only on the condition of modified judicial review. In response to this assertion, the court may take one of two different paths.

First, a court may find an invalid provision to be divorceable. Consequently, an arbitration agreement survives as if parties did not change the scope of judicial review. For example, in *Kyocera* the US court found that the invalid provision was severable because it pertained to the review of the arbitration procedure that should have been conducted by the court, while the rest of the agreement was related to the arbitration procedure conducted by the tribunal.[65]

Second, if a court finds that a party would not arbitrate at all without the possibility of modified judicial review, the entire arbitration agreement becomes unenforceable. In contrast to *Kyocera*, a different US court ruled that '[t]he provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed. To do so would be to create an entirely new agreement to which neither party agreed ... The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results'.[66] The Supreme Court of New Zealand similarly found an entire arbitration agreement invalid when it struck down the clause stipulating the appeal on questions of law and fact, because the parties indicated in their arbitration agreement the degree of importance that they attributed to the scope of their ability to challenge the award on appeal and because the factual matrix at the time the parties entered into the arbitration agreement showed that the clause

[65] See *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

[66] *Crowell v. Downey Community Hospital Foundation*, 95 Cal.App.4th 732 (Cal. Ct. App. 2012), 740.

stipulating the expanded judicial review was a key element of the agreement to arbitrate.[67]

In principle, in cases dealing with waiver clauses, the parties' clear intent to constrain or completely exclude judicial control may be a strong indication that the parties may well have preferred no arbitration rather than arbitration followed by regular annulment proceedings. In regard to expanded judicial review, the courts may be expected to keep an arbitration agreement alive and proceed to examine an award on the basis of the statutory grounds of review, assuming that the parties would have consented to arbitration with the possibility of the review available under applicable law rather than not arbitrate at all.

Considering the complexity of this matter, it is improbable that a universal solution covering all potential cases can be found. Rather, different combinations of the facts of the case, rules of contract interpretation, and variety of general principles of law in each country have the potential to result in diverse outcomes in each individual case. Nonetheless, in accordance with the principle of severability, it may be argued that, to the extent possible, the arbitration-friendly attitude of the courts should favour continuity of arbitration agreements.

6. ADVANTAGES AND DISADVANTAGES OF ALLOWING PARTIES TO LIMIT OR EXPAND GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

As can be seen from the discussion above, there is no magic formula for designing an ideal party-dependant system of judicial review that could overcome all policy and practical issues related to its legal nature and application. Despite such uncertainty, many countries, including some key common and civil law jurisdictions, recognise the value of the parties' freedom to tailor the post-award judicial review as they see fit. They offer businesses the choice that would serve their interests best, knowing that certain parties may prioritise the quality of arbitral awards, while others may appreciate fast resolution of their dispute. Many prospective parties in arbitration also take into consideration the prospect of enforcement of arbitral awards abroad. Since exclusion and expansion agreements have a decisive impact on each of these aspects of arbitration, their availability, stipulation and application significantly affect the whole arbitration system itself.

[67] See *Ewan Robert Carr and Brookside Farm Trust Ltd. v. Gallaway Cook Allan*, [2014] NZSC 75 (Supreme Court of New Zealand).

6.1. Quality of Arbitral Awards

One of the main advantages of international arbitration is that it provides its users the opportunity to select arbitrators with the technical and commercial expertise that is tailored to the unique needs of parties in each dispute. However, it is no secret that at least some arbitrators, especially those who are untrained in the law, are sometimes more driven by a tendency to search for business-oriented solutions rather than to strictly apply the governing law to the facts. As a result, the incompetence of such arbitrators to decide complex statutory issues in cross-border disputes may result in obviously aberrant decisions, which would serve no purpose to parties.[68] When viewed through this prism, the prospect of heightened judicial control could put pressure on arbitrators to weigh the issues at stake more carefully, knowing that their decisions could be subject to strict scrutiny and rigorous sanction. Thus, it appears that arbitration users may benefit if they can contract expanded judicial review to improve the odds of obtaining a correct and just outcome of their dispute. As a result, parties who might otherwise not agree to arbitrate may be more willing to use arbitration if appellate courts might have the final say in the dispute in case their expectations that the arbitral tribunal could be composed of impartial, competent, and independent arbitrators prove to be false.

In contrast, it would not be always prudent for international parties to restrict the grounds for vacatur without second thought. Arbitration agreements to take matters out of courts may lift the weight off the arbitrators' shoulders and thus make them more open to rendering awards of questionable quality, with the serious potential to impede justice in arbitration—especially if their decisions would not be subject of judicial control abroad in cases in which the winning party is seeking to execute the arbitration award only in the seat of arbitration.

6.2. Integrity of Arbitral Procedures

While expanded judicial review can presumably improve the quality of awards, it may at the same time threaten the integrity of arbitral proceedings. As explained above, this model of judicial control may negate the advantage of the typically swift resolution of disputes through arbitration. Therefore, parties contracting for more comprehensive judicial review should be mindful of the additional delays, costs, possible obstructions of proceedings and other unwelcomed frustrations. In addition, the appeal on the merits would most likely eliminate confidentiality, which is another major advantage of arbitration.

[68] Such awards are known as 'maverick arbitral decisions', 'knucklehead awards', 'Russian Roulette awards' or 'roll-the dice' arbitration awards.

Although the drawbacks of expended judicial review are obvious, they are not insurmountable. For example, national laws can limit parties to elect only one or several additional grounds for review, with which local courts are well familiar. Parties are also free to save time and costs by further narrowing the contested issues before the court. They can also give up their claims at any time. In any case, the benefits of arbitration would still be retained in connection with those issues that are finally settled by arbitrators (Montgomery 2000, 552). Since reviewing arbitration decisions based on errors of law or substantial evidence would be less burdensome than a full trial, a further argument can be made that expanded review does not completely undermine efficiency of arbitration, but instead 'lessens the distance on the expeditiousness spectrum, between full-blown litigation and non-reviewable arbitration' (Hulea 2003, 358). This view is in accordance with the above explained theory of false conflict between the principles of party autonomy and finality.

On the other side, the abolishment or reduction of judicial post-award review may open the floodgates for blatant attempts to abuse the procedural rights or jeopardise public and private interests of third parties by an unscrupulous party, who may 'contaminate' proceedings to the extent that such behaviour would irrevocably taint an arbitration award. However, in the absence of such harmful practices, the potential advantages of reduced review may appear rather obvious, especially for the parties who prefer an efficient resolution of their dispute. For example, a full waiver could be very useful in time-sensitive cases, either because of the type of dispute (e.g. in disputes involving perishable or seasonal goods), or the amount potentially in dispute (e.g. in low-value disputes), or remedy sought in arbitration (e.g. declaratory relief affecting future contractual obligations). In these cases, parties can maximise informality, flexibility, speed, simplicity, reduction of expenses and other benefits of arbitration by minimising the interference of the courts through arbitration. Furthermore, they can quickly move to the enforcement stage after an award is made—to ensure the prompt recovery of the fruits of successful resolution of their dispute.

6.3. Enforceability of Awards

Although optional limited judicial review may be the ideal option in some cases—because of its anticipated positive impact on the quality of awards and integrity of arbitral procedures—it might also prove unwelcome in practice when it comes to enforceability of awards. Its wider application might provoke a global tsunami of judgments denying recognition and enforcement of awards. Such tectonic movements within the current arbitration system would seriously undermine the bedrock principles of modern international arbitration, embodied in the New York Convention and the UNCITRAL Model Law.

First, the lack of possibility to annul an award in the situs would raise fears of refusal to enforce such 'floating award' in other jurisdictions because such stateless awards are deemed unenforceable under the New York Convention. If this is the correct interpretation, as it has been vigorously argued by numerous scholars, the chances of a winning party benefitting from an award would drop dramatically if parties agreed to completely preclude judicial review of arbitration awards (Van den Berg 1986, 213). Similarly, there would be no guarantees that the award would be enforced abroad if parties limit domestic courts to review awards only on one or several available grounds, since the grounds for enforcement mirroring the excluded grounds for annulment may be non-waivable in the country of enforcement.

Second, the benefits of a 'neutral nationality' of the arbitral forum could be lost if a country of enforcement, as it is often the case, is the country of one of the parties. Namely, it is assumed that parties choose international arbitration because they do not trust each other's courts. Instead, they want to resolve their dispute before a neutral third-party forum that is unlikely to appear biased. The abovementioned unsuccessful attempt to reform Belgian arbitration law illustrates all the dangers of shifting judicial control away from courts of the seat of arbitration to those of the countries responsible for enforcement of awards. In an attempt to attract non-Belgian parties and ease the caseload of the courts by excluding review of awards 'which do not at all concern our country, and which at present are often used for purely dilatory purposes',[69] the government in fact drove the foreign parties away from Belgium who were reluctant to give up any right of review in the seat of arbitration. A similar outcome may occur if the optional complete exclusion of judicial review before neutral courts of the situs is constantly triggered by the parties.

Similar complications, although to a much lesser extent, might arise if a foreign court enforces an award that was vacated on non-statutory grounds chosen by parties. Namely, if a local court sends an award to a tribunal for reconsideration and the new tribunal renders a different decision, the situation could create the two-awards problem of inconsistent court decisions in countries of annulment and enforcement. Similarly, if a court of the seat simply reverses an award, confusion may arise regarding the status of the original award. In order to reduce this risk, it has been suggested that parties simply contract a clause authorising the original tribunal to retain jurisdiction in case of vacatur of its award (Barceló 2009, 4).

Another potential concern is the refusal of enforcement of an award by a foreign court, after a local court rules that the award is correct on the

[69] Legislative history concerning Article 1717 of the Belgian Judicial Code, cited by Vanderelst (1986, 86).

merits. A discontented party may argue that the clause allowing for a substantial review is also applicable in the enforcement stage. If the foreign court accepts the jurisdiction to review the award on the merits—which is unlikely but still possible—its conclusion on the validity of the award may differ from the original ruling of the court of the seat. To avoid this situation, it is best to clarify in the arbitration agreement that the expanded grounds for review do not refer to the grounds for enforcement (Moses 2003, 321–22).

7. CONCLUSION

The discussion presented in this paper has indicated that the traditional judicial review of international arbitral awards is the process by which a court reviews an award on a limited number of narrowly circumscribed grounds. As explained, in national systems that cherish the classic judicial review mechanism, the core virtues of party autonomy and finality in arbitration are, among others, safeguarded by the strict prohibition of judges reviewing errors of law made by arbitrators. This default position, laid down in the UNCITRAL Model Law, prohibits private parties from conferring or tampering with the jurisdiction of national courts. Thus, parties can choose between a one-tier arbitration system offering efficiency—ensured by limited judicial review—and a classic judicial appeal mechanism designed to favour the quality of decision-making. Yet, it was argued that, instead of choosing between these two extremes, a sensible middle way approach might be to allow parties greater freedom to streamline a more flexible dispute resolution process, provided that it does not inflict undue burdens on the national courts, infringe the rights of non-parties, or threaten public interests.

Although no system can perfectly reconcile the principles of party autonomy and finality, it appears that arbitration agreements limiting and expanding the statutory grounds for setting aside of awards are, in principle, compatible with the nature of arbitration. As seen in section 4 of the paper, a significant number of the most important jurisdictions for international commercial arbitration—including Switzerland, England, France and, arguably, the US—explicitly or implicitly allow parties to modify the grounds for annulment.

In order to ensure enforcement of arbitration clauses modifying the statutory grounds for vacatur under national laws that permit them, parties should express their will with definiteness and precision. It was further suggested that the parties' unreasonable and unrestrained requests for review or its exclusion should be rejected. Instead, a sensible middle ground may be to allow parties to freely limit the grounds for annulment, provided that they do not exclude the possibility to set aside an award on

the basis of its harmful impact on the interests of third parties or public policy—and, perhaps, wrongfully determined jurisdiction by the tribunal. Their freedom to agree on additional grounds for review should be limited only to the substantial review of arbitral awards or to one or more reasons for appeal available under the applicable national law. Otherwise, arbitration agreements containing an exclusion or expansion clause may become entirely unenforceable.

The paper further discusses the circumstances under which it would be beneficial for parties to minimise or increase judicial review of arbitral awards. The parties to time-sensitive cases might consider agreeing to partially or entirely waive their right to challenge the award, especially if there is no need to enforce the award outside the seat of arbitration. In contrast, the possibility of increased judicial review would be desirable in arbitrations involving complex legal issues, in which the substantial correctness of the final decision is presumably more important than the effectiveness of decision-making process. In any case, the parties should be aware that any modifications to the setting-aside proceedings might affect the certainty and predictability of the enforcement of arbitral awards.

The struggle to reconcile the values of party autonomy and finality of awards, in combination with the practical considerations presented above, boils down to the ultimate dilemma of whether agreements modifying the grounds of annulment increase or undermine public confidence in arbitration. As discussed above, the possibility of concluding such agreements seems to be more sensitive to the diverse interests and expectations of arbitration users than the currently predominant system of mandatory statutory grounds for annulment. In any case, whether arbitration clauses limiting or expanding the scope of judicial review will become a more common practice (if permitted by more jurisdictions in the future) will ultimately depend on the circumstances of each dispute, such as the type of claim, the complexity of the issues at stake, the value of potential claims, the possible time constraints, the risk of dilatory tactics, and the prospects of enforcement of award in other jurisdictions.

REFERENCES

Barceló III, John J. 2009. Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective. 1–19 in *Resolving International Conflicts—Libor Amicorum Tibor Várady*, edited by Yehuda Elkana, Nenad Dimitrijević, Peter Hay, and Lajos Vékás. Budapest: CEU Press.

Born, Gary B. 2016. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing.* 5th ed. Alphen aan den Rijn: Kluwer Law International.

Born, Gary B. 2014. *International Commercial Arbitration*. 2d ed. Alphen aan den Rijn: Kluwer Law International.

Hamlin, James B. 4/1998. Contractual Alteration of the Scope of Judicial Review: The US Experience. *Journal of International Arbitration* 15: 47–62.

Hulea, Dan C. 1/2003. Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective. *Brooklyn Journal of International Law* 29: 313–368.

Kapeliuk-Klinger, Daphna. 2019. National Report for Israel (2013 through 2018). 1–31 in *ICCA International Handbook on Commercial Arbitration,* Supplement No. 104, edited by Lise Bosman. Alphen aan den Rijn: Kluwer Law International.

Kroll, Stefan M., Peter Kraft. 2015. Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse Against the Award, § 1059 – Application for Setting Aside. 383–420 in *Arbitration in Germany: The Model Law in Practice*, edited by Karl-Heinz Böckstiegel, Patricia Nacimiento, and Stefan M. Kroll. 2d ed. Alphen aan den Rijn: Kluwer Law International.

McIlwrath, Michael, John Savage. 2010. *International Arbitration and Mediation: A Practical Guide*. Alphen aan den Rijn: Kluwer Law International.

Mitzner, Matthew M. 1/2009. Snatching Arbitral Freedom from Hall Street's Clenched Fist. *Review of Litigation* 29: 179–218.

Montgomery, Leanne. 2/2000. Expanded Judicial Review of Commercial Arbitration Awards – Bargaining for the Best of Both Worlds: *Lapine Technology Corp. v. Kyocera Corp*. *University of Cincinnati Law Review* 68: 529–554.

Moses, Margaret L. 3/2003. Party Agreements to Expand Judicial Review of Arbitral Awards. *Journal of International Arbitration* 20: 315–323.

Park, William W. 2006. *Arbitration of International Business Disputes*. 1t ed. Oxford: Oxford University Press.

Park, William W. 3/1989. National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration. *Tulane Law Review* 63: 647–709.

Park, William W. 2001. Why Courts Review Arbitral Awards. 595–606 in *Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel*, edited by

Robert Briner, Yves L. Fortier, Klaus P. Berger, and Jens Bredow. Köln, Berlin, Bonn, Munchen: Carl Heymanns Verlag KG.

Pavić, Vladimir. 2010. Annulment of Arbitral Awards in International Commercial Arbitration. 131–152 in *Investment and Commercial Arbitration – Similarities and Divergences*, edited by Christina Knahr, Christian Koller, Walter Rechberger, and August Reinisch. Utrecht: Eleven International Publishing.

Raghavan, Vikram. 3/1998. Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on Some US Developments. *Journal of International Arbitration* 15: 103–134.

Rau, Alan S. 4/2006. Fear of Freedom. *American Review of International Arbitration* 17: 469–495.

UNCITRAL Secretariat. 2008. Explanatory Note on the 1985 Model Law on International Commercial Arbitration as Amended in 2006.

UNCITRAL. 2020. Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status* (last visited 1 December 2020).

Van den Berg, Jan A. 1986/3. Non-Domestic Arbitral Awards Under the 1958 New York Convention. *Arbitration International* 2: 191–219.

Vanderelst, Alain. 2/1986. Increasing the Appeal of Belgium as an International Arbitration Forum? – The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards. *Journal of International Arbitration* 3: 77–86.

Várady, Tibor. (2–3)2006. On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What Is Actually Pro-Arbitration? *Zbornik PFZ* 56: 455–478.

Walser, Manuel, Lisa Sartor. 2020. Liechtenstein: International Arbitration 2020, in *ICLG – International Arbitration Laws and Regulations 2020*, available at: *https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/liechtenstein* (last visited 1 December 2020).

Weber, Stefan, Katharina Kitzberger. 2020. Austria: International Arbitration 2019, in *ICLG – International Arbitration Laws and Regulations 2020*, available at: *https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/austria* (last visited 1 December 2020).

Article history:
Received: 30. 10. 2020.
Accepted: 6. 12. 2020.

UDC 344.3(497.11)"1944/1946"

CERIF: S115, S100

DOI: 10.51204/Anali_PFUB_20408A

Valerija Dabetić, LL.M.*

"LEGALITY" OF THE LEGAL ORDER IN POSTWAR SERBIA FROM 1944 TO 1946: ORGANIZATION AND WORK OF THE JUDICIARY

The judiciary in Serbia is heir to a long tradition of political influence, which was particularly visible during the communist regime after World War II. Violations of the presumption of innocence, retroactive sentencing and a denial of basic human rights are just some of the features of the work of the postwar "judiciary" in Serbia, between 1944 and 1946. This paper analyzes the implications of revolutionary legislative activity, the structure and organization of the Military Court and the Court of Honor, and examines to what extent the dominant political culture, implemented through the state coercive apparatus, influenced judicial adjudication. The paper elaborates on Radbruch's idea of "statutory lawlessness", Fuller's notion of "procedural natural law" and "internal morality of law" and argues that the postwar law of communist Serbia did not exercise formal and procedural justice, and cannot be called a legal system in the full sense of the word.

Key words: *Communist Serbia. – Formal and procedural justice. – "Internal morality of law". – Military courts. – Court of honor.*

> "If one applauds the assassination of political opponents,
> or orders the murder of people of another race,
> all the while meting out the most cruel and degrading
> punishment for the same acts committed against those of one's own
> persuasion, this is neither justice nor law."
>
> Gustav Radbruch

* Teaching Assistant, University of Belgrade Faculty of Law, *valerija.dabetic@ius.bg.ac.rs*.

1. INTRODUCTION

In order to institutionalize its power, each government must adopt a legal framework, establish a judiciary to adjudicate in accordance with positive regulations, and appoint law enforcement executive bodies. Despite the fact that some authorities manage to organize themselves in this way and gain a certain degree of legitimacy, from a legal point of view, their work and actions cannot be considered legal for this reason alone. An example of such a government can be found in Yugoslav history when, after World War II from 1944 to 1946, the communist regime created a normative system that did not exercise formal or procedural justice (Dajović 2017, 82). Using the judiciary for the implementation of these legal rules, the state succeeded in maintaining its (partisan) power in various areas of public and private social life. Although there are legal restrictions on such an extension of competencies, the specific social-historical context of postwar Serbia created a suitable opportunity for strengthening the executive branch, which was the embodiment of all three branches of government and enabled the application of "statutory lawlessness" (Radbruch 2006a, 1–11), based on which the government dealt with its ideological opponents.

One of the recurring themes in legal theory, which was acknowledged by the post-Nazi process of "legal overcoming of the past" in Germany, is the status of borderline, ephemeral cases of legal and political regimes, which in some significant aspects deviate from the "standard" case of minimal decent constitutional democracy. Referring to this as a "Nuremberg problem" or "the Hitler problem" (Jovanović 2013, 147), the actual dilemma is whether shortcomings of such systems were immoral to the extent that those moral deficiencies actually require that such an order is deprived of the qualification of "legal" and "legality". This debate is still on the table, with natural law theorists approving these arguments by recognizing a bond between law and morality, and legal positivists generally still opposing this standpoint. This paper analyzes the legal and institutional framework of the postwar communist Serbia, paying special attention to the revolutionary legal rules, structure, organization and work of the judiciary, with one relevant difference: unlike the abovementioned theoretical confrontation, the paper does not question the "legality" of defeated, defective normative and institutional regime (e.g. Nazi system, fascist, or Apartheid), but rather the birth and institutionalization of the communist order in Serbia which would become solidified and present in a "different form" for the next 45 years.[1] By examining the consequences

[1] We deliberately use quotation marks saying "different form" referring to the theoretical and empirical researches showing that the communist elites in Serbia are still present, but in a different form. According to these findings, elites have converted their previous resources—specifically political and organizational capital—into economic and

of implementing revolutionary justice and judicial application of the regulations from this period, we will try to answer the following questions: in a revolutionary environment, can the judiciary do anything other than support "statutory lawlessness"? Or as Fuller once asked, in this type of social context who should "do the dirty work, the courts or the legislature"? (Fuller 1958, 649).

The paper is organized into three parts. In the first, theoretical part of the paper we critically analyze Lon Fuller's idea of "procedural natural law" and the eight criteria for "internal morality of law". We defend the standpoint that only law, created in compliance with these conditions, can guarantee the respect of human dignity and a correct legal procedure in accordance with the requirements of justice and morality. A similar approach could be seen in the works of Gustav Radbruch and Hanna Arendt, who warn that only legal orders that do not engage in "arbitrarily granting and withholding human rights" (Radbruch 2006b, 14), abuses and abolish democratic freedoms betraying "the will to justice" in this way, do not lack validity (Arendt 1999, 320). In the second part, we deal with the specific local social context characterized by the birth and strengthening of the totalitarian regime, during the period from 1944 to 1946, when the political structure opportunistically dealt with its ideological opponents, with the help of the courts and based on the law that did not exercise formal and procedural justice. The focal point of this paper is its third section, which encompasses the analysis of a) the normative activity of the Communist Party, through the critical assessment of the violations of the basic principles of criminal law and criminal procedure, and b) the repercussions of establishing the new, revolutionary Military Court and the Court of Honor, which ruled based on regulations that reflected the official totalitarian ideology.

2. THEORETICAL FRAMEWORK

The main characteristic of postwar Yugoslav society was its aspiration to radically abolish the existing and create a new, "righteous" social system. To this end, the public and largely private sphere (Mitrović 2005, 341–356)[2] were governed by an official (party-based), obligatory

political capital of a different type, which in the new capitalist order are crucial for maintaining an elite position (Lazić 2011; 2016, 57–80; Pafeto 2017, 20, 62).

[2] By eliminating the boundaries between the public and the private, everything that falls under individual action is subject to examination. So, the principle of *cogitationis poenam nemo patitur*—to punish a deed or a word and that no one will be punished for their opinion—was no longer relevant. There were also those who were punished for verbalizing their disagreement with some of the actions of the authorities (their thoughts) through songs, jokes and rhymes (Mitrović 2005, 341–356). See more on the "crimes of

ideology, disseminated on a massive scale by the party through the media, while the stern police organization fought against (in)visible enemies (Kuljić 1983, 154).[3] Although these features meet the theoretical characteristics of Carl J. Friedrich' totalitarian dictatorship: the totalitarian regime in its developed form "did not arise from the efforts of those who created it, but from the political situation in which the anti-constitutional and anti-democratic movements and their leaders found themselves" (Kuljić 1983, 154). The postwar social context during the period from 1944 to 1946 created a political situation in which the "winners", in this case both in World War II and in the concurrent civil war, gained the support and trust of a broad section of society (the masses), which enabled them to overcome internal and external crises and establish themselves as the government (Arendt 1999, 314).

Due to the danger of "totalitarian movements using and abusing democratic freedoms in order to ultimately abolish them" (Arendt 1999, 320), legal philosopher Gustav Radbruch warned of the necessity of setting qualitative restrictions on the content of law. While witnessing the horrors of World War II, especially the crimes committed by the Nazi regime, Radbruch deviates from his initial idea – that for the sake of legal certainty bad laws should be given validity, and changes his initial idea that "everything that benefits the people is law" into "only what law is benefits the people" (Radbruch 2006b, 14). He adds that in a situation when the current regulations "deliberately betray the will to justice" or when there is arbitrariness in the (non)recognition of human rights, citizens and jurists are not required to act in accordance with such arbitrary, cruel laws and "must find the courage to deny them legal character" (Radbruch 2006b, 14; Haldemann 2005, 162–178; Jovanović 2013, 145–167; Stepanov 2012, 93–102).

Although history recalls various attempts to reduce human rights, through many historical and political struggles, they have become a part of positive modern legal systems and as such represent a criterion for establishing an (un)just society (Hasanbegović, 2016, 48–50). In other words, in liberal democracies human rights represent positivized natural

opinion" and verbal political torts, especially the judicial interpretation such as "hostile propaganda can also be carried out by singing songs (verdict of the Supreme Court of Croatia No. 1355/52); "...for public propaganda, the public is not needed. The perpetrator and another person are enough.", "...propaganda can also be carried out against one person" (Instruction of the Supreme Court of the SFRY, No. 208/52, obligatory for all courts); the crime or the possibility to committing a crime could be "known only to the prosecuting authorities" (Danilović 2002, 69, 63–72).

[3] With this typology, Carl J. Friedrich tried to prove that fascist and communist totalitarian dictatorships are in fact the same. Due to the limited scope of this paper, we will not go into a detailed analysis of the differences between these two systems, but rather accept the basic typology and look for similarities with the postwar Yugoslav communist society during the period from 1944 to 1946 (Kuljić 1983, 154).

rights, self-evident legal values, supreme values, i.e. basic principles of humane society, while in an undemocratic system (authoritarian, totalitarian, etc.) the protection of these moral and political requirements is completely absent or simply proclaimed, but not implemented in the true sense of the word (Hasanbegović, 2016, 50–56; Uzelac 1992, 420–421). This purely nominal proclamation creates room for the general denial and violation of human rights as; although formally the courts are bound by such laws, *de facto* they are "tacitly" authorized to judge *contra legem* in situations where the letter of the law and political will collide.[4]

By reconciling the eternal antagonism between the school of *ius natural* and positive law, Lon Fuller takes a qualitatively different approach to analyzing the relationship between the law and morality. He believes that law is "the enterprise of subjecting human conduct to the governance of rules" and that the legal system is the product of this purposeful activity (Fuller 1969, 106). Therefore, the law—in order to be called law in the full sense of the word—cannot be completely immoral or perverted, but must contain a minimum of morality (Fuller 2011, 12). A correct legal order must respect the eight procedural and objective requirements of the "law's internal morality" (Fuller 1969, 46–91), which are value-neutral according to the "substantive aims of the law" (Fuller 1969, 152).

Firstly, laws must be *sufficiently general*, i.e. rules must exist, and any resolution on a case-by-case basis—in order to create a general principle—would lead to legal uncertainty. Secondly, laws must be *publicly promulgated* i.e. known to the public so that citizens can a) know which rules to follow, b) criticize their content, and c) control whether the lawmakers act in accordance with them. Thirdly, laws must *not be enacted retroactively*, barring exceptional cases when some formal irregularity needs to be subsequently corrected, or in order to preserve legality. Even then, Fuller emphasizes that one should be especially careful, because the abuse or overuse of retroactivity can bring legal uncertainty.[5] Fourthly,

[4] Josip Broz Tito's statement to certain judges, saying that "they should not stick to the law like a drunk sticks to the fence," is generally well known (Uzelac 1992, 420–421).

[5] It is important to emphasize that Fuller's prohibition of retroactivity is initially referred to laws as a general legal acts, not to verdicts as individual legal acts. For the purpose of this paper, we do not consider that all of Fuller's rules of internal morality apply strictly to legislation. For example, the majority of the verdicts from 1944 to 1946 were backdated, passed without any previous presentation of material evidence, and were verdicts in which the basic procedural equality of the parties was neglected. The government didn't use a possibility of retroactivity in special cases as Fuller suggests ("as a curative measure" or "to cure irregularities of form") (Fuller 1969, 53–54), rather to give a legal basis for sentences (mostly death) that have already been committed. In other words, there was no trial in the true sense of the word. Taking into account all of the above, this type of bringing verdicts will be treated as a *specific form of retroactivity*.

legal rules must be *clear*, written in intelligible language, but one should not at all costs strive to clarify the legal standards typical to the language of law. The fifth criterion is the consistency of the law, whereby Fuller appeals to the legislator that the adopted rules should be mutually *compatible* and free of contradictions. Sixthly, laws that require impossible (in)action from subjects are simply not feasible. Therefore, it must be *possible to obey* any given law. Seventhly, the law should be *relatively constant* and not be changed too frequently, as its consistency ensures a higher degree of legal certainty. Finally, legal rules remain mere words on paper if there is no *compatibility between the published rule and its official application*. In other words, in situations where the law is incomplete, courts have the task of eliminating this disagreement by applying the law in accordance with its obvious or apparent meaning, through the principles of interpretation and understanding of the original purpose of enactment (Fuller 1969, 33–41, 46–91).

Internal morality is a necessary, but insufficient condition for achieving legal order in the full sense of the word, i.e. procedural justice, is a precondition for the realization of material justice. As a confirmation of this idea, Fuller points out that it is difficult to find a historical example of a legislator who has abided by all eight rules of internal morality and passed a morally incorrect law that "brutal indifference to justice and human welfare" (Fuller 1969, 154). In other words, "if the basic principles of procedural justice are not realized, then the law is unjust... And an unjust law is not a law that performs the function it should have—the function to exercise justice" (Dajović 2017, 103). Therefore, in order for a law to be viewed as a typical legal system, and not as a "defective or perverted law" (Dajović 2017, 82), it must exercise formal and procedural justice.

3. SOCIO-HISTORICAL CONTEXT

In order to understand any social phenomenon, it is important to understand the time in which it was conceived and the historical circumstances that shaped it, since social phenomena are impossible to decontextualize (Flyvbjerg 2012, 61; Tamanaha 2017, 31). In the case of postwar Yugoslavia and Serbia, the local social context was closely linked to the world's struggle against Nazism and fascism. This ideological connection conditioned the creation of people's democracies in most communist societies, which did, in the first years of their constitution, intensively promote anti-fascism under the auspices of the fight against so-called enemies of the people and war criminals (Cvetković 2011, 33–36; Arendt 1999, 311–348).

Due to the suffering during World War II, the revolutionary communist movement in Serbia in the postwar period, starting from 1944, massively sanctioned those who (implicitly or passively) did not identify with the new official ideology (Božić 2017; Božić 2018). Upon examining all the available materials, historian Srdjan Cvetković concludes that, during the period from 1944 to 1946, the communist regime did not hesitate to hand down many death sentences (Cvetković 2006, 81–103) and that revolutionary justice (which would often grow into political violence (Heywood 2005, 219)) perpetrated through "wild cleansings" of political and class enemies of the revolution, which were carried out in strict secrecy, usually under cover of night and with no paper trail (Cvetković 2007, 74–105).

The punishment of those who "in one way or another cooperated with the occupier"[6] initially had a non-institutional character: most trials were conducted in secrecy, usually under the control of the Department for the Protection of the People (OZNA). Verdicts were prepared in advance (unwritten, blank verdicts)[7] or were passed retroactively in order to legalize the already committed executions of respectable citizens.[8] The violations of basic human rights and restriction of civil and political freedoms reached their peak in the transitional period of the constitution of communist rule (so-called "liquidation of the enemies of the people 1944—1953" (Cvetković 2019)), when party leaders took over the foremost levers of power, actively participated in the direction of political trials (Danilović, 2002, 91–134), and handed down a number of death sentences without evidence or having held trials (Cvetković, Dević 2019, 57).[9]

[6] Odluka o ustanovi suda za suđenje zločina i prestupa protiv srpske nacionalne časti [Decision on the establishment of a court for the trial of crimes and offenses against Serbian national honor]. Official Gazette of Serbia. 24 February 1945. *https://www.uzzpro.gov.rs/doc/biblioteka/bib-propisi/restitucija/5-odluka-o-ustanovi-suda.pdf.* (last visited 26 June 2020).

[7] Unwritten "blank" verdicts of the Military Court of the Kosmaj Partisan Detachment from 1943, prepared in advance to be subsequently filled out after the execution (VA. NOVJ, k, 1642, doc. 6–1/12) and Report on sending fabricated verdicts of the Military Court of the Kosmaj Partisan Detachment, from 3 July 1944 (AC Ž, Đ-9. OKM) (Cvetković, Dević 2019, 338).

[8] On the basis of such disorder, the "law" of postwar Yugoslavia started with the derogation of the entire legal system of the Kingdom of Yugoslavia, through the enactment of the Law on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation. With the adoption of this Law in October 1946, the representatives of the People's Liberation War created an internal legal discontinuity between the monarchy and the Republic of Yugoslavia (Mišić 2017, 128).

[9] This is supported by OZNA documents (Report of the Judicial Department in Croatia, from 17 January 1945), which clearly state that "The majority were liquidated without a court hearing. For some of the liquidated, our military courts were asked to make verdicts in order for them to be published, which was done..." (Cvetković, Dević 2019, 57).

Such actions were made possible through the establishment of a broad legal framework by which individuals could be labelled as "enemies of the people" and "war criminals". This was done by expanding the jurisdictions of military courts, the OZNA and the police, by establishing the Court of Honor, which was presided over by lay people rather than trained judges, and generally by establishing functional dependency of the courts on the executive authority (Cvetković 2011, 38–39). Although "interpreters of history are children of their time" (Petranović 1988, IX), historical facts speak in favor of the thesis that this political repression had a class character and in most cases was directed towards the middle class, which consisted of entrepreneurs, intellectuals, merchants, wealthier peasants (so-called *kulaks*), priests, opposition politicians, etc. (Cvetković 2011, 36). What history has indicated—and modern historians confirmed with their findings—is that the work of the OZNA in cooperation with the courts was planned in advance and systematically carried out, and that most of the procedures conducted were "simply masking the committed crimes" (Vuković 2018, 155).

The justification and support for this treatment were consistently constructed through the cultural sphere, within which the government changed the public discourse and limited pluralism of opinions. In order to form a new and homogeneous collective identity, all official means of enforcement and propaganda (the education system, public culture, the media, national symbols), over which the state-party system largely had control during the period from 1944 to 1946, were used. The work of university teachers was carefully monitored up until the early 1950s, but also later, and their professional, ideological, political and moral characteristics were recorded in their personal files (Bondžić 2009, 200). Using the example of lawyers, even at university, students were educated in the spirit of the new ideology, whereas the transmitters of this knowledge were mainly Marxist professors who had been deemed as "suitable" (Vasiljević *et al*. 2019, 86).[10] After graduating, law graduates who applied to become judges had to meet the criterion of "moral and political suitability", while the state, i.e. the Communist Party, had the final word on their election (Zvekić 1983, 284, 366). This political instrumentalization of legal education, as well as the subsequent position and work of jurists in practice (Mavrenović 2006),[11] further deepened the

[10] Here are some examples of descriptions used for professors of the Faculty of Law (1949) that best illustrate the spirit of this time: "Not to be considered for the position of a full professor." "Good-intentioned and with his attitude he looks like a friend of the Party." "He studies Marxism diligently." "The party organization has recommended that he be removed from the faculty." "The adoption of Marxism and Leninism is not visible." "He can develop into a good lecturer." (Vasiljević *et al.* 2019, 86)

[11] One of the documents that depicts the absurdity and hopelessness of the socio-political context of postwar Serbia is the Notice of the OZNA of the People's Republic of Serbia, for February 1952, which analyzed the moral, professional and political suitability

difference between legal values *per se* and values interpreted in the new communist spirit.

This specific sociohistorical context contributed to the existence of an inconsistent legal order in postwar Yugoslavia, which was a consequence of the legal particularism of the Kingdom of Serbs, Croats and Slovenes, created on 1 December 1918 through the unification of states that previously had their own separate legal systems.[12] Despite intensive normative activities, by the end of World War II Yugoslav law was a mixture of new regulations and particular elements of the six original legal systems (Drakić 2008, 652–654). The first Constitution of the Federative People's Republic of Yugoslavia (adopted in 1946 and modelled according to the Constitution of the Soviet Union, i.e. Stalin's 1936 Constitution) abolished the separation of powers that had existed previously (Mišić 2017, 129). Although it was outlined that the courts judge independently and according to the law, judges of the Supreme, district and country courts were appointed and dismissed by the executive branch.[13] Such an institutional arrangement was in fact only a formalization of the previously informal division of executive power during the period from 1944 to 1946.

4. NORMATIVE FRAMEWORK AND JUDICIAL PROCEEDINGS

4.1. Violations of the Basic Principles of Criminal Law and Criminal Procedure

In order to be called legal, a normative system must meet certain criteria. In particular, criminal law should not only guarantee criminal protection to the citizens, but should also protect citizens from the criminal law itself by prescribing punishable behaviors clearly and uncontraversially. This idea is embodied in the principle of legality *nullum crimen, nulla poena sine lege*, which has four components: *nulla poena sine lege*

of lawyers and concluded that they "represent one of the greatest problems of our legal service and especially the judiciary" and that it is necessary to make a great effort to raise "younger, socialist and party-loyal lawyers". Their work was carefully monitored and described as follows: "387 lawyers are hostile in trials, or in some way harm and do not assist the court, and 245 are held loyal in trials [but most of these only take civil litigation, and avoid litigation of a political nature] and the other 146 occasionally or only formally practice law. 60 lawyers are characterized as active dissidents from the Party" (Mavrenović 2006).

[12] Specifically, in the territory of Serbia, the regulations of the former Kingdom of Serbia were valid (among other things, the Criminal Code of 1860, the Serbian Civil Code of 1844, etc.), until they were subsequently amended by the regulations of the Kingdom of Serbs, Croats and Slovenes (Drakić 2008, 645–646; Nikolić, 2004, 277–309).

[13] The Constitution of the Federative People's Republic of Yugoslavia, articles 116 and 121.

scripta—criminal offenses must be foreseen, precisely prescribed by the law, while unwritten law cannot be applied; *nulla poena sine lege certa*—criminal law provisions should be defined and precise in order to clearly distinguish between what is allowed and what is punishable; *nulla poena sine lege praevia*—retroactive application of the law is not allowed, barring exceptional cases when the new law is more lenient towards the perpetrator; and *nulla poena sine lege stricta*—the courts are not allowed to extend the application of the criminal law to similar cases by analogy (Kolaković-Bojović 2014, 240–242).[14]

It is widely known that each criminal proceeding is initiated with the aim of protecting social values, which inevitably leads to the restriction of certain human rights of the accused (Knežević 2004, 209). In order for this decision on the restriction of rights and freedoms to have legitimacy, it needs to be made in an optimal institutional environment in which the aspirations of the entire state apparatus for punishment, on the one hand, and the defense of the defendant on the other hand, are confronted before an independent judicial body. Hence, *the right to a fair trial* in a narrower sense means the creation of an equal procedural position of the opposing parties, while in a broader sense it means an independent and impartial judiciary (Knežević 2004, 210). This formal equality is of a procedural nature and as such is a requirement for resolving an impartial dispute (Dajović 2017, 103). It also implies compliance with the principle of *the presumption of innocence*, i.e. that everyone is presumed innocent until their guilt is determined by a final court decision, and that state and local self-government bodies, as well as the media, are required to not violate the rights of the accused in their public statements (Ilić 2012, 571).

For the purpose of protection the general public interest, the bodies of criminal procedure, i.e. the public prosecutor and the police, are required to objectively clarify the suspicion of the existence of a criminal offense, while the court is obliged to freely evaluate the presented evidence and establish all relevant facts concerning the criminal offense of which an individual is accused (Sijerčić-Čolić 2012, 171–172). By fulfilling the set of these requirements, the court will, in accordance with *the principle of material truth*, determine the factual situation, i.e. the "pure, extrajudicial reality" (Uzelac 1992, 420). It is evident that it is impossible for judges to be completely objective and neutral, because every "act of description by the one who describes it is also an act of evaluation" (Uzelac 1992, 424). This is especially evident in totalitarian

[14] Derogation of the rule of law and vagueness of legal regulations were characteristics of the Nazi "law" in Germany, and the courts in postwar Yugoslavia also applied creative analogy (Criminal Code of 1947, Article 5, paragraph 3 "... an act which, although not explicitly specified by the law, according to the similarity of its characteristics, corresponds to a criminal act that is explicitly determined in the law ... ") (Vuković 2018, 147).

regimes where court proceedings usually have an *a priori* outcome and where the judge's task is to explain and justify a "predetermined truth" (which is actually a reflection of dominant interests and power relations (Hall 2001, 513)) (Uzelac 1992, 427).

In order to preserve its impartiality, the court, as a decision-making body, cannot be directly involved in discovering all relevant facts, i.e. it must not perform dual functions, because it would then be a witness within its own matter (Uzelac 1992, 423). This restriction is materialized through *the accusatory principle* which outlines that procedural functions are separate and should therefore be performed by different procedural subjects: the burden of proof and prosecution is on the prosecutor, the defendant is in charge of preparing their defense, while the court is in charge of adjudication. When the same person performs two functions at the same case (e.g. prosecuting and judging), the impartiality of the trial is violated (Majić 2010, 194–196). In addition to violation of the above referred legal principles, other essential legal principles such as, for example, *the right to judicial protection*, *the right to defense*, *the right to a public hearing*, *equal right of access to court*, and *equal treatment*, as well as *the right to a fair hearing* with respect to *the principle of adversarial proceedings* – are also seriously threatened under these circumstances.

In addition to the above, the postwar communist legislation abounded in vague normative formulations and "open concepts" that did not have a predetermined meaning, but were determined in each individual case by the bodies in charge (Uzelac 1992, 425). When the content of a norm is broadly and imprecisely formulated—which in legal circles is often referred to as the use of so-called "caoutchouc regulations" or "suspender paragraphs"—citizens can struggle to distinguish between illegal and permissible behavior. Apart from legal uncertainty, the consequence of such so-called *omnibus regulations* may also overlap with the components of related crimes, so the question justifiably arises as to whether in such situations one could apply the rule *ibi ius incertum, ibi ius nullum*, i.e. where the law is indefinite, it is null and void? (Kolaković – Bojović 2014, 241).

The question is whether and to what extent the postwar communist legislation, during the period from 1944 to 1946, conformed to the previously elaborated principles of legality. Although compliance with these principles helps "strengthen" and humanize the position of the defendant, the question is whether and to what extent, judges could decide impartially in the given socio-political context, taken into consideration that in most criminal proceedings the applicant was the state (that is *per se* stronger than the accused), while the role of investigative judge, who was often recruited from the ranks of former police officers in the

immediate postwar period (Majić 2010, 195), was played by an official from the state apparatus.

4.2. Military Court

In order to organize the work of the Military Court, the Supreme Headquarters of the People's Liberation Army of Yugoslavia (NOVJ) and the Partisan Detachments of Yugoslavia (POJ) passed the Decree on Military Courts on 24 May 1944.[15] *Even though the authors of the Decree*[16] *and the manner of its adoption*[17] *were disregarded, the very content of the Decree in its key elements seriously violates the basic principles of the legal order. In addition to the criminal offenses of "soldiers, non-commissioned officers and junior officers", the jurisdiction of the Military Court was also extended to civilians. In other words, the Military Court was competent "for all acts of persons*, in the territory in which war operations are carried out and where a faster court decision proves to be necessary" (Article 4). Article 5 further explains that the Military Court will also be competent "*for all acts* committed in occupied or temporarily abandoned territory".[18] Such an extension of the jurisdiction of the Military Court was justified by the need for fast and efficient conduct of proceedings and the implementation of sanctions. The Decree further stipulates that the Military Court has the jurisdiction in proceedings for "war crimes, acts of enemies of the people and crimes of military personnel and prisoners of war" (Article 12). Such a provision seemingly befits the Military Court, i.e. it falls within its jurisdiction. However, the part that defines in detail *who falls under the definition of war criminal and enemy of the people* is described very broadly, with the exception of

[15] Uredba o vojnim sudovima NOVJ propisana 24. maja 1944. godine od vrhovnog komandanta NOV i POJ maršala Jugoslavije Josipa Broza Tita [Decree on Military Courts of the NOV of Yugoslavia prescribed on 24 May 1944 by the Supreme Commander of the NOV and the POJ, Marshal Josip Broz Tito of Yugoslavia]. Archive Signs – Database of the Second World War on the territory of Yugoslavia. 172. *http://znaci.net/arhiv/dokument/6484* (last visited 26 May 2020).

[16] It is to be expected that such a serious part of the law as the prescription of incriminated behavior and the implementation of sanctions will be within the competence of the legislative power that would regulate this area within the form of laws, and not that the creator of this Decree is the executive authority.

[17] The Supreme Headquarters of NOV was an entity that did not have (parliamentary) legitimacy in the sense that it was not elected in regular elections by the citizens but was formed on the initiative of its members. The first session of the Supreme Headquarters of NOV. Archive Signs – Database of the Second World War on the territory of Yugoslavia. *http://znaci.net/arhiv/odrednica/prvo-zasedanje-avnoj-a* (last visited 28 October 2020).

[18] Decree on Military Courts of the NOV of Yugoslavia prescribed on 24 May 1944 by the Supreme Commander of the NOV and POJ, Marshal Josip Broz Tito of Yugoslavia.

active members of Ustaša, Chetnik and other armed units that were in the service of the enemy, it also includes "all those who betrayed the fight of the nation and were in collusion with the occupier; all those who revolt from the people's government and act against it" (Articles 13 and 14).[19]

One more example of "statutory lawlessness" can be seen in Article 27, which outlines that "in establishing the truth about the actions and guilt of the accused, the court *shall not be formally bound by any means of evidence*, but makes its decision at its sole discretion."[20] Although the latter part of the cited provision gives precedence to free judicial conviction as one of the elements of independent judiciary, in fact, the entire provision is in conflict with the right to a fair trial. The entire procedure is rounded up in Article 30, which prescribes the possibility of imposing the *death penalty* "by firing squad, and, in especially severe cases, by hanging," but nowhere in the entire Decree is it exhaustively stated for which crimes and in which situations the death penalty could actually be imposed.[21] This means that it was left to the judge's discretion to impose the capital punishment when they deemed it justified. The repressive nature of this legislation is particularly evident in Article 17 of the Decree, which stipulates that a verdict imposing the death sentence also provides "the loss of military or civilian honor" as well as "confiscation of the convict's property in favor of the People's Liberation Fund".[22]

We note that the encroachment on, and the assuming of the competencies of regular courts by the Military Court, in the absence of a valid legal basis, raises reasonable doubts as to the legitimacy and real intentions of the author of the Decree (the ruling party). A broad and insufficiently precise definition of "war criminals and enemies of the people" can create room for abuse and arbitrary action, which has a direct impact on legal certainty, or the lack thereof. By taking into account that the judicial interpretation of "work against the people's government" can be very subjective and extensive, the question arises as to why the provisions of criminal law, which by their nature restrict human rights and freedoms and require precise definition, are not defined precisely in this case. By releasing the judges from the obligation to act upon impartially presented evidence, the principle of material truth is derogated, and judges are released from all elementary legal restrictions on the passing of a judgment. The imperfection and limitation of language, the inherent vagueness of legal terms, the contextual nature of the meaning of terms and the fact that the law is often intentionally unfinished and

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

incomplete (Bovan 2014, 100–132) do not mean that judges can interpret the law outside certain legal principles (Fuller 2011: 94). This nominal support for judicial freedom can be interpreted as a euphemism for its overstepping and potential abuse.

Although it is superfluous to discuss the justification of the only sanction which, due to its irrevocable character, leaves no room for correcting possible procedural errors, annuls the right to life, and puts cruelty before humanity (Janković 1985, 12–31, 172–193), we do not rule out the possibility that the death sentence had a significant preventive effect in this transitional period, in terms of intimidating and educating the entire postwar society, which was regularly informed about occurring executions.[23] However, we believe that the absence of a precise definition of criminal offenses for which the death penalty can be imposed, as well as the nonexistence of the right to a legal remedy, is a serious violation of the principles of legality and legal security. As for the provision that allows for confiscation of property belonging to a death row inmate, the property of a convict can be legally confiscated only if it is proven in a clear and unambiguous manner, following a court proceeding, that such a property originated from a specific criminal offense. The mentioned provision is in fact *conditio sine qua non* for the abuse of criminal procedure and judicial power for political purposes, because in this way the "enemy of the people" and their family are completely deprived of material means of subsistence as well as political and civil rights. Finally, provisions that prescribe the confiscation of property, civil rights and freedoms, and even life—and thus legalize the annulment of people as legal entities—do not have the characteristics of legality (Zdravković 2018, 30, 40).

During the period between 1944 and 1946 most of these proceedings were conducted quickly, secretly, at night and according to lists prepared in advance by the OZNA. Most Military Court judgements were pre-prepared ("blank" verdicts) or written retroactively in order to create a legal basis for death penalties already carried out (Cvetković, Dević 2019, 57). "Blank verdicts" were the product of rather arbitrary and intuitive judicial decisions that were not based on clear, formal and promulgated rules. This khadi justice (*Kadijustiz*), as termed by Max Weber, was based on political postulates (Rabb 2015, 349–351; Swedberg 2005, 136–137) and contributed to the creation of a legal system that could not guarantee stability, ensure the generality of norms or provide predictability and

[23] This was also confirmed by the words of Marshal Josip Broz Tito, spoken at one of the meetings of the Central Committee in 1945: "Enough with those death sentences and killings! The death penalty has no effect anymore—no one is actually afraid of death anymore!" (Đilas, Milovan. 1990. *Revolucionarni rat*. 432–433 according to Terzić 2011). As well as "the guilty need to be found even though there are no guilty." (Jakšić 1990, 322).

reliability in terms of human rights, because decisions were handed down *ad hoc* (Turner 2002, 48).[24] This "general and drastic deterioration in legality" (Fuller 1969, 40) has allowed courts to circumvent rules that should be equally relevant to those who pass them and to those to whom they apply. *Kadijustiz* and the unobstructed use of retroactivity (which Fuller allows and justifies in certain situations when it is in the general interest ("as a curative measure") (Fuller 1969, 53–54)), which turned into its abuse, corresponded to the interests of the authorities who extended their own competencies by transferring unlimited powers to the courts.

4.3. Court of Honor

Simultaneously with the Military Court, which adjudicated for the most serious crimes, at the Great Anti-Fascist People's Liberation Assembly of Serbia, held 9–12 November 1944, a decision was made to constitute the Court for the Trial of Crimes and Offenses against the Serbian National Honor committed in the territory of Serbia.[25] In line with this decision the Court of Honor was tasked with punishing "capitulators" and "rouges" who "either out of personal or social selfishness, or out of cowardice ... cooperated with the occupier, served his apparatus or rendered him services of various forms" and in that way "they betrayed their people and tarnished their national name and honor [and] caused damage and shame to the Serbian people."[26] The court was organized as an independent body, based in Belgrade, with different departments throughout Serbia. This type of court (actually a lustration body) was not only characteristic for Serbia, but other countries also had them: first of all the Soviet Union, as well as France, Germany, Japan, etc. (Cvetković 2019, 358).

The Court of Honor was competent for all acts that could not be qualified as "high treason or assisting the occupier in committing war

[24] Although the *khadi* is a judge in the Islamic court, Max Weber uses this term very widely describing *khadi justice* as "the administration of justice which is oriented not toward fixed rules of a formally rational law but toward the ethical, religious, political, or otherwise expediential postulates of a substantively irrational law" (Bendix 1977, 400) and *khadi decisions* as "informal judgments rendered in terms of concrete ethical or other practical valuations" (Trubek 1972, 733). See more on the discrepancy between substantive-irrational (*khadi-justice*) and formal–rational justice where every judicial decision is based on the "application" of a general abstract legal rules to the concrete case (Marsh 2000, 281–285; Feldman 1991, 219).

[25] Decision on the establishment of the Court for the Trial of Crimes and Offenses against the Serbian National Honor.

[26] *Ibid.*

crimes."[27] Any cooperation with the occupier and domestic treason that was of a political, propaganda, cultural, artistic, economic, administrative, legal or other character, was considered *a crime against the Serbian national honor*. To avoid difficulties in interpretation, this seemingly rather extensive provision is clarified in detail by listing possible forms of such cooperation: aiding, abetting and working in treacherous, military, political or economic organizations relevant to the occupier; ceding one's own company to the occupier for use; all acts that gave legitimacy to the occupying power or aided their work, and undermined the people's liberation struggle; maintaining close or friendly ties with the occupying army, "representing the interests of the occupiers before the courts; serving in the police and bureaucracy in a place especially important for the occupier".[28]

What is perhaps the most legally debatable is Article 2 paragraph 3, which sanctions "guilt according to the position of responsible persons from the state administration", i.e. their "failure to make due efforts to avoid the shameful defeat and capitulation of Yugoslavia in 1941."[29] What is not legally disputable is that a person can suffer sanction for both action and inaction (omission). However, what is highly controversial is the vague legal standard of "due effort" that the court would have individually assessed in each particular case. What exactly does "due effort" imply? Does effort count as every action, and is failure to make due effort more of a neutral or passive attitude? If not every action is effort, then what action counts as effort and at what point can it be considered "due effort"? As in most of the analyzed regulations, here we find a vagueness of the legal terminology (Bovan 2014, 100–132), but in this case, the lack of authentic clarification by the legislator allows for sanctions based on objective responsibility, without the defendant's subjective guilt.

The special courts of honor were entitled to impose three types of punishment: a) a regular punishment of temporary or lifelong loss of national honor, which consisted of exclusion from public life, the prohibition of performing public functions, and loss of all civil rights, b) a punishment of light or heavy forced labor of up to 10 years, that was served in mines (Senjski Rudnik), prisons (in Sremska Mitrovica) and other similar institutions, and c) a full or partial confiscation of

[27] *Ibid*.

[28] Odluka o sudu za suđenje zločina i prestupa protiv srpske nacionalne časti [Decision on the Court for the Trial of Crimes and Offenses against the Serbian National Honor], Official Gazette of Serbia, Art. 2, para. 1 and 2). 24 February 1945. *https://www.uzzpro.gov.rs/doc/biblioteka/bib-propisi/restitucija/6-odluka-o-sudu-za-sudjenje-zlocina.pdf* (last visited 26 June 2020).

[29] *Ibid*., Art. 2, para. 3.

property[30]Although the principles of modern criminal law require the determination of the individual responsibility of a person, consistent application of the penalty of confiscation of a defendant's property also affected their spouse, children, parents and other family members with whom they lived and who had a share in acquiring joint property. Therefore, Article 4 provides a mitigating circumstance, that during the confiscation, the "immediate family that had been left without necessary care" of the convicted person was taken into account.[31] Consequently, a kind of collective responsibility is mitigated and responsibility for others is limited, but what legally completely derogates this provision is that confiscation of property does not refer to property acquired by a criminal offense, but to all of the convict's assets.

Furthermore, what is especially controversial is the *composition of the Court of Honor*. Of the initially appointed 27 members of the Court, only three members had legal training: one judge, one trainee judge, and one lawyer. The other members included ten farmers, two workers, two teachers and one professor, a student, a carpenter, a peasant, a colonel, a clerk, an engineer, the administrative head and two members whose occupation was not specified.[32] Although it was the idea of the Presidency of the National Assembly that the presidents and secretaries of the judicial council in the districts should be professional judges, trained for this vocation, this condition was not always fulfilled. Thus, in addition to peasants, carpenters and students, this duty was entrusted to miners, housewives, bakers, tailors, blacksmiths, cobblers, etc. (Mitrović 2007, 27–28). Without any intention of going into the moral characteristics of these persons, the very nature of the vocations of the appointed members of the judicial councils disqualified them, and showed the lay character of this institution. If it is taken into account that the incompetent composition of the court violates the right to a fair trial, the question arises: what criteria were used when selecting the persons chosen for the first composition of the Court of Honor?

Unlike the Military Court, the trials and hearings of the Court of Honor were public, with the national newspaper *Politika* regularly reporting about the completed trials and convictions. Although it is sometimes difficult to distinguish between "vigorous exhortation and imposed duty" (Fuller 1969, 71), one could often hear the appeal of prosecutor Miloš Jovanović that citizens should report the enemy, because in doing so they perform their "duty and do a patriotic deed".[33] Such

[30] *Ibid.*, Art. 4.

[31] *Ibid*.

[32] *Ibid*.

[33] Dokumenti i knjige o Drugom svetskom ratu na teritoriji Jugoslavije i povezanim zbivanjima. *Beograd u ratu i revoluciji* (Vol. 2) – U slobodnom Beogradu do konačne

public statements by state officials aroused caution among citizens who, fearing their own denunciation and out of fear for the lives and property of their loved ones, avoided or reduced contacts with fellow citizens (Arendt 1999, 331). At the beginning the "cleansings", and the subsequent trials of the defendants and all those who were "guilty of kinship" because they were family members or friends with the defendants, led to "atomization of the masses" which was only preparation for the creation of a classless society (Arendt 1999, 331).

Through various types of control (the University Committee, lower-level Party bodies at faculties, student organizations, the ministry in charge of higher education and science, the State Security Administration (SDB)), the Communist Party also exercised ideological and political control over university teachers and intensively worked on improving so-called ideological purity of teaching and re-education of hesitant individuals (Bondžić 2009, 204–205). Being aware of the social significance and role of the Serbian intelligentsia, the Party applied several strategies to "reshape" this social stratum: a) annihilation i.e. its repression, removal from the public sphere, b) integration of those who wanted to cooperate with the new government, c) creation of a new intelligentsia from the ranks of peasants and workers who would will be in the service of the working people, and d) building a Party-loyal intelligentsia (Milićević 2007, 295–297, 304).

Therefore, along with the Court of Honor, special courts of honor were established at the University of Belgrade, the National Theater, the Military Museum, and other cultural associations and institutions. The Court of Honor at the University of Belgrade was established on 12 December 1944 with the aim of renewal of the faculty (Pantić 2015, 154–173) and more importantly to "break the fascist chains with which the occupier and traitors chained but did not stifle the University of Belgrade" (Mitrović 2009, 177). The court was chaired by the University Reconstruction Commission, which, upon its establishment, sent out a request to all professors for written statements about their own, as well as about the "work and behavior" of their colleagues (because denunciation is a "patriotic trait"?). The majority of professors (a total of 370 who passed the inspection of this lustration body) described their work and attitude during the occupation as honorable and said that they did not commit any "sin against their people or against the autonomy, tradition and interests of the University". Despite the fact that they backed their claims with evidence, the court often acted repressively towards those who, in the opinion of the Court, were "remnants of fascism" (Aleksić 1998).

pobede. Karakteristike društveno – političkog života u oslobođenom gradu – Suđenja za zločine i prestupe protiv srpske nacionalne časti. *http://znaci.net/00001/233_4.pdf* (last visited 19 June 2020).

Professors who, in the opinion of the Court, lost the moral right to continue practicing as teachers, could be: a) removed from the faculty, while their case would finally be decided by the competent court outside the university, b) removed from the university, c) reprimanded and prevented from advancing for a certain period of time, or d) warned. During the period after 1945—1946, most of the convicted professors were tacitly rehabilitated, employed in other jobs or returned to teaching. However, professors who left the country and thus evaded the political persecution under the auspices of the "spiritual renewal" of the university did not receive such preferential treatment (Mitrović 2009, 177).

Although they were transitory in nature—in the sense that they existed for no more than eight months—the function of the courts of honor had an important political and educational repercussions. First of all, they discredited the bourgeoisie—mostly the "undesirable, reactionary, dishonest and unpopular" intelligentsia (Milićević 2007, 293)—who were most often the defendants. Second, they eliminated possible opposition, because the verdicts meant not only permanent or temporary loss of honor, but also a loss of all other civil rights, suffrage, right to work, pension, etc. These sanctions were accompanied by the confiscation of convicts' property, which permanently passed into the hands of the state economy. Finally, the responsibility for criminal acts from this domain had no statute of limitations, there was no right to legal remedy and verdicts were enforceable upon passing (Mitrović 2007, 15–16). This is why it was difficult (often impossible) to preserve a minimum of human dignity, being something which "necessarily claims universal validity, applying to every human being" (Benda 2000, 452).

5. CONCLUDING REMARKS

Opinions differ significantly in regard to the 1944–1946 period in Yugoslav and Serbian history: some authors completely deny the existence of communist crimes, others "trade" with their dark numbers, some relativize them, and there are those who justify them. This revision of the past is still present, often taking the form of revisionism in terms of ideological and political "recorrecting" and changing the historical picture (Milošević 2013, 11–25), and bidding on the number of victims of the communist regime (Radanović 2013, 159). Leaving aside this hermeneutic pluralism, we may be able to agree on one issue: the critical confrontation of Serbian society with its past is the only way to overcome the remnants of this repressive heritage (Kuljić 2002, 21; Petrović 2017, 111–126; Molnar 2011, 247–261). However, previous research has shown that it is not as difficult to reconstruct historical facts (although a significant body of pertinent archival documentation is missing) as it is difficult to

reconstruct the social circumstances and ideological climate that have remained dominant to this day, in a way making it difficult to shed light on what is, in a way, a taboo topic. Therefore, this paper does not deal with the number of innocent victims—for whom we have the deepest respect—or those whom the hand of revolutionary justice "justly caught" because they cooperated with the occupier to the detriment of their people. Instead, this paper deals with a scientific, critical, objective and impartial analysis of the normative system and organization of courts, i.e. the structures and rules according to which judges made rulings in the postwar period from 1944 to 1946.

By defending Fuller's position on "procedural natural law" and Radbruch's notion that the meaning of the law is to serve the legal value, i.e. the idea of the law – justice, we conclude that the postwar legal framework of communist Serbia during the period from 1944 to 1946 collided with basic moral and social values that are supposed to be prevailing over any legal regulation. The ideological coloration of the revolutionary legislation, the establishment of government at the cost of eliminating (possible) political dissidents,[34] and a selective observation of human rights, which are the criteria for establishing an (un)just social system, indicates that the government did not gave "the citizen(s) rules by which to shape their conduct, but to frighten (them) into impotence" (Fuller 1969: 40). The Party did not hesitate to exercise (and sometimes exceeded) the monopoly of physical force, while the adoption, application and implementation of "legal regulations" was also instrumentalized by it. The law was used as an *a priori* or *posteriori* means to legitimize arbitrary rule, the nominal proclamation of independent judiciary maintained the semblance of a separation of powers, and the entire judiciary and legal system served to maintain state (party) power in virtually all areas of public and private social life.

By analyzing the work of legislative and judicial entities during the period between 1944 and 1946, this paper concludes that these two types of legal institutions do not meet the formal or substantive criteria to be called laws or courts. By their nature these legal institutions have been "so unjust and so socially harmful that validity, indeed legal character itself, must be denied them" (Radbruch 2006b, 14). Judges interpreted the meaning of legal regulations quite extensively, uncritically and pragmatically (so-called "caoutchouc regulations"), and in the judicial application of these rules, the rights and freedoms of defendants were not only limited, but in most cases absolutely denied (so-called *kadijustiz*). The application of double moral requirements shows that it is not enough to nominally call something a law or a court in order for it to be one in practice, because "where equality, the

[34] It should be noted that "the delusion of every government, especially the totalitarian one, is that physical elimination reduces the number of enemies. In fact it produces more and more political opponents and dissidents" (Danilović 2002, 32).

core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law." (Radbruch 2006a, 7).

Some may question the relevance of this topic or wonder why we focus on a relatively short period of revolutionary justice (that for some is long passed), considering that all the principles of minimal morality examined in the paper are nowadays positivized in the form of international human rights law. First of all, an aim of this paper is to emphasize that this type of debates between legal positivists and natural law theorists is still a hot topic to a certain extent. Furthermore, a case study like this helps us to hone our understandings of the concept of law and typical, standard cases of legality, simultaneously reminding legal positivists that borderline case deserve to be treated as special jurisprudential problems of "fidelity to law" (Fuller 1958, 630–672). Last, but not the least, it is our opinion that it is not a waste of time to reopen this dark chapter of Serbian law (or a lack thereof), but that in these difficult and unstable times for legal order, justice and human rights, such papers are more than desirable as a reminder that the law must meet a minimum of morality in order to be considered a legal order in the full sense of the word.

And, finally, having in mind that the communist regime in Serbia managed to, in a way, reshape and exist for more than 45 years, despite the fact that it was built on grounds of "statutory lawlessness", certain important questions still seem to remain unanswered. In particular, given that the law is a specific area of social life in which the consequences of an "imperishable past" are perhaps felt the most (Molnar 2011, 250), to what extent has this—at the time revolutionary—judiciary influenced the character of today's judiciary in Serbia? Bearing in mind that the judicial profession is inseparable from the personality of a judge, is it possible (and to what extent) for the holders of these functions to substantially change their beliefs—the very beliefs that some of them have acquired in the postwar communist education curriculum? After analyzing the legal framework, performance and organization of the judiciary in this short, but at the same time extremely relevant period, we cannot, regrettably, offer a comprehensive, scientifically sound answer. What we can do is ponder whether is it possible to rule out any possibility that this practice could be reincarnated in a similar form or under similar social circumstances. We have witnessed quite frequently that history is repeating itself, and this is why we cannot predict with absolute certainty that some future socio-political context will not rebirth old ghosts and create another (totalitarian) political system which, in its essence, will deeply negate the basic principles of law and morality, while simultaneously offering the illusion of impartial justice and separation of powers. In this respect, perhaps the words of Ernst Benda, former president of Federal Constitutional Court of Germany, could serve as a solid reminder that

"every country has to avoid being too overconfident that 'it could not happen here' or 'it could not happen in our time'. One of the reasons why it did happen in Germany is that many of the population's educated groups and classes (including a number of those who became victims because of their optimism and their confidence that it 'could not happen here') believed that the existing high standard of civilization and culture would prevent a totalitarian regime." (Benda 2000, 447).

REFERENCES

Arendt, Hannah. 1999. *Izvori totalitarizma*. Translated by Slavica Stojanović, Aleksandra Bajazetov-Vučen. Belgrade: Feministička izdavačka kuća 94. *https://www.mreza-mira.net/wp-content/uploads/Hana-Arendt-Izvori-totalitarizma.pdf* (last visited 18 June 2020).

Aleksić, Pero. 1998/3. Nečastivi na Beogradskom univerzitetu. *Srpsko nasleđe – Istorijske sveske*. *http://www.srpsko-nasledje.rs/sr-l/1998/02/article-09.html* (last visited 17 July 2020).

Benda, Ernst. 2000/2. The Protection of Human Dignity (Article 1 of the Basic Law). *SMU Law Review* 53: 443–454.

Bendix, Reinhard. 1977. *Max Weber: An Intellectual Portrait.* Berkeley, Los Angeles, London: University of California Press.

Bondžić, Dragomir. 2009. Komunistička vlast i profesori Beogradskog Univerziteta 1945–1954. in *Desničini susreti*, edited by Drago Roksandić, Magdalena Najbar-Agičić, Ivana Cvijović Javorina. Zagreb: University of Zagreb Faculty of Humanities and Social Sciences. 199–208.

Bovan, Saša. 2016. *Pravna hermeneutika izmedju filozofije i logike: Socioloski metod u tumačenju i primeni prava.* Belgrade: University of Belgrade Faculty of Law.

Božić, Dragiša. 2017. *Preživeli govore*. Moravci. (last visited 17 July 2020).

Božić, Dragiša. 2018. *Crveni metak – državni zločini 1944–1957*. Moravci. *http://ljig.rs/download/CRVENI-METAK-ELEKTRONSKA-VERZIJA2.pdf* (last visited 17 July 2020).

Cvetković, Srđan. 2006/1. Ko su 105 (104) streljanih u Beogradu 1944. *Istorija 20. veka* 1: 81–103.

Cvetković, Srđan. 2007/1. "Divlja čišćenja" u Beogradu 1944. – Prilog istraživanju likvidacije klasnih i političkih neprijatelja revolucije. *Hereticus – Časopis za preispitivanje prošlosti* 5: 74–105.

Cvetković, Srđan. 2011. *Između srpa i čekića 2 – Politička represija u Srbiji 1953–1985.* Belgrade: Official Gazette – Institute for Contemporary History.

Cvetković, Srđan. 2019. *Između srpa i čekića 1 – Likvidacija "narodnih neprijatelja" 1944 – 1953. (drugo izdanje)*. Belgrade: Official Gazette.

Cvetković, Srđan, Nemanja Dević. 2019. *OZNA – Represija komunističkog režima u Srbiji 1944–1946. – Dokumenti*. Belgrade: Catena Mundi – Institute for Contemporary History – U ime naroda za slobodnu Srbiju.

Dajović, Goran. 2017/1. Pravda i pravo: novi odgovori na staro pitanje. *Annals of the Faculty of Law in Belgrade* 65: 82–108.

Danilović, Rajko. 2002. *Upotreba neprijatelja – "Politička suđenja u Jugoslaviji 1945–1991*. Belgrade: Montena.

Dokumenti i knjige o Drugom svetskom ratu na teritoriji Jugoslavije i povezanim zbivanjima. *Beograd u ratu i revoluciji* (Vol. 2) – U slobodnom Beogradu do konačne pobede. Karakteristike društveno – političkog života u oslobođenom gradu – Suđenja za zločine i prestupe protiv srpske nacionalne časti. *http://znaci.net/00001/233_4.pdf* (last visited 19 June 2020).

Drakić, Gordana. 2008/1–2. Formiranje pravnog sistema u međuratnoj jugoslovenskoj državi. *Novi Sad Faculty of Law Collected Papers*: 645–655.

Feldman, Stephen M. 1991/2. An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law. *Law & Social Inquiry* 16: 205–248.

Flyvbjerg, Bent. 2012. *Šta mogu društvene nauke – razlozi neuspeha i strategija za budućnost*. Translated by Milos Vukčević. Belgrade: Official Gazette.

Fuller, Lon L. 1958/4. Positivism and Fidelity to Law: A Reply to Professor Hart. *Harvard Law Review* 71: 630–672.

Fuller, Lon L. 1969. *The Morality of Law.* New Haven and London: Yale University Press.

Fuller, Lon L. 2011. *Moralnost prava*. Translated by Silva Mitrović. Belgrade: University of Belgrade Faculty of Law.

Haldemann, Frank. 2005/2. Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law. *Ratio Juirs* 18: 162–178.

Hall, Stuart. 2001. Encoding, decoding. 507–517 in *The Cultural Studies Reader (Second Edition)*, edited by Simon During. London – New York: Routledge.

Hasanbegović, Jasminka. 2016. Why Do We Need Fundamental Rights, Not Only in Practice, But Also in Theory? 47–60 in *Fundamental Rights: Justification and Interpretation*, edited by Kenneth Einar Himma, Bojan Spaić. Hague: Eleven International Publishing.

Heywood, Andrew. 2005. *Političke ideologije*. Translated by Milanka Radić. Belgrade: Zavod za udžbenike i nastavna sredstva.

Ilić, Ivan. 2012. Pretpostavka nevinosti okrivljenog i pravo na javno informisanje. *Collection of Papers Faculty of Law Niš* 61: 571–586.

Jakšić, Pavle. 1990. Nad uspomenama II, Belgrade: Rad–Svedočanstva.

Janković, Ivan. 1985. *Smrt u prisustvu vlasti – smrtna kazna u Jugoslaviji i svetu*. Belgrade: Istraživačko–izdavački centar SSO Srbije.

Jovanović, Miodrag A. 2013. Legal Validity and Human Dignity – On Radbruch's Formula. *Archiv für Rechts – und Sozialphilosophie – Beihefte* 137: 145–167.

Knežević, Saša. 2004. Pravo na pravično suđenje. *Collection of Papers Faculty of Law Niš* 44, 207–235.

Kolaković-Bojović, Milica. 2014. Zloupotreba položaja odgovornog lica: *de lege lata et de lege ferenda*. 237–246 in *Prestup i kazna: de lege lata et de lege ferenda*, edited by Leposava Kron. Belgrade: Institute of Criminological and Sociological Research.

Kuljić, Todor. 1983. *Teorije o totalitarizmu*. Belgrade: Istraživačko – izdavački centar SSO Srbije.

Lazić, Mladen. 2011. *Čekajući kapitalizam – nastanak novih klasnih odnosa u Srbiji.* Belgrade: Official Gazette.

Lazić, Mladen. 2016. Obrasci regrutacije političke elite. 57–80 in *Politička elita u Srbiji u periodu konsolidacije kapitalističkog poretka*, edited by Mladen Lazić. Belgrade: Čigoja.

Majić, Miodrag. 2012. Napuštanje inkvizitorskog modela krivičnog postupka kao nužan korak u stvaranju nepristrasnog krivičnog suda u Srbiji. 192–203 in *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva (normativni i praktični aspekti)*, edited by Ana Petrović and Ivan Jovanović. Belgrade: OSCE Mission to Serbia.

Marsh, Robert M. 2000/2. Weber's Misunderstanding of Traditional Chinese Law. *American Journal of Sociology* 106: 281–302.

Mavrenović, Slobodan. 2006/1. Vreme u kojem je advokatura predstavljala najveći problem našeg sudstva. *Branič* 119: 106–108. *https://aks.org.rs/aks/wp-content/uploads/2015/04/Branic_1–2006.pdf* (last visited 26 May 2020).

Mišić, Marica. 2017/1. Redovno sudstvo u FNRJ u vreme državnih reformi (1948–1954) – Prikaz Zakona o sudovima iz 1954. godine. *Eudaimonia* 1: 127–158, *https://www.ivrserbia.org/article/redovno-sudstvo-u-fnrj-u-vreme-drzavnih-reformi-1948–1954-prikaz-zakona-o-sudovima-iz-1954-godine/* (last visited 3 June 2020).

Milićević. Nataša. 2007. Komunistička strategija prema srpskoj inteligenciji 1944–1950. 293–310 in *Srbi i Jugoslavija: država, društvo, politika* by Momčilo Isić. Belgrade: Institute of Recent History of Serbia. *https://www.inisbgd.co.rs/celo/zb_2.pdf* (last visited 20 October 2020).

Milošević, Srđan. 2013. Istorijski revizionizam i društveni kontekst. 11–25 in *Politička upotreba prošlosti – o istorijskom revizionizmu na postjugoslovenskom prostoru,* edited by Momir Samardžić, Milivoj Bešlin, Srđan Milošević. Novi Sad: Alternative cultural organization – AKO.

Mitrović, Momčilo. 2005. Kako su psovali Maršala. *Dijalog povjesničara – istoričara (Zagreb)* 9: 341–356.

Mitrović, Momčilo. 2007. *Srpska nacionalna čast pred zakonom 1945.* Belgrade: INIS.

Mitrović, Momčilo. 2009. Prilog izučavanju Suda časti na Beogradskom Univerzitetu. *Zbornik radova Desničini susreti. http://ckhis.ffzg.unizg.hr/files/file/pdf/Desnicini-susreti/DS-2009-pdf/DS-2009–14-Mitrovic.pdf* (last visited 17 July 2020).

Molnar, Aleksandar. 2011. Pravno savladavanje totalitarne prošlosti. *Europski glasnik (Zagreb)* 16: 247–261.

Nikolić, Dušan Ž. 2004/2. Dva veka građanskog prava u obnovljenoj Srbiji 1804–2004. *Novi Sad Faculty of Law Collected Papers* 38: 277–309.

Pafeto, Vilfredo. 2017. *Kruženje elita – primena sociooloških teorija*. Novi Sad: Mediterran Publishing.

Pantić, Dragan D. 2015/2. Obnova rada Pravnog fakulteta u Beogradu neposredno posle završetka Drugog svetskog rata. *Annals of the Faculty of Law in Belgrade* 63: 154–173.

Petranović, Branko. 1988. *Istorija Jugoslavije 1918–1988 – knjiga II: Narodnooslobodilački rat 1941–1945*. Belgrade: Nolit.

Petrović, Vladimir. 2017/1–2. Šta je prevladavanje prošlosti i zašto u Srbiji hramlje? *Hereticus:* 111–126.

Rabb, Intisar A. 2015. Against Kadijustiz: On the Negative Citation of Foreign Law. *Suffolk University Law Review* 48: 343 – 377.

Radanović, Milan. 2013. Kontroverze oko kvantifikovanja i strukturisanja stradalih u Srbiji nakon oslobođenja 1944–1945. 143–219 in *Politička upotreba prošlosti – o istorijskom revizionizmu na postjugoslovenskom prostoru*, edited by Momir Samardžić, Milivoj Bešlin, Srđan Milošević. Novi Sad: Alternative Cultural Organization – AKO.

Radbruch, Gustav. 2006/1a. Statutory Lawlessness and Supra-Statutory Law (1946). Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. *Oxford Journal of Legal Studies* 26: 1–11.

Radbruch, Gustav. 2006/1b. Five Minutes of Legal Philosophy (1945). Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. *Oxford Journal of Legal Studies* 26: 13–15.

Sijerčić-Čolić, Hajrija. 2012. Načelo materijalne istine u krivičnom postupku. 169–192 in *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva (normativni i praktični aspekti)*, edited by Ana Petrović i Ivan Jovanović. Belgrade: OSCE Mission to Serbia.

Stepanov, Radivoj. 2012. Radbruhovo jusnaturalističko prevladavanje pravnog pozitivizma. *Godišnjak Filozofskog fakulteta u Novom Sadu* 37: 93–102.

Swedberg, Richard. 2005. *The Max Weber Dictionary – Key Words and Central Concepts.* Stanford: Stanford University Press.

Tamanaha, Brian Z. 2017. *A Realistic Theory of Law*. Cambridge: Cambridge University Press.

Terzić, Milan. 2011/2. Gubici četnika Draže Mihailovića na Zelengori i Sutjesci – maj 1945. *Vojno-istorijski glasnik* 61:71–81.

Trubek, David M. 1972/3. Max Weber on Law and the Rise of Capitalism. *Wisconsin Law Review*: 720–753.

Turner, Bryan S. 2002. *Max Weber – From History to Modernity.* London, New York: Routledge – Taylor & Francis.

Uzelac, Alan. 1992/4. "Materijalna istina" – iskrivljeno ogledalo jedne teorije istine u sudskom postupku. *Collected Papers of Zagreb Law Faculty* 42: 419–432.

Vasiljević, Mirko, Zoran Mirković, Marko Đurđević, Miroslav Perišić, Svetlana Mirčov, Miljko Valjarević. 2019. *Pravni fakultet u Beogradu* 1808–2018. Belgrade: University of Belgrade Faculty of Law.

Vuković, Igor. 2018. Poredak zločina – Krivično pravo Nezavisne Države Hrvatske. 145–183 in *Pravni poredak Nezavisne Države Hrvatske*, edited by Boris Begović, Zoran S. Mirković. Belgrade: University of Belgrade Faculty of Law.

Zdravković. Miloš. 2018. "Pravnost" poretka Nezavisne Države Hrvatske. 19–40 in *Pravni poredak Nezavisne Države Hrvatske*, edited by Boris Begović, Zoran S. Mirković. Belgrade: University of Belgrade Faculty of Law.

Zvekić, Uglješa. 1983. *Profesija sudija – Sociološka analiza*. Belgrade: University of Belgrade Faculty of Law.

Article history:
Received: 31. 10. 2020.
Accepted: 6. 12. 2020.

UDC 343.222(698.2); 347.512(698.2)

CERIF: S 130

DOI: 10.51204/Anali_PFUB_20409A

Goran Georgijević, PhD*

MAURITIAN TORT LAW

According to the general tort law of Mauritius (articles 1382 through 1384 of the Mauritian Civil Code), three conditions must be met before tort liability may be implemented, namely the existence of harm, the existence of a causal link, and the existence of a harmful event. This paper contains an analysis of the fundamentals of the tort law of Mauritius, which is based on Mauritian case law and French case law and French doctrine, which are considered a persuasive authority in Mauritian Civil Law.

Key words: *Mauritian. – Tort. – Law. – Liability. – Harm. – Causal.*

1. INTRODUCTION

1.1. Definition of Tort Liability

In Mauritian law, tort liability is defined as an obligation, imposed by law on one person (an individual or a corporate body), to compensate harm suffered by another person (Cabrillac 2020, 222, para. 219; Porchy-Simon 2020, 349, para. 671). Indeed, civil liability is split into two constituent blocks: there is, on one hand, contractual liability, and on the other hand—tort liability.

It should be noted from the outset that Mauritian civil law has a well-established rule of non-accumulation of contractual liability (Chénédé 2018, 139 subs.) and tort liability (Cabrillac 2020, 223, para. 220; Porchy-Simon 2020, 349, para. 671). Thus, a victim of harm cannot

* Lecturer, Faculty of Law and Management, University of Mauritius, *g.georgijevic@uom.ac.mu*.

freely choose the type of liability that will be applied to his case, nor combine the rules of two types of liability (see also: Seube 2019, part II).[1]

1.2. Functions of Tort Liability

Tort liability fulfils several functions in Mauritian law. First of all, there is the compensatory function: the main mission of tort liability in Mauritian law is to ensure the compensation of harms suffered by the victims.[2] Moreover, one of the functions of the tort liability in Mauritian law is the normative one, which consists in letting everyone know which behaviors are the socially acceptable ones. This function is fulfilled through legal sanctions and the repression of faulty behaviors, i.e. abnormal acts committed by a wrongdoer. Finally, the third function of the tort liability in Mauritian law is directly linked to the abovementioned normative function, and this third function is called *preventive function*. One of the purposes of the tort liability in Mauritian law is to warn potential wrongdoers about the consequences that they will face, should they cause unlawful harm to a third party. In conclusion, the tort law of Mauritius aims, among others, to reduce the number of harms caused, by encouraging all persons and legal entities to behave cautiously.

1.3. Reparable Harm and Irreparable Harm

It should be noted that the foundations of tort liability in Mauritian law are laid down in articles 1382 through 1386 of the Mauritian Civil Code (compare with Latina, Chantepie 2018, 649–650). One of the conditions stemming from the abovementioned articles is reparable harm. In other words, Mauritian civil law does not provide compensation for all the harm likely to occur in the territory of the Republic of Mauritius. There are also harms for which the victim cannot be compensated and whose burden the victim must bear themselves.[3]

---

[1] See the judgments of the Supreme Court of Mauritius in *Air Austral v. Hurjuk A. H. I* 2010 SCJ 202; *Sotramon Ltd v. Mediterranean Shipping Company S. A.* 2015 SCJ 109; *Vestalane Investments (Pty) Ltd v. Federal Trust (Mauritius) Ltd.* 2013 SCJ 217.

[2] See the judgment of the Supreme Court of Mauritius in *The Municipal Council of Curepipe v. Ganessan Murday* 2011 SCJ 362. – See also: Civ. 2nd ch., 9 July 1981, Appeal No. 80–12142.

[3] Thus, there exists harms that is considered to have been legitimately caused. This harm cannot be compensated under articles 1382 through 1386 of the Mauritian Civil Code. For instance, a successful merchant who develops his client base will certainly cause financial harm to his competitors, whose income will decrease. However, the former will not be required to compensate the latter as long as the competition game is in conformity with the law.

2. THE CONDITIONS FOR THE IMPLEMENTATION OF TORT LIABILITY

In the general tort law of Mauritius (articles 1382 through 1384 of the Mauritian Civil Code), three conditions must be met before tort liability may be implemented, namely the existence of harm, the existence of a causal link, and the existence of a harmful event.

2.1. Harm

Harm is defined in Mauritian tort law as an injury to a legally protected interest. More specifically, harm may consist either of an attack on a person's property (this type of harm is material or patrimonial)[4] or of an injury of a person's extra-patrimonial interests (this type of harm is the moral or extra-patrimonial one). The harm is usually directly caused to a victim, but sometimes, the persons close to the victim of harm may be suffering their own, personal harm (*victims by ricochet*), arising from the harm inflicted to the abovementioned direct victim.

2.1.1. Harm Suffered by Direct Victims

The harm suffered by a direct victim can be either material or moral. Material harm consists of any harm directly liable to financial assessment, suffered by an individual or legal entity. This type of harm can take several forms, namely the forms of *material loss suffered* (*perte faite*), *missed gain* (*gain manqué*) and *loss of an opportunity* (*perte d'une chance*). Material loss suffered consists of the decrease in the property of the victim of harm.[5] The missed gain is an enrichment on which the victim could have legitimately counted, if there had not been any harmful fact. This definition of the missed gain was laid down in the judgment of the Supreme Court of Mauritius in *Dabee v. Ramtohul* 1967 MR 8.[6] Mauritian tort law also provides compensation for the loss of a serious chance to make a profit[7] or to avoid a

[4] See the Supreme Court of Mauritius judgment in *l'Inattendu Co. Ltd. v. Cargo Express Co. Ltd.* 2001 SCJ 7.

[5] For example, a material loss is suffered in the case of destruction or damage to an object belonging to the victim (vehicle, house, etc.). The destruction or deterioration of the object reduces the property of its owner, as the owner loses all or a part of the economic value of the object.

[6] Thus, the professional income of a victim, which could not be gained because of a civil fault of the wrongdoer, qualifies as missed gain. However, this income has to be certain, otherwise, the harm is considered to be a mere possibility (*préjudice éventuel*) and will not be repaired.

[7] For example, a litigant has lost a serious chance to make a profit, which constitutes reparable harm, when it became impossible for them to use their procedural rights, due to a fault of their legal representative (attorney), whereas the litigant had a

loss.[8] Thus, there exists the loss of a serious reparable chance when a candidate, having had the necessary skills and knowledge, could not sit for an examination or participate in a competition because of the wrongful event. This rule has been laid down in the judgment of the Intermediate Court of Mauritius in *Calleechurn Ashwin Kumar v. Bhoyro Satteedeo* & ORS of 2007 INT 63.

Moral harm is defined in Mauritian tort law as an injury to a person's extra-patrimonial aspects. It consists of the suffering of a victim, and the abovementioned suffering is sometimes mental and sometimes it may be physical. Moral damage may result from the violation of the right to honor (defamation),[9] of the right to name (name usurpation) or of the right to privacy (unauthorized revelations). In such cases, mental suffering arises from the violation of the aforementioned rights. For instance, in the Supreme Court's judgment in *La Sentinelle Ltd v. JR Dayal* of 2000 (SCJ 092) the letters MACRO,[10] added after the name of the Commissioner of Police at the time, in an article published in the newspaper *l'Express* on 13 June 1996, were qualified as insult, having damaged the honor of the victim. He was awarded 100,000 rupees as compensation for the moral injury by the Commissioner of Police. It should also be noted that in Mauritian law there is also the right to compensation for moral damage caused by an attack on the right to reputation, consideration or honor of a legal entity[11] that is not a living being.[12] The direct victim can also be compensated for the mental suffering stemming from their inability to engage in an activity that they regularly practiced before the harm was caused[13] (e.g. doing sports, going fishing with their children, etc.). This type of moral harm is called *loss of pleasure* (*préjudice d'agrément*).[14] The victim of a road accident or other unfortunate event is also entitled to

---

serious chance of winning the case (Cass. 1st ch., 18 November 1975, D. 1976, IR, 38; Cass. 1st ch., 16 March 1965, D. 1965, 425).

[8] *cf.* Crim. Ch. 10 January 1996, Appeal No. 95–80686; Cass. 1st ch., 21 November 2006, Bull. civ. I, No. 498; Cass. 1st ch. 22 March 2012, Appeal No. 11–10935 and 11–11237.

[9] *cf.* Cass. com. ch. 26 April 1994, Appeal No. 92–15884; Cass. com. ch. 1 February 1994, Appeal No. 92–11171.

[10] In Mauritian Creole language, which is the dialect spoken in Mauritius, "macro" means a pimp.

[11] In fact, in such cases, the moral harm is suffered by the persons who are closely involved in the functioning of the company, such as its executives.

[12] *Police v. Bundhoo Mohamed Ali Dilshad & ANOR* 2007 INT 296. In this case, a company suffered moral harm because its reputation in the United States of America had been tarnished by the wrongdoing (forgery) by an employee of that company.

[13] See the Supreme Court of Mauritius judgment in *Dabee v. Ramtohul* 1967 MR 8.

[14] Thus, in a judgment of the Plenary Assembly of the French Court of Cassation dated 19 December 2003, one can read: "(...) the loss of pleasure is a subjective injury of

compensation for mental pain caused by being mutilated or disfigured. This kind of moral damage is called *aesthetic harm*. Moreover, in Mauritian civil law, the moral harm of the direct victim can also consist of the physical suffering caused by an attack on their physical integrity.[15] This rule is clearly stated in the Supreme Court judgments in *Mohonee K. v. New India Assurance Co. Ltd* 2019 SCJ 16 and *Dabee v. Ramtohul* 1967 MR 8. It should be noted that in the judgment in *Boodhoo v. Ramsamy & Anor* 1985 SCJ 22, the Supreme Court of Mauritius found that the right of the direct victim to compensation for moral harm, conceived as physical suffering, can be transmitted to their heirs.[16]

2.1.2. Damage Suffered by Victims by Ricochet

The harm suffered by a victim by ricochet, which is an autonomous harm derived from the harm caused to a direct victim, can be material or moral. It may happen that the link between the direct victim and victim by ricochet consists of a maintenance claim that the latter has towards the former. According to Article 203 of the Mauritian Civil Code, parents owe maintenance to their minor children. The same legal obligation applies to spouses, who owe each other fidelity, relief and assistance, according to Article 212 of the Mauritius Civil Code. Thus, when a young child is deprived of financial support, because of the death of a parent who generated professional income, the wrongdoer guilty of their death will have to compensate for the material harm caused to the child by the loss of the parent's financial support. If the accident had not happened, the financial support provided to the child by the parent would have been maintained. The harm suffered by the child is qualified as missed gain. Mauritian case law is clearly set in this direction, and the Supreme Court judgments in *Boodhoo v. Ramsamy & ANOR* 1985 SCJ 22 and *Gokhool SD v. Groupement français d'assurances* 2009 SCJ 412 are a clear proof of this orientation.

The same solution should be adopted in cases where the victim by ricochet did not have any maintenance claim towards the direct victim provided for by law, but benefited from voluntary and regular financial assistance by the latter.[17]

a person resulting from the disturbances experienced in the conditions of a person's existence." (translated by author) (Appeal No. 02–14783).

[15] Cass. 2nd ch., 11 October 2005, Appeal No. 04–30360.

[16] This principle is reaffirmed in the decisions of the Intermediate Court of Mauritius *Lal Mahomed Bibi Mymoon v. Mauritius Union Assurance Co. Ltd.* 2007 INT 68.

[17] If the direct victim had not been killed, the victim by ricochet would have continued to receive the financial aid from the direct victim. The loss of this voluntary aid constitutes material harm suffered by the victim by ricochet (missed gain). See: Cass. crim. ch. 2 May 1983, Appeal No. 80–95264.

It should be noted that the Supreme Court of Mauritius refused long ago to award compensation for material and moral harm suffered by the concubine, in case of the death of their partner. This position stems from the judgments in *Lingel-Roy M. J. E. M. & Ors v. The State of Mauritius & Anor* 2017 SCJ 411, *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & ANOR* 2007 SCJ 106, *Naikoo v. Société Héritiers Bhogun* 1972 MR 66, and *Moutou v. Mauritius Government Railways* 1933 MR 102 (for an academic analysis of the legal grounds put forward by the Supreme Court of Mauritius, see: Georgijevic 2019, 3–20).

The harm caused to the direct victim is very often likely to create mental suffering for a person close to them (victim by ricochet). When the moral harm of the victim by ricochet stems from the death of the direct victim, Mauritian civil law presumes that a blood relative or an ally of the direct victim has actually suffered moral harm because of the abovementioned death. This presumption is not absolute, and can be overturned by the defendant, i.e. the wrongdoer. Thus, the Mauritian Supreme Court has, for example, refused to allow compensation for non-pecuniary (moral) harm to a wife *de facto* separated for years from her deceased husband and living in cohabitation with another man. Given the circumstances of the case, she was not able to prove the moral (mental) suffering that her spouse's death caused her. This rule was laid down in the judgment of the Supreme Court of Mauritius in *Scott v. Brasse* of 1968 MR 31. On the other hand, there are numerous judgments in which the surviving wife and children were awarded compensation for non-pecuniary harm by ricochet, for example, *Gutty & Ors. v. Eleonore* 1980 SCJ 312, para. 17 *in Gokhool S D v. Groupement français d'assurances* 2009 SCJ 412. The moral harm stemming from the infirmity of the direct victim is also a reparable one, and the abovementioned infirmity does not have to be exceptionally serious.[18]

2.2. Causality Link

In Mauritian Tort law there are two conceivable modes of appreciation of the causal link: on one hand, there is the theory of equivalence of conditions (*théorie de l'équivalence des conditions*) and, on the other hand, there is also the theory of adequate causality (*théorie de la causalité adéquate*). Whichever theory is applied by Mauritian courts, the causal link must be proven by the plaintiff, and this link cannot be presumed.

2.2.1. The Theory of Equivalence of Conditions

According to the theory of equivalence of conditions, the legal cause of harm is any event without which the harm would not have

[18] Cass. 2nd ch. 1 July 2010, Appeal No. 09–15907; Cass. 2nd ch., 8 December 1971, Appeal No. 70–12550.

occurred. If the event in question had not occurred, the harm would not have occurred neither. On the other hand, if the harm would have occurred even in the absence of an event, that event is not its legal cause. Those rules are clearly stated in the Mauritian Supreme Court's judgments in *Beau Plan Sugar Estate v. WW S. Pultee* 1994 SCJ 399[19] and *Caprede v. State of Mauritius* 2010 SCJ 147.[20]

2.2.2. The Theory of Adequate Causality

According to the theory of adequate causality, not all event, in the absence of which the harm would not have occurred, are necessarily legal cause for damages. The cause of harm is an event which, *in the normal course of events*, would have entailed harm. On the other hand, events which are not, in the usual course of events, considered to be the cause of harm will remain outside the causal link. Thus, the existence of the causal link between the harm and an event is assessed from the point of view of a good family father (*bon père de famille*), i.e. from the point of view of a reasonable and prudent man or woman. If for an average and reasonable person the harm is the normal result of an event, the latter will be considered as the adequate cause of the former. The theory of the adequate causality was implicitly applied in the judgment of the Supreme Court of Mauritius in *Parmessur V K P & Ors v. Beeharee V & Anor* 2014 SCJ 135. Theft, committed by a third party, of the personal belongings of a driver involved in a traffic accident cannot be the civil liability of the other driver involved in the same accident, whose fault for the accident has not been contested. The theft of a person's personal belongings is not the normal, usual result of a road accident in which the person has been involved.

2.2.3. Proof of Causal Link

According to Mauritian tort law, the burden of proof of the causal link lies with the plaintiff, i.e. on the alleged victim of harm, in accordance

[19] In this judgment a spouse, whose husband has already deceased, brought an action before the Supreme Court of Mauritius against her late husband's employer and asked for the compensation of the harm stemming from the death of the husband. She asserted that his was due to the refusal by the employer, three years prior to the death of the employee, to approve sick leave for the latter's back pains. The Court rejected this request of the wife: the refusal to grant sick leave was not a necessary a factor in the death of the employee. Thus, there was no causal link between the two.

[20] In this judgment a mother, whose son hanged himself while in police custody, brought an action before the Supreme Court of Mauritius against the State of Mauritius and sought compensation of the harm stemming from the death of her son. She asserted that his death was due to the fault of a police officer who did not check the prisoners as often as he should have done (as per the Police Regulations). The Court rejected this request of the mother: the fault of the police officer was not a necessary factor in the death of the prisoner. Thus, there was no causal link between the two.

with the adage *actori incumbit probatio*. As the causal link is a legal fact, the means of proof are not limited,[21] and the plaintiff can use all possible means of proof (writings, testimony, etc.) in order to prove their harm. Judges or magistrates may have recourse to presumptions of fact, provided those presumptions are serious, precise and consistent. The Intermediate Court of Mauritius confirmed this rule in its judgment in *L. Iyemparooma v. CIP Ltee* of 2010 INT 178.[22]

2.2.4. Causal Link in Case of Several Wrongdoers Causing the Same Harm

It may happen that two or more persons carry out the same activity in a group, and that harm is caused by one of the members of that group, without knowing exactly which one caused it. According to the current Civil Code of Mauritius, all members of the group are considered not to be liable in tort, given the fact that it is impossible to precisely identify the wrongdoer. This principle is laid down in the Supreme Court's judgment in *Emamally and ORS v. Patun and ANOR* of 1975 SCJ 34. Two hunters participated in the same hunt and one of them accidentally killed a person who was walking not far from the two of them. It was impossible to establish which one exactly killed the victim, which is why the Supreme Court exonerated both hunters from the liability in tort. This solution seems to be very harsh on the victim of harm, and maybe it would be better to declare all the members of the group liable *in solidum* for harm instead of exonerating them.

2.3. Harmful Event

In Mauritian tort law, there are three potential harmful events that may give rise to the tort liability of a wrongdoer: a fault (*faute*), an act by an object (*fait des choses*), and an act by another person (*fait d'autrui*).

2.3.1. Fault

Fault, one amongst the events giving rise to tort liability in Mauritian law, is dealt with in articles 1382 and 1383 of the Mauritian Civil Code. However, these articles do not give any legal definition of

[21] *cf.* Artt. 1341 subs. of the Mauritian Civil Code applying to the existence and content of contract.

[22] In this judgment the plaintiff asserted that he suffered harm due to a food poisoning and that the cause of that poisoning was the consumption of bottles of water bought at a supermarket. Thus, he sued the supermarket and asked for compensation of his harm. The Court rejected his request because there was no serious, precise and consistent presumptions of facts that would allow the Court to establish the existence of the causal link. In fact, there were too many potential sources of the plaintiff's food poisoning such as poorly washed vegetables that he ate.

fault (Porchy-Simon 2020, 363, para. 697). In Mauritian tort law, it is not necessary to look for a specific legal provision in order to establish the existence of civil fault. Civil fault is defined as the violation of the general principle of not harming others unfairly (*ne pas nuire injustement à autrui*) (Cabrillac 2020, 237, para. 241). Fault is an error in the behavior of a wrongdoer (Cabrillac 2020, 238, para. 241).

In Mauritian civil law, the burden of proof of the existence of civil fault lies with the alleged victim, in accordance with the adage *actori incumbit probatio*. Since civil fault is a legal fact (*fait juridique*), and not a legal act (*acte juridique*), all means of proof, including witnesses, are allowed.

Traditionally, it is considered that the capacity for discernment of a wrongdoer, is a building block of the notion of civil fault, because it gives a moral dimension to the fault. A person unable to differentiate between right and wrong cannot be held liable in tort. Nevertheless, one may notice this in the Mauritian Supreme Court judgment in *Medine Sugar Estates Co. Ltd v. Anthony* of 1990 SCJ 334 this condition has been abandoned (Jeanne, Touzain 2020, 210 subs.). Thus, despite the lack of capacity for discernment, a 3-year-old child may commit a civil fault, when going over a zoo fence that is 74 cm high, entering the tiger enclosure and getting injured by the animal. On the other hand, a misconduct, i.e. an error in the behavior of a wrongdoer, is a building block of the notion of civil fault in Mauritian tort law. The fault is the deviation in the behavior of the wrongdoer from the behavior that is deemed to be correct.[23] In Mauritian civil law, civil fault is assessed *in abstracto* (Cabrillac 2020, 238, para. 241; Porchy-Simon 2020, 365, para. 798; Jeanne, Touzain 2020, 213). This rule is clearly laid down in the judgment of the Supreme Court of Mauritius in *Neron Publications Co Ltd v. La Sentinelle Ltd & Ors* 2020 SCJ 63 as well as in the judgment of the Intermediate Court in *D. Hurnam v. D. K. Dabee* 2010 INT 244. The assessment of the civil fault *in abstracto* is about comparing the behavior of the wrongdoer with the behavior of an abstract and average person, a person that is "reasonably careful and wise". Nevertheless, it has to be highlighted that in the *in abstracto* assessment of fault, a diligent and prudent person exercising the same activity is taken as the model for the comparison. For example, the behavior of a doctor who is an alleged wrongdoer is compared to that of an abstract, prudent and wise doctor; the behavior of a worker whose fault is being alleged is compared to the behavior of an abstract prudent and wise worker. Professional qualification is therefore a concrete element that permeates the *in abstracto* assessment

[23] See the judgments in *Mohun v. Jugnah & ANOR* of 2002 SCJ 36; *Ramchurn Uma Parvati & ORS v. Sahadeo Ashok & ANOR* of 2008 INT 192.

of civil fault. In addition, in the *in abstracto* assessment of civil fault, the circumstances of the case are taken into account, and a judge or a magistrate must ask themselves the question what a good family father (a careful and reasonable person) would have done in the same circumstances.

It should be noted that the fault of a victim may entail the partial exemption of the person liable in tort for the harm suffered by the victim. The exemption of liability will be proportionate to the gravity of the victim's fault. The Supreme Court of Mauritius sets our clearly those rules in its judgments in *Coonjah v. Soap and Allied Industries Ltd.* of 1977 MR 309,[24] *M. & A. Aluminum Center Ltd. v. The Mauritius Commercial Bank Ltd.* of 2009 SCJ 52, and *Press Distribution Co. Ltd. v. CEB and Ors* 2014 SCJ 58.

Mauritian civil law takes into account not only faults by commission but also faults by omission. Civil fault by commission is an act that one committed, where one should not have committed it. In contrast, fault by omission consists in not doing something that one should have done. When an omission contravenes a legal or regulatory duty to act, it certainly constitutes a civil fault.[25] On the other hand, when an omission does not contravene a legal or regulatory duty, such an omission may be considered a civil fault, provided that it is contrary to a professional duty, other than a legal or regulatory duty (Cabrillac 2020, 240, para. 244; Porchy-Simon 2020, 365, para. 796; Jeanne, Touzain 2020, 211).[26] In its judgment in *Rouillon Marie Josee Raymonde v. Utchanah Jef* 2007 INT 250, the Intermediate Court of Mauritius states that a hairdresser did not commit civil fault because they she does not install surveillance cameras in their hair salon. There is no professional obligation to do so.

Finally, according to Mauritian case law, the way in which subjective rights (*droit subjectifs*) are exercised may amount to a civil fault, in spite of the fact that the exercise of subjective rights is *a priori* free and the compensation for the harm resulting from the abovementioned exercise cannot be awarded. This is particularly true when a subjective right is exercised with the intention of harming others (*intention de nuire*) (Cabrillac 2020, 242 s., para. 249 s.; Jeanne, Touzain 2020, 212), as

[24] In this case, the fault of the victim, who is the ex-employee of the person liable in tort, consisted in not wearing a protective mask in the workplace. This fault reduced the tort liability of the former employer of the victim by 25%.

[25] For example, Article 39 A (2) of the Mauritian Penal Code stipulates that "any person who willfully omits to provide to a person in danger such assistance as he could, without any risk to himself or to a third party, provide to that person by his own intervention or by calling for help, shall be punished by a fine not exceeding 10,000 rupees and by imprisonment for a term not exceeding 2 years." This culpable omission is not only a criminal fault but also a civil fault.

[26] Comp. with: Cass. 1st ch., 22 January 2014, *Recueil Dalloz*, 2014, 276.

evidenced by the judgments of the Intermediate Court in *Gendoo v. Razbully* of 2010 INT 149 and *Hurloll Leelder v. Choolun Anandissan* of 2007.[27]

2.3.2. Act by an Object

In Mauritian civil law the act by an object is a harmful event that may lead to tort liability (see: Batteur 2020, 292 subs.). This type of liability is called *strict (full) liability*. There is the common law of liability for an act by an object, arising from Article 1384 paragraphs 5 and 6 of the Mauritian Civil Code. The abovementioned common law applies in all cases, except in cases where the Civil Code has provided a special regime of tort liability for acts of objects (articles 1385 and 1386, liability for an act by an animal and liability for the damage caused by the ruin or poor maintenance of a building). The judgment that introduced to Mauritian law the objective tort liability for harm resulting from acts of objects was the Supreme Court's judgment in *Rose Belle S.E. Board v. Chateauneuf Ltd.* of 1990 MR 9 and 16.[28]

The implementation of strict (objective) liability for acts of objects in Mauritian common tort law requires fulfillment of three conditions: the object, its act, and the identification of the person responsible for the abovementioned act. In principle, any object may give rise to objective liability for an act by an object, under Article 1384 of the Mauritian Civil Code, but on condition that a person has control over that object. In other words, there must be a person who exercises the power of control and direction over the object. Article 1384 of the Mauritian Civil Code applies to both movable and immovable property (Cabrillac 2020, 245–247, para. 253–257; Jeanne, Touzain 2020, 235), with the exception of those falling under articles 1385 and 1386 of the Civil Code[29]. The act by an object (Cabrillac 2020, 238, para. 247–248, 258–259; Jeanne, Touzain 2020, 236–237) designates the causal link between the object and the seat of harm.[30] It is up to the alleged victim to prove the act by an object, in

[27] In two cases cited above, civil fault consisted of the misuse of the right to report a criminal offense to the police. This misuse was motivated by the desire to take revenge on the victim of the false denunciation.

[28] In the same vein, there is also the judgment of the Supreme Court of Mauritius in *Compagnie Sucrière de Bel Ombre v. Vishnoo Bungaroo* of 2000 SCJ 308 as well as the judgment of the Intermediate Court of Mauritius in *Mauritius Union Assurance v. T. Raghu & Cie* of 2011 INT 27.

[29] The harm caused by the ruin of a building is reparable under a special regime provided for in article 1386 of the Mauritian Civil Code. Moreover, the harm caused by the act of an animal falls under the special regime contained in article 1385 of the Mauritian Civil Code.

[30] The seat of harm is sometimes the thing destroyed or damaged, and sometimes the body of the victim of harm.

accordance with the adage *actori incumbit probatio*. When there is no contact between the object and the seat of harm, *a priori* there is no act by an object, and the object cannot be considered the legal cause of the harm. However, the situation is different when the harm has been caused by an abnormality in the positioning of the object or by an abnormality in its condition. On the other hand, if there is contact between the object and the seat of harm, two situations must be distinguished. On one hand, it may happen that contact has occurred between a moving object and the seat of harm. On the other hand, contact involves sometimes an inert object and the seat of harm. When there was contact between a moving object and the seat of harm, the victim of the harm needs simply to prove contact. The presumption of the act by an object, i.e. the causal link between the object and the harm will be deduced from the proof of contact between the object and the seat of harm. The presumption is a simple one and it means that the guardian of the object can override it by providing proof of force majeure (or other exonerating circumstances). The Intermediate Court of Mauritius laid down the abovementioned rule in clear and straightforward terms in the judgment in *Mauritius Union Assurance v. T. Raghu & Cie* of 2011. On the other hand, when there is contact between an inert object and the seat of harm, the alleged victim must prove either the abnormality of the positioning of the object or the abnormality of its condition.[31] The principle is clearly stated in the decisions of the Intermediate Court of Mauritius in *Mauritius Union Assurance v. Municipal Council of Beau-Bassin-Rose Hill* of 2011 INT 28 and *Gunnoo Robin v. Mahatma Gandhi Institute* of 2006 INT 73.[32]

According to Article 1384 of the Mauritian Civil Code, the guardian of the object is liable for the harm stemming from the act by an object (Cabrillac 2020, 248 s., para. 260 s.; Jeanne, Touzain 2020, 237–240). The guardian can be defined as the person who has the independent power, whether this power is in accordance with the law or not, to use, direct and control the object. The natural guardian of the object is its owner, because they have legal power over it, conferred upon them by article 544 of the Civil Code. This principle is set out in the judgments of the Intermediate Court of Mauritius in *MADMR Mohamed & ANOR v. S. Virginie & ANOR* of 2010 INT 240 and *Mauritius Union Assurance v. T. Raghu & Cie* of 2011. On the other hand, an agent (*préposé*), and in particular an employee, cannot be considered the guardian of an object within the meaning of Article 1384 of the Mauritian Civil Code. They work under the orders of others (for example, employees obey the orders

[31] Comp. with: Cass. 2nd ch., 15 June 2000, Bull. civ. II, No. 103; 25 October 2001, Bull. civ. II, No. 162; 18 September. 2003, Bull. civ. II, No. 287; 24 February 2005.

[32] In those two judgments, an abnormality of the object (a metal gate and a staircase) was noted, and it made it possible to apply the full (objective) liability of its guardian.

of their employer) and do not have the independent power to use the object, control it, and direct it.[33]

A thief can be considered as guardian of an object, because they have independent power, although it is not in compliance with the law, to use the object, to control it, and to direct it. Furthermore, in the event of theft, the owner loses custody of the object and ceases to be liable for the harm caused by it. These principles are clearly stated in the judgments of the Supreme Court of Mauritius in *Appasawmy v. The Albatross Insurance Co* 1997 MR 98, *Yip Tat Chung Sichi & Anor v. Cargo Handling Corporation & Anor* 2006 SCJ 127, as well as in the judgment of the Intermediate Court in *Mauritius Union Insurance v. T. Raghu & Cie* of 2011. Finally, there may also be people to whom the owner entrusts the object, and who can become guardians of it, within the meaning of Article 1384 of the Mauritian Civil Code. Some contracts[34] entail transfer of the legal power to use, direct and control the object. Therefore, the owner of the object ceases to be its guardian, and the person to whom the power of mastery over the object has been transferred becomes its guardian. This principle is clearly stated in the judgments of the Supreme Court of Mauritius in *J. Mohulu v. H. Musruck* of 1996 SCJ 306 and *Chetty N. v. Gaindoo B. & Ors* 2015 SCJ 366.

The guardian of the object cannot be exonerated from their tort liability by proving that they were not at fault. Thus, the guardian of the object is not allowed to provide proof that they properly supervised the object, and that the harm was caused by an undetectable defect in it. The Supreme Court of Mauritius cites this rule in the judgment in *General Construction Co. Ltd. v. Ibrahim Cassam & Co. Ltd* of 2011. In Mauritian civil law, there are three grounds that exclude liability for act by an object: force majeure, fault of the victim, and fault of a third party. Force majeure is an external, reasonably unforeseeable and irresistible event. This definition is given in the Supreme Court of Mauritius judgments in *Fatehmamode & Co. Ltd. v. United Docs* of 1979 SCJ 430 and *General Construction Co. Ltd. v. Ibrahim Cassam & Co. Ltd* from 2011 SCJ 19. Fault of the victim indicates their abnormal behavior, i.e. behavior contrary to that of a good family father (careful and reasonable person). Following the judgment of the French Court of Cassation dated 13 April 1934, and another judgment of the same Court dated 13 December 1936, fault of the victim can entail the complete exoneration of the guardian of an object, if the abovementioned fault was the sole cause of the harm. In other words, fault of the victim presenting all the characteristics of a force majeure will completely exonerate the guardian of an object. The victim's

[33] See the judgments in *L. Appasawmy v. The Albatross Insurance Co.* de 1997 *MR 98*; *Sun Insurance Co. Ltd v. Government of Mauritius SCJ 85; General Leasing Co. Ltd. & ANOR v. State of Mauritius* of 2008.

[34] Contract of lease and contract of deposit, for example.

fault must therefore have been reasonably unpredictable and irresistible from the point of view of the guardian, i.e. from the point of view of a reasonably careful person. The principle is adopted by the Supreme Court of Mauritius as evidenced by its decisions in *Rose Belle S.E. Board v. Chateauneuf Ltd.* of 1990, *Medine Sugar Estates Co. Ltd v. Anthony* of 1990, *Veeren V. v. State Insurance Company of Mauritius (Sicom) Ltd & Anor* 2019 SCJ 267, and *Toorab F.B v. La Prudence Mauricienne Assurance Co. Ltd* 2016 SCJ 370. The victim's fault that is not normally unpredictable and irresistible, from the point of view of the guardian of the object, may partially exonerate the latter from their liability. The guardian will be exonerated proportionally to the seriousness of the victim's fault. The rule is laid down in the Supreme Court's judgment in *Rose Belle S.E. Board v. Chateauneuf Ltd.* 1990, and was repeated in *Brette N. R. & Ors v. Harvey J. L. P. & Anor* 2018 SCJ 80. Finally, the fault of a third party will entail the total exemption of the guardian, if this fault has all the characteristics of a force majeure. On the other hand, if the fault of a third party is not normally unforeseeable and irresistible, the guardian of the object will not be exonerated at all.

2.3.3. Act by Another Person

Tort liability of parents for acts of their children. In Mauritian civil law, the father and mother are liable for the harm stemming from the acts of their minor children. According to Article 1384 paragraph 2 of the Mauritian Civil Code, "the father and mother, as long as they exercise guardianship rights, are jointly liable for the harm caused by their minor children living with them" (translated by author). Paragraph 6 of Article 1384 adds that parents can exonerate themselves if they can prove that they could not prevent the act that gave rise to their liability. In Mauritian tort law, parents are considered to be liable for the harm caused by their minor child by virtue of a presumption of fault. There is a presumption that a child has caused harm to others, because they have been poorly supervised or poorly educated by their parents. However, the abovementioned presumption of fault is not absolute and may be overturned, if the parents provide proof that they have not committed any fault, i.e. that they have appropriate supervised and properly educated their child who has caused harm to others. The principle is clearly stated in the Supreme Court of Mauritius judgment in *Rabaille v. Boodhun* 1978 MR 34.[35]

[35] A major turnaround occurred in France in 1997 in a judgment known as *Bertrand* (Cass. 2 19 February 1997) of the second civil chamber of the Court of Cassation: parents' liability is now a strict (objective) liability, implicitly based on the idea of risk. Parents can only be exonerated from their liability by providing proof of force majeure or proof of fault of the victim (which then amounts to force majeure). Conversely, it is no longer possible for parents to be exonerated from their liability by proving the absence of their fault, i.e. by providing proof that they have properly educated and supervised their

The constitutive elements of parental liability for the harm stemming from the acts of their children are the guardianship rights over the child, the minority of the child, the cohabitation between the child and the parents, as well as the wrongdoing of the child.

Article 1384 paragraph 2 of the Mauritian Civil Code applies only to the father and mother. It does not apply to other legal guardians or to grandparents of the child under the roof of whom the child might be at the time of causing harm to others (Ancel 2020, 469). According to Article 1384 paragraph 2, the father and mother are liable for the harm caused by their child as long as they have custody of it (Ancel 2020, 469).[36] Article 1384 paragraph 2 of the Mauritius Civil Code states also that parents are liable for the harm caused by their minor child (Ancel 2020, 469).[37] The child must be a minor at the time it caused the harm to the third person.[38] It does not matter whether the child has become adult at the moment when compensation for the harm is requested. On the other hand, it should be noted that if the minor child is emancipated by marriage,[39] its parents cease to be liable for the harm caused by this child.[40] Parents are liable in tort only for the harm caused by their minor

child and that they have committed no fault pertaining to the harm caused by their child. The new case law is the consequence of a new interpretation of the rule in the French Civil Code according to which the parents may be exonerated from their liability by proving that they were not able to prevent the act of their child (in Mauritius, paragraph 6 of Article 1384 of the Mauritius Civil Code is identical to the abovementioned rule in the French Civil Code).

[36] Married parents, as well as parents living in a notorious cohabitation in Mauritius, jointly exercise parental authority over their minor children. Thus, article 372 of the Mauritian Civil Code stipulates that during marriage, the father and mother jointly exercise parental authority. In addition, article 374 of the Civil Code stipulates that if two parents who are not married have recognized the natural child and if they live together (notorious cohabitation) they exercise parental authority jointly. In these cases, both parents exercise parental authority, and both have custody of the child. Therefore, both are liable for the harm caused to others by the minor child. Their liability is joint and several. In the event of a *de facto* separation of married parents, one of the parents will have custody and the other the right of visitation and accommodation. This is provided by article 372 of the Mauritian Civil Code, which authorizes judges to rule on the custody of the child. In this case, whoever has custody of the child will be responsible for the harm caused by the minor child. Article 373–2 of the Mauritian Civil Code stipulates that in the event of divorce or legal separation, parental authority will be exercised by the parent on whom the judge has conferred custody. This parent will be civilly liable for the harm caused by the child.

[37] According to Article 388 of the Mauritian Civil Code, a child is minor until the age of 18.

[38] Cass. 2nd ch., 25 October 1989, Bull. civ. II, No. 194.

[39] Artt. 476–478 of the Mauritian Civil Code.

[40] This is the consequence of the autonomy of an emancipated child, and of the fact that it is no longer the object of parental authority. Parents are therefore not liable for acts of their emancipated minor child.

children living with them at the moment when the harm was caused. In other words, there must be a community of life under the same roof between the child and the parents at the moment the harm occurs. Community of life refers to the fact that the parents and the child were living under the same roof at the time moment the harm has occurred.[41] This condition is compatible with parental liability based on a presumption of fault, such a presumption being the positive law of Mauritius, as per the previously mentioned judgment in *Rabaille*. If the child cohabits with its parents, they have the opportunity to educate and supervise the child well. However, if the parents do not educate their child and do not supervise it, they commit a civil fault and will be liable in tort for the harm caused to a third person by their child.[42] French case law (a persuasive authority in Mauritian civil law) specifies that the termination of community of life between the parents and a child, without parental authorization, does not exonerate the parents of their civil liability, because it is deemed that the community of life never ceased.[43] Parents are responsible only for damage caused by a fault (a wrongful act) of their minor child. Indeed, it would be illogical to declare the parents liable for damage for which the child cannot be liable itself (on that issue see: Ancel 2020, 469).[44]

The tort liability of the father and mother is not incompatible with the liability of their minor child. The latter is liable for harm stemming from its civil fault. There will be an addition of tort liabilities, not a substitution of one tort liability by another. The parents and their child are jointly liable for harm and the victim will be able to choose the person, a parent or a child, who will be sued in torts before a court of justice.[45]

Parents will be exonerated from their tort liability for an act by their minor child if they are able to prove that the damage caused by the

[41] Compare with the judgment of the second civil chamber of the Court of Cassation dated 19 February 1997 and known as *Samda*. See also: Cass. 2nd ch. 9 March 2000, Bull. civ. II, No. 44; Cass. crim. ch. Feb 8 2005, JCP 2005, II, 10049.

[42] Examples, Cass. 1st ch., 2 July 1991, Bull. civ. I, No. 224; Cass. 2nd ch., 24 April 1989, D. 1990, 519.

[43] Cass. crim. ch. 21 August 1996.

[44] French case law (persuasive authority) has ended up declaring parents liable in tort for the acts of their children, even when a child has not committed a civil fault, i.e. even when his behavior has not been abnormal. See the judgment of the Plenary Assembly of the French Court of Cassation, dated 9 May 1984, known as *Fullenwarth*; see also two judgments of the Plenary Assembly of the Court of Cassation, dated 13 December 2002, and the judgment in *Levert* which is a judgment of the second civil chamber of the Court de Cassation, dated 10 May 2001, Bull. civ. II, No. 96.

[45] In general, the victim of harm will sue in tort the person who is the most solvent, and most in most cases the person sued in tort will be one of the parents, but one never knows... Young minors may be sometimes rich heirs, and it will be in the best interest of the victim to sue the minor who caused harm.

child is due to a *force majeure*. In Mauritian Tort Law, a *force majeure* may be defined as an event external to the parents, normally unforeseeable and normally irresistible. Moreover, in Mauritian civil law, parents can exonerate themselves from their tort liability by providing proof that the act by their child was unforeseeable and irresistible to them. In other words, the parents can exonerate themselves from their liability by proving that they did not commit a civil fault, and that they have properly supervised and educated the child. This rule was laid down in the mentioned Supreme Court of Mauritius judgment in *Rabaille*. Finally, a civil fault of the victim, which is an abnormal behavior, entails either the total exoneration or the partial exoneration of the parents.[46]

Tort liability of the principal for an act by their agent. Article 1384 paragraph 3 of the Mauritian Civil Code provides that principals are liable in tort for damages caused by their agents (e.g. employees) in the fulfilment of the functions for which they have been employed. Certain conditions must be met in order to apply the liability of a principal. Moreover, once these conditions are met, it is necessary to determine how to coordinate the tort liability of the principal and the liability of the agent.

First of all, a principal's tort liability depends on the existence of a principal-agent relationship, also known as preposition report (*rapport de préposition*) (Terré *et al*. 2019, 1125–1126, No. 1060). Secondly, there must also exist a wrongful act by the agent (Terré *et al*. 2019, 1129–1130, No. 1064) and thirdly, there must be a sufficient relationship between the wrongful act by the agent and their function (Tranchant, Egéa 2020, 133–135; Terré *et al*. 2019, 1130–1133, No. 1065). The relationship between the agent and the principal is called *relationship of preposition* or *bond of preposition*.[47] Traditionally, it is deemed that the essential element of the abovementioned relationship is the power (right) of the principal to give orders to the agent regarding the work to be done. The bond of preposition is therefore a bond of authority, i.e. a bond of subordination between the agent and the principal. Thus, the principal has the right to give orders and instructions on how the agent will perform their duties. On one hand, the principal determines the goal to be achieved, and, on the other hand, the principle provides the agent the means to achieve the goal. The contracts that generate the bond of preposition are, in particular, the employment

[46] The exemption from tort liability of the parents will be complete when the fault of the victim takes on the characteristics of a *force majeure*, i.e. if the abovementioned fault is unpredictable and irresistible from the point of view of the child that caused the damage. Conversely, if the victim's fault is normally foreseeable and resistible, the exemption of parents will be partial, and the extent of that exemption will depend on the seriousness of the victim's fault.

[47] See the judgment of the Supreme Court of Mauritius in *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors* 2016 SCJ 56.

contract and the agency contract,[48] unlike the contract of enterprise. The principal is liable in tort for an act for which the agent would be responsible themself, i.e. for a wrongful act (a civil fault). Article 1384 paragraph 3 of the Mauritian Civil Code does not mention explicitly civil fault of the agent, but this condition for the tort liability of the principal results from the common sense.[49] Mauritian courts insist on the requirement of the civil fault of the agent, as evidenced by the judgments in *Gowry v. The State* 1996 SCJ 135, *Vikas Trading Co. Ltd v. The Government of Mauritius* 2001 SCJ 237 and *Dassruth R. P. v. Femi Publishing Co. Ltd. & Or*s 2016 SCJ 56. The principal will be liable under Article 1384 of the Mauritian Civil Code when the agent has committed a civil fault in the performance of a mission entrusted to them. On the other hand, the principal will not be liable in tort for an act by the agent in case of the abuse of functions committed by the latter. Abuse of functions means that the act by an agent has a certain proximity to the functions (regarding the place, time or means used) but was performed outside the functions, without the authorization of the principal and for a self-serving purpose. The non-liability in tort of the principal in the case of abuse of functions committed by the agent was laid down in the judgment by the Supreme Court of Mauritius in *Dookhy M. & ORS v. SBM* 2007 SCJ 1, where a bank employee had embezzled a sum of 300,000 rupees, without authorization from the bank. The liability in tort of the latter, as principal, could therefore not be applied. The notion of abuse of functions has also been addressed or mentioned in the Supreme Court's decisions *Beau Villa v. Chuckowree and Lamco Insurance Ltd.* 1992 SCJ 83 and *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors* 2016 SCJ 56.

In Mauritian law, the tort liability of the principal is added to the liability of the agent (Tranchant, Egéa 2020, 135). The agent's liability is based on their civil fault, as per Article 1382 of the Mauritian Civil Code, and the liability of the principal is a vicarious liability, based on Article 1384 of the Mauritian Civil Code. Both the principal and the agent are jointly liable and the victim can sue either the principal or the agent for damages (depending on their solvency, i.e. financial situation) and seek compensation of the entire damages suffered. This solution results from the judgments of the Supreme Court of Mauritius in *Vikas Trading Co. Ltd v. The Government of Mauritius* 2001 SCJ 237 and *Beau Villa v. Chuckowree and Lamco Insurance Ltd.* 1992 SCJ 83.[50]

[48] French civil law (persuasive authority in Mauritius) has broadened the classic definition of the relationship of preposition. This relationship exists not only when one person has the right to give orders to another, but also if *de facto* one person gives orders to the other. A friend or relative who gives orders to another as part of voluntary aid provided by the latter will be considered as principal within the meaning of Article 1384 of the Mauritian Civil Code.

[49] See: Cass. 2nd ch., 8 April 2004, Bull. civ. II, No. 194.

[50] *cf.* Plen. Ass. 25 February 2000 (judgment known as *Costedoat*); Plen. Ass. 14 December 2001 (judgment known as *Cousin*) and Cass. crim. ch. 12 November 2008.

3. ADMINISTRATIVE TORT LIABILITY

Administrative tort liability (on that notion in France see: Ricci, Lombard 2018, 277 subs.) in Mauritian law is also governed by Article 1384 of the Mauritian Civil Code. The abovementioned article applies to the principal, i.e. public administration, and the agent, i.e. an employee of the public administration (on the special legislation in Mauritian law that refers to Article 1384 of the Mauritian Civil Code, see: Knetsch, 92 subs.). However, there is an important specificity of the administrative tort liability of the State as principal for the faults committed by its employees: the State will be liable in tort only in the event of serious fault of its agent, and this fault is sovereignly appreciated by judges. The State will not be liable in case of simple negligence or recklessness on the part of its agent. This is clearly stated in the judgments of the Supreme Court of Mauritius in *Transpacific Export Services Ltd v. The State of Mauritius & Anor* 2016 SCJ 407, *Transpacific Export Services Ltd v. The State & Anor* 2018 PC 28, *Senarain M. v. The Commissioner of Police & Anor* 2019 SCJ 72, and *Mario Alain Chung Ching Ah Sue v. The State of Mauritius* 2015 SCJ 110.

4. CONCLUSION

In this paper, it has been explained that many key institutions of the Mauritian tort law are borrowed from the French tort law, which is clearly a persuasive authority in Mauritius. Thus, the categories such as material and moral harms, victim by ricochet, theory of equivalence of conditions, theory of adequate causality, harmful event, etc. exist both in Mauritian and French tort law. However, as it has been shown in this paper, Mauritian tort law is perfectly autonomous and independent from French tort law. The Mauritian Supreme Court does not have any formal obligation to follow the French case law on torts. Thus, the Mauritian Supreme Court denies to a concubine, as a victim by ricochet, the right to be compensated for her material and moral losses, whereas the French Court of Cassation has conferred such rights upon the concubine since 1970. Moreover, when a harm is caused by an unidentified wrongdoer forming part of a group, Mauritian tort law denies the right to compensation to the victim, whereas French tort law ensures compensation *via* the tort liability *in solidum* of all members of the group. Mauritian tort law differs also from French tort law regarding the nature of the liability of parents for the harm to third persons caused by their minor children. In Mauritius, the liability of parents is subjective, based on the presumption of fault, whereas in France, since the *Bertrand* judgment in 1997, the tort liability of parents is strict (objective), based on the idea of risk being controlled by the parents.

REFERENCES

Ancel, Pascal. 2020. *Droit des obligations en 12 thèmes*. 2nd ed. Paris: Dalloz.

Batteur, Annick. 2020. *Droit civil des obligations*. Paris: Dalloz.

Cabrillac, Rémy. 2020. *Droit des obligations*. 14th ed. Paris: Dalloz.

Chénédé, François. 2018. *Le nouveau droit des obligations et des contrats 2019/2020*. 2nd ed. Paris: Dalloz.

Georgijevic, Goran. 2019. La réparation des préjudices par ricochet du concubin en droit mauricien. *Carnets de Recherche de l'océan Indien* 4: 3–20.

Jeanne, Nicolas, Antoine Touzain. 2020. *Le droit des obligations en cas pratiques*. Paris: Dalloz.

Knetsch, Jonas. 2017. La réception du droit français de la responsabilité à Maurice. *Revue Internationale de Droit Comparé* 1: 92.

Latina, Matias, Gaël Chantepie. 2018. *Le nouveau droit des obligations*. 2nd ed. Paris: Dalloz.

Porchy-Simon, Stéphanie. 2020. *Droit des obligations 2021*. 13th ed. Paris: Dalloz.

Ricci, Jean-Claude, Frédéric Lombard. 2018. *Droit administratif des obligations*. Paris: Sirey.

Seube, Jean-Baptiste. 2019. Responsabilité contractuelle et délictuelle à l'Ile Maurice, le jugement Sotramon, part II. *IJLS Law Journal.*

Terré, François, Yves Lequette, Philippe Simler, François Chénédé. 2019. *Droit civil, Les obligations*. 12th ed. Paris: Dalloz.

Tranchant, Laetitia, Vincent Egéa. 2020. *Droit des obligations 2021*. 24th ed. Paris: Dalloz.

Article history:
Received: 13. 10. 2020.
Accepted: 2. 11. 2020.

Nikola Ilić, LL.M.*

Bernanke, Ben S., Timothy F. Geithner, Henry M. Paulson, Jr. 2019. *Firefighting: The Financial Crisis and Its Lessons*. New York: Penguin Books, 230.

"Importantly, in the 1930s, in the Great Depression, the Federal Reserve, despite its mandate, was quite passive and, as a result, financial crisis became very severe, lasted essentially from 1929 to 1933."

Ben S. Bernanke

Today many people believe that they understand what triggered the 2008 financial crisis and how it was resolved. However, only a few of them in fact performed the open-heart surgery on the American economy and prevented the lethal outcome. Among these few are the authors of this book: Ben S. Bernanke, the chairman of the Federal Reserve Board from 2006 to 2014, Henry M. Paulson Jr., the US Treasury secretary from 2006 to 2009, and Timothy F. Geithner, president of the Federal Reserve Bank of New York from 2003 to 2009. Before and during the financial crisis, the authors held some of the most influential decision-making positions in the world, which enabled them to observe the crisis from the very top, and not only to observe.

During the fourth quarter of 2008, the American economy was on the verge of collapse. The financial markets unexpectedly slumped – market value of almost all financial instruments plummeted, while credit was unavailable to anyone except the safest of borrowers. At the same time, in the real sector, more than 700,000 Americans lost their jobs, while world trade and industrial output were falling as fast as they had during the fourth quarter of 1929.[1] How did the economic downturn occur so suddenly? What were the regulators supposed to do, and what did they

* Teaching Assistant, University of Belgrade Faculty of Law, *nikola.ilic@ius.bg.ac.rs*.

[1] A goldmine of relevant data and charts regarding the crisis can be found in the appendix of the book.

do? These are just some of the questions raised and answered in this book.

In the first chapter (out of five) of the book, the authors describe the initial spark of the financial crisis. In their opinion, the crisis started as a classic example of financial panic – a run on the financial system triggered by a crisis of confidence in mortgages. Furthermore, the problem of mortgages itself occurred due to lenders being systematically exposed to wrong incentives. They would approve almost any credit application, regardless of applicant's credit history, whether or not they were employed or provided any documents verifying their income.[2] The reason for such lenders' behaviour lies in innovative financial derivatives. Specifically, lenders were using mortgages to create mortgage-backed securities and selling them on the financial markets to investors looking for higher returns. Lenders vastly transformed mortgages into the complex securities, and rating agencies, dependent on issuers' fees, often rated them as AAA – effectively as safe as the US Treasury bonds.[3] In that way, through financial markets, bad mortgages started to underpin the pillars of the American economy.

The first stark warning before the crisis came with the BNP Paribas, France's largest bank, announcing a freeze on withdrawals from three funds holding securities backed by US subprime mortgages, due to the "complete evaporation of liquidity" in the securities markets.[4] In the second chapter, the authors honestly admit that they were concerned about BPN Paribas at the time, but they did not have a clue it will metastasize into the worst crisis in generations. Some of the readers might get an impression that the authors are trying to justify their passivity by explaining early intervention would have been criticized as a misguided overreaction that would rescue the reckless and ratchet up moral hazard. While the authors, in their professional capacity, were "talking to one another every day, usually multiple times", the European Central Bank (ECB) was the first to react, by buying securities in the open market and injecting $130 billion into frozen credit markets. The US Federal Reserve (Fed) followed that intervention by buying $62 billion worth of US Treasury bonds and issuing a statement encouraging banks to borrow from the discount window.

[2] Besides the complex economics phenomenon, the authors explain in detail popular slang during the crisis, such as – "NINJA (no income no job) loans", "liar loans", and "exploding ARMs (adjustable-rate mortgage) loans".

[3] Besides the monetary incentives, crucial reason behind rating agencies' behaviour, which the authors did not elaborate at length, were the lack of competition and transparency, as well as the type of their liability. For more details, see Lieven 2016, 26–31.

[4] The announcement was released on 9 August 2007. See: Boyd 2007.

Interestingly, the authors support and justify the Fed's initial reaction, even though they did not understand the cause of the crisis, at the time when the reaction took place. It may be the opinion of some of the readers that injecting additional liquidity into financial markets and allowing short-term borrowing from the Fed, without addressing the cause of the problem, only accelerated the process of lending and produced millions of new mortgage-backed securities in the US.[5] In other words, some readers may disagree with the authors and conclude that the Fed, by its initial reaction, partially accelerated the crisis that it had attempted to solve.

Following the Fed's initial intervention in the financial markets – not surprisingly for some readers – even more banks faced severe financial difficulties. Among others, Bear Stearns, an eighty-five-year-old investment bank, with more than $400 billion in assets, was on the verge of bankruptcy in March 2008. Its cash reserves had dwindled from $18 billion to $2 billion in just four days, and the only solution left was to file for bankruptcy. In the authors' opinion, the main problem was fragile confidence, causing a sudden run on Bear Stearns and other financial institutions. Nevertheless, the authors did not provide any clear answer to the question – why was confidence so fragile? In short, it seems that many participants in the financial markets were facing a severe and sudden lack of liquidity (unaware of the bad loans mortgages plummeting prices of financial instruments), and the only instinctive reaction was to ask for more money. In this sense, fragile confidence and run on Bear Stearns were not the cause of the crisis, but a mere consequence of the bad loans and mortgage-backed securities. However, one must agree with the authors that Bear Stearns was too interconnected to fail,[6] and thus regulators had a justifiable reason to react.

In the third and fourth chapters, the authors describe how the flame of the crisis spread to other financial institutions and the entire American economy. The next weakest investment bank was Lehman Brothers, followed by Merrill Lynch, Morgan Stanley, Goldman Sachs, and others. Like a domino effect, the collapse of one or more colossal investment banks could severely endanger mortgage giants Fannie Mae and Freddie Mac, which could further amplify instability and break down of the entire financial system. The Fed initially wanted to prevent that causal link to materialise and, among other measures, launched an aggressive landing program called the Primary Dealer Credit Facility (PDCF), which

[5] Apart from the mortgage-backed securities, some contributions highlight two additional causes of the 2008 crisis: investment banks operated with an exceedingly high level of leverage, and they used to finance their assets through short-term loans. See, for example, Ball 2018, 19.

[6] Bear Stearns and its business ties with other participants in the market are also described in Abolafia 2020, 81–83.

accepted a broader range of collateral, including riskier assets, compared to previous regulations. In the author's words, this "intervention calmed the markets", and more than ten years later, economists agree that through this intervention the Fed prevented an international economic catastrophe.[7]

However, calming the markets was not a permanent regulatory solution because the additional lending provided by the Fed did not tackle the root of the crisis. On the contrary, additional lending made an impression that the crisis was only a temporary fluctuation, and all the participants had the same incentives as before the crisis – to continue their usual business activities, including selling and buying toxic assets. In that sense, one may conclude that the most valuable result of the Fed's initial intervention was the additional time that the regulators got to figure out what the real problem was, and how to resolve it permanently.

In the meantime, from March to October 2008, it becomes apparent what the toxic assets were, and why they were so toxic for their owners, and the US economy. In the author's words " [...] the branches of government officially recognized that the crisis poses a grave threat to the economy and gave crisis managers expanded authority to stabilize the financial system ". In the fifth chapter, the authors explain the regulation following the PDCF, which finally cut the roots of the crisis. Firstly, the US government enacted the Troubled Asset Relief Program (TARP), aiming to purchase the toxic assets and equity from private financial institutions and strengthen the financial sector.[8] On that occasion, Henry M. Paulson summoned the CEOs of the nine systemically important banks to the Treasury. As expected, one of the main obstacles for the TARP's implementation was the reluctance of the relatively successful banks to accept the government's equity investments. They were reasonably concerned that the program would reduce their return on equity (ROE) and make them look as their more imperilled competitors. However, the authors "[...] reminded them that none of them should be confident they have enough capital to survive the severe recession that lay ahead [...]". By relying solely on the descriptions from this book, one could conclude that the authors were extremely polite and gentle while fighting the worst economic crisis in decades. Faced with this extreme kindness, colossal banks did not have any other option except to support the government's program. The very same afternoon, the stock market posted its biggest single-day point gain in history.

The second major step in getting to the root of the problem was the enactment of the Home Affordable Refinance Program (HARP). The

[7] See, for example, Bernanke 2020, 84–86; Erdem 2020, 83–84.

[8] The TARP was enacted in compliance with the Emergency Economic Stabilization Act, and initially authorized expenditures of $700 billion for purchasing and/or insuring trouble assets by the US Treasury.

main aim of the program was to help "underwater" homeowners to refinance their mortgages, even though they owed more than their homes were worth at the time of the modification of their monthly payments. In the beginning, the scope of the program was limited, and the progressive left parties strongly opposed its implementation. However, this program ultimately reached more than 8 million homeowners and significantly contributed to the stabilization of the housing and the mortgage markets in the US. Interestingly, in the authors' opinion, "[...] solving the economic crisis was a necessary condition for solving the housing crisis, while the reverse was not necessarily true." Due to the lack of valid arguments for such a stance, the reader may end up wondering which came first: the chicken or the egg?

In the final chapter, the authors discuss what are the lessons from the financial crisis, and what regulators could do to prevent a similar one in the future. One of the main conclusions, completely justifying the authors in their professional capacity, is that – "financial crisis can be devastating even when the response is relatively aggressive and benefits from the formidable financial strength and credibility of the United States. The best strategy for a financial crisis is not to have one. And the best way to limit the damage if there is one is to make sure the crisis managers have the tools to fight before things got too bad." Speaking of the next financial crisis, the authors admit no one knows what it will look like but historically, in their opinion, crises have followed a similar mania-panic-crash pattern of excessive risk-taking and leverage. In this sense, the authors suggest stricter limits on the risk firms may take with borrowed money. They should be required to hold more loss-absorbing capital and take on less leverage. This implies more conservative liquidity requirements, forcing lenders to hold more cash and other liquid assets while relying less on short-term financing. Also, the authors suggest special (even stricter) constraints on risk-taking and funding for the largest firms, which could pose a threat for a whole financial system if they were to default on their obligations. Finally, the authors suggest that the new rules should be applied more broadly across the financial systems, not only in the US but also in other countries, in order to prevent "migration of risk" outside the perimeter of the rules toward more favourable regulatory residences.

In the end, reading between the lines, it seems the authors believe they were impeccable in their professional capacity. However, putting aside all subjective impressions and attitudes, one may conclude that the firefighting was truly demanding and eventually successful. One of the reasons why it was so demanding lies in the fact the firefighters initially used petrol instead of water. It is true that the regulators eventually helped in the process of recovery, but still, one should be cautious when glorifying the regulation and underestimating the invisible hand. That hand may take away something, but one should not forget – it provided everything.

REFERENCES

Abolafia, Mitchel Y. 2020. *Stewards of the Market: How the Federal Reserve Made Sense of the Financial Crisis*, Cambridge, Massachusetts; London, England: Harvard University Press.

Ball, Laurence M. 2018. *The Fed and Lehman Brothers: Setting the Record Straight on a Financial Disaster*. New York; Cambridge, MA: Cambridge University Press.

Bernanke, Ben S., Timothy F. Geithner, Henry M. Paulson, J. Nellie Liang (eds). 2020. *First Responders: Inside the U.S. Strategy for Fighting the 2007–2009 Global Financial Crisis*. New Haven; London: Yale University Press.

Boyd, Sebastian. 2007. BNP Paribas Freezes Funds as Loan Losses Roil Markets. *Bloomberg*, 9 August. *https://www.bloomberg.com/news/articles/2007–08–09/bnp-paribas-freezes-funds-as-loan-losses-roil-markets* (last visited 30 October 2020)

Erdem, Orhan. 2020. *After the Crash: Understanding the Social, Economic and Technological Consequences of the 2008 Crisis*. Cham: Palgrave Macmillan.

Lieven, Petra. 2016. *Rating Agencies and the Fallout of the 2007–2008 Financial Crisis*. Frankfurt, New York: PL Academic Research.

Ana Odorović, LL.M.*

Voigt, Stefan. 2020. *Constitutional Economics: A Primer*. Cambridge: Cambridge University Press, 138

Constitutions have remained an unchartered territory for economists for a long time, despite their relentless efforts to appropriate any remaining study subject traditionally associated with other social sciences and humanities, in particular, political science, history, and law. It is precisely at the intersection of these disciplines that constitutional economics emerged and particularly gained prominence on the verge of 21st century, with the significant increase in data availability and the development of specific cross-country indicators. The economists' interest in constitutions should not come as a surprise, given the mainstreaming of some of the closely related disciplines, such as public choice, economic history, institutional economics, and law & economics. What is somewhat astonishing is the expedited pace at which it has been developing, as well as the substantial number of avenues for fruitful research efforts. In his primer of constitutional economics, Stefan Voigt, one of the pioneers in this field, provides a type of blueprint for future "'goldminers" in the area where to dig and which tools to use. Through a systematic account of the most influential research to date, Voight aims to answer a rather simple question—do constitutions really matter? If they do, at least for some (economic) outcomes, yet another question arises—what is the explanation of the emergence and modification of constitutions within a society?

Before delving into more nuanced questions, the author first familiarizes the reader with the main concepts used by constitutional economists and then discusses the most common methodological and data-related limitations that they face. Through economic lenses, a constitution can be defined as a system of rules used for the provision of public goods within a society. It serves to constrain the representatives of the society in the way they choose what public goods are to be produced. However, as the author points out, there is little agreement among

* Teaching Assistant, University of Belgrade Faculty of Law, *ana.odorovic@ius.bg.ac.rs*.

economists regarding what economic problem constitutions aim to resolve.

One school of thought compares constitutions to contracts that solve a coordination game between members of the society. It can either be a social contract, a contract that emerges within principal-agent relationship, or a contract that works as a commitment device. The idea behind the social contract is that the members of society can be better off if they agree on disarmament, which would allow them to reduce the resources spent on protecting and stealing goods, or to produce public goods whose production by individual members is not profitable. Alternatively, the constitution can be perceived as a contract that constrains the actions of the agent, i.e. the government, and induces them to act in the interest of the principal, i.e. citizens. In the third version of the "constitution as a contract" approach, the constitution acts as a pre-commitment device for society as a whole, which suffers from time-inconsistent preferences. In contrast, subscribers to a different school of thought view constitutions as a bundle of conventions that serve to resolve a coordination game between the members of society. In their view, this explains the self-enforcing nature of constitutions, as the most basic set of rules for which there is no external sanction. Finally, some economists deny the possibility that the emergence of constitutions is the product of a rational human design, simply because the subjective knowledge of the individual actors cannot be easily aggregated. Instead, they see constitutional rules as a result of a trial-and-error or evolutionary process.

Regardless of the theoretical lenses through which constitutional rules are perceived, there is a number of methodological and measurement challenges with which empirical economists in the field struggle. According to the author, the main hurdle lies in the difficulty to establish causation because none of the constitutional traits used as explanatory variables are ever truly exogenous. Provisions are always affected to some extent by the specific context in which constitutions are created, which may also have independent impact on the outcome variable of interest. Given that randomized experiments are impossible, natural experiments are quite rare, and lab experiments—although on the rise—often lack real-world validity, empirical studies mainly rely on an instrumental variable approach, with several new tools gradually gaining significance. If one were to assume that identification strategy was not an issue, another challenge lies in establishing the transmission channel through which constitutional traits affect (economic) outcomes: is it through fiscal policy, public goods provided, or the efficiency of the government in the providing public goods, including low levels of corruption and political rents? Lastly, according to Voigt, measuring (coding) constitutions is very a complex endeavor, not only because

institutional details matter, but also because there is a gap between the *de jure* and *de facto* constitutional provisions—which is one of the central topics of this book.

Before looking at specific constitutional traits, the author discusses the differences between the economic outcomes of democracies and autocracies. The question is important not only because autocracies outnumber democracies even nowadays, but also because the constitutions of the two types of regimes tend to read very similarly. As the author puts it, one might wonder even what is the purpose of constitutions in democracies. One conjecture in the literature is that constitutions do not always serve as "window dressing" but rather allow the autocrat to make credible commitments and spur investments in that country. Interestingly, economic theory is inconclusive regarding whether higher growth rates are expected in democracies. While the rule of law and secure property rights should be conductive to greater investments, the high pressure to redistribute wealth in democracies could compromise growth rates. Although empirical studies also do not offer a clear answer, some evidence suggests that it is the transmission channel that makes a difference. While democracy is conductive to growth by increasing the accumulation of human capital, it hinders growth by reducing physical capital accumulation and by increasing government consumption. However, like Leo Tolstoy's unhappy families, not all autocracies are created equal. As the author suggests, a more nuanced answer is needed by looking into different types of autocracies. The transition from autocracies to democracies is another question that has occupied constitutional economists for more than a decade. While there is no comprehensive theory of regime transformation yet, there is some agreement that the main factor is the change in the relative power of the interest groups, in particular those that have some positive veto power, i.e. power to have a negative impact on the size of the overall number of goods produced by the society.

In the central part of the book, the author considers the effect of specific constitutional rules. A broad body of knowledge is systematized following the usual structure of many recent constitutions (basic rights, horizontal and vertical separation of powers, the role of independent agencies, direct democracy, and electoral rules). For each set of rules considered, Voight provides an overview of the theory and empirics, and then endogenizes the selection of rules by analyzing the factors that lead to the choice of one set of rules over another. Given a large number of issues that are presented in a concise format in the book, only a handful of the most interesting conjectures will be reviewed. When it comes to the basic constitutional rights, it is puzzling that economic and positive social rights are expected to have opposite effects on income levels, because the latter imposes costs on those that generate income.

Nevertheless, the central issue is whether there is a congruence between the *de jure* and the *de facto* rights, which in turn often depends on other constitutional characteristics. Moreover, the gap between *de jure* and de *facto* rights may further depend on the factors that are driving the inclusion of basic rights in the constitution. It is argued that the basic rights that were granted as a result of coercion by external players (other powerful states or international aid donors), or as a consequence of acculturation (imitating how things are done in other countries), are less likely to be effectively enforced.

Horizontal separation of powers is another constitutional trait that preoccupies constitutional economists. In particular, it is hypothesized that parliamentary systems—as opposed to presidential systems—lead to higher taxes and government spending, as it is easier for them to collude with the executive. Similarly, it is argued that bicameral systems entail lower decision costs, leading to lower government expenditures. While the empirical results are still inconclusive, Voigt contends that the third branch—the judiciary—is the crucial part of the equation. In particular, the question is what sort of rules make the judiciary less accountable to those who have the power to reappoint (for example, term lengths or the involvement of judicial councils). Not surprisingly, the empirical literature suggests that only *de facto*—and not *de jure*—rules on judicial independence have an impact on economic growth. This intuitive finding naturally makes one wonder why would the legislature want to create an independent judiciary in the first place. One of the leading theories emphasizes the role of political competition and uncertainty: if politicians expect their party to remain in power, they are less interested in creating an independent judiciary than if they expect to lose power in due course.

An interesting theory has been developed concerning the vertical separation of powers: it is hypothesized that federally constituted states lead to greater government spending as opposed to unitary ones. Two arguments have been offered. Firstly, if the number of states is large, economies of scale in the provision of public goods cannot be achieved. Secondly, the federal government faces a moral hazard problem, i.e. it is impossible for it to credibly commit to not bailing-out states that can no longer service their debts. According to the author, the separation of power in the broadest sense may also include the involvement of independent agencies, or allowing citizens to be part of the decision-making process through direct democracy. Both of these constitutional traits are expected to lead to positive economic outcomes due to their ability to mitigate the principal agent problem between the citizens and their government.

Finally, one of the most comprehensive theories is offered regarding the effects of electoral systems. It is argued that coalition governments

are more likely under the proportional representation rule than under the majority rule. As a consequence, some scholars contend that parties participating in the coalition will want to cater to preferences of different constituencies, leading to higher government spending and tax rates. In contrast, under the majority rule, politicians will have an incentive to please those groups that can help them obtain plurality of votes, leading to greater financing of pork-barrel goods compared to genuine public goods.

The last part of the book is devoted to areas of constitutional economics, which are, in the author's opinion, the least explored issues and in a need of further investigation. An overarching issue in most of the considerations discussed earlier is *de jure – de facto* gap. As the author rightly points out, finding an optimal way to measure it and explain the factors behind it is one of the most important tasks for constitutional economists in the future. The other two topics that the author proposes are procedural rules underlying constitutional change and emergency constitutions.

The carefully balanced and unbiased selection of topics in this book makes the reader—depending on their prior knowledge and personal interests—occasionally regret that certain topics were not expanded at the expense of others. As one may expect from a primer, the theoretical parts of the book, in particular, often serve as a teaser in terms of publications that the reader needs to look for, rather than providing a full account of how the hypotheses were derived. For this reason, one may not repudiate any of the conjectures provided in this book without diving deep into the original publications that the book relies upon.

This very concise piece clearly speaks to the newcomers in the field, unselfishly revealing the issues and methods that are still rudimentary and unpolished—including the results of the author's own research. Its unpretentious and direct, yet profound and knowledgeable discourse appears inviting for scholars with different backgrounds. In fact, the book perfectly reflects the open spirit, lively debates and the rigorous analysis that Stefan Voigt nurtures at the Institute for Law and Economics at the University of Hamburg.

Marko Božić, PhD*

Beširević, Violeta (ed.). 2019. *New Politics of Decisionism*. The Hague: Eleven International Publishing, 207.

The *New Politics of Decisionism* volume, edited by Violeta Beširević, Professor at the Union University Law School in Belgrade and Associate Researcher with the Central European University in Budapest, is a follow-up to the conference co-organized under the same name by the University of Belgrade Faculty of Political Sciences and Faculty of Law in November 2017. The book has three parts, preceded by the editor's introduction.

The editorial introduction outlines the volume, also explaining its title, namely how Carl Schmitt's decisionism relates to modern populist tendencies. It argues that modern populist regimes, just like Schmitt's version of illiberal democracy, rely on democratic legitimacy, but do not necessary protect liberal values, which could supposedly undermine the capacity to resist the enemies of the state. Such new politics of decisionism do not discard democracy as a rule of majority, rather they discard representative democracy since it can easily set aside individual rights and institutions protecting them. As such, they are a hybrid phenomenon, a grey zone lying between democracy and dictatorship, but surely closer to the authoritarian pole of modern politics. New populisms, just like Schmitt's decisionism, grant political power implying exclusive competencies to pass the most important decisions—that state of exception exists—which cannot be based on deliberation and the rule of law, but on the leader's personal judgment.

Part I of the book, "The Current Rise of Populism: Deconstructing Issues" (pp. 11–90), focuses on definitional and conceptual issues. In order to define the phenomenon of populism, this chapter explores key notions and discusses relevant terminology. However, instead of positive definitions, its four contributions offer an analytical groundwork, trying

* Associate Professor, Union University Faculty of Law, *marko.bozic@pravnifakultet.rs*.

to discern the specific place and role that populism has had in modern political practice and patterns of its discursive use.

The chapter opens with Samuel Issacharoff's contribution entitled "Democracy's Deficits", which considers the four central institutional challenges to democracy, as the main social conditions for the rise of populist movements. The author begins with the accelerated decline of political parties, described as a tendency of political fragmentation: dissolution of discipline and internal diffusion of power, shifting from party leadership to individual party members and officeholders. Issacharoff recognizes another two political causes *stricto sensu*: the paralysis of the legislative branches and the decline of state competencies—but also a social one: losing the sense of social cohesion, described as a significant erosion of collective solidarity that provided the historic glue for the common project of democratic governance. Speaking of this, the author focuses on the two most representative current challenges: immigration and the massive, plunging decline of the living standard of the population. "There is not a populist movement in a Western democracy at present that does not play to both xenophobia and economic insecurity" (p. 27), since the laboring backbones of advanced industrial countries find themselves challenged by rapidly changing demographics, as well as by pressures on their living standards and wealth that is markedly shifting to other parts of the world (p. 30).

However, Issacharoff does not question other aspects of modern *Humana condition*. He mentions the relevance of technological changes, ease of modern communication and transportation, the globalization that exerts pressure on broad horizontal organizations, whose prime advantage has been providing access to economic or political markets, but does not further investigate these aspects that might turn to be the crucial points in further evolution of populist engagements. Instead, he concludes his paper with an optimistic prognosis, predicting a forthcoming decline of populism for four reasons: "First, waves of populist anger tend to be conjunctural [...] Second, democratic states abound in civil society institutions that resist the anti-liberalism of caudillo politics [...] Third, democratic societies develop thick legal institutions bounded by the rule of law. Moments of populist passion confront constitutional constraints and the restraining force of constitutional courts..." (p. 35)

Knowing that "it is simply not possible to find an uncontroversial scholarly definition of populism" (p. 44), Tibor Várady's contribution "Populism – A Notion Rising Above Its Content" raises the question "whether the understandable urge to use the term populism did or did not prevail over its content; in other words, whether the label 'populism' is a matching one, which also provides sufficient explanation." (p. 39) In order to give an answer, Várady turns to analysis of contemporary political

discourse hoping that "the identification of an opposite notion may contribute to the formation of a frame of reference and to the clarity of the concept," (p. 44) yet arrives at a conclusion that "in public discourse, the term "populism" is becoming more and more reduced to a rhetoric weapon that can be used against all kinds of opponents for the purpose of denouncement." (p. 51) Unsurprisingly, this uncritical overuse of the term "populism" with the aim to qualify or disqualify a wide range of targets in the current political discourse is followed by the absence of a clear juxtaposition with an antipode. This explains the plausibility of Várady's starting concern of "what could (and should) be perceived as the opposite of populism?" (p. 39)

David M. Rasmussen's study "Reflections on the Nature of Populism and the Fragility of Democracy: Democracy in Crisis" tries to expand on the issue that Várady identified by offering an analytical overview of the populist discourse. After a brief historical overview of the use of the term "populism" from Ancient Rome to the great 18th-century declarations on rights and liberties, he points out that "populism thrives on dividing the democratic population into a binary opposition, generally between elites and non-elites, the authentic and the inauthentic, the good and the bad" aimed at generating "a legitimation crisis continuing to delegitimize legitimate members of the democratic order as well as the institutions they represent." (p. 57) In this model, it is irrelevant who the elite are. What matters is how this reduction of political order structures a populist discourse and its consequential political action. According to Rasmussen, the outcome is always the same: " [...] by an act of simplification populism undercuts the legitimate diversity of democratic society by claiming to represent only those who fit within its narrow ideological perspective. As such populism chooses unity over equality hence departing from a core ingredient of modern democracy. By granting membership rights only to the majority of the chosen, it undercuts a universal commitment to equality that must be the basis of any democratic order. As such it materializes the collective into a single actor much in the way Lefort thought about totalitarianism." (p. 58)

The last of the four papers in part I, entitled "Populism and Nationalism", by Nenad Miščević, starts with the same structural analysis of the populist discourse considering society as being ultimately divided into two homogeneous and antagonistic groups, "the pure people" as opposed to "the corrupt elite". The author profounds it by denouncing "two ways of characterizing 'the people': either in terms of social status (class, income level, etc.) or in terms of ethnic and/or cultural belonging." (p. 63) In fact, Miščević's contribution is less an analytical and more an empirical study further examining the conditions conducive to populist success. After briefly reflecting on predominantly left-wing populism,

stressing the social nature of the above-mentioned contrast, Miščević focuses on the right wing of the political playground, especially the parties representing so-called "moderate statist nationalism" which, in his opinion, can block far-right populist movements and tendencies. Subsequently, the author offers a case study discussing the Croatian ruling party (Croatian Democratic Uniom – HDZ) as an example of moderate statist nationalism acting as a barrier to populist solutions. His argumentation is relatively straightforward: "The national-populist option needs a free space, and it cannot find it in the situation in which the ruling team is clearly patriotic, and thus above the accusation of being composed of traitors and where its actions are strictly limited by the rule of law, in particular, by appeal to human rights, in a manner that does not leave open space for populist 'spontaneity' of the leader." (p. 71) As such, it could explain the rise and success of the extreme right in Western Europe, the political playground of which has been deprived of these "soft nationalist" options for a long time.

Miščević's text exploring the relationship between closely tied notions of populism and nationalism ends the first part of the book, introducing at the same time its second part, entitled "Comparative Populism: Case Studies" (pp. 91–138), reserved for a series of less optimistic case studies as illustrative empirical verification of the aforementioned theoretical model.

Part II opens with Andras Bozoki's text "Beyond Illiberal Democracy: The Case of Hungary" trying to demystify the notion of illiberal democracy, a label frequently used by Victor Orbán to describe the political nature of his rule, which is often perceived as a paradigm of today's modern populism. According to Bozoki's definition, this hybrid regime, semi-democracy and semi-dictatorship, is a majoritarian, bottom-up, re-politicized democratic alternative to democratic elitism in which working people regain power from the politically correct, yet socially less sensitive elites. The reason why the new authoritarian leaders, like Orbán in Hungary, "like the concept of 'illiberal democracy' so much is that it offers an opportunity for them to present themselves as (some sort of) democrats. [...] Despite their own role in destroying the rule of law, they make all efforts to convince everyone that they are elected by the people." (p. 95) Unlike traditional liberal democracy, this is a dominant party-system with limited competition and elections held without real options, led by the political elite in power who "deliberately rearranges state regulations and the political arena as to grant itself undue advantages." (p. 94)

Adam Shinar's paper "Populism, Free Speech and the Anti-Entrenchment Principle" goes beyond a case study. Its starting point is a denouncement of the contemporary rise of administrative power and the growing class of bureaucrats, as the two main causes of populist success.

According to Shinar, "whereas the rise in administrative power in the past led to charges of a democratic deficit, the present populism either minimizes the importance of democracy, or more accurately, puts forward a conception of democracy that views majority rule as its most important and defining characteristic." (p. 107) However, unlike Bozoki's general overview of Orbán's authoritarianism, Shinar describes a specific mechanism by which the elite in power in present-day Israel rearranges state regulations and grants itself undue advantages. Relying on the doctrinal distinction between the negative aspect of free speech (as the duty not to interfere and censor) and the positive aspect of free speech (as the duty to fund and support) in recent years, the Israeli government justifies "selective funding of speech, in particular, supporting speech in line with policies, values and ideas the government wishes to advance." (p. 109) At first glance, this cannot be an issue since, as Shinar points out, a democratic government is elected precisely to implement the policies its voters wish to promote. The problem begins when the state, run by such a government, grants a privileged status to a certain conception of the good life, namely when "the government equates itself with 'the people', it confuses the government and the state..." (p. 117) At this point, the importance of the court as a guardian of liberal democracy becomes obvious. Therefore, Shinar examines the Israeli court doctrine of anti-entrenchment as a successful institutional mechanism of defense: "According to the conventional meaning of this principle, the government may promote the policies for which it was put into office, but it must not act to entrench its power, thus preventing its replacement." (p. 118) In the specific free speech context, "it stipulates that the government should be prevented from using its allocative power to leverage its positions in a way that will prevent the political minority [...] especially when its speech is critical of government policy." (p. 121) On the contrary, the government must finance expression directed at promoting democratic society and its values, especially when such expression strives to resist the values and policies of the government itself.

The third and the last contribution in this chapter, Dušan Spasojević's "Transforming Populism – From Protest Vote to Ruling Ideology: The Case of Serbia", presents the case of the currently ruling Serbian Progressive Party (SNS), as an illustrative example of how the phenomenon of populism results from progressive "de-ideologization of the mainstream parties and stability of party systems in Europe [that] led to cartelization of politics (or establishment of formal and informal obstacles for the newly emerging parties), which means that new actors on political scene have to be more radical, more provocative and more anti-systematic in order to attract voters' attention." (p. 127) In fact, Spasojević questions the idea that the populist parties are per definition primarily protest parties, usually successful when in opposition, but

failing once in the government (p. 128). Throughout the ideological transformation of the Serbian Progressive Party—from a radical populist and nationalistic opposition, without any governing potential, to the ruling, predominantly pro-EU, center-right populist party—his analysis shows that a "longer period in government results in increased level of conflicts and broader scope of actors included in the conflict. In other words, corrupted elites, defined by SNS, are getting bigger and include not only political opponents, but also representatives of oversight and regulatory state institutions, civil society and media." (p. 137)

The last, third part of the book, entitled "Courts under the Populist Challenge" (pp. 139–207), does not deal as much with the real setbacks to the rise of modern populism from the perspective of preventing its causes, but rather with the resistance coming from a strong institutional framework and democratic culture. This chapter questions the controversial experiences of the post-communist Eastern European democracies with insufficient institutional capacities, thus unable to protect their open societies under construction.

In the opening text "Poland: From Paradigm to Pariah? Facts and Interpretations of Polish Constitutional Crisis", Marcin Matczak synthesized the three main causes of Polish failure before conservative populism. The first is of a historical nature: "Analyzing the crisis from a historical viewpoint leads to the conclusion that the subjective experience of the rule of law in Poland – in particular the belief that the law is an obstacle on the road to justice – created in the leaders of PiS and their supporters a very peculiar understanding of the relationship between procedural justice and substantive justice (fairness)" where "the redundancy of procedural justice is reflected in the government's approach to the Constitutional Tribunal and the judiciary: the independence is secondary to the need for it to be composed of people who understand the government's sense of justice..." (p. 151) This historical explanation is followed by a sociological one. Namely, if the Polish populist turnover was possible, it was not caused so much by the strength of the political attack on the rule of law, but rather by an accompanying evident lack of democratic culture of the Polish people who "are ready to provide their elected representatives with an absolute right to change the rules, including the constitutional ones, even without the formal legitimacy to do so." (p. 157) Finally, there is the third, legal explanation, defined as the weakness of the institutional defense mechanisms, headed by the weakness of the legal culture the "key feature of which is the ability to carry out complex legal reasoning when interpreting legal text and assessing the validity of legal actions." (p. 155) Instead of it, the preferred form of reasoning of the Polish judicial culture is an isolated interpretation "which enables a misuse of powers" and formalistic argumentation "according to which

formal compliance of one's actions with the law is sufficient basis for their legality" (p. 155)

Matczak's austere conclusion that the immaturity of Polish and, more broadly, Central-Eastern European legal culture, which, not having developed adequate tools to defend itself against recent attacks on the rule of law yet, is confirmed by the Romanian experience described in Simina Tanasescu's contribution entitled "Romania: From Constitutional Democracy to Constitutional Decay". Although similar to the Polish one, the Romanian case seems to be even more compelling, stressing an evident defeatism of national courts in their opposition to populist tendencies. According to Tanasescu, the power of judges "resides as much in the rationality of the legal arguments which support a judicial decision as in the people's consent to obey the law." (p. 181) However, if "judges cannot afford to ignore or disrespect law even more than public opinion and that confronts them with a choice – which should not be considered difficult – between legality and populism," (p. 181) it is precisely the danger of the court supporting populist views, through its decisions, that characterizes the particularity of transitional or fragile democracies, and casts doubt on the courts' independence and systemic integrity. This raises the question of the role of the court as related to constitutional democracy and leads to the final conclusion that "through the constant validation of a systematic weakening of checks and balances, the Constitutional Court is contributing to the constitutional capture or constitutional decay of constitutional democracy in Romania." (p. 190)

According to Bertil Emrah Oder's study, however, the approach of the Turkish Constitutional Court towards an ever-stronger populist rule in Erdoğan's Turkey is more ambivalent. In her paper "Populism and the Turkish Constitutional Court: From a Game Broker to a Strategic Compromiser", relying heavily on the Court's recent case law, she explains that, under the populist pressure, the Court has preferred not to clash with presidential preferences in exercising a constitutional review, refraining at the same time from supporting it in a constitutional complaint procedure.

Violeta Beširević's contribution "If Schmitt Were Alive... Adjusting Constitutional Review to Populist Rule in Serbia" is the closing chapter aiming "not to join an open discussion on what populism stands for," but rather to respond to the starting dilemma on "whether courts can confront populism." (p. 193) After reminding the readers that even in developed democracies the highest courts have been known to yield to pressure, like in the case of Trump's controversial travel ban, which "seriously questions the ability of the courts to limit the manoeuvring room for the populists" (p. 194), Beširević turns to the Serbian case which—remarkably, yet unsurprisingly—resembles its Eastern European counterparts, especially

by the modest level of its legal culture, undermining expectations and investing in the authority of the Court. According to Beširević, "the Court had not managed to escape the communist-era legacy of dependency and distance itself from the strategy of strict deference to the ruling power" which "confirmed the Court's proclivity to rule only when either its decisions became politically irrelevant or when the preference of the ruling majority became manifestly clear." (p. 198) More specifically, in its rulings regarding the so-called Brussels Agreement, aimed at normalizing relations between Belgrade and Pristina, the government austerity measures and constitutionality of detention orders issued against persons accused of corruption in the privatization cases that Beširević analyzed, "the Court did not officially stay of proceedings, but like in other high-profile political cases, it played its well-known safe strategy, rejected to rule in a timely manner and after a two-year delay, it dismissed the challenge on jurisdictional grounds." (p. 201) This subjective legal-cultural perception of judge-made law explains the lack of capacity of the Court to contribute to democratic consolidation in Serbia. Instead of a transformative jurisprudence "the judges' subscription to a narrowly conceived positive jurisprudence, the absence of precedential authority and poor legal reasoning, substantiated the claim that constitutional review in Serbia has not amounted to an effective mechanism of governance." (p. 198)

These final reflections may also be read as general concluding remarks referring not only to a particular Serbian experience, but equally to most other Eastern European societies in transition, in which the constitutional review has remained discouragingly autistic to the struggle against populism and democratic consolidation. Such a conclusion most certainly overcomes the framework of only the third part of the book, thus encompassing its overall aim. It overarches all the chapters of this book: from illustrating that a constitutional review is not always a viable strategy for confronting populist regimes and relativizing Samuel Issacharoff's optimism relying on institutional resistance, in its first part, to Adam Shinar's Israeli case study, in its second part. In fact, it tells that neither is there a strong institutional framework without a strong civil society behind it, nor is there a constitutional judiciary without a juridical culture able to endorse democracy and bridge the gap between the law and society.

GUIDELINES FOR AUTHORS

The *BLR* languages are English and Serbian.

BLR publishes articles, critical analyses, case law and legislation comments, book reviews and other contributions to the fields of law and social sciences. Only analytical reviews of scientific and professional books are accepted for publishing, not purely descriptive ones.

For papers in English, either British English or American English spelling and terminology should be used, but the one should be followed consistently throughout the paper.

Spelling in references should follow the original source material.

If English is not your first language, before submitting your manuscript you may wish to have it proofread, to ensure that reviewers fully understand your writing. Authors are liable for the costs of such proofreading.

By submitting the paper, the authors declare that the paper has not been published; that the paper has not been accepted for publication nor is under consideration for publication elsewhere; and that the authors are the copyright holders and are informed of, and have fulfilled, any requirements regarding the rights of third parties.

The receipt of all papers will be acknowledged by email. All papers will be screened by the Editorial Board for their suitability for entering the peer review process. Suitable contributions will be subject to a double-blind external peer review.

For further information on the *BLR* Editorial Policies, please consult *https://anali.rs/eticki-kodeks/?lang=en*

Please abide by the following instructions when submitting a paper to *BLR*.

The manuscript should be arranged in the following order:

1. Cover page
2. Abstract and keywords
3. Manuscript and reference list
4. Appendices, tables and figures

1. COVER PAGE

The cover page of the submission should include the following information:

- Title of the paper.
- Name, date of birth and affiliation of all contributing authors.
- Full address for correspondence and email address. If the paper is co-authored, please provide the requested information for each of the authors.

2. ABSTRACT AND KEYWORDS

Please provide an abstract that is not longer than 150 words. The abstract should not contain undefined abbreviations or unspecified references.

Please provide five keywords, in alphabetical order, suitable for indexing.

Papers in Serbian should contain an abstract and keywords both in English and in Serbian language, with the abstract and keywords in English positioned following the reference list.

3. MANUSCRIPT AND REFERENCE LIST

As our peer-review process is blind, the names of authors or their affiliations should NOT appear anywhere on the pages of the manuscript.

Papers should be word processed in the following format:

Page format: A4

Margins: 2.5 cm

Font: Times New Roman

Line spacing main text: 1.5

Line spacing Footnotes: Easy

Font size main text: 12 pt

Font size footnotes: 10 pt

Page numbering: Plain number, bottom of the page, right indent

Refer to persons by first and last name at first mention (John Smith) and only by last name thereafter (Smith). Do not use “Professor”, “Mr.”, or other titles.

Figures and tables should be mentioned in the text in order of appearance. All figures and tables should be mentioned in the text.

All acronyms and abbreviations should be spelled out in the first reference, with capitals used thereafter.

European Union – EU,

The United Nations Commission on International Trade Law – UNCITRAL

Numbers from one to nine should be written as words; higher numbers should be written as numerals. Dates should be written as follows: 1 January 2012; 2011–2012; or the 1990s.

Footnotes should be substantive and cannot contain purely bibliographic material. Simple citations should be in the text, with the exception of statutes and cases.

***BLR* uses the following section headings, all centered:**

1. FULL CAPS

1.1. Caps and Lowercase

1.1.1. Italic Caps and Lowercase

Citations

All citations, in text and footnotes, should be in **author/year/page(s)** style.

The preferred form of in-text citation is the citation **with locating information**:

Following Hovenkamp (1994, 366–69);

According to Craswell (2003, 255 n. 13) – *where note 13 is on page 255*;

As suggested by Craswell (2003, 254 and n. 11) – *where note 11 is* ***not*** *on page 254*.

However, when appropriate and by way of exception, the authors may use in-text citation **without locating information**, with or without a simple signal (*see*, *see especially*, *see for example*, etc.)

(see, for example, Corcoran 2004; Mullen 2000)

(see especially Demsetz 1967)

(Scott and Coustalin 1995)

One author

T(ext): Following Ely (1980, page), we argue that

R(eference list): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, Mass.: Harvard University Press.

Two authors

T: As demonstrated elsewhere (Daniels, Martin 1995, page),

R: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

Three authors

T: As suggested by Cecil, Lind, Bermant (1987, page),

R: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

More than three authors

T: Following the research design in Turner *et al*. (2002, page),

R: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

Institutional author

T: (U.S. Department of Justice 1992, page)

R: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

No author

T: (*Journal of the Assembly* 1822, page).

R: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

More than one work

Clermont, Eisenberg (1992, page; 1998, page)

More than one work in a year

T: (White 1991a, page)

R: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal,* April 4.

Multiple authors and works

(Grogger 1991, page; Witte 1980, page; Levitt 1997, page)

Chapter in a book

T: Holmes (1988 page) argues that

R: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240 in *Constitutionalism and Democracy,* edited by John Elster and Rune Slagstad. Cambridge: Cambridge University Press.

Chapter in a multivolume work

T: Schwartz, Sykes (1998) differ from this view

R: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–64 in vol. 2 of *The New Palgrave Dictionary of Economics and the Law,* edited by Peter Newman. London: MacMillan.

Edition

T: Using the method of Greene (1997), we constructed a model to show

R: Greene, William H. 1997. *Econometric Analysis.* 3d ed. Upper Saddle River, N.J.: Prentice Hall.

Reprint

T: (Angell, Ames [1832] 1972, 24)

R: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Journal article

In the list of references, journal articles should be cited in the following manner: surname and name of the author, number and year of the issue, title of the article, title of the journal, volume number, pages.

T: The model used in Levine *et al*. (1999, page)

R: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 2/1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

T: According to Podlipnik (2018, page)

R: Podlipnik, Jernej. 4/2018. The Legal Nature of the Slovenian Special Tax on Undeclared Income. *Annals of the Faculty of Law in Belgrade* 66: 103–113.

Entire issue of a journal

T: The fairness or efficiency benefits of bad-faith laws are discussed at length in *Texas Law Review* (1994)

R: Texas Law Review. 1994. *Symposium: Law of Bad Faith in Contrast and Insurance,* special issue. 72: 1203–1702.

Commentary

T: Smith (1983, page) argues that

R: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240 in *Commentary to the Law on Obligations*, edited by Jane Foster. Cambridge: Cambridge University Press.

T: Schmalenbach (2018, page) argues that

R: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–55 in *Vienna Convention on the Law of Treaties: A Commentary*, edited by Oliver Dörr, Kirsten Schmalenbach. Berlin: Springer-Verlag GmbH Germany.

Magazine or newspaper article with no author

T: had appeared in *Newsweek* (2000).

R: Newsweek. 2000. MP3.com Gets Ripped. 18 September.

Magazine or newspaper article with author(s)

T: (Mathews, DeBaise 2000)

R: Mathews, Anna Wilde, Colleen DeBaise. 2000. MP3.com Deal Ends Lawsuit on Copyrights. *Wall Street Journal,* 11 November.

Unpublished manuscript

T: (Daughety, Reinganum 2002)

R: Daughety, Andrew F., and Jennifer F. Reinganum. 2002. Exploiting Future Settlements: A Signaling Model of Most-Favored-Nation Clauses in Settlement Bargaining. Unpublished manuscript. Vanderbilt University, Department of Economics, August.

Working paper

T: (Eisenberg, Wells 2002)

R: Eisenberg, Theodore, Martin T. Wells. 2002. Trial Outcomes and Demographics: Is There a Bronx Effect? Working paper. Cornell University Law School, Ithaca, NY.

Numbered working paper

T: (Glaeser, Sacerdote 2000)

R: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Personal correspondence/communication

T: as asserted by Welch (1998)

R: Welch, Thomas. 1998. Letter to author, 15 January.

Stable URL

T: According to the Intellectual Property Office (2018),

R: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html* (last visited 28 February, 2019).

In press

T: (Spier 2003, page)

R: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Forthcoming

T: One study (Joyce, forthcoming) includes the District of Columbia

R: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Cases

F(ootnote)*:* CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, para. 16; Supreme Court of Serbia, Rev. 1354/06, 6. September 2006., Paragraf Lex; Supreme Court of Serbia, Rev. 2331/96, 3. July 1996., *Bulletin of the Supreme Court of Serbia* 4/96, 27.

T: Use abbreviated reference for in-text citations of cases (CJEU C-20/12, or Giersch and Others; Opinion of AG Mengozzi; VSS Rev. 1354/06) consistently throughout the paper.

R: Do not include cases in the reference list.

Legislation

F: Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, Art. 6 (3); Zakonik o krivičnom postupku [Code of Criminal Procedure], *Official Gazette of the RS*, 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014, Art. 2, para. 1, it. 3.

T: Use abbreviated reference for in-text citations of pieces of legislation (Regulation No. 1052/2013; Directive 2013/32; ZKP, or ZKP of Serbia) consistently throughout the paper.

R: Do not include legislation in the reference list.

4. APPENDIXES, TABLES AND FIGURES

Footnotes in appendixes should be numbered consecutively with those in the rest of the text.

Numbering of equations, tables, and figures in appendixes should begin again with 1 (Equation A1, Table A1, Figure A1, etc., for Appendix A; Equation B1, Table B1, Figure B1, etc., for Appendix B).

No more than one table should appear on a page. Tables may run more than one page.

Tables should have brief captions. All explanatory material should be provided in notes at the bottom of the table.

Identify all quantities, units of measurement, and abbreviations for all entries.

Sources should be identified in full at the bottom of each table. Do not give cross-references to footnotes elsewhere in the article.

Figures should be provided in files separate from the text and should be clearly labeled.

Do not use shading or color in graphs. If distinctions need to be made visually, please use hatching and cross hatching or another means of display. Grays are difficult to reproduce and often appear blotchy in the printed journal.

Do not use figure boxes or rules around the figures.

Please use the Times Roman font if there is any lettering or text in your figure. Type should be 7 points or larger.

Graphics files should be black and white.

Figure captions should be placed together on a separate double-spaced page, labeled Figure Legends.

Figures may be no greater than 10 cm x 18 cm. To avoid substantial figure reduction, keys to identifying items in the figure should be set within or beneath the figure.

CIP – Каталогизација у публикацији
Народна бибилиотека Србије, Београд

34(497.11)

АНАЛИ Правног факултета у Београду : часопис за правне и друштвене науке = Annals of the Faculty of Law in Belgrade : Belgrade Law review : Journal of Legal and Social Sciences / главни уредник Марија Караникић Мирић. – [Српско изд.]. – Год. 1, бр. 1 (1953)– . – Београд : Правни факултет, 1953– (Земун : Бирограф). – 24 cm

Тромесечно. – Сваки 4. број у години на енгл. језику. – Drugo izdanje na drugom medijumu: Анали Правног факултета у Београду (Online) = ISSN 2406-2693. – ISSN 0003-2565 = Анали Правног факултета у Београду
COBISS.SR-ID 6016514

Annals of the Faculty of Law in Belgrade (Belgrade Law Review) is the oldest Balkan academic law journal, having been founded in 1906 as *Archive for Legal and Social Sciences*. This law review has been published continuously in Serbian with abstracts in foreign languages. Its Editors-in-Chief have been the most prominent Serbian law professors and lawyers, such as Mihajlo Konstantinović, Milan Bartoš, Vojislav Bakić, Vojislav Simović, Obren Stanković, Dejan Popović, Miodrag Orlić, Danilo Basta, Sima Avramović, Miroljub Labus and Mirko Vasiljević. Since 2006, the law review has added one international edition annually.

The Belgrade Law Review is a peer-reviewed journal that utilizes an international body of editors, advisers and referees to select outstanding contributions. The journal solicits articles, contributions, case law and legislation comments, debates and book reviews on all aspects of law and social sciences, being interdisciplinary oriented. Special emphasis is placed on contemporary legal developments, but the journal's range includes jurisprudence and legal history. The journal serves as a forum for the expression of the legal ideas of foremost scholars, jurists, and societal leaders.

The journal is available online at
anali.rs

ARTICLES IN THIS ISSUE:

ISSN 0003-2565