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SALE OF GOODS CONTRACTS IN SAUDI ARABIA: ACCESSION TO THE CISG, THE CIVIL TRANSACTIONS ACT AND CONFLICT RULES[***]

This paper examines the implications of Saudi Arabia's accession to the UN Convention on Contracts for the International Sale of Goods (CISG) in August 2023. Saudi Arabia joined only Parts I and II, postponing a decision on Part III pending further analysis of its compatibility with Sharia law. Two months earlier, Saudi Arabia enacted the Civil Transactions Act (CTA), its first civil law codification, largely replacing Sharia in contractual and non-contractual obligations. However, the CTA lacks conflict rules, leaving Saudi Arabia without legislation on conflict-of-law rules for sale contracts. This paper explores Saudi Arabia's options for joining Part III of the CISG, the possibility of choosing foreign law or the entire CISG before Saudi courts or in arbitration, and compares the CISG with the CTA. It assesses the legal and practical challenges of harmonizing Saudi Arabia's new legal framework with international sales law.

Key words: *CISG. – Saudi Arabia. – Civil Transactions Act. – Conflict Rules.*

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1. INTRODUCTION

The main goal of this paper is to analyze the circumstances and implications of the accession of Saudi Arabia to the United Nations Convention on Contracts for the International Sale of Goods (CISG). The importance of a G20 state entering into the CISG is reason enough to conduct this analysis, however, the true motive for this paper is the complex and interesting legal situation created by joining the CISG. Saudi Arabia's legal system is Sharia-based. Saudi Arabia acceded only to Parts I and II of the CISG and not to the entire Convention, adopting almost simultaneously its first ever civil law codification, while still not accepting any conflict rules except in arbitration. This paper aims to shed light on these exciting developments, for potential foreign investors and their lawyers, who need to adjust their contracts, as well as for Saudi legal professionals and researchers, who are equally busy catching up with the fast pace of Saudi legislative evolution. Under different circumstances, the paper would aim to clearly identify the advantages and disadvantages for Saudi and foreign contractual partners when choosing the CISG over Saudi national law. However, the depth of such analysis is limited due to the fact that the application of the new Saudi Civil Transactions Act (CTA)[1] in practice has started only very recently, and judicial practice and research are still scarce. Saudi Arabia is the only state to join only parts I and II of the CISG, yet it has never been discussed to what extent and how the CISG can be effective when applied with such restrictions. Due to the given limitations, the paper aims to give a comprehensive overview of potential legal questions that may arise from Saudi Arabia's accession to the CISG, while an in-depth analysis will be conducted only for selected questions that the authors deem most important and appropriate.

2. SAUDI ARABIA'S ACCESSION TO PARTS I AND II OF THE CISG

On 3 August 2023 Saudi Arabia acceded to the UN Convention on Contracts for the International Sale of Goods and became the 96th party to the Convention, which entered into force in Saudi Arabia on 1 September 2024.[2] This development came as somewhat of a surprise, as so far Bahrain was the only Gulf Cooperation Council (GCC) member state to become party

[1] Royal Decree No. M/191, 18 June 2023.

[2] United Nations, Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). *https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status* (last visited February 17, 2025).

to the Convention, furthermore, it is only the eighth state from the Arab world to do so, after Egypt, Syria, Iraq, Mauritania, Lebanon, Bahrain, and Palestine.[3]

The main reason for the slow and scarce accession of Arab states to the CISG is because of the potential incompatibility of the CISG with Sharia (Spagnolo, Bhatti 2023, 155), in particular with regards to the provisions of Articles 78 and 84 (1) CISG, providing for the charging of interest in case of late payment or refund of the price. That is why Saudi Arabia, at least for the time being, has joined only Parts I and II of the CISG, and not Part III where the said provisions on interest are found. Officially, Saudi Arabia is reviewing the compatibility of Part III of the CISG with Sharia and will later make its decision whether to join Part III.[4] The final decision of Saudi Arabia to join or not to join Part III of the CISG may have a huge impact on other GCC, Arab and other states influence by Sharia law, should they consider joining CISG in the future.

For those readers who have not examined the CISG text in a while, just a quick reminder: Parts I and II cover only the first 24 articles of the CISG, regulating the CISG's applicability, general terms, and formation of contracts. Arguably, the heart of the CISG is found in Articles 25–89. Saudi Arabia became the first state in history to make a reservation regarding Article 92 (1) CISG and not join Part III of the Convention. In the past, there were cases involving Nordic states that under Article 92 CISG made reservations to Part II of the CISG, which regulates the formation of the contract. All of these reservations have since been withdrawn, and Part II applies in all Contracting States (Ferrari 2018, 214; Schmidt-Kessel 2016, 263). However, Part II does not carry the same weight as Part III of the CISG. Joining only Parts I and II does not render accession to the CISG meaningless, as we will show later in the paper. Let us first look at how it was possible that the text of the most successful substantive law convention in the world contains provision on interest.

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[3] Egypt on 1 January 1988, Syria on 1 January 1988, Iraq on 1 April 1991, Mauritania on 1 September 2000, Lebanon on 1 December 2009 and Bahrain on 1 October 2011 and Palestine 1 January 2019.

[4] Resolution No. 3, Saudi Arabia's Accession to the United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted 11 April 1980, Royal Decree No. M/196, 4 Dhu al-Hijjah 1444 AH (22 June 2023), Kingdom of Saudi Arabia. *https://ncar.gov.sa* (last visited February 17, 2025).

2.1. How Were Provisions on Interest Included in the CISG and Could They Have Been Avoided?

From the current perspective, a provision on interest in the CISG seems quite culturally insensitive. The CISG is the most important substantive law convention drafted by UNCITRAL that is intended to be joined by as many states as possible. However, the legislative history shows that provisions on interest could have been easily avoided, at least not in the case of Article 78. The predecessor of the CISG, the UNIDROIT Convention Relating to a Uniform Law on the International Sale of Goods (ULIS),[5] contained provisions corresponding to Articles 78 and 84 CISG in its Articles 83 and 81, respectively. Therefore, the first draft of the CISG contained similar provisions (Bacher 2016, 1112, para. 4). Yet, the working group revising the first draft recommended removing the provision corresponding to today's Article 78, because there were a number of countries that set maximum rates for interest within their public policy, as well as countries that prohibit charging of any interest, and many developing countries especially opposed such provisions.[6]

The representative of Egypt participated actively in the discussion reminding the delegates that "certain countries and legal systems, whose religions forbade the payment of interest, attached special importance to the question under discussion. Those countries were often wealthy; some of them were oil-exporting countries; others consumed great quantities of goods from the developed countries. If they – and the major consumers among them in particular – were to be encouraged to adhere to the Convention, that instrument should not deal with the matter of interest in a manner unacceptable to them; [...] it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner." He further pointed out that he "was unaware of any refusal on the part of such countries to charge interest on loans or credit offered in international relations. It might be that another term was used, in which case it would be easy to add after the word 'interests' in the proposed provisions a phrase such as 'or any other corresponding fee'."[7]

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5 Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

6 Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods, A/32/17, 25–64, paras. 496–499.

7 UN Conference on CISG 1980, paras. 10 and 14.

The representative of Iraq also emphasized that "as the representative of Egypt had done, that certain Arab countries did not charge interest. His delegation would have preferred that there were no reference at all to interest in the Convention. If, however, a provision concerning that question had to be included it would be desirable, in order to make it possible for the countries which did not charge interest to accede to the Convention, to allow them expressly to enter a reservation to such a provision."[8]

The representative of Canada supported the proposals of the Arab states: "referring to the comments of the representative of Iraq, he thought that two solutions might be envisaged: Arab countries concluding a contract with other countries not belonging to the same system might omit all references to interest; or else, application of the article relating to interest might be optional; countries would be free to accept or reject the provisions concerned at the time of accession to the Convention."[9]

The representative from Yugoslavia emphasized the need to protect developing countries: "especially in the case of the developing countries, which were mainly purchasers of goods, which lacked financial resources, and which consequently found themselves frequently in arrears. She readily understood the position of those delegations which would prefer the Convention not to deal with interest."[10]

In the end, regardless of the fact that many states opposed such provisions, they were simply outvoted and Article 78 was adopted. The discussion on Article 84 was linked to the work on Article 78 and eventually they were both adopted.[11] Without wanting to engage with hypotheticals too deeply, it is likely that today, with Saudi Arabia being member of G20[12] and with the significance of the GCC and the Arab states in the global economy, the outcome of the voting might be different. The voices of Egypt, Iraq and Canada, explaining the risk that states whose legal system is based on Sharia may not be willing to become of party because of two single provisions on interest, would likely raise more concern now than they did in 1980. Both proposals, the first one for a reservation option regarding Articles 78 and 84, as raised by Egypt, Iraq and Canada, and the second one to add the phrase

8 UN Conference on CISG 1980, para. 20.

9 UN Conference on CISG 1980, para. 23.

10 UN Conference on CISG 1980, para. 11.

11 UN Conference on CISG 1980, para. 44.

12 G20. 2024. G20 Members. *https://g20.org/about-g20/g20-members/* (last visited December 26, 2024).

"or any other corresponding fee" after the word "interests" in the proposed provisions, as raised by Egypt, would have enabled states with Sharia-based law to more easily join the CISG (Spagnolo, Bhatti 2023, 155).

At the time of its adoption, there were already discussion whether Article 78 CISG would have significant practical importance as creditors would be better off recovering their damage under Article 74, except in rare cases where the damage would not be recoverable due to an impediment under Article 79 (Schlechtriem 1986, 99). However, the absence of importance predicted for this provision has been disproven in practice. Economic forces, including inflation, have caused sharp increases in interest rates and Article 78 poses a threat that encourages voluntary performance (Honnold, Flechtner 2009, 601). However, due to the many compromises that had to be made to adopt Article 78, especially the lack of a concrete interest rate or a mechanism to calculate it, the provision has caused great problems in practice (Atamer 2018, 1028, para. 3). The CISG Advisory Council tried to create a uniform interpretation by proposing that the interest rate be defined according to the law of the state where the creditor has its place of business (CISG Advisory Council 2013b, 3.36). However, this is exactly the solution that the states that opposed the adoption of Article 78 feared the most, as it creates further social imbalance between the states who will usually be the place of business of the creditor and the state of the debtor. The problems caused by the lack of details under Article 78 may be overcome by agreement of the parties. However, the question arises whether the adoption of Articles 78 and 84 (1) was worth the potential exclusion of Sharia states, if an agreement of parties overriding the CISG provisions is the only solution that would provide legal security. Finaly, even an agreement of the parties may not provide final resolution, as some states have set maximum interest rates or the agreement may violate public policy of some states in other ways (Spagnolo, Bhatti 2023, 161), which could lead to non-enforceability of foreign judgments or arbitral awards, if they provide for a higher interest rate (Bacher 2016, 1124, para. 50).

The exclusion of one entire group of states with Sharia background from joining the CISG should not have been achieved because of Article 78 and 84 (1), which cause great problems in practice and where the divergence is such that a uniform rule is not acceptable to the CISG parties. Alternatively, a solution like Article 28, which allows common law states to avoid remedies not available under their own law, would have been acceptable to Sharia states with regards to Articles 78 and 84. While it may not seem pertinent to compare the importance of common law states and Sharia law states, it is difficult not to see a different treatment when comparing Article 28 CISG as a favor to common law states and Article 78 as a clear exclusion of Sharia law states.

2.2. Application of Parts I and II of the CISG in Saudi Arabia – Can It Work Without Part III?

For now, only Parts I and II, i.e., Articles 1–24 of the CISG, will be applicable in Saudi Arabia. As is widely known, apart from the extensive provisions on the applicability of the CISG in Articles 1–6, Articles 1–24 regulate solely the interpretation of the CISG, interpretation of parties' statements, trade usages, and contract formation. We may surmise that from a practical perspective that a Saudi judge would only apply the CISG to see whether a sales contract is validly concluded (Arts. 14–24 CISG), and possibly to interpret the contract (Art. 8 CISG) and to include trade usages (Art. 9 CISG), while questions of potential breach of contract and remedies would be resolved under Saudi domestic law. This kind of *dépeçage* for very closely related issues is certainly not desirable. For example, the parties' contractual obligations would be determined based on their intent and interpretation of the contract under Article 8 CISG, as well as the offer and acceptance under Articles 14–24, but a breach of these obligations would be determined under the CTA. This is certainly not how the CISG was designed. It would serve the goal of the CISG if Article 8 CISG remained applicable to interpret the parties' conduct to the extent possible, even if it is related to provisions of obligations contained in Part III of the CISG.

This can be best perceived in regard to the obligation to interpret the obligations of the parties in accordance with the good faith principle under Article 7 CISG. As is already well known, the CISG does not contain a general good faith principle typical for civil law and Sharia law states, but merely states that "[i]n the interpretation of this Convention, regard is to be had to (...) the observance of good faith in international trade." This duty interpretation is understood to oblige courts to interpret the existing obligations of the parties, codified within the CISG, to perform their obligations in good faith, rather than to create additional obligations and duties based on the good faith principles (Honnold, Flechtner 2009, 95). The observance of good faith in international trade (Art. 7 (1) CISG), may have two important areas of application in conjunction with Articles 1–24 CISG. One of them is primarily applied by civil law courts, requiring the party introducing standards terms to make them available to the other party by relying on good faith in international trade (Article 7 (1) CISG).[13] The second important implication

[13] See Schwenzer Hachem 2016b, 127. The CISG Advisory Council adopted a more differentiated approach to the duty of the offeree to make their standard terms available to the other party, but without relying on good faith in international trade (Art. 7 (1) CISG) (CISG Advisory Council 2013a). This may be a good example

of good faith application is to communicate to the offeror the modifications they made to their acceptance of the offer under Article 21 CISG (Honnold, Flechtner 2009, 95). However, the most important areas of application of the good faith provision under Article 7 (1) CISG are lost without the application of Part III of the CISG. These include: observing good faith when mitigating damages (Art. 77), prohibiting the abuse of rights when asking for specific performance (Art. 46 (1)), the principle of *venire contra factum proprium* when the obligee caused the impediment to obligor's performance (Art. 80), etc. (Perales Viscasillas 2018, 123, para. 27). Articles 1–24, which are currently in effect in Saudi Arabia, for the most part do not regulate any obligations of the parties and the duty to interpret them in good faith almost runs completely empty. When Nordic states made a reservation under Article 92 CISG to Part II of the CISG, which regulates the formation of the contract, this was less likely to cause practical problems in application, as the formation of contract in Part II can more easily be disconnected from Part I and III.

It is likely that there are many more and even more adequate examples of how Parts I–III of the CISG were meant to function together, and such systematic interpretation becomes lost when only Parts I and II of the CISG are applicable. An inevitable question is whether its currently more advisable for the parties to exclude the application of the CISG to their contract, considering that they would otherwise face the application of two different legal regimes to certain core contractual issues. The main benefit of preserving the application of Parts I and II CISG (by not excluding the CISG explicitly) is to ensure the international validity of the contract, at least with regard to contract formation issues governed by the CISG. Also, as will be analyzed below, the Saudi CTA and Parts I and II of the CISG are quite compatible and their joint application should not cause any major contradictions, which will be apparent based on our analysis. However, it is inevitable that many parties would feel safer either by excluding the CISG entirely, or by incorporating Part III of the CISG into their contract, with the exception of Articles 78 and 84, to ensure that the CISG would become applicable in its entirety. This way of "substantive" choice of law by incorporating the CISG into the contract (Meškić 2012, 12),[14] is also safer than a conflict rules choice of law of a foreign state that is a party to the

of extensive use of good faith, which is in line with civil law traditions but not elsewhere, as Art. 19 CISG merely regulates a reply to an offer that contains different terms and may amount to a counter-offer.

[14] Substantive, as opposed to the conflict-rules, choice of law (German materriellrechtliche vs. kollisionsrechtliche Rechtswahl) is a way of incorporating the law fully or in part into the contract and thereby avoiding any prohibition that may exist in the domestic legal system *lex fori* and apply to such a choice of law.

CISG (Art. 1 (1)(b)), because Saudi Arabia does not have conflict rules except in arbitration, as will be elaborated further below. Therefore, it is possible that a choice of law would not be honored before courts (except in arbitration), while the incorporation of Part III into the contract would be honored as a contractual provision, not as foreign law. The disadvantage of such a method, in comparison to a standard choice of law clause, is that the contract would still be subject to national law and its mandatory law limitations, while a choice of foreign law, when validly executed, has the effect of avoiding any mandatory limitation of the *lex fori*, except for its overriding mandatory provisions (Meškić 2012, 12). The other option is to simply exclude the CISG expressly, until Saudi Arabia finds a way to join Part III without Articles 78 and 84.

2.3. What Are the Options for Saudi Arabia to Join Part III of the CISG?

The CISG does not allow reservations for specific articles of the convention.[15] Instead, Articles 92–98 regulate possible declarations that allow a nation to vary the effects of the convention. Article 92 is of particular importance for Saudi Arabia, as it allows nations to declare that they will not be bound by Part II of the Convention (relating to contract formation) or Part III (relating to the rights and obligations of the seller and buyer, and the remedies and defenses available to them). As mentioned previously, Saudi Arabia has declared that it will not be bound by Part III of the CISG.

The Royal Decree ratifying the CISG by the Kingdom of Saudi Arabia contained a resolution delegating the Saudi Minister of Commerce to negotiate with other contracting parties of the CISG not to oblige Saudi Arabia under Articles 78 and 84 (1) CISG. As explained above, both of these articles are related to interest. Saudi Arabia determined that it would not be able to abide by its international obligation to honor the CISG if it accepted what is contained in Articles 78 and 84 (1). Saudi judges have been traditionally opposed to interest, deeming such enforcement to be contrary to the public policy of Saudi Arabia (Al-Sulaim 2021, 847–852).

The question of CISG compatibility with Sharia has already been discussed in comparative literature. The discussion has traditionally focused on the violation of Sharia by Article 78, as interest constitutes prohibited

[15] CISG, Art. 98 ("No reservations are permitted except those expressly authorized in this Convention.")

usury or *riba* (Akaddaf 2001, 46), while more comprehensive works also include the prohibition of speculation or *gharar* (CISG Advisory Council 2013b, 3.43). As Article 78 already leaves the applicable interest rate open, Schroeter suggests that whenever a party with its place of business in a Sharia state is involved, the interest rate should be zero (Schroeter 2018, 38). Interestingly enough, the CISG Advisory Council, in its Opinion No. 14, expresses the same view. Firstly, it declares that the interest rate would be calculated based on the law of the creditor's place of business. But the CISG Advisory Council acknowledges that the interest might be prohibited under the law of the creditor and in such case the interest rate would be zero (CISG Advisory Council 2013b, 3.36); the creditor may only request damages that are available under Article 74 CISG. Clearly, the CISG Advisory Council tries to find solutions for situations involving Sharia law states and this effort deserves support, however, the current analysis stops a bit short of a comprehensive approach. Firstly, from the perspective of Saudi courts, it would be difficult to apply the law of the creditor, as Saudi Arabia does not (yet) accept conflict rules, and a Saudi judge is very unlikely to follow such hidden conflict rule within Article 78 CISG.[16] Secondly, should Saudi Arabia join Part III of the CISG, it would need to be made clear to the deciding body that even if the law of the creditor does provide for an interest rate, such judgement or arbitral award would not be enforceable in Saudi Arabia, at least in the part where interest has been awarded.

This section would be unfit to address the full status of interest in the Kingdom.[17] The sensitivity of the issue also needs to be fully respected. Instead, the discussion on interest should be limited to the form of full retribution, compensation or unjust enrichment, a sign of *restitutio in integrum* (Song 2007, 722; Spagnolo, Bhatti 2023, 161–164). In other words, interest within the understanding in Saudi Arabia must be viewed as a method to receive full compensation to the injured party in a contractual relationship, something that the CTA (Art. 163) and the CISG afford (Djordjevic 2018, 958).[18]

Besides interest, one should also ask to what extent do other clauses of the CISG are compatible with Sharia. For example, Articles 71–73, entailing the suspension of performance of the obligation based on the prognosis

[16] Further analysis of the lack of Saudi conflict rules and how it affects the application of the CISG is provided below.

[17] Legal instruments that would allow for certain fees related to interest in Saudi Arabia or Sharia-based systems in general have been a hot topic in literature for quite a while, with regards to Islamic banking and contractual clauses, such as penalty clauses, liquidated damages, loss of profit, etc.

[18] It is viewed that full compensation is a general principle of the CISG.

that the other party will not perform under Article 71, the anticipatory breach under Article 72, and the avoidance of contract for future installment based on the prognosis related to the performance of previous installments under Article 73, may pose some issues with the Sharia prohibition related to *gharar*, the general prohibition of matters whose consequences are speculative or excessively uncertain, e.g., gambling (Hallaq 2009, 255).[19] The standard of prognosis whether in the future one party will not perform, and therefore the other party may suspend its performance or even avoid the contract, may just be to uncertain and violate the prohibition of *gharar*. The view that anticipatory breach, as available in common law systems is not compatible with *gharar*, has been expressed before (Adunola 2019, 11–18). The current standard (Art. 71) that after the conclusion of the contract "it becomes apparent" that the other party will not perform, in literature and practice requires a "high" or "substantial degree" of likelihood (Saidov 2018, 895, para. 19), but not "very high" probability or "one bordering on certainty" (Brunner, Berchtold 2019, 487, para. 19). While the threshold for Article 72 is slightly stricter, it is still not "almost certainly" (Brunner, Altenkirch 2019, 497, para. 5), but it should be "obvious to everybody" (Saidov 2018, 922, para. 7). Such speculative actions taken by parties based on prognosis would be scrutinized against the prohibition of *gharar* before the Saudi courts and more often than not may fail the test. This concern would largely be removed if the Saudi legislator passes the new Commercial Transaction Act without changes to the draft. Namely Article 92 of the draft Saudi Commercial Transaction Act states that if one of the parties fails to fulfill its obligation regarding periodic supplies, the other party is not allowed to terminate the contract unless the failure to perform would cause significant harm to it or undermine the confidence in the ability of the defaulting party to continue supplying subsequent items regularly (Almazyad 2024, 4557). Such a provision would clearly open the door to anticipatory breach in Saudi law. However, the example of the legislative procedure for CTA shows that there may be many changes to the initial draft, so the current text of the draft Commercial Transaction Act should not be taken as final. Rather, we may shift our focus to the fact that some provisions of the CTA do regulate situations typical of anticipatory breach, where the probability of future nonperformance of the other party is closer to certainty and has therefore been recognized as valid. This is for example the case under Article 176 CTA, which states that compensation will be due without notice to the debtor, if the performance of the obligation becomes impossible or fruitless due to an act by the debtor (Art. 176 (b)

[19] *Gharar* means uncertainty as to "ontological possibilities, such as the very existence or inexistence of the thing contracted" (Hallaq 2009, 244).

CTA), or if the debtor states in writing that they will not perform their obligation (Art. 176 (e) CTA). Both of these situations would be typical for the anticipatory breach, with the remark that they both represent an example when there is very high level of probability that the other party will not perform (Almazyad 2024, 4555).

Several options exist for Saudi Arabia going forward. A potential interpretative declaration,[20] which would explain the very restrictive interpretation of interest in Saudi Arabia is one option, in which case Saudi Arabia could declare that interest which remains within the principle of *restitutio in integrum* may be based on certain contractual clauses. One alternative or even an additional option would be to limit the jurisdiction of Saudi courts in matters related to interest to certain courts, other than Sharia courts; this is what the Kingdom has done to resolve the issue of interest occurring in certain specialized areas of law.[21] This also shows why such a general provision on interest under Article 78 CISG is much less acceptable than more specific instruments with a narrow scope of application. A potential interpretative declaration could help narrow done the permissible interpretation of the provision in Saudi Arabia. Further legislative steps to implement fees, such as assigning jurisdiction to specialized committees to rule on requests related to a permissible form of interest, could provide more legal security.

3. SAUDI ARABIA'S NEW CTA

The Saudi CTA aims to comprehensively regulate all matters related to contractual and noncontractual civil transactions. It regulates, *inter alia*, sources of personal obligations,[22] modalities of obligations,[23] nominate

[20] For more information about the legal nature and procedure for issuing interpretative declarations see the United Nations 2011.

[21] Saudi Arabia has established judicial committees, which resolve specialized issues, e.g., capital market, international customs, and financial disputes. These committees have specific jurisdiction. See for example the option of a specialized committee to issue a penalty of 10% (Art. 86 of the 2019 Government Tenders and Procurement Law), when a bidder violates contractual terms, including delayed performance.

[22] This includes general theory for contracts, delicts and unjust enrichment, *see* Civil Transactions Act, Chapter 2.

[23] Including conditions on obligations, transfer of obligations, and extinguishment of obligations. *See* Civil Transaction Act, Chapter 3.

and innominate contracts,[24] and property rights.[25] The CTA is one of four legal instruments announced in the Specialized Legal Instruments Project (Saudi Press Agency 2021). The Specialized Legal Instruments Project is an initiative to split from the previous legal system, providing legal instruments that regulate legal relationships through legal norms. The announcement showcases a previous project intended to have the same impact. The "Glossary of Judicial Rules" was envisaged to be obligatory through judicial precedents that regulate legal matters through "judicial principles".[26] However, the project was deemed "not fit for society and its ambitions," and was consequently scrapped (Saudi Press Agency 2021).

It would be a mistake to suggest that the Saudi Arabian civil legal system did not *legally* exist at all before the introduction of the CTA. The CTA was issued subsequent to many laws and regulations in the Kingdom. Unlike many countries, who adopt a civil code before enacting more specialized laws and regulations, the Saudi CTA came after the enactment of more specialized laws and regulations. Before the CTA, laws on ancillary rights *in rem*,[27] employment contracts,[28] insurance,[29] and ownership of real estate units[30] were regulated before, for some examples long before, the CTA ever took effect. Even some legal principles of civil law were part of judicial practice before the CTA ever took effect (Diwan Al-Mazalim 2021, 124). Such a fact suggests that the CTA is not new in the realm of legal civil rules in Saudi.

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24 See Art. 30 CTA.

25 Civil Transaction Act, Part 3.

26 The Glossary of Judicial Rules compiles several case laws and extracts some rules arising from these cases. It does exist today. See BOG n.d.

27 The Civil Transactions Act does not regulate such matter, see Civil Transaction Act, Art. 719 ("Ancillary rights in rem shall be subject to the legal provisions related thereto."); what is meant here is reference to two regulations, Registered Real Estate Mortgage Law (2012) Umm Al-Qura [Official Gazette] No. 4422 of 2012; and Law of Commercial Pledge (2018) Umm Al-Qura [Official Gazette] No. 4722 of 2018.

28 Civil Transaction Act, Art. 479 ("An employment contract shall be subject to the legal provisions related thereto."); Labor Law (2005) Umm Al-Qura [Official Gazzete] No. 4068 of 2005.

29 Civil Transaction Act, Art. 607 ("An insurance contract shall be subject to the legal provisions related thereto."); insurance regulations are available on the Insurance Authority website: *https://www.ia.gov.sa/en/Regulations/systems.html* (last visited December 16, 2024).

30 Civil Transaction Act, Art. 640 ("Ownership of real estate units shall be subject to the legal provisions related thereto."); see Law of the Ownership, Subdivision, and Management of Real Estate Units (2020) Umm Al-Qura [Official Gazette] No. 4822 of 2020.

One may assume that this Saudi Arabia is subscribing to fully-fledged civil law system, but that conclusion may be haste. Foremost, the CTA cannot be interpreted and applied completely independently from Sharia. This becomes most obvious from the gap filling mechanism. Article 1 states that the CTA applies to all matters that are regulated by this law "in letter or in implication". If a gap exists, the general Sharia principles provided for in the Concluding Provisions in Article 720 CTA shall apply. Article 720 lists forty-one (41) Sharia principles general rules that shall be used for gap filling. If these principles offer no solution, then the provisions derived from Sharia that are most consistent with this Law shall apply. Admittedly, the methodology of determining provisions "most consistent" with this law will be more clarified as more case law is published. This suggests that the Saudi legal system offers resort to these Sharia principles for the purpose of gap-filling. Another crucial (and less emphasized) legal revelation is the fact that the Judicial Principles issued by the Saudi Supreme Court are now grounds for annulling judgements. The Implementation Regulations for the Methods of Appeal against Judicial Decisions regulates that a violation of Judicial Principles issued by the Supreme Court constitutes a ground for appeal against any judgment.[31] This provides an element of *stare decisis* in Saudi jurisprudence. In these respects, Saudi law is expected to develop differently from other purely civil law systems.

4. CONFLICT RULES IN SAUDI ARABIA AND WHAT IT MEANS FOR THE APPLICABILITY OF THE CISG AND THE SAUDI CTA

It is assumed that all countries accept the fundamental concept that national courts may apply foreign law when dealing with international transactions. However, this method of private international law is not universally adopted and as of present does not exist in Saudi Arabia. While some specific conflict rules in certain special areas of law do exist in the legal system of Saudi Arabia, there is no conflict rule that would allow a choice of law before the courts, which would impact how the CISG and the CTA are applied in practice. As a consequence of this notion, this section will briefly address potential advantages of arbitration over litigation in Saudi Arabia, at least in disputes involving international business transactions.

[31] Implementation Regulations for Methods of Appeal Against Judgments, issued by Ministerial Decision No. 512, 5 Muharram 1445 AH (23 July 2023), Kingdom of Saudi Arabia.

4.1. The Lack of Regulation of Conflict Rules in Saudi Arabia

In Saudi Arabia there is still no private international law or a similar act that would regulate conflict rules (Makhlouf 2023). The other two traditional areas of private international law are regulated: international jurisdiction within Articles 24–30 of the Saudi Civil Procedure Law, and recognition and enforcement of foreign judgements in Article 11 of the Enforcement Law. If we look at the neighboring countries from the GCC with similar legal tradition, these states have adopted conflict rules either within a separate act on private international law, like in Kuwait (Aljarallah 2023)[32] and Bahrain,[33] within the introductory part of their civil transactions acts, like in UAE[34] and Oman,[35] or the Civil Code like, in Qatar.[36]

This does not mean that the Saudi law does not have any conflict rules; saying so would be too simplistic. It is true that the Saudi Basic Code (the most supreme law of the land) commands that all courts apply Sharia and laws issued by the legislature.[37] This article is copied verbatim in Article 1 of the Civil Procedure Law,[38] Law of the Judiciary,[39] and the Law of Procedure Before the Board of Grievances.[40] This clause may at first define Saudi Arabia as a country adopting an absolute unilateralist approach to conflict of laws (Hatzimihail 2021, 161).[41] The unilateralist approach features the

[32] Kuwaiti law regulating the legal relationships with foreign elements, Act No.5/1961, *Official Journal*, appendix No. 316 of the 27th of February 1961.

[33] Bahrain, Law No. (6) of 2015 On Conflict of Laws in Civil and Commercial Matters with a Foreign Element.

[34] Arts. 10–28 of the Civil Transactions Act of UAE, Federal Law No. (5) of 1985 concerning the issuance of the civil transactions law of the United Arab Emirates.

[35] Arts. 10–28 of the Civil Transactions Law of Oman, Royal Decree 27/2013.

[36] Arts. 10–38 of the Law No. (22) of 2004 Regarding Promulgating the Civil Code 22/2004 of Qatar.

[37] See Basic Law of Governance, Royal Order No. A/90, 27 Sha'ban 1412 AH (1 March 1992), Kingdom of Saudi Arabia, Art. 48 ("The courts shall apply to cases brought before them the provisions of Sharia, as indicated by the Quran and the Sunna as well as the laws not in conflict with the Quran and the Sunna enacted by the State.").

[38] Law of Procedure Before Sharia Courts, Royal Decree No. M/1, 22 Muharram 1435 AH (25 November 2013), Kingdom of Saudi Arabia, Art.1.

39 Law of the Judiciary, Royal Decree No. M/78, 19 Ramadan 1428 AH (1 October 2007), Kingdom of Saudi Arabia, Art. 11.

[40] Law of Procedure Before the Board of Grievances, Royal Decree No. M/3, 22 Muharram 1435 AH (25 November 2013), Kingdom of Saudi Arabia, Art. 1.

[41] Absolute unilateralism is defined as the application of local laws regardless of foreign law applicable.

specification of the scope of applying your own law, without reference to further instances of foreign law applicable (Wolff 1950, 97–98). Clearly, many Saudi regulations contain unilateral conflict rules that specify the scope when the specific Saudi law may be applicable.[42] While this is true, Saudi law has developed several multilateral conflict of law rules in the Commercial Papers Law[43] and Evidence Law,[44] in addition to Article 38 of the Arbitration Law. A choice of substantive law in contracts may also be possible under Article 46 CTA, where reference to standard terms may be interpreted to be tantamount to a substantive law applicable to a contract.[45] Saudi Arabia also has touted the idea of establishing an investment court,[46] which may arrive with dedicated multilateral conflict rules.[47]

Most of the GCC states (Kuwait, Bahrain, UAE) followed the model of the conflict rules from the Egyptian Civil Code of 1949[48] which were themselves inspired by the Italian Civil Code of 1942 (Arts. 17–31)[49] and remained

[42] See e.g. Personal Data Protection Law, Royal Decree No. M/19, 9 Safar 1443 AH (16 September 2021), Kingdom of Saudi Arabia, Art. 2 ("This Law shall apply to any form of processing of personal data relating to individuals that is carried out in the Kingdom as well as any form of processing of personal data relating to individuals residing in the Kingdom that is carried out by an entity outside the Kingdom."); and Competition Law, Royal Decree No. M/75, 29 Jumada al-Thani 1440 AH (6 March 2019), Kingdom of Saudi Arabia, Art. 2 (1) ("1. Without prejudice to the provisions of other laws, the provisions of this Law shall apply to: a) all entities within the Kingdom; and b) practices taking place outside the Kingdom which have an adverse effect on fair competition within the Kingdom, in accordance with the provisions of this Law.").

[43] Law of Commercial Papers, Royal Decree No. M/37, 11 Shawwal 1383 AH (25 February 1964), Kingdom of Saudi Arabia, Art. 7 (a conflict rule relating to the law applicable to the capacity of the drawer in a bill of exchange).

[44] Law of Evidence, Royal Decree No. M/43, 26 Jumada al-Awwal 1443 AH (30 December 2021), Kingdom of Saudi Arabia, Art. 6 (1) (relating to the agreement of the parties' choice on rules of evidence).

[45] CTA, Art. 46 ("If the contracting parties make in the contract an explicit or implicit reference to the provisions of a model document, to specific rules, or to any other document, the same shall be deemed part of the contract.") Such agreements are be subject to Saudi mandatory provisions of law. The substantive choice of law is derived from the substantive law of Saudi Arabia. This depends on the view of party autonomy in conflict of laws: a priori or derivative. For specifications on these two views on party autonomy, see (Basedow 2015, 125–127).

[46] See Ministry of Investment 2021; Argaam 2024.

[47] This is also corroborated by Saudi Arabia's choice to not use the declaration available in Art. 95 of the CISG, which allows the contracting state not to be bound to apply the CISG through the conflict of law rules of another state, see CISG, Arts. 1 (1)(b) and 95.

[48] Promulgated by Law No. 131 of 1948, amended up to Law No. 55 of 1970.

[49] Approved by the Italian Royal Decree No. 262 of 16 March 1942.

almost unchanged from the Italian Civil Code of 1865 (Eihawary 2013, 5). While the Italian legislator in the meantime modernized the conflict rules in the Italian Private International Law Act of 1995,[50] the GCC states drafted their conflict rules based on a model that is more than a century old.

The solutions provide for party autonomy, as a main principle, and alternatively for common habitual residence/domicile of the parties (Eihawary 2013, 24)[51], and if there is none, for the place of contract conclusion (Basedow 2015, 119–121).[52] While the primacy of party autonomy to freely choose the applicable law deserves praise, the subsidiary connecting factors are outdated and the criticism of such solutions is well known. It may be worth mentioning that, for example, in the case of online contracts with uncertain place of contract conclusion, if the parties did not choose the applicable law and they also do not have their habitual residence/domicile in the same country, the court may have trouble determining the place of contract conclusion. This leads to the undesirable result that despite having three subsidiary solutions in the conflict rule, it may become impossible to determine the applicable law, probably leading to the application of *lex fori*.

For Saudi Arabia, there is one important conclusion arising from the analysis of the conflict rules regulations in the GCC: Saudi Arabia should look for an updated model for its private international law, rather than follow solutions that worked well over a century ago in a different economic environment. Most prominently, in the area of contractual sale of goods, the EU Rome I Regulation[53] may serve as a good starting point and/or the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods.[54] Obviously, a full codification of private internation law would need to go beyond that and have a modern general part, and regulate international jurisdiction, conflicts of laws and recognition and enforcement of foreign judgements, as a well-coordinated system of rules based on modern models, such as EU private international law regulations (Meškić 2022, 803) and more recent national codifications.

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50 Law No. 218 of 31 May 1995.

51 For example, Art. 17 of the Private International Law of Bahrain provides for habitual residence, while Art. 19 of the UAE Civil Transactions Act provides for domicile.

52 For party autonomy in the Middle-East, see Basedow 2015.

53 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177*, 4.7.2008, 6–16.

54 Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.

Another point is yet to be made: Saudi Arabia does not have a codification of conflict rules yet, differently from other GCC countries. The authors strongly advocate the adoption of the conflict rules. There are many reasons for regulating conflict rules. One of them is quite obvious, as Saudi Arabia is one of the very few states in the world that does not have a codified system of private international law (Krüger 2017, 1613). One of the goals of the Saudi Vision 2030 is to use its geographic location to become an epicenter of the trade.[55] It is important to guarantee that business parties can choose the applicable law as they wish. Trade partners would expect that they have this option in Saudi Arabia, as it is available elsewhere; foreign investors may not want to submit their contracts to the application of Saudi law as they may feel it would give an advantage to the Saudi contract party, or they may not be familiar with Saudi legislation and would prefer to opt for a legislation that is closer to them. Currently, it is possible to choose foreign applicable law only in arbitration, based on Article 38 of the Saudi Arbitration Law.[56] The option to choose the applicable law in arbitration was introduced with the reform of Saudi Arbitration Law in 2012 (Alshubaiki, Meškić 2022), and in literature it has been called "a small sensation" (Bälz, Almousa 2013, 251). The choice of law under Article 38 of the Saudi Arbitration Law is "subject to Sharia and the public policy of the Kingdom". Although this restriction does not exist in Article 28 of the UNCITRAL Model Law on International Commercial Arbitration, it was used as the model for the Saudi Arbitration Law, and in practice it should not be of great relevance. Public policy is a known reservation to the application of foreign law. It is clear that any violation of general principles of Sharia would be equivalent to a violation of public policy in the Kingdom and as such would be reason for both the annulment of the arbitral award under 50 (2) of the Saudi Arbitration Law, and nonenforcement under Article V (2) (b) of the New York Convention. Therefore, the public policy and Sharia reservation for the choice of law under Article 38 of the Saudi Arbitration Law has more of an explanatory character, rather than adding any additional restriction to the usual public policy reservation in annulment or enforcement proceedings. A Royal Order was issued explaining the meaning of "Sharia" to mean a narrow understanding of very fundamental principles of Sharia.[57] This narrow understanding has been reflected in literature (by an Enforcement

[55] Vision 2030. n.d.

[56] Royal Decree No. M/34, dated 16 April 2012.

[57] Royal Order Issued No. 7260 (2012), unpublished (21/03/1443H) (corr. to 2012).

Court (see Al-Khader 2016, 114) and court practice.[58] If the parties have not chosen the applicable substantive law in arbitration under Article 38 of the Saudi Arbitration law, the principle of closest connection applies.

4.2. Impact of the Lack of Conflict Rules on the Applicability of the CISG and the Saudi CTA

The lack of conflict rules in Saudi Arabia is of importance both for the CISG and for the Saudi CTA. Under Article 1 CISG, Saudi courts would not only apply CISG when the place of business of the parties are in different Contracting States (Art. 1 (a) CISG), but also when the Saudi private international law rules refer to the law of a Contracting State (Art. 1 (b) CISG). If the contracting parties have their place of business in different Contracting States to the CISG, Saudi courts will apply Part I and II of the CISG, as Saudi Arabia has only ratified these two parts at the present. However, if under Article 1 (b) CISG, Saudi conflict rules would refer to a law of a Contracting State that ratified the entire CISG (which is every other Contracting State other than Saudi Arabia), in that case Saudi courts could suddenly apply the entire CISG using a back door. This would potentially open the door to the application of interest (Arts. 78 and 84 CISG). However, there are no conflict rules in Saudi Arabia and therefore Article 1 (b) CISG cannot apply except in arbitration. Furthermore, in arbitration under Article 38 of the Saudi Arbitration law, the CISG could become applicable only to the extent that it does not violate Sharia, which means that Part III could become applicable, but Articles 78 and 84 CISG would not apply to the extent that they violate Sharia. Saudi Arabia could have made a declaration under Article 95 CISG that Article 1 (b) CISG will not apply to Saudi Arabia, but it did not. This means that any adoption of conflict rules in the future could potentially open the door to the application of Part III of the CISG under Article 1 (b) CISG. However, no judge in Saudi Arabia would approve a claim for interest under Articles 78 and 84 CISG. Simply, any future legislation on conflict rules would certainly provide for a public policy reservation, as this is common in comparative law. Even without such reservation, no judge in Saudi Arabia would grant

[58] Judgement No. 4151/1/G, 1 *BOG Reporter* of 1436H 139, 142 (1435H (corr. to 2014), Riyadh Administrative Court of Appeal); Judgement No. 26/D/TG 3/2, 1 *BOG Reporter* of 1434H 273, 328 (1433H (corr. to 2012), Jeddah Administrative Court of Appeal); Judgment No. 5190/2/S, 1 *BOG Reporter* of 1436H 147, 167 (1436H (corr. to 2015), Riyadh Administrative Court of Appeal); Judgement No. 117/16/2, 1 *BOG Reporter* of 1433H 215, 305; Judgement No. 5854/2/S, 1 *BOG Reporter* of 1438H 146, 149 (1437H (corr. to 2015), Administrative Court of Appeal).

interest that violates Sharia, as Sharia is part of the constitution of Saudi Arabia. Currently, the lack of conflict rule regulation leaves Article 1 (b) CISG without any scope of application before Saudi courts.

Furthermore, the lack of conflict rules simply means that the Saudi CTA always applies before Saudi courts to sale of goods contracts, when Parts I or II of the CISG are not applicable. This further means that any gap within the CISG under Article 7 (2) CISG, in absence of any gap filling CISG principles, will be filled by the Saudi CTA.

As a concluding remark to the conflict rules, it would be in line with the Saudi Vision 2030 to adopt conflict rules, as this has already been done by all other GCC states. On the other hand, the content of such conflict rules should not be taken from the GCC states, but from a more recent model, such as the EU Rome I Regulation, other EU Regulations, or more recent national codifications.

4.3. Advantages of Arbitration Over Litigation in Cross-Border Disputes in Saudi Arabia

The current lack of conflict rules also provides great advantage to the choice of arbitration as a dispute resolution mechanism over litigation in Saudi Arabia, as parties may only choose the applicable law in arbitration. Furthermore, under Article 11 of the Saudi Enforcement law, Saudi courts will not enforce foreign judgements, if a Saudi court would have had jurisdiction in the case, had it been brought before Saudi courts. When analyzing the Saudi provision on international jurisdiction (Art. 24–30 of the Saudi Civil Procedure Law), Saudi courts have jurisdiction whenever a Saudi national is the defendant (even if they do not have domicile or residence in Saudi; Article 24 of the Saudi Civil Procedure Law). The Saudi Supreme Court has also expressly prohibited choice of court agreements in favor of foreign courts.[59] This means in any given situation, if a foreign party or a Saudi national initiate a procedure against a Saudi national in a foreign state – the judgement would not be recognized in Saudi Arabia. But even if a Saudi brings a claim against a foreign national in a foreign state, such a judgement would not be recognized in Saudi Arabia if the foreign national has residence in Saudi Arabia (Art. 25 of the Civil Procedure Law), or the obligation was initiated or is enforceable in Saudi Arabia, or concerns bankruptcy

[59] Judgment No. 422596, Supreme Court of Saudi Arabia, Fifth Circuit, 9 Ramadan 1442 AH (21 April 2021).

declared or property in Saudi Arabia (Art. 26 of the Civil Procedure Law). Simply, Saudi courts have a wide international jurisdiction under Saudi Civil Procedure Law and in all of these cases foreign rulings would not be recognized. Furthermore, reciprocity is required under Article 11 of the Enforcement Law, and according to the implementing regulation of the Enforcement Law, the burden of proving the satisfaction of the reciprocity treatment requirement lies with the party requesting enforcement.[60] This may significantly lower the chances of enforcement of a foreign judgement, even in the few situations in which Saudi courts do not have jurisdiction.

At the same time, the New York Convention applies for foreign arbitration awards. This means that Article 11 of the Enforcement Law does not apply to arbitral awards, as international treaties have priority, as stated in that very same Article. Statistics published by the Saudi Center for Commercial Arbitration in 2023 show that since the Saudi Arbitration Act was adopted in 2012, there have been approximately 35,000 applications for enforcement with an aggregate value of enforced arbitral awards of just over USD 6.16 billion (MacPherson, Balfaqeeh 2023, 244). Also, about 92% of the motions to annul the arbitral awards were denied by courts.[61]

Currently, without conflict rules available in litigation and with the restrictive legislation on recognition of foreign judgements, arbitration is clearly more advantageous for foreign investors. Should litigation be preferred by the foreign business partner in any case, it would be wise to simply bring the claim to Saudi Arabia, unless a foreign judgment could be enforced elsewhere.

5. COMPARISON BETWEEN THE SAUDI CTA AND THE CISG

The CTA performs the function of a “general private law of the land” on contractual and noncontractual obligations. It is an important and significant piece of legislation that contextualizes all contracts and the temperament with which they will be viewed and interpreted, but also noncontractual relations, certain property regulations, etc. One the other hand, the CISG has a different function. It is an instrument that attempts to unify international sales law. The CTA, therefore, differs in function from other specialized

[60] Art. 11 (6) of the Implementing regulations of the Enforcement Law.

[61] Art. 11 (6) of the Implementing regulations of the Enforcement Law.

legislations, like the CISG. The paradigm with which we look at the CTA and the CISG are distinct. So what service does reviewing these two laws provide?

The CTA also governs specialized matters, such as nominal contracts, one of which is the sales contracts. Articles 307–360 CTA regulate sales contracts. Therefore, both legal instruments constitute significant regulations of sales contracts in the Saudi legal system. One obvious purpose of a comparative analysis is to help the parties choose between the CTA and the CISG. Initially, the CISG will apply with its superseding effect as an international convention (Brunner, Maier, Stacher 2019, 25),[62] but only with regards to matters governed by Parts I and II of the CISG. This means that the comparison may show how well Part I and I of the CISG work together with the CTA. However, due to the dispositive character of the CISG, parties drafting the contract could, based on Article 6CISG, make the choice to expressly or implicitly exclude the entire CISG or part of it accordingly. The comparison will serve a better educated choice between the CISG and the CTA. Finally, such a comparative analysis will serve an epistemological purpose. The CISG is well known and researched; the understanding of how the solutions under the CTA compare to the CISG helps foreign legal systems to understand Saudi law. These purposes justify the comparison.

5.1. Goods

The CISG does not define goods, but goods are understood very broadly; according to case law, CISG "goods" typically are items that are, at the moment of delivery, "moveable and tangible".[63]

Art 22 (1) CTA defines movable goods as anything that is not an immovable. Under Article 22 (2) CTA, movable property shall be deemed immovable by destination if the owner of such property places it in a real property owned thereby for the purpose of serving or utilizing the real property on a permanent basis, even if it is not permanently attached thereto.

[62] Basic Law of Governance, Art. 81 ("The application of this Law shall not prejudice treaties and agreements with states and international organizations and agencies to which the Kingdom of Saudi Arabia is party.")

[63] See Cour d'appel de Grenoble (France) 26 April 1995, *Marques Roque v. Manin Reviere* (Second hand portable warehouse shed), CISG-Online 154 (Pace). See Kantonsgericht des Kantons Zug (Switzerland) 21 October 1999 (*PVC and other synthetic materials*), CISG-Online 491 (Pace); for further references, see Mistelis 2018, para. 37.

The CISG and the CTA follow different understandings, since for the CISG it is decisive whether the goods are movable at the time of delivery, regardless of whether they will (permanently or not) become attachable to land. This is the dominant view in the literature and is also reflected in case law, for example in the case of a turnkey contract of sale of an entire production plant.[64] Under the CTA, however, if such a movable good becomes part of an immovable, even if it is not permanently attached to it, it is no longer considered a good.

The most important conclusion is that the national understanding of movable against immovable property, does not impact the applicability of the CISG. In accordance with Article 7(1) CISG, goods are to be interpreted autonomously, regarding the international character of the CISG and the need to promote uniformity in its application. When deciding whether the CISG applies to goods in Saudi Arabia, Article 22 CTA will not be taken into consideration, but rather the understanding of goods within the CISG itself.

5.2. Formation

When it comes to the form of the contract, the freedom of form envisaged by Article 11 CISG is fully embedded in Article 33 (2) CTA, which states that intent may be expressed verbally, in writing, by a discernible sign, or by exchange, and it may be expressed explicitly or implicitly, unless otherwise required by legal provisions, agreement, or the nature of the dealing. Furthermore, under Article 10 of the Saudi Electronic Transactions Act[65] offer and acceptance concluded by electronic means shall be deemed valid and enforceable.

On the other hand, there are slight differences in the regulation of the offer and the acceptance. Under Article 34 (1) CTA, the display of goods and services and the indication of their prices is deemed an offer, unless proven otherwise. An advertisement indicating prices is not deemed an offer, unless evidence exists that it is intended as an offer (Art. 34 (2) CTA). While the CTA and the CISG do both consider an advertisement to be an invitation to make an offer, under Article 14 (2) CISG it is clarified that CISG is stricter with its requirement that the offer needs to be addressed to one or more

[64] Swiss Federal Supreme Court, Switzerland, 16 July 2012 – 4A_753/2011, CISG-online, case 2371; Schwenzer, Hachem 2016a, para. 22, 71; Brunner, Feit 2019, 39, para. 4.

[65] Royal Decree No. M/18, 26 March 2007.

persons, as otherwise it is not be considered an offer. While the display of goods and services with price indication is an offer under Article 34 (1) CTA, it is not an offer under Article 14 (2) CISG, unless it is addressed to one or more specific persons. Article 34 (1) CTA opens the door to have a binding offer even to the general public as a rule, as is also the case with Article 1114 of the French Civil Code (AlSamara 2024, 48). This is opposite to Article 14 (2) CISG, which considers offers to the public only to be an invitation to make an offer. However, in practice there is a significant overlap between the two provisions. Namely, under the CISG, an offer to the public displaying the intention to be bound, such as the display of the remaining stock or time-limit for answers, would also be a valid offer (Schroeter 2016, 287; Ferrari 2018, 229), similarly to Article 34 (1) CTA. When an offer sets a time limit for acceptance, it is a binding offer and may not be revoked before the time limit expires, both under Article 35 CTA and under Article 16 (2)(a) CISG.

Silence does not mean acceptance unless there is evidence to the contrary, under Article 18 CISG and also under Article 37 (1) CTA. Both codifications name previous practice between the parties as an example when silence may amount to an acceptance (Art. 18 (3) CISG and Art. 37 (2) CTA). Agreement on essential terms is sufficient to be a valid acceptance (Art. 42 CTA). Disagreement on nonessential terms may be postponed, or decided later by the court, unless parties make the contract conclusion conditional upon such an agreement (Art. 42 CTA). There is no indication in the law of what such *essentialia negotii* may be, contrary to Article 19 (3) CISG, which attempts to list "material" terms that are considered to alter the offer materially, and thereby constitute a counter-offer and not acceptance.

5.3. Contract Interpretation

Contract interpretation is regulated somewhat differently under the CTA compared to the CISG. Article 104 CTA firstly determines that clear contractual provisions are not subject to interpretation (Art. 104 (1) CTA), while contractual provisions that are subject to interpretation interpreted in accordance with the common will of the parties (Art. 104 (2) CTA). The exclusion of clear provisions from judicial interpretation is in line with the model in Article 1192 of the French Civil Code which aims to avoid the risk of judicial distortion of party autonomy (AlSamara 2024, 132).

When searching for the common will of the parties, a mix of subjective and objective methods of interpretation is used. Namely, under Article 104 (2) CTA, the mutual intent of the contracting parties must be met rather than relying solely on the literal meaning of the text; the interpretation takes into

consideration custom, the circumstances of the contract, the nature of the dealing, the nature of previous dealings between the contracting parties, the status of the contracting parties, and the expected level of trust between them. All of the contract terms must be consistent and must not contradict each other. Finaly, under Article 104 (3) CTA, the *contra proferentem* rule applies in adhesion contracts, and in case of doubt provisions are interpreted in favor of the debtor, which corresponds to Article 1190 of the French Civil Code. The CTA here varies from how Saudi courts have interpreted conduct of the parties in the past. Following Sharia, the Saudi courts initially applied the subjective intention as the primary and only criterion for contract interpretation (Ministry of Justice 2018, 33). This became a judicial principle that subsequent courts must respect.[66] The CTA amended this test and promotes a general clause for interpretation. Furthermore, Article 104 CTA does not directly address noncontractual conduct or statements, such as offer, acceptance, notification, or withdrawal. Here, Article 720 CTA could potentially come into play. Under Article 720 CTA, Rule 2, in contracts effect is given to intention and meaning, not to form. This primary focus on intention is in line with the previously explained Sharia principle of contract interpretation. The relationship between Articles 104 and 720 CTA is not entirely clear. Under Article 720 CTA, the rules set forth in this Article are applied in a manner not inconsistent with legal provisions, subject to their respective nature, conditions, and exceptions. Article 720 CTA does not have the purpose to replace, but rather supplement Article 104 CTA. As both provisions clearly refer to the interpretation of contracts, it may be understood that Article 720 Rule 2 further emphasizes the importance of the parties' intent. Under Article 104 CTA, it is already required to reach outside of the contract to take into account all relevant circumstances, especially to consider the mutual trust between the parties, their status, and previous dealings. When interpreted together with Article 720 CTA, such circumstances may be used to establish the mutual intent of the parties.

The interpretation rules under the CISG are quite different from the ones provided by the Saudi CTA. Article 8 CISG does not exclude clear contractual provisions from interpretation and establishes a clear hierarchy in favor of the subjective method of interpretation (Art. 8 (1) CISG), whereas the objective understanding of a third reasonable person (Art. 8 (2) CISG) is applied only when the subjective interpretation is not applicable (Brunner, Feit 2019, 39). Finaly, for both the subjective and objective interpretation,

[66] Saudi courts are subject to observing the judicial principles issued by the Saudi Supreme Court, see Implementation Regulations for the Ways to Annul Judgements, Art. 40 (2023), *Umm Al-Qura* [Official Gazzette] Issue 4993 year 101.

the negotiations and subsequent conduct under Article 8 (3) CISG are taken into consideration, which clearly opens the door to reach far outside of the contract to establish the common intent of the parties (CISG Advisory Council 2004). Unlike Article 104 (3) CTA, the CISG does not provide *contra proferentem* rule of interpretation.

5.4. Content Control Over Standard Terms

A topic that has gained a lot of attention in the past several decades, especially with the adoption of EU Council Directive 93/13/EEC[67] with the large case law of the EU Court of Justice, is the court supervision of unfair terms contained in not-individually negotiated agreements. While Article 2.1.20 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT 2016) provides for content control over surprising terms in standard contracts, there is no corresponding provision in the CISG. Only Article 19 CISG addresses some of the issues related to valid inclusion of standard terms in contracts.[68] On the other hand, the Saudi CTA does regulate both the inclusion and the fairness control, at least for contracts of adhesion.[69] For the contracts of adhesion to be validly accepted an "acknowledgment of the offeror's non-negotiable conditions" is sufficient. Under Article 96 CTA, if a contract of adhesion contains arbitrary conditions, the court may amend such conditions or exempt the adhering party therefrom, as required by equity. Parties cannot derogate from Article 96 CTA, as any such agreement to the contrary is deemed null and void. Both provisions on the contract of adhesion are taken literally from the Egyptian Civil Code (Arts. 100 and 149). What kind of "acknowledgment" is required under Article 40 CISG, and which provisions are considered to be "arbitrary" under Article 96 CTA will remain to be seen in the further development of theory and practice. Moreover, the CTA regulates terms in which one party has abused its rights

[67] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 95, 21.4.1993.

[68] The courts and the CISG Advisory Council attempted to fill the gaps related to the inclusion of standard terms in contracts, but not with regards to their content as this is not governed by the CISG (CISG Advisory Council 2013a).

[69] While Bälz and Fawzy (2024, 5) do recognize the control over adhesion contracts regulated in the Saudi Civil Transaction Act, they conclude that the provision only applies to consumer contracts. However, it is not possible to understand from where they draw this conclusion. While it is true that adhesion contracts are often concluded by consumers, they are also very present in B2B contracts, and the CTA does not restrict the application of its Articles 40 and 96 just to consumer contracts, but rather it also applies to B2B contracts.

under the contract. Under Article 29 CTA, a party would be deemed to be abusing its rights if "the right is exercised only to harm others, the benefit of exercising the right is substantially disproportionate to the harm it causes to others, [or] if the right is exercised unlawfully or for other than the intended purpose." Such articles may also form a basis for terminating a contract in which one party has abused its rights through any of the three circumstances above. The notion of abuse of rights is slightly broad and may be explored only before the courts.

5.5. Nonperformance and Remedies

The idea of a unified concept of contractual breaches has been heralded by the late Ernst Rebel (Kleinschmidt 2018, 1076). The CISG's unified concept of nonconformity and remedies may be the most valuable part of the CISG and it has impacted later legal instruments (Basedow 2005). The CISG does not have specific rules on partial performance, nonperformance, and defective performance; they are all united in Article 35 as general nonperformance. However, they are currently not applicable in Saudi Arabia as Saudi Arabia has acceded to Part III. The Saudi CTA does not have a unified concept of nonconformity, as established in Article 35 CISG. Consequently, it does not provide for a unified set of remedies, but the remedies depend on the type of nonconformity. For example, if there is a third party right to the sold goods, the buyer may request for the return of the paid price, i.e., the value of the fruits that the buyer is required to reimburse the party claiming ownership, i.e., expenses incurred for the buyer, which will not be compensated by the party claiming ownership, i.e., luxurious expenses if the seller acted in bad faith, and compensation for any harm for establishing ownership (Art. 335 CTA).

The most general provision on nonconformity in sale may be found in Article 338 CTA, obliging the seller to warrant that the sold item is "free from any redhibitory defect that would diminish its value or render it unfit for its intended use contrary to what is specified in the contract or what can be perceived according to its nature or its particular use." Article 339 CTA releases the seller from any warranty for defects, if the defect was known to the buyer, the defect is accepted by usage, or if the defect happened after delivery. The provision does encompass the contractual agreement on the characteristics of the goods, the ordinary use and the particular use, similarly to Article 35 CISG, but without a clear hierarchy and additional requirements as set in Article 35 CISG. Like the CISG, the CTA does not provide, at least not

initially, a "materiality" condition for nonconformity of breaches. Of course, the CISG does require a fundamental breach for the use of certain remedies, as will be elaborated below.

In case of a defect, the buyer has the right to choose between termination or retaining the sold item and ask for the price difference, which is the difference between the sale price of the item with and without the defect (Art. 338 (2) CTA). The seller may avoid the price reduction by providing substitution (Art. 338 (2) CTA). Additionally, the buyer has the right to compensation for any harm they incur (Art. 338 (3) CTA).

Firstly, it is noteworthy that Article 338 CTA gives the buyer the right to choose between the remedies (Bälz, Fawzy 2024, 10). As such, Saudi law on sales does not have a hierarchy of remedies.[70] This is in stark contrast to the CISG, which prioritizes repair, price reduction and damages as the milder remedies, while primarily requiring a fundamental breach of contract for the remedies of avoidance (Art. 49 (1) CISG) and substitution (Art. 46 (2) CISG). However, the choice of remedies under Article 338 CTA also does not come without further requirements. The CTA chapter on sales contracts needs to be read together with the general part of the CTA. Article 107 CTA provides that the right to terminate the contract may be denied by a judge, if the unperformed part is insignificant compared to the obligation. For example, in cases of delay of performance or partial nonperformance it would be within the discretion of the judge whether termination or a specific performance with compensation would be granted (AlSamara 2024, 137). This may differ only if the parties agree on a termination clause in their contract (Art. 108 CTA).

Secondly, there does not seem to be a right to demand repair. This would be highly unusual, as in many instances this would be the mildest remedy for the seller, and sometimes even preferred by the buyer. However, the right to repair may be found in a rather unusual place – within the request for compensation. The Saudi legislator established the principle for noncontractual damages under Article 136 CTA, stating that the compensation shall restore the aggrieved party to their original position or the position they would have been in had the harm not occurred. When looking at Article 139 CTA, based on the circumstances and the petition of the aggrieved party, the court may order that compensation be paid in the form of a similar property or that the situation be restored to its original condition. This clearly includes repair of things that are damaged

[70] This, for example, is in line with the Principles of European Contract Law and opposite to German law (Schmidt-Kessel 2011, 193).

by a (noncontractual) harmful act (AlSamara 2024, 204). Finaly, the Saudi legislator decided that repair instead or as a part of compensation can also be rewarded for contractual damages, as Article 180 CTA states that Articles 136–139 CTA also apply to contractual compensation, unless otherwise agreed. Another significant requirement for contractual compensation may be found in Article 180 CTA, which states that if the obligation arises from the contract, the debtor who has not committed any act of fraud or gross negligence will be liable only for compensating the harm that could have been anticipated at the time of contracting. The provision was obviously based on Articles 1231–1233 of the French Civil Code. The limitation of damages to what could have been anticipated at the time of contracting follows the same goal as the foreseeability requirement (Art. 74 CISG).

Thirdly, the connection between contractual and noncontractual damages established by Article 180 CTA is highly welcome. The CTA clearly distinguishes between contractual and noncontractual damages. Contractual damages are somewhat left unregulated and are only mentioned as a remedy for breach of contract (Art. 107 CTA) or a consequence of a termination of the contract (Art. 111 CTA). On the other hand, noncontractual damages are highly developed in Articles 118–143 CTA. Although the general provision on liability for damages (Art. 120 CTA), with its wording "[a]ny fault causing harm to a third party shall entail liability for compensation," sets valid requirements that could be used to establish contractual liability, as the provision only applies to noncontractual liability and there is no corresponding provision on contractual liability that would clarify causation, fault or similar requirements for contractual damages. Considering that under Article 180 CTA, Article 137 CTA also applies to contractual damages, the aggrieved party has a duty to mitigate damages, although not stated as expressly as in Article 77 CISG and probably also not to the same extent. Namely, under Article 137 CTA, a loss shall be deemed a natural result of the harmful act if the aggrieved party is unable to avoid such harm by exercising the level of care a reasonable person would exercise under similar circumstances. Another welcome consequence of Article 137 CTA is that the aggrieved party is explicitly entitled to the loss of profit. In the past, Saudi courts where reluctant to award loss of profits due to the prohibition of speculative transactions under Sharia law, in particular due to the prohibition of *gharar* (Bälz, Fawzy 2024, 7), and therefore a compensation of future or uncertain damages caused problems. It is still expected that claims for loss of profit will be subject to the strict burden of proof borne by the requesting party.

5.6. Notice and Time Period

Similarly to the CISG, the CTA does not state a concrete number of days, neither for the inspection of goods, nor for the notice of defects. The period for inspection is "as soon as possible in a manner that is typical in such dealing" (Art. 340 CTA), which is comparable to "within as short a period as is practicable in the circumstances" (Art. 38 CISG). Obviously, under the CISG there is a rich jurisprudence on what "as short as practicable" means, while under the CTA, as a rather recent act, such jurisprudence is yet to be established. After the inspection, the buyer notifies the seller of such defect "within reasonable time", which is identical to Article 39 CISG. The difference between the two acts lies in the hidden defects that cannot be discovered by reasonable inspection. Namely, in case of such hidden defects, the buyer needs to notify the seller as soon as they discover the defect under Article 340 (2) CTA, whereas under Article 39 CISG, the buyer still has a reasonable time. It remains to be seen if under Article 340 CTA the reasonable time for notice in case of defects that are discoverable by an ordinary inspection, and the time period "as soon as" the defect is discovered for hidden defects, will be interpreted in practice to mean different amounts of time. Finaly, there is an objective time period set in both the CISG and the CTA for claims based on defects that were not discoverable by a reasonable inspection. Under Article 344 CTA, a claim for warranty against defects may not be heard upon the lapse of 180 days from the day of delivery of the sold item, unless the seller's warranty extends beyond such a period. The six-months period is significantly shorter than the two years granted by Article 39 CISG.

5.7. Findings on the Comparison Between the CISG and the Saudi CTA

The primary purpose of the comparison conducted here is to shed light on the new civil law provisions in Saudi Arabia by comparing them to the widely known provisions of the CISG. The Saudi CTA bears no big surprises, which is an accomplishment in itself, as one of the primary goals for the new CTA was to provide legal security. Considering the rather drastic shift from Sharia law to almost comprehensive regulation of civil transactions, it seems to be a good strategy to rely heavily on the legal texts of the Egyptian and French Civil Code, which have significant practice. Whether the CISG or the CTA is more buyer- or seller-friendly is difficult to estimate based on this limited analysis, since, for example, the CTA does provide a choice of remedies (although under additional conditions), whereas the CISG provides a longer time period for notification of defects. At the same time, the

comparison did not reveal any obvious contradictions between the solutions in the CTA and the CISG that would make it impossible to apply Parts I and II of the CISG together with the rest of the provisions of the CTA to the same contract. At the current situation, it would be highly advisable to regulate matters in greater detail in the contract to avoid any possible obstacles for the true intent of the parties to be practiced in cross-border sales contracts.

6. CONCLUSION

Saudi Arabia joining the CISG is an important milestone for both Saudi Arabia and the success of the CISG. Saudi Arabia is the only G20 member with a Sharia-based legal system and may serve as an inspiration to other Sharia-based states. The discussion on the Sharia-compatibility of the CISG, which has been reopened by Saudi Arabia, may have a great impact on other Sharia-based states should they consider joining the CISG in the future. In literature and even in the CISG Advisory Council Opinion No. 14 there seems to be a culturally sensible understanding that the interest rate under Articles 78 and 84 CISG should be zero, when involving a creditor with a place of business in a Sharia-based state. However, such a result is anything but obvious from the formulation of Articles 78 and 84 CISG, and it is not realistic to expect that the courts would reach such a conclusion. Furthermore, this does not resolve the issue that simply any decision involving a party with a place of business in Saudi Arabia, whether on the creditor or the debtor side, would not be recognized by Saudi courts if it includes interest. The discussion on the interpretation of interest in Sharia-based states is highly sensitive; it is subject to very detailed and numerous interpretations by Sharia scholars and as such must be approached with great caution. One of the possible ways forward could be an interpretative declaration by Saudi Arabia on a very narrow interpretation of Articles 78 and 84 CISG that may be applied in Saudi Arabia, linked to a legislative act that gives jurisdiction to a specialized committee to decide disputes that may arise from these provisions. In such cases it would require further examination if the provisions of Articles 71–73 CISG would also demand an interpretative declaration, due to their potential violation of *gharar*. At the same time, the Saudi CTA is a highly welcome gap-filling mechanism not only under Article 7 (2) CISG, but also as a replacement for Part III of the CISG. The solutions provided in the CTA seem quite compatible with Parts I and II of the CISG and may also be linked to the established theory and jurisprudence under the French and Egyptian Civil Code, which served as models for the CTA. For parties who wish to apply the CISG in its entirety to enjoy the benefits of a well-established and neutral international legislative framework, the only way is to include the

provisions of Part III of the CISG into their contract, without Articles 78 and 84. Obviously, copy-pasting of provisions would not amount to a choice of law, as it is anyway currently unavailable, but rather the Saudi CTA would remain applicable to the contract. Such an option should work fine, as most provisions on sales contracts in the CTA are dispositive in nature. On the contrary, if the parties wish to exclude the CISG, the CTA provides a moder legislative framework, while Sharia remains applicable for gap-filing. In litigation judges might interpret the CTA in light of Sharia, as this was the applicable law for decades. Until Saudi Arabia adopts a system of conflict rules applicable before the courts, not only can Article 1 (b) CISG not be applied, but arbitration will also have a clear advantage over litigation for resolution of international commercial disputes. Overall, the topic of Saudi Arabia joining the CISG requires more research and publication, primarily on the compatibility of other provisions of the CISG with Sharia – not only Articles 78 and 84 CISG – as well as the similarities and differences between the CISG and the CTA, as both could not be comprehensively addressed in this paper.

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THE ROAD AHEAD: CHALLENGES TO THE EFFECTIVE ENFORCEMENT OF THE EU REPRESENTATIVE ACTIONS DIRECTIVE[***]

The rise of digital technology has driven progress but also enabled large-scale national and cross-border consumer law infringements. Unlawful digital practices threaten the internal market and the EU's goal of high consumer protection. Directive (EU) 2020/1828 on representative actions aims to enhance enforcement by balancing access to justice and litigation abuse. Its key contribution is to ensure that consumers can seek injunctions and redress in all Member States. However, while a step forward, the Directive does not fully resolve issues of standing and funding, which hinder access to justice and effective enforcement. Addressing these challenges depends on the creativity and flexibility of national legislators, lawyers, and courts to make representative actions more practical and effective. This article examines the impact of the Directive and argues that additional efforts are crucial to overcome its limitations and ensure meaningful consumer protection across the EU.

Key words: *Collective interests of consumers. – Funding. – Locus Standi. – Qualified entities. – Representative Actions.*

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1. INTRODUCTION

Effective access to justice ensures the protection of substantive rights because it entails a fundamental human right to a remedy. According to Homburger (1974, 343) and Cappelletti (1989, 272–273), collective access to justice is one of the most fascinating features and important achievements of modern litigation. It overcomes the legal protection deficits of individual litigation, such as legal uncertainty, ignorance of substantive or procedural rights, and rational apathy due to a negative cost-benefit analysis of litigation as a more efficient and feasible enforcement mechanism, making unviable cases viable (Nagy 2019, 20). In the current era of globalisation and digitalisation, a single unlawful practice can cause large-scale consumer detriment. However, the European legislator's ongoing efforts to create a system that can effectively protect consumers and achieve the internal market – as the main goal of EU law, but which differs significantly from the US-style opt-out class action – has been characterized by legal scholars as a 'trial-and-error approach' (Uzelac, Voet 2021, 3). The previous Injunctions Directive 98/27/EC[1] failed to achieve the Union's objective of effective enforcement. This is because it merely provided for the cessation or prohibition of harmful practices, without compensation for damages.

In the context of a David vs. Goliath scenario in consumer protection, it was imperative to introduce a procedural mechanism capable of providing injunctions and redress remedies, to ensure that the internal market was a level playing field for traders and consumers. Consequently, the Representative Action Directive (EU) 2020/1828[2] (RAD) was adopted on 25 November 2020, as the culmination of a complex political and policy-making process, characterized by compromise, industry pressure, lobbying and differing national considerations (Hodges 2013, 68–78). Member States were given a two-year period to transpose the RAD by 25 December 2022, and a six-month window to implement and apply it from 25 June 2023.[3] This paper argues that locus standi and funding, as the most important elements

[1] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumer interests, OJ L166/51 of 11 June 1998 repealed and replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests, OJ L110/30 of 1 May 2009.

[2] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409 of 4 December 2020.

[3] Arts. 22–25 RAD.

of access to justice, must not be subordinated to the fear of abusive litigation in order to achieve the effectiveness of representative actions. As analysed by Nagy (2019, 53), the possibility of abuse in both individual and collective litigation is directly proportional to its effectiveness. Moreover, Nagy (2019, 35–38) demystifies the 'abuses' of the US class action as a contextual result of the regulatory environment of the legal system itself, characterised by the concept of the 'private attorney general', a highly litigious society, an entrepreneurial model of lawyering, jury trials, and extensive pre-trial discovery. These features are all alien to the conservative European legal tradition. The same opt-out mechanism used by ten European Member States has not led to a flood of litigation. In addition, the use of US-style class actions is flourishing in Australia and Canada, but their legal systems are more in line with European principles than the US regulatory environment (Nagy 2019, 55–59; Voet 2017, 5–6).

This paper provides a critical overview of standing and funding as (un) surmountable challenges to effective judicial enforcement of representative actions. The lack of regulatory oversight of third-party funding (TPF) can also hamper standing, particularly in cases where concerns arise about conflicts of interest that need to be assessed by the courts. Section 2 provides a brief description of the issues that have preoccupied national legislators during the transposition process of the RAD. Section 3 addresses the cornerstone issue of collective interests as a procedural requirement for the admissibility of representative actions. Section 4 deals with the intricacies of the criteria for designating qualified entities and their impact on access to justice. Section 5 provides a comprehensive overview of the issue of standing and the limitations imposed by judicial interpretation. Section 6 deals with the rules on funding, which can make or break representative actions. Section 7 offers concluding remarks and highlights the added value of legal creativity, judicial flexibility, and pragmatism in filling the gaps.

2. THE CHALLENGES INTRODUCED BY THE TRANSPOSITION OF THE REPRESENTATIVE ACTIONS DIRECTIVE

Ever since collective redress began its journey in the EU three decades ago, the efforts of both European and national legislators have highlighted the existing conflicting interests of business and civil society[4] (Mucha 2020).

[4] Commission staff working document, public consultation, Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final, of 4 February 2011, point 11.

The former warned of potential abuses, while the latter argued for improved access to justice and more effective consumer protection. The only point of consensus was the need for coherence, as discrepancies and inconsistencies lead to parallel litigation and forum shopping.[5] The transposition of the RAD reflects the same dilemma in identifying the optimal approach, as collective redress in the EU remains less accessible and less comprehensible (Đurović, Kaprou 2020, 165; Biard 2018, 192–193). The RAD was designed as a 'principle-based instrument of minimum harmonization' to complement national legal frameworks only 'where and when necessary' (European Commission 2021, 4). Member States are free to choose approaches that reflect the political, cultural, social, economic, customary and traditional particularities of their legal systems and are the product of a thorough understanding of the practical problems and challenges. The effectiveness of the RAD depends heavily on such procedural choices and will undoubtedly cause friction with the traditional principles of procedural law (Rott 2020, 223). Galič and Vlahek (2019, 215) identify Slovenia as a notable example of the 'do's and don'ts' in the field of litigation reform. Slovenia has successfully navigated domestic legal constraints and utilised best practices, resulting in a significant increase in the number of representative actions (Galič, Vlahek 2019, 245–247).

Another challenge are digitalisation and alternative strategies for litigation through internet platforms, which are rather neglected by the RAD. The Digital Fairness Fitness Check of EU consumer law in 2024 revealed limited effectiveness, efficiency, relevance and coherence in consumer protection and application of EU consumer legislation (Mišćenić, Tereszkiewicz 2024, 230). The accelerated growth of online marketplaces and transactions has exposed digital consumers to an increased risk of potential mass damage cases. The use of consumer data as a form of currency in exchange for 'free' services has become a common practice, where consent is often obtained by default and consumers are even unaware of the profit generated for companies (Đurović 2024, 18). This phenomenon has led to the recent excessive adoption of diverse and fragmented EU legislation, which is more related to digitalisation than to the effective protection of consumers' rights and interests. Consumer detriment in the EU is estimated at EUR 7.9 billion per year, while the annual cost to businesses of complying with the directives

[5] *Ibid*.

is EUR 511–737.3 million.[6] According to the Digital Fairness Fitness Check 2024, the average consumer, defined in the case law of the CJEU as a 'reasonably well informed and reasonably observant and circumspect person', becomes weak and vulnerable in the digital environment, where he is exposed to various unfair digital commercial practices and techniques (Namysłowska 2024, 255; Mišćenić 2024, 100–102). Enhanced procedural protection of substantive consumer rights, which has always been recognized as a fundamental objective of the EU consumer law (Hess, Law 2019, 5–8; Pavillon 2023, 65–68),[7] has become one of the priorities of the future Digital Fairness Act. This objective is at the same time one of the main priorities for the national courts, which must ensure the effective protection of consumer rights combined with the uniform interpretation and application of EU law (Mišćenić 2019, 130).

At the EU level, the transposition of the RAD proved to be a difficult and complex undertaking, characterised by delays due to different national contexts, extensive or limited procedural changes, fierce business opposition, political instability, the impact of the pandemic, the cost-of-living crisis, and international tensions (Biard-Denieul 2024, 754–757). Of the 27 Member States, only the Netherlands, Hungary and Lithuania had transposed the RAD by the end of the transposition period, i.e. on time. As a result, the Commission launched infringement proceedings against 24 Member States, which were stopped after transposition into national law.[8] The results was a kaleidoscope of different procedural requirements for the designation of qualified entities, standing and financing, which will be analysed in the following sections. It is essential to determine whether the obstacles to standing and funding are sufficiently substantial to make the exercise of the right to bring representative actions impossible or excessively difficult.

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6 European Commission, Commission Staff Working Document Fitness Check of EU consumer law on digital fairness, Brussels, 3 October 2024 SWD (2024) 230 final, 86, and the following Study to support the Fitness Check of EU consumer law on digital fairness and the report on the application of the Modernisation Directive (EU) 2019/2161, 4 October 2024.

7 Art. 12 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016, in line with Arts. 38 and 47 of the Charter of Fundamental Rights of the European Union [2016] OJ C 202/391.

8 The Croatian transposition of the RAD in the Act on representative actions for the protection of the collective interests and rights of consumers, OG 59/23 is in force from 25 June 2023.

3. WHO IS REPRESENTED BY THE REPRESENTATIVE ACTIONS DIRECTIVE?

The RAD is responsible for representing the interests of consumers in a number of key areas listed in its Annex 1, including but not limited to unfair contract terms, financial services, product liability and safety, media, telecommunications, energy, and the General Data Protection Regulation (EU) 2016/679 (GDPR).[9] In line with the principle of procedural autonomy, Member States may decide on the number of individual consumers to be represented by a representative action and limit its scope to the protection of collective interests or to include the individual interests of members of a consumer association, as long as the procedural mechanism functions effectively and efficiently.[10] In the *Banco de Santander* case, C-346/23, Advocate General Medina stated that the Member States' discretion to determine the scope of an action is subject to the requirement of a 'useful effect' in line with the objectives of a directive.[11] Moreover, the interpretation of the concept of 'collective interests' by competent authorities may be unclear and inconsistent, even within the jurisdiction of a given Member State (Safjan, Gorywoda, Janczuk 2009, 197–200). The vague and negative definition of the former Injunctions Directive 98/27/EC, where collective interests were not a 'cumulation of interests of individuals who have been harmed by an infringement',[12] was problematic in terms of enforcement (Safjan, Gorywoda, Janczuk 2009, 173–176).

A comprehensive strategy on the concept of collective interest was needed to ensure harmonisation and accountability. The RAD defines collective consumer interests as the general interests of consumers or the interests of a group of consumers for the purposes of compensation, repair, replacement, price reduction, termination of the contract or reimbursement of the price paid.[13] The representative action should identify or, at least describe the individual consumers as members of the group of consumers entitled to benefit from a redress measure, despite the fact that they are not

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[10] Opinion of AG Medina to the case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2024:690, paras. 37–59.

[11] *Ibid*., paras. 59–74.

[12] Rec. 3 of the Injunctions Directive 2009/22/EC.

[13] Art. 2 in line with Art. 3 (3) (10) RAD.

plaintiffs in the proceedings.[14] The term 'group of consumers' is understood to denote natural persons who have been harmed or may be harmed by infringements, provided that these persons are acting for purposes which are outside their trade, business, craft or profession, regardless of the label used to refer to them as travellers, users, customers, retail investors or clients, data subjects, etc.[15] The champions of the consumer organization model of collective redress are qualified entities, designated by Member States, which can be a claimant party in the proceedings and can seek an injunctive measure, a redress measure or both on behalf of consumers (Đurović, Kaprou 2020, 164). A qualified entity is defined as any consumer organization or public body. However, small or medium-sized enterprises and individual plaintiffs, for-profit entities and consumers themselves are excluded from the definition.[16] The limited category of persons who can initiate a representative action may affect its overall effectiveness (European Commission 2017, 259).

Collective redress should not be exclusively available to a select number of authorized entities with limited capabilities for damage compensation.[17] The RAD is more conservative than the EU Commission's 2013 Recommendation, which took into account the state of play in the Member States and proposed to extend the locus standi to a 'group of two or more natural or legal persons', who have suffered individual damage in a mass harm situation.[18] On the positive side, the provisions for wider action can still be applied in this respect.[19] Member States may continue to adopt or maintain provisions giving standing to other natural or legal persons, as long as at least one procedural mechanism is in line with the RAD, in order to give consumers more choice.[20] In Portugal, the 'more the merrier' approach with opt-out has been in effect since the 1990s, allowing even a single citizen to bring

14 Art. 9 (5) RAD.

15 Rec. 14 RAD.

16 Art. 3 (4) RAD.

17 As argued in the Opinion of the European Economic and Social Committee on Defining the collective actions system and its role in the context of Community consumer law of 25 June 2008, OJ C 162/1, 12.

18 Art. 3 (a) of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, OJ L 201/60 of 26 July 2013.

19 Art. 1 (2) RAD. See also Art. 7 of the former Injunctions Directives 98/27/EC 2009 and 2009/22/EC.

20 Recs. 11, 12 and 18 and Art. 1 (2) RAD enable more choices for consumers to select which national collective redress mechanism to use.

a collective action, with no abuse of litigation in sight (Rodrigues 2022, 5). The Netherlands is the only country that has used ad hoc qualified entities and has the most plaintiff-friendly approach to representative actions used on behalf of companies, investors, employees or in the public interest (Angstmann 2024).

4. THE COMPLEXITY BEHIND THE CRITERIA FOR DESIGNATION OF DOMESTIC AND CROSS-BORDER REPRESENTATIVE ACTIONS

The process of designating qualified entities acts as the first 'gatekeeper' in terms of access to justice, facilitating or hindering representative actions (Rott 2020, 224). There are two different categories of representative actions: domestic and cross-border. The first category is subject to the discretion of the Member States, contingent upon the requirement of effectiveness. The second category is subject to a series of requirements, including 12 months of actual public activity in the protection of consumer interests, a legitimate interest demonstrated by a statutory purpose, a non-profit character, solvency, independence, and transparency.[21] If the representative action is brought in the Member State where the qualified entity is designated, it is considered to be domestic, irrespective of the existence of cross-border elements, such as the defendant being a trader domiciled in another Member State or the representation of consumers from several Member States.[22] Conversely, if the action is brought in a Member State other than the Member State of designation, it is considered to be cross-border. This is based on striking a balance between effectiveness and safeguards (Amaro *et al.* 2018, 15). The competent authority can review the criteria for designation every five years, and the court can reassess the criteria if traders claim that a qualified entity no longer fulfils them during litigation.[23] Such claims by traders have become routine in Germany as collective redress has become more effective, while the criteria for entities not (at least partly) funded by the state have been tightened. This has led to delays and an apparent reluctance to register new entities (Rott 2020, 223–224).

[21] Recs. 25–27 and Art. 4 (3) RAD.

[22] Rec. 23 RAD.

[23] Art. 5 (3) and (4) RAD.

An ad hoc entity or opt-out principle is reserved for domestic actions.[24] Member States may apply the same restrictive cross-border designation criteria to domestic actions.[25] Such a decision by a Member State with an already dysfunctional collective redress mechanism could create a 'Catch-22' scenario and act as a barrier to the aggregation of claims. Domestic actions are not burdened by the same complexities as cross-border actions (e.g. increased financial costs, language barriers, ignorance of foreign law, favoured or less favoured legal systems, evidence and assessment of all the circumstances of the infringement) to require the presence of the same safeguards against abusive litigation (Poretti 2019, 339–362). Stricter criteria do not help consumers to use representative actions; they only create unnecessary bureaucracy, slow down designation procedures and prevent consumer organisations from acting quickly to fulfil their statutory purpose. One set of criteria is partly justified by the need for a common standard, but it is too burdensome for smaller organisations (European Commission 2021, 6).

For effective enforcement, the bar for the designation and eligibility criteria should not be set too high (European Commission 2021, 7). Associations already struggle with financial incentives and human resources to prepare cases. As noted by Biard and Kramer (2019, 250–256), Member States vary in their experience with collective redress and the effectiveness of their systems. It is important to recognise that litigation abuse is implausible in Member States with dysfunctional collective redress systems, where the number of initiated collective actions is very low or non-existent. There has been no abuse of collective redress in Europe, so the implementation of the RAD should be seen as an 'opportunity, where flexibility can be applied' (European Commission 2021, 7). The purpose of the so-called 'placebo' legislation, which only exists to appease industry, must be questioned if it has minimal impact (Amaro *et al.* 2018, 30–31).

Finally, the complexity of the designation criteria depends on the views of the shareholders: consumers consider them to be too strict, while businesses argue that they do not offer sufficient guarantees to prevent abuse because they are general, superficial and imprecise. According to Mucha (2020, 23–24), the RAD has not addressed several issues. The first issue is how the non-profit character of qualified entities can be demonstrated and verified by the court. Secondly, the ad hoc qualified entity for certain representative actions is contrary to the business environment. Third, the RAD does not prohibit

[24] Rec. 26 and Art. 4 (5) (6) RAD.

[25] Art. 4 (5) RAD.

lawyers and litigation funders from being members of qualified entities, so the risk of using qualified entities for profit making is not prevented (Mucha 2020, 23–24).

5. THE LOCUS STANDI ROLLERCOASTER: BETWEEN LEGAL REGULATION AND NATIONAL JURISPRUDENCE

Following the research design in Amaro *et al.* (2018, 30–31), the legal capacity to bring an action to represent consumer interests before the courts of the Member States, granted either to a member of the group, or to a public or private body, is a problematic issue, due to the strictness and differences in the national frameworks. Locus standi depends on the sector, the remedy sought (injunctions or damages) and the nature of the consumer interests involved (individual, collective, or diffuse).[26] This could lead to different designation procedures for qualified entities. The transposition of the RAD has also led to a plethora of legislative choices and a judicial rollercoaster on the issues of standing and funding. A 'one size fits all' solution remains elusive. Representative actions are driven by the need to prevent parallel litigation in different Member State jurisdictions, although the means to achieve this are unclear (Stöhr 2020, 1613).

The RAD's intention to harmonise only cross-border collective redress through mutual recognition of locus standi has left the Member States with considerable leeway for domestic actions. As a result, the specificity of the procedural rules on standing and funding of representative actions in each Member State may lead to different interpretations of the scope of consumer interests and restrictions on standing. The following text will further illustrate this problem using the example of one Member State, namely the Croatian collective redress case on the protection of consumer interests against the use of unfair contractual terms in CHF consumer credit agreements in Croatia, and the CJEU's position on enforcement issues. The collective redress system in Croatia can hardly be described as functional (Uzelac 2014, 60–68). The first and only collective redress proceeding on the assessment of the unfairness of contractual terms in CHF consumer credit agreements, also known as the Franak case, raised issues of standing, collective interest and effectiveness of consumer rights protection (Mišćenić 2023a, 231; Mišćenić 2019, 231). In 2011, an action for an injunction brought before the Zagreb Commercial Court by the newly established

[26] The latter two categories are predicated on the assumption that consumers may or may not be easily identifiable or determinable.

association Franak against seven commercial banks was dismissed as inadmissible for lack of standing. The fragmented, complex and inconsistent nature of Croatian consumer protection legislation was a contributing factor. The Franak association was unable to identify the key provision determining which Croatian entities were qualified to bring collective redress actions. To remedy this, Franak signed a cooperation agreement with the Croatian Union of Consumer Protection Associations – Consumer, which initiated the proceedings on its behalf in 2012. The collective redress proceedings experienced significant difficulties in all their aspects, from procedural to substantive, mostly related to issues concerning the guarantee of effective protection of consumer rights, and ended almost ten years later, in 2022, with the ECtHR judgment dismissing the applicant banks' complaints regarding the alleged violation of Article 6(1) of the European Convention on Human Rights (Mišćenić 2023b, 118–123).[27]

In its case law, the CJEU distinguishes between the standing of consumer associations and the issue of funding, in terms of legal aid and possible abuse of procedure, as in the *Banco Santander* case concerning dual-purpose contracts.[28] The preliminary question referred by the Spanish Supreme Court was whether national courts may exceptionally restrict the standing of consumer organisations in cases where claims are considered frivolous or unfounded.[29] The aim was to prevent 'fraudulent or wrongful use of standing', circumvention of procedures and abuse of legal aid schemes. It was also important to consider whether legal aid should be granted in such circumstances and whether individuals represented by the consumer association should be exempted from paying court fees.[30] Spanish jurisprudence is broadly consistent in allowing consumer associations to defend the interests of their members under the previous MiFID,[31] except in the case of 'speculative or high-value financial products', unless they are

[27] ECtHR case *OTP banka d.d. and others v Croatia* of 8 November 2022, Applications Nos. 38541/21, 39015/21, 39063/21, 39167/21 and 41145/21, para. 16.

[28] CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2025:13, para. 78. Opinion of AG Medina to CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels) ECLI:EU:C:2024:690, para. 65–74.

[29] *Ibid*., Banco Santander, paras. 22–25.

[30] *Ibid*., Banco Santander, para. 24.

[31] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ 2004 L 145, 1.

'common, ordinary and widespread'.[32] In its previous case law on markets for financial instruments and the conditions for relying on consumer status, the CJEU has established that factors such as classification as a 'retail client', transaction value, risk of financial loss, knowledge, expertise or behaviour (e.g. high volume of transactions in a relatively short period of time or investment of significant sums) are irrelevant in determining whether or not such persons can be classified as consumers.[33] When interpreting EU law, it is necessary to consider the explicit wording, as well as the broader context and objectives of the legislation.[34]

In the absence of an explicit provision, it is essential to determine whether the collective dimension and purpose of an action should be limited to defending the general interests of consumers, or whether it may also include individual interests, leaving it to the law of the Member State to determine the qualified entities and the procedural rules for representation. Member States retain the prerogative to determine the standing of qualified entities, the individual or collective nature of the interests defended, and the detailed procedural rules.[35] In the absence of EU legislation on legal aid for consumer organisations and in accordance with the principle of procedural autonomy, Member States shall lay down such rules, provided that the principles of equivalence and effectiveness are respected. These rules must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.[36] In the *Banco Santander* case, the CJEU found no evidence that the procedural rules did not comply with the principle of equivalence. The absence of legal aid does not undermine the principle of effectiveness, provided that the court fees to be paid by an association 'do not constitute insurmountable costs which are likely to make it impossible or excessively difficult in practice to exercise the right of action provided by EU substantive law, which it is for the referring court to ascertain'.[37] National case-law restricting the capacity of consumer associations to represent the interests of individual consumers with dual status as investors on the basis of the

[32] CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2025:13, para. 19.

[33] CJEU, case C-500/18, Reliantco Investments and Reliantco Investments Limassol Sucursala Bucureşti, EU:C:2020:264, paras. 44–57.

[34] CJEU, case C-243/21, TOYA, EU:C:2022:889, para. 36.

[35] CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2025:13, para. 44.

[36] Banco Santander, para. 57. CJEU case C-448/17, EOS KSI Slovensko EU:C:2018:745, para. 36.

[37] CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2025:13, para 61.

value and nature of financial products should be precluded.[38] However, legal aid and exemption from payment of the opposing party's court fees and costs may be restricted on the basis of such criteria.[39]

The CJEU's approach to enforcement is also illustrated by the multifaceted judgments in the *Meta Platforms* cases, which dealt with the protection of both individual and collective interests of consumers, represented by a non-profit consumer protection association, against personal data infringement, unfair commercial practices, and the use of invalid general terms and conditions (Vrbljanac 2024, 270–272).[40] In the first case, *Meta Platforms Ireland*, the question referred concerned the capacity of an association to initiate proceedings on an objective basis, irrespective of the infringement of the rights of individual data subjects and the existence of a mandate to act on their behalf. This question arose in the post-GDPR era, in the context of German civil procedure, which provides that the right to bring an action persists until the end of the proceedings in the last instance.[41] The CJEU's judgment in *Meta Platforms Ireland* demonstrated a significant development that goes beyond the judicial interpretation of locus standi and the admissibility of injunctions under the GDPR. The same happened in the recent case of *Meta Platforms Ireland (Action représentative).*[42] The *Meta* cases demonstrated the CJEU's commitment to strengthening private enforcement of collective redress mechanisms, which are crucial for the protection of consumer's right to privacy and personal data in the digital environment (Vrbljanac 2024, 270–273; Mišćenić 2022, 209). The case law of the CJEU also facilitates a deeper understanding of the significance of collective redress and the procedural aspects of collective access to justice for the enforcement of substantive consumer rights guaranteed by the *acquis*.[43]

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38 Opinion of AG Medina to CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels) ECLI:EU:C:2024:690, para. 92

39 CJEU, case C-346/23, Banco Santander (Représentation des consommateurs individuels), ECLI:EU:C:2025:13, para. 63.

40 CJEU, case C-319/20, Meta Platforms Ireland, ECLI:EU:C:2022:322.

41 Opinion of AG de la Tour to CJEU, case C-319/20, Meta Platforms Ireland, ECLI:EU:C:2021:979, para. 27 and 35.

42 CJEU, case C-757/22, Meta Platforms Ireland (Action représentative) [2024] ECLI:EU:C:2024:598.

43 CJEU, case C-319/20, Meta Platforms Ireland, ECLI:EU:C:2022:322, paras. 67–78.

6. WHO WILL PAY FOR IT? THE KEY ISSUES REGARDING THE PROCEDURAL COSTS AND REPRESENTATIVE ACTIONS FINANCING

Funding determines the viability of collective access to justice. The human and financial resources of qualified entities are limited, and all entities need incentives to initiate representative actions. Regardless of their motivation, litigation becomes a matter of strategy due to lack of funding or experience (Caponi, Novak 2019, 63–93). The lesson from US-style class actions is that the effectiveness of a collective redress system depends on adequate remuneration and incentives for lawyers to represent the collective interests of consumers (Miller 2009, 280–281). Without adequate funding and adjustments to traditional rules, the excellent basic design of substantive and procedural provisions will become irrelevant and nothing more than a 'Potemkin Village' (Howells 2009, 339–343). However, the European legislator has not adequately addressed the issue of funding, leaving it to the Member States. The rules on 'the time limits within which individual consumers may obtain redress' or 'the destination of any outstanding redress funds not recovered within the time limits', are also left to the Member States.[44] The RAD provides a general rule that Member States should ensure that the costs of representative actions do not prevent the effective enforcement of injunctive or redress relief, but at the same time Member States should not be obliged to finance them.[45]

The term 'costs of proceedings' covers a wide range of expenses, including court fees and expenses, fees for legal representation by a lawyer or other legal professional, fees for providing information to consumers, organisational costs, translation of documents and other services. In Europe, the 'looser pays principle' applies (Caponi, Novak 2019, 63–93). This means that the unsuccessful party in a representative action is liable for the successful party's legal costs, unless they were incurred unnecessarily.[46] Individual consumers can only be held liable for the costs of the proceedings in exceptional circumstances, i.e. if these costs were incurred as a result of intentional or negligent conduct, such as unlawful conduct to prolong the proceedings.[47]

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44 Art. 9 (7) RAD.

45 Rec. 70 RAD.

46 Rec. 38 and Art. 12 RAD.

47 Rec. 38 and Art. 12 (2) (3) RAD.

Support for qualified entities may be provided through public funding, structural support, limited court or administrative fees, access to legal aid, a modest membership fee and third-party funding (TPF). The RAD neither encourages nor prohibits TPF,[48] rather the provisions of the RAD on this issue are general, descriptive and ambiguous, delegating legislative powers to Member States without establishing regulatory measures for TPF and without sufficiently addressing the risks of conflict of interest[49] (AmCham EU 2024, 6). Conversely, concerns have also been raised about the impact of prescriptive regulation on the risk/reward balance for funders. This can lead to a lack of funding and impact on access to justice. The European Law Institute's Principles Governing the Third-Party Funding of Litigation suggest that such regulation is only appropriate where there is a problem or market failure (ELI 2024, 10). The definition of TPF in Europe was not clear-cut and it was advisable to establish an autonomous European definition (Amaro *et al.* 2018, 35–38). Sahani (2017, 405) defines TPF as 'a controversial business arrangement whereby an outside entity – called a third-party funder – finances the legal representation of a party involved in litigation or arbitration, or finances a law firm's portfolio of cases, in return for a profit'. The RAD only requires transparency, independence and the absence of conflicts of interest.[50] Failure to comply with these requirements may result in the court refusing to recognise the legal standing of the qualified entity or declaring the representative action inadmissible.[51] In order to avoid conflicts of interests, it is essential that the TPF's economic interest in the outcome of the representative action is aligned with that of the consumers.[52] A conflict of interest that could potentially lead to abusive litigation is deemed to exist if the third-party funding provider: is a trader operating in the same market as the defendant, is a competitor of/dependent on the defendant, has an economic interest in the representative action or its outcome, or could unduly influence the procedural decisions or the settlement.[53]

Legal doctrine has suggested many funding alternatives. According to Howells (2009, 339–343), the use of the opt-out method in combination with the cy-près doctrine could prove decisive. The cy-près doctrine is an

[48] Crowdfunding, donations within the remit of corporate social responsibility initiatives, or funding through equal contributions by the members of the qualified entity are eligible for third-party funding. Rec.52 (2) RAD.

[49] Art. 10 RAD.

[50] Rec. 52 of the Preamble in line with Art 10 RAD.

[51] Art. 10 (4) RAD.

[52] Art. 10 (2) b. RAD.

[53] Rec. 52 in line with Art 10 (2) RAD.

equitable remedy used by courts to allocate residual funds in class actions after all identified class members have been compensated. These funds can be used for the 'next best use', typically a charitable purpose (Shiel 2015). The controversy stems from the lack of clear, judicially enforced standards for how and when cy-près should be used (Kadri, Cofone 2020). Dayagi-Epstein (2006, 224–225) suggested a multifaceted approach to funding, including contributions from victims and their representatives, legal aid mechanisms, public and private funds, insurance companies and other market actors, contingency fee arrangements with lawyers, and special funds created for the purpose of collective redress. Procedural risks can be mitigated by risk insurance, as is the case in Austria, or by public funding (Stadler 2009, 312). To our knowledge, European law firms do not usually pre-finance litigation and there is still 'little incentive for a race to the courtroom' (Stadler 2009, 321). This trend may be changing, inspired by a number of US law firms acting as litigation funders in the Netherlands (Kramer *et al.* 2023, 5).

Member States could follow the example of the Canadian province of Quebec by establishing a support fund to finance future actions from fines imposed for violations of consumer law, a share of the amount recovered in collective actions, or unclaimed compensation[54] (Piché 2021, 341–342; BEUC 2022, 16–21). The proceeds from trifle losses should also be paid into such a fund rather than distributed, as individual damages are too small and scattered to justify individual litigation, but the aggregate damage on a collective scale is substantial and should be enforced in the public interest[55] (Van Boom, Loos 2007, 250; Micklitz 2007, 14). Consideration should be given to explicitly recognizing the possibility of cy-près in order to gain practical experience and insight into the size of the remaining funds (Kramer *et al.* 2023, 9). The introduction of a sui generis 'skimming off profit claim', with the primary aim of both deterring and depriving the defendant of the economic benefit derived from the illegal conduct, should also be considered as a possible source for future representative actions. The German practical experience with skimming off profit or *Gewinnabschöpfungsanspruch* (germ.), which lies between the law of torts and the law of unjust enrichment, can provide insights into how to optimise these actions (Stadler, Micklitz 2003, 559–562; Stadler 2009, 325–327).

[54] Opinion of the European Economic and Social Committee on Defining the collective action system and its role in the context of community consumer law (own initiative opinion) OJ C 162/1 of 25 June 2008, 17–19.

[55] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final, of 11 April 2018, 14.

In addition, the introduction of a US-style contingency fee was considered both undesirable and unfeasible in European collective redress but could be useful if combined with appropriate safeguards (Đurović, Kaprou 2020, 170). Moreover, contingency fees are neither foreign nor prohibited in all Member States. In Slovenia, they are generally permitted and regulated as a sui generis TPF arrangement, which allows up to 30% of the collective total, where the attorney assumes the financial risk for all costs, including his representation (Galič, Vlahek 2019, 241). Another example is the Austrian system, where the Consumer Information Association or the *Verein für Konsumenteninformation* (germ.) and a private insurance company (a non-lawyer) enter into *a pactum de quota litis* agreement. The private insurance company refinances the costs of the proceedings for one third of the proceeds in case of success (Stuyck 2009, 81). This agreement covers the procedural risk of litigation and eliminates frivolous and insubstantial claims (Stadler 2009, 312).

At the IBA Annual Litigation Forum 2024, experienced lawyers and academics debated the implementation of the RAD and the practical use of TPF, demonstrating that the effectiveness of the RAD has yet to be ascertained (IBA 2024). The funding of representative actions is affected by different legal regulations on TPF, ranging from strict, medium, liberal to none, which can make funding attractive, unattractive or impossible in a complex situation. Germany has a strict rule limiting the success fee to a maximum of ten per cent of the amount recovered, while Portugal has a more moderate approach of 'a fair and proportionate amount and judicial oversight' (IBA 2024). Spain, on the other hand, has only imposed judicial oversight with no limit on the percentage. This makes Spain more attractive as a cross-border forum. Consumers themselves would have to be more creative in terms of contingency fee arrangements regarding the distribution of the share of the collective total to the TPF (IBA 2024).

Finally, the RAD has yet to exploit the potential of alternative litigation funding strategies in terms of TPF through intermediaries via the internet. Their effectiveness in improving access to justice and the enforcement of large-scale damages is noteworthy (European Commission 2017, 153–156). There is a recent trend of companies offering TPF services through internet platforms, structuring and creating mass claims and acting as intermediaries between legal counsel and disputing parties (Biard, Kramer 2019, 250–256). These companies assume responsibility for all actions in the event of litigation. This includes instructing legal representatives, formulating litigation strategy and negotiating settlements, as well as gathering evidence and filing documents (European Commission 2017, 153). Consumers can take their case to court without financial risk by filing electronically. Such

platforms currently operate in a somewhat unclear legal environment. If left unregulated, various challenges may arise, such as civil procedure issues, reduced consumer compensation, under-enforcement of consumer rights, disputes between the platform and the consumer, information requirements, litigation strategy, and the relationship with individual cases on similar issues (European Commission 2017, 154–156).

7. CONCLUDING REMARKS

The issues of standing and funding of representative actions are important and complex preconditions for access to justice that have been neglected by the European legislator and left to the specific circumstances of each Member State. Different procedural mechanisms in the Member States offer different levels of consumer protection depending on the country of origin. The added value of the RAD in introducing a single procedural mechanism for both injunctive and redress relief is of no consequence if this mechanism is not efficient and effective. This paper shows that these issues are critical to the viability of collective litigation.

First, the complexity of the criteria for designating qualified entities reduces the number of qualified entities that can act as representatives of consumers' interests. If the designation process creates many legal, economic or time-consuming barriers, it may discourage claims and impede access to justice. Strict criteria for designation, as a double obstacle to prevent abuse in litigation are superfluous given the right to reject manifestly ill-founded cases at the earliest possible stage of the procedure. In order to improve access to justice and ensure effective enforcement of representative actions, any consumer association with full legal capacity should be entitled to defend consumer interests. Second, judicial interpretation of the concepts of 'collective interests' and 'conflict of interests' may limit locus standi. The right to dismiss manifestly ill-founded cases at the earliest possible stage of the procedure, in accordance with national law, where there are doubts about conflicts of interest, creates some legal uncertainty. The focus should be on clarifying the issue of doubt and the related procedural framework. Third, the use of TPF in contingency fee agreements is left to the creativity of the consumers themselves.

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CIVIL LIABILITY OF PRINCIPAL FOR THE ACTS OF AGENT – A COMPARISON BETWEEN FRANCE AND MAURITIUS

Mauritian civil law is strongly influenced by French civil law, for historical reasons. Civil liability, tort and contractual law, is regulated in an almost same manner in the two countries. However, as French civil law is only a persuasive authority in Mauritius, the position of the French Court of Cassation is not always followed by the Mauritian Supreme Court. Moreover, even when the legal solutions in the two countries are the same, differences can exist between the contractual and tort liabilities of principals for the acts of their agents. This paper aims at critically analyzing the similarities and differences in the tort and contractual liabilities of principals for the acts of their agents in France and Mauritius.

Key words: *Civil Liability*. – *Principal*. – *Acts*. – *Agent*.

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1. INTRODUCTION

Republic of Mauritius is a small island country located in the Indian Ocean, and comprised of Mauritius Island, Rodrigues Island, the Cargados Carajos Shoals, the Agalega Islands, and the Chagos Archipelago.[1] The main feature of the Mauritian legal system is its hybrid (mixed) nature.[2] One part of the Mauritian laws is of common law origin, and those laws are written in English. There are also the laws inspired by the French legislation, and these laws are written in French (Domingue 2002, 67; Knetsch 2019, 198–199). On the one hand, the Mauritian Constitution,[3] the Administrative Law,[4] the Insolvency Law,[5] the Anti-Corruption Law,[6] and the Maritime Law[7] are of common law origin and written in English (Knetsch 2019, 198–199). On the other hand, the Civil Code of 1805,[8] the Commercial Code of 1809, and the Code of Civil Procedure of 1808 are of French inspiration, and are written in French. The Mauritian Criminal Code of 1838 is mostly of French origin, and written, in parallel, both in French and English.[9]

This mixed nature of the Mauritian legal system results from historical circumstances (Law Reform Commission 2010; Domingue 2002, 62; Agostini 1992, 21–22; Venchard 1982, 31; Agostini 2004, 116–117). When the French took possession of Mauritius, they applied their laws. However, in the early 19th century the French in Mauritius suffered a military defeat from the United Kingdom, which took possession of the island. The new colonial force in Mauritius established the organization of the courts based on the British model (Angelo 1970, 233–237). However, the laws previously adopted by the French, e.g., the Civil Code, remained in force thanks to Article 8 of the Act of Capitulation signed between the France and United Kingdom in 1810. The abovementioned Article has authorized the inhabitants of the island to retain their customs, *laws,* and religion (Agostini 1992, 21–22; Venchard 1982, 31; Angelo 1970, 237–239). Moreover, although the Mauritian courts are completely independent of their French counterparts, and the Supreme Court of Mauritius does not have any formal obligation to adopt the same

1 Britannica. 2024.

2 JuriGlobe. 2024.

3 The Constitution, General Notice 54/1968.

4 Law Reform Commission of Mauritius 2009, 12–14.

5 Insolvency Act of 2009, Act. 3/2009.

6 Prevention of Corruption Act of 2002, Act. 5/2022.

7 Merchant Shipping Act of 2007, Act 26/2007.

8 Adopted in 1805, the Civil Code came into force in 1808.

9 Criminal Code Act of 1838, Act 6/1838.

position as the French Court of Cassation (*Cour de cassation)* in civil law matters, most of the time the Mauritian Supreme Court will follow the position of the French Court of Cassation, if an article in the Mauritian Civil Code is identical or very similar to an article in the French Civil Code. The French case law and doctrine are a persuasive authority in Mauritius. It has been clearly stated in the judgment of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* of 2017[10] that "there is no legal obligation for the Mauritian Supreme Court to adopt the same position as the French Court of Cassation in a civil law matter, as pointed out in the previously quoted judgment of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* of 2017."[11]

Given the historical background of the Mauritian civil law, it is justified to compare the French civil law with the Mauritian civil law, which has been and still is strongly influenced by the former. Such a comparison can lead to ideas on how to amend and improve the Mauritian civil law.

Civil liability in Mauritius and France is composed of tort liability, on the one hand, and contractual liability, on the other.

Tort liability is a branch of civil law that is composed of only a few articles in the Mauritian Civil Code (Articles 1382–1386) and the massive case law of the Supreme Court of Mauritius on the subject matter. The situation is very similar in France today: tort liability is regulated in Articles 1240 through 1253 of the French Civil Code and the numerous judgments of the French Court of Cassation. The case law on tort law issues in France and Mauritius will be the same, given that Articles 1240 through 1244 of the French Civil Code, on the one hand, and Articles 1382 through 1386 of the Mauritian Civil Code, on the other hand, are very similar in most cases. There are three sources (*faits générateurs*) of tort law both in France and Mauritius, namely civil fault (Terré *et al.* 2022, 1073 ff.; Flour, Aubert, Savaux 2024, 181 ff.; Bufflan-Lanore, Larribau-Terneyre 2024, 863 ff.), act of an object (Terré *et al.* 2022, 1095 ff.; Flour, Aubert, Savaux 2024, 485 ff.;

[10] Supreme Court of Mauritius 2017 SCJ 411 *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor*: "It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from *L'Etendry v The Queen* [1953 MR 15]: 'the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law.'"

[11] "But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle."

Bufflan-Lanore, Larribau-Terneyre 2024, 897 ff.) and act of another (Terré *et al.* 2022, 1150 ff.; Flour, Aubert, Savaux 2024, 383 ff.; Bufflan-Lanore, Larribau-Terneyre 2024, 937 ff.).

Contractual liability is defined similarly in France (Porchy-Simon 2024, 329; Tranchant, Egéa 2024, 98) and Mauritius.[12] The debtor of a contractual obligation must repair the harm suffered by the creditor due to the inexecution or defective execution of a contractual obligation. For instance, if the debtor does not pay the price agreed upon with the creditor or if they deliver to the debtor, in bad faith, goods with a hidden defect, the creditor may ask a court to order the debtor to compensate the creditor for the harm suffered (Porchy-Simon 2024, 339). Both in France and Mauritius, as a matter of principle, the debtor must compensate the creditor only for the harm reasonably foreseeable when the contract has been made (Porchy-Simon 2024, 339).[13] However, if the debtor has intentionally failed to fulfill their contractual obligation (*faute intentionnelle*) or if they have committed a serious fault (*faute grave*), they will have to compensate the creditor for the entire harm suffered, including the harm that was reasonably foreseeable when the contract was made (Porchy-Simon 2024, 339).[14] Unlike tort liability, where the tortfeasor can escape their liability for harm caused to another person if they prove that no fault has been committed, the debtor of a contractual obligation, which qualifies as obligation of a result, can avoid their contractual liability only if they prove force majeure, i.e., the existence of an external event of natural[15] or human origin[16] that is reasonably unforeseeable[17] and reasonably inevitable (Porchy-Simon 2024, 331; Tranchant, Egéa 2024, 100–101).[18]

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[12] Article 1147 of the Mauritian Civil Code. See the judgments of the Supreme Court of Mauritius 2010 SCJ 202 *Air Austral v. Hurjuk A. H. I*; 2015 SCJ 109 *Sotramon Ltd v. Mediterranean Shipping Company S. A.*; in the same matter Judicial Committee of the Privy Council 2017 UKPC 23 17 July 2017; Supreme Court of Mauritius 2018 SCJ 111 *Chuckravanen v. Esoof*; 2023 SCJ 369 *Quinn M. & Anor v. Societe Indigene Ltee* and 2023 SCJ 365 *Zoobair & Osman Properties Ltd & Ors v. Banque des Mascareignes Ltee*.

[13] Article 1150 of the Mauritian Civil Code.

[14] Article 1151 of the Mauritian Civil Code.

[15] It can be a flood, a fire, an earthquake, etc.

[16] It can be a war, an administrative measure, or a new state law.

[17] The event needs to be unforeseeable to a reasonable and careful person.

[18] The event's consequences need to be predictable to a reasonable and careful person. See the judgment of the Supreme Court of Mauritius 1972 SCJ 189 *Butan v. Rivière de Rempart Bus Services*.

Both in Mauritius and France, the civil liability of the principal, especially the employer, for the acts of their agent (employee) can be contractual or tort liability. Even though important similarities exist between the legal provisions adopted in France and Mauritius, there are also notable differences. This is why, in this paper, we will compare and analyze the similarities and differences of the civil liability of principals for the acts of their agents, with the view to find how to improve the Mauritian law on the civil liability of principals for the acts of agents.

The method used in this study is the traditional desk research method. Drawing upon an extensive reading of the case law, pertinent laws, books, articles, and other relevant documentary resources from both France and Mauritius, we will address the questions identified for this study and try to provide analytical and critical answers.

2. SIMILARITIES IN THE CONDITIONS FOR THE CONTRACTUAL AND TORT LIABILITIES OF PRINCIPAL

Two conditions appear to be common to tort and contractual liabilities in France and Mauritius: the requirement of a subordination link, and the requirement that a fault is committed in the fulfillment of the agent's mission.

2.1. The Requirement of a Subordination Link

An agent, both in French (Terré *et al.* 2022, 1174–1175; Flour, Aubert, Savaux 2024, 422–429; Wolmark, Peskine 2022, 32; Gauriau, Miné 2021, 145–146; Dockes, Auzero, Baugard 2021, 273; Gaudu, Bergeron-Canut 2021, 75) and Mauritian laws of civil liability,[19] can be defined as a person completing a task or fulfilling a mission in conformity with the orders given by their principal. The latter has the power to control the execution of the aforesaid mission and to apply the disciplinary sanction, if necessary. The subordination link between the principal and the agent is a prerequisite for the contractual and tort liability of the principal for the acts of their agent. Traditionally, both in France and in Mauritius, this subordination link is composed of the power of the principal to give orders to the agent, to control their execution (Cabrillac 2024, 300), and to apply the disciplinary

[19] See the judgment of the Supreme Court of Mauritius 2016 SCJ 56 *Dassruth R. P. v. Femi Publishing Co. Ltd. & Ors*.

sanctions against the agent, if necessary. However, more recently, this traditional definition had to be adapted to the employment contracts where the employee keeps important autonomy in the fulfillment of their contractual duties. For instance, high-skilled employees such as doctors and teachers have a lot of liberty in the organization of the fulfillment of their contractual duties, and the contents of their work is not usually controlled by employers. There is still a subordination link between these employees and their employers, provided that the latter has disciplinary power over the former and that the place and time of the fulfillment of the contractual obligations is determined by the employer (Dockès, Auzero, Baugard 2021, 280; Gaudu, Bergeron-Canut 2021, 75–77).

This condition for the civil liability of the principal reveals the importance of the legal power exercised over the agent by the principal, not only regarding the existence of the civil liability of the latter but also pertaining to the nature of this liability (Flour, Aubert, Savaux 2024, 420).

2.2. The Requirement That a Fault Is Committed in the Fulfilment of Agent's Mission

2.2.1. Tort Liability: A Civil Fault Must Be Committed in the Fulfilment of the Agent's Mission

Under Article 1242 of the French Civil Code and Article 1384 of the Mauritian Civil Code, which regulate tort liability of the principal for the acts of their agent, the former is liable in tort for the acts (civil faults) of the latter committed in the discharge of the functions of the latter. In other words, the principal is liable for the harm caused to third parties by their agent while fulfilling a mission forming part of the subordination link between the principal and agent (Terré *et al.* 2022, 1179; Bufflan-Lanore, Larribau-Terneyre 2024, 961; Cabrillac 2024, 301). For instance, teaching is the main function of a teacher working in a public school. If the teacher commits a civil fault during the fulfillment of their mission to teach, on a specific day and at a specific time, and this fault causes harm to a third party, then the public school, in its capacity as the principal, will be liable in tort to this third party, under Article 1242 of the French Civil Code and Article 1384 of the Mauritian Civil Code. Another example: if a driver working for a private company, while driving the CEO of the aforesaid company to an important meeting, hits a pedestrian and causes bodily harm to the latter, the company, as a principal, will be liable in tort to the victim of bodily harm for the civil fault of its driver. This logical rule is predicated on the power the principal exercises over their agent, this power is known as a subordination link.

Is the principal liable in tort for acts committed by the agent outside their functions (missions) but directly linked to their functions (Bufflan-Lanore, Larribau-Terneyre 2024, 962)? For instance, is a cinema liable in tort for bodily harm suffered by a young lady who has been raped in the cinema's toilet by a security agent working there (see Cabrillac 2024, 301)? Is a security agency liable in tort to the mother of a deceased person who has been tortured and killed, for financial reasons, by an employee of that security agency?[20] In these two examples, the agent has committed a civil fault, i.e., an act that a reasonable and careful person would have not committed in the same circumstances. Moreover, such an act definitely falls outside the agent's functions and missions. However, the act has been facilitated by the agent's functions, as the act has been perpetrated during the agent's working hours and at their workplace.

Both in France and Mauritius this question is known as abuse of functions (*abus de fonctions*). After some hesitation, the French Court of Cassation, which still plays the role of persuasive authority in Mauritius, exonerated the principal from tort liability for civil faults of their agent committed outside the functions of the latter, even though the commission of the fault was facilitated by the agent's functions. In its landmark case dated 19 May 1988, the Plenary Assembly of the French Court of Cassation announced that the principal would not be liable for civil faults of their agent, provided that the fault is committed outside the agent's functions, without the principal's authorization and for the pure personal interest of the agent.[21] The three conditions laid down in the 1988 Court of Cassation's judgment are cumulative (Bufflan-Lanore, Larribau-Terneyre 2024, 965). If one of them is missing, the principal will be liable in tort for the agent's acts. The same approach was adopted by the Supreme Court of Mauritius in the cases of *Mir v. IBL Ltd.*[22], *Dookhy M. & ORS v. SBM*[23] and *Beau Villa v. Chuckowree and Lamco Insurance Ltd.*[24]

The solution adopted both in France and in Mauritius is very logical: if the civil fault committed by the agent is detached from their functions, it would be difficult to understand why the principal should be liable for it in tort. The power exercised by the principal over their agent, which justifies the

[20] Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL*.

[21] Dalloz 1988, 513.

[22] Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL Ltd.*

[23] Supreme Court of Mauritius 2007 SCJ 1 *Dookhy M. & ORS v. SBM*.

[24] Supreme Court of Mauritius 1992 SCJ 83 *Beau Villa v. Chuckowree and Lamco Insurance Ltd.*

liability of the former for the acts of the latter, has not been respected, and in those circumstances, nothing justifies that the principal be liable in tort for the acts of the agent.

2.2.2. Contractual Liability: A Civil Fault Must Be Committed in the Fulfilment of the Agent's Mission

Both in France and in Mauritius, if a contract generates an obligation of result (*obligation de résultat*) (Flour, Aubert, Savaux 2024, 38), the debtor will escape their contractual liability by proving the existence of a force majeure event (Flour, Aubert, Savaux 2024, 39). If a contractual debtor (principal) uses their employees (agents) in the fulfillment of the contractual obligations, the debtor cannot be exonerated of the contractual liability by proving that the employee (agent) has not committed civil fault. In that sense, the exoneration of the principal, who is the contractual debtor of an obligation of result, is more difficult than the exoneration of the principal of their tort liability for the acts of the agent, where the principal can be exonerated of their liability in tort if they prove that the agent has not committed a civil fault. In the field of contractual liability, the absence of the debtor's (principal's) fault or their employee's (agent's) fault is the risk that the contractual debtor needs to bear. For instance, if a defective machine explodes while the debtor's employee is fulfilling the debtor's contractual obligation, this absence of civil fault of the employee and their employer (the contractual debtor) will not suffice to exonerate the employer (the contractual debtor) of their liability.

The situation radically changes when the employee (agent) of the contractual debtor (principal) commits a fault not forming part of their functions and missions *(abus de fonctions*) (Terré *et al.* 2022, 1184). If the employee commits a civil fault outside the limits of their missions and functions, they cannot be considered as a tool used by their employer in the fulfillment of their contractual obligations. In this case, the subordination link, i.e., the relationship of power, between the principal and agent justifying, the former's contractual liability for the acts of the latter, has ceased. From the legal point of view the agent becomes a third party, external to the contractual debtor, and as such their act can qualify as force majeure, provided that the act has been reasonably unforeseeable and reasonably inevitable for the employer, in terms of its consequences. The employer (principal) will thus be exonerated from their contractual liability, the act of their employee (agent) falling outside the scope of the latter's functions and missions and constitutes force majeure from the employer's (principal's) point of view.

This strong bond between civil fault and the missions and functions of an agent is even more visible in the obligations of means, where the debtor of a contractual obligation does not need to provide the creditor with a result, the former only needs to put their best efforts in the fulfillment of their contractual obligation. In other words, the debtor of the contractual obligation must not commit a civil fault in the fulfillment of the obligation of means: they have to do everything that a reasonable and careful person would have done in the same circumstances (Flour, Aubert, Savaux 2024, 38–39). If the agent used by his principal in the fulfillment of the latter's contractual obligations commits a civil fault, the principal will bear civil liability as if they have personally committed that fault. On the contrary, if the agent has not committed any civil fault in the fulfillment of their missions and functions, their principal will not be held liable for the harm suffered by other contractual party.

3. DIFFERENCES IN THE CONDITIONS FOR THE CONTRACTUAL AND TORT LIABILITIES OF THE PRINCIPAL

3.1. Inequal Importance of Civil Fault

3.1.1. Tort Liability: Requirement of a Civil Fault Committed by the Agent

In France and Mauritius, the principal may be declared liable in tort only for the acts of their agent that constitute a civil fault of the latter (Terré *et al.* 2022, 1178; Bufflan-Lanore, Larribau-Terneyre 2024, 960; Cabrillac 2024, 300). Both in France (Flour, Aubert, Savaux 2024, 214–216) and Mauritius,[25] the abstract test (*appreciation in abstracto*) is applied in the assessment of whether an act of the agent constitutes a tort fault or not. This means that the act of the agent will be compared to what a reasonable and careful person, exercising the same profession, would have done in the same circumstances (see Flour, Aubert, Savaux 2024, 216–217). If their act conforms with what a reasonable and careful person, exercising the same profession, would have done in the same circumstances, no tort fault can be linked to the agent. Consequently, the principal will bear no tort liability for the acts of the agent that do not entail any tort liability. This seems very logical, as it would be very difficult to understand, in terms of the principles of tort law, why the

[25] Supreme Court of Mauritius 2020 SCJ 63 *Neron Publications Co Ltd v. La Sentinelle Ltd & Ors*; Supreme Court of Mauritius 2019 SCJ 218 *Belloguet L.F. & Anor v. Mungur I. (DR) & Ors*; Supreme Court of Mauritius 2001 SCJ 60 *Cundasamy v. The Government of Mauritius* and Supreme Court of Mauritius 2023 SCJ 195 *Mir v. IBL*.

principal should be liable for an act for which the agent is not liable. We fully agree with Flour, Aubert and Savaux that the obligation to compensate the victim for their harm, where the agent has not committed civil fault and is simply involved in the harm caused to the victim, would be difficult to justify (Flour, Aubert, Savaux 2024, 430–431). However, it is necessary to point out that in the field of tort liability of parents for the acts of their minor children, the French Court of Cassation (*Cour de cassation*) applies logical nonsense: a parent will be held in tort even though their minor child has committed no civil fault (compare Flour, Aubert, Savaux 2024, 432; see also Bufflan-Lanore, Larribau-Terneyre 2024, 960–961).[26] The solution adopted by the French Court of Cassation can be easily understood in terms of the feeling of justice, as it provides the victim with compensation for bodily harm. However, the solution fails to be explained in terms of the principles of tort law in Mauritius, as it is difficult to understand why the parents should be held liable in tort for the acts of their minor children whose acts do not constitute a civil fault.

3.1.2. Contractual Liability: Limited Scope of the Civil Fault of the Agent

Very often, both in France and Mauritius, a debtor of a contractual obligation uses the services of employees in the fulfillment of their contractual obligations. For instance, a gardening company might use the services of its employees in the fulfillment of a contract made with a client. If ever the employees of the debtor cause harm to the client, this may entail civil liability of the debtor as principal, for the acts of their agents (employees).

Both in France (Terré *et al.* 2022, 942) and Mauritius, the obligations of result (*obligations de résultat*) must be differentiated from the obligations of means (*obligations de moyen*) as far as the principal's contractual liability for the acts of their agents is concerned. In Mauritius, the landmark case on this topic is the *Butan v. Rivière de Rempart Bus Services* case,[27] where the Supreme Court of Mauritius held that the obligation of the transporter to ensure the security of passengers is an obligation of result.

[26] The case is known in France as *arrêt Levert*: Cass. 2nd Civil Chamber, 10 May 2001, No. of pourvoi 99–11.287.

[27] Supreme Court of Mauritius 1972 SCJ 189 *Butan v. Rivière de Rempart Bus Services*.

In the obligations of result, the debtor needs to provide the creditor with the result specified in the contract. For instance, the gardening company needs to clean up the client's yard while respecting the client's property. In this type of obligation, the debtor cannot escape their contractual liability by proving that they or their employee has not committed a civil fault. The use of an employee in the fulfillment of the contractual obligations is the risk that needs to be assumed by the principal (employer) (Terré *et al.* 2022, 948–949). The only means for the employer to escape their contractual liability is to prove the existence of a force majeure event, i.e., an event external to the debtor and their employee, reasonably unforeseeable for the debtor and their employee and reasonably inevitable, in terms of consequences, for the debtor and their employee (Terré *et al.* 2022, 945–946). As the use of an employee in the fulfillment of the contractual obligations is not an external event for the principal as a contractual debtor, they will be liable for the acts of their employees even though they have not committed a civil fault. The contractual liability of the debtor for an obligation of result, regarding the acts of their agent, is thus more severe for the debtor than the tort liability of the principal for the acts of their agent. The principal can avoid tort liability by proving that the agent has not committed a civil fault, whereas the principal will bear the contractual liability for the harm caused to their client and will not be able to avoid it by proving that their employee (agent) had not committed a civil fault.

The situation is different in the obligations of means, where the debtor does not guarantee the result expected by the creditor. The debtor needs only to make their best efforts, and if the result expected by the creditor is not achieved, the debtor will not bear contractual liability for it (Terré *et al.* 2022, 942–943). In Mauritius, the landmark case on this topic is *Central Electricity Board v. Auckloo*.[28]

In this type of obligation, there are factors of risk that are not under the debtor's control, and it would be unfair to hold them liable for the absence of the result expected by the creditor. For instance, in the medical contract made by a private hospital and a client, the private hospital undertakes the obligation to provide the best service possible to the patient. The latter needs to be properly informed of the risks of the medical procedures to be done, the former has to properly apply the approved medical procedures, etc. However, the private hospital does not guarantee that the patient will be healed, as the full recovery of the patient depends on their prior medical

[28] Supreme Court of Mauritius 1981 MR 92 *Central Electricity Board v. Auckloo*.

condition as well as on their habits in everyday life. This is why the debtor is contractually liable only if they have not made the best efforts in the discharge of the contractual obligation, i.e., if they have committed a civil fault. If the debtor of the obligation of means has done everything that a reasonable and careful person would have done in the same circumstances, they have not committed any civil fault and will not be contractually liable (Terré *et al.* 2022, 943). The same applies to the employees (agents) of the debtor: their fault is treated as the personal fault of the contractual debtor (Flour, Aubert, Savaux 2024, 1231). For instance, if the doctor employed by the private hospital has done everything properly and has not committed a civil fault in the discharge of the obligation to provide the client with the health care service, their employer (principal) will not be contractually liable for any bodily harm suffered by the patient (Terré *et al.* 2022, 934, 948–949). In conclusion, the tort and contractual liabilities of the principal in the obligations of means have the same intensity, as they both require a civil fault to be committed by the agent to declare the principal liable.

3.2. Inequal Place of the Agent's Civil Immunity

3.2.1. Tort Liability: The Differences Between French and Mauritian Law on the Agent's Civil Immunity

Since the *Costedoat* case in France, i.e., the judgment of the Plenary Assembly of the Court of Cassation in France dated 25 February 2000, an agent having committed a nonintentional civil fault and having remained within the limits of their mission will benefit from civil immunity, meaning that the victim could not claim compensation for their harm from the agent (Flour, Aubert, Savaux 2024, 448–449, 454, 457; Bufflan-Lanore, Larribau-Terneyre 2024, 966–968).[29] For the time being, there is no such immunity in Mauritius. The new case law in France is explained by the fact that the principal is very often insured against the harm that their agents could cause to third parties and the principal's insurer will bear the financial charge of the compensation for the victim's harm. As such insurance is still not developed enough in Mauritius, we believe that, for the time being, there is no reason to suspend the personal subjective liability of the agent.

[29] Cass. Plen. Ass. 25 February 2000, No. of pourvoi 97–17.378. and 97.20.152.

3.2.2. Contractual Liability: Lack of the Agent's Civil Immunity

In both France and Mauritius, the agent that assisted the contractual debtor, their principal, in the fulfillment of the contractual obligation will not benefit from civil immunity. However, French law will likely follow the *Costedoat* case law even in the case of contractual liability, given the highly developed insurance coverage of the principal's liability for the harm caused by their agent. Given the fact that such insurance is still not very developed in Mauritius, the agent should remain personally and subjectively liable for the harm caused to the other party to the contract made with the principal.

4. STRICT V. SUBJECTIVE LIABILITY OF THE PRINCIPAL FOR THE ACTS OF THEIR AGENTS

4.1. Principal's Tort Liability: Strict (Objective) Liability Recommended

In France, the principal's tort liability for the acts of their agent is objective, i.e., completely independent of the principal's fault while choosing and monitoring the agent. Thus, even if the principal has chosen well and has monitored well their agent, this lack of the principal's fault will not entail the exoneration from their tort liability (Bufflan-Lanore, Larribau-Terneyre 2024, 970). The principal needs to prove force majeure, to be exonerated from tort liability (Bufflan-Lanore, Larribau-Terneyre 2024, 970). In the *Jhugdamby B. v. Private Secondary Education Authority* case,[30] the Mauritian Supreme Court held that the principal tort liability for the acts of their agents was strict (objective).[31]

Objective tort liability, where the principal cannot escape liability by proving that he has not committed a civil fault, seems to be the most suitable solution for Mauritius. As the principal usually benefits financially from their agent's activity, the objective tort liability, more severe than the traditional tort liability based on fault, seems to be reasonable. In France, this idea is known as "*risque-contrepartie*" (Flour, Aubert, Savaux 2024, 417–418; Bufflan-Lanore, Larribau-Terneyre 2024, 974; Cabrillac 2024, 299). Another

[30] Supreme Court of Mauritius 2022 SCJ 56 *Jhugdamby B. v. Private Secondary Education Authority*.

[31] "In respect of vicarious liability of the principal it is objective and strict, i.e., 'no fault liability'. It means that there is no need to prove fault on the part of the principal" (translated by author).

idea has been proposed to justify the principal's objective liability for the acts of their agents: the former guarantees the solvency of the latter, and this is why the principal's liability is strict (objective) (Flour, Aubert, Savaux 2024, 420–421).

4.2. The Principal's Contractual Liability: The Nature of the Liability Depending on the Nature of the Contractual Obligation

The strength of the principal's contractual liability for the acts of their agent involved in the execution of the former's contractual obligations will depend on the nature of the contractual obligation. If an obligation is the obligation of result, the liability of the principal for the acts of their agent is rather objective, as the principal cannot escape their contractual liability by proving that they have not committed a civil fault and that everything that a reasonable and careful person would have done in the same circumstanced has been done. The only cause for the exoneration of the principal is a force majeure event that is external to the contractual debtor (principal). Every element that is intern to the contractual debtor (principal) is a legal risk that they must bear. If an agent has not committed civil fault, that will not be the cause for the principal's exoneration from the contractual liability. On the other hand, force majeure is an exceptional risk, extern to the contractual debtor (principal) and it would not be fair that they bear the consequences of this risk, as it was not reasonably foreseeable and evitable when the contract was made.

In the obligations of means, the contractual liability of the principal for the acts of their agent is necessarily subjective. Only a civil fault, defined as the behavior that a reasonable and careful person would not have had in the same circumstances, can put contractual liability on the principal's shoulders. And the principal can be exonerated of their liability if they prove that the agent has not committed civil fault.

5. CONCLUSION

In this paper, we have critically analyzed the similarities and differences between tort and contractual liabilities in France and Mauritius. We have reached the conclusion that there is a common core of conditions for the application of the civil liability of principals for the acts of their agents, namely the subordination link and the requirement that civil fault has been committed by the agent in the fulfillment of their mission. The subordination

link reflects the legal power of the principal over their agent, justifying the civil liability of the former for the latter's acts. The same can be said for the requirement of a civil fault being committed by the agent in the fulfillment of their mission: if the agent's act falls outside their mission, the subordination link has not been respected and there is no justification for the principal's civil liability. On the other hand, we have noted an inequal place of civil fault in the tort and contractual liabilities of the principal, which is due to the differences in their nature. Moreover, the immunity of the agent is treated differently in contractual and tort liabilities of the principal, and differences exist also between French and Mauritian tort law. These differences are mainly due to the place of the principal's insurer in the compensation of the victim's harm. Finally, the differences in the nature of the principal's tort and contractual liabilities are due to the nature of these liabilities and the nature of the contractual obligations. Strict (objective) liability should be preferred to the subjective one, as far as possible, given the economic benefit that the principal earns while using the effort of their agent.

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*DATA RETENTION AND CRIMINAL PROCEDURE IN SERBIA****

The use of information technology enables state authorities to prosecute perpetrators and process personal data on an unprecedented scale and in an unimaginable way, in the course of taking measures and actions to prevent, detect and investigate criminal acts. One of the disputed processing is the nonselective mass monitoring of electronic communications in the form of retention of communication data, which, given the technological development and social importance of electronic communications, can on occasion reveal more about an individual than the content of the communication itself. This form of data processing represents interference with guaranteed human rights and freedoms, and need to be legally regulated in order to prevent their violation. The authors analyze the legal framework for retention of communication data and access to retained data for the purposes of criminal proceedings in Serbia, especially in light of the relevant practices of the CJEU and ECtHR.

Key words: *Electronic communications*. – *Data retention*. – *Criminal procedure*. – *Personal data protection*. – *Privacy*.

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1. INTRODUCTION

When Edward Snowden revealed that the NSA had been extensively collecting call detail records, a large portion of the world was shocked and surprised. Although the sitting President of the United States stated in a speech early 2014, among other things, that such a system does not collect the content of phone calls or the identities of the people involved (*Washington Post* 2014), the academic and professional community also understood what had been left unsaid – that this involved the mass collection of metadata, and that such surveillance encroached on privacy without the appropriate strict criteria for its application and effective oversight by independent supervisory authorities, which was potentially also a violation of certain fundamental human rights and freedoms, steering society towards an Orwellian reality.[1] At the time this "practice" was not unique to the United States, nor is it at the present; for years, it has justifiably been the subject of public and academic discourse,[2] (inadequate) regulation, and the consequent judicial review in many countries.

EU law has influenced the legal framework for electronic communications in Serbia, including in terms of data retention and access to such data. With the adoption of the Data Retention Directives (Directive 2006/24/EC)[3] at the Union level, an obligation was created for providers of publicly available electronic communication services and public communication networks to retain certain data they collect or process in connection with these services, in order to ensure their availability to competent authorities for the purpose of detecting and proving serious criminal offences, as well as for the detection and prosecution of perpetrators of such offences. However, the Serbian legislator has not sufficiently and appropriately followed the further development of Directive 2006/24/EC and data retention regulations of EU member states, especially considering the rulings of the Court of Justice of the EU (CJEU). Furthermore, the relevant decisions of the European Court of Human Rights (ECtHR), establishing violations of the rights under the European Convention on Human Rights (ECHR) related to data retention, were also not taken into account. In this paper, the authors analyze the

1 For more on this, see Pisarić (2019, 156).

2 For more on this, see, e.g., Rojszczak 2021a; Rojszczak 2021b.

3 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105/54 of 13/4/2006.

domestic legal framework for data retention and the access of competent authorities to retained data for the purpose of criminal proceedings, particularly examining it through the lens of the decisions of the CJEU and the ECtHR.

2. LEGAL FRAMEWORK IN SERBIA

In Serbia, data retention of electronic communications, following the example of Directive 2006/24/EC, was regulated in 2010 with the adoption of the Law on Electronic Communications (LEC),[4] within Chapter XVII: Confidentiality of Electronic Communications, Lawful Interception, and Data Retention. Some provisions from this chapter were declared unconstitutional in 2013 by the Decision of the Constitutional Court of the Republic of Serbia (Decision of the CC),[5] while some were amended in 2014.[6] Following these interventions, the provisions from Chapter XVII remain in effect, despite the adoption of the new Law on Electronic Communications[7] in 2023 (LEC 2023). Namely, Article 180, para. 1 LEC 2023 stipulates that with the entry into force of this law, the previous Law on Electronic Communications ceased to apply, and at the same time, for inexplicable and legislatively unjustified reasons, establishes that certain provisions of the LEC remain in force, including the provisions on data retention. As the new regulation governing electronic communications failed (or avoided) to address data retention, the relevant provisions have unnaturally and incoherently remained outside the core text of the systemic law. For a comprehensive understanding of the legal framework for data retention, it is important to note that the general rules are contained in several articles of the LEC and are more specifically regulated in bylaws (adopted based on the law that is no longer in force). In the following sections, we will analyze data retention and access to retained data as two steps of a single mechanism.

[4] Law on Electronic Communications, *Official Gazette of the Republic of Serbia* 44/10.

[5] Constitutional Court of the Republic of Serbia, Iuz 1245/2010, 13 June 2013, *Official Gazette of the Republic of Serbia* 60/13.

[6] Law on Amendments to the Law on Electronic Communications, *Official Gazette of the Republic of Serbia* 62/2014.

[7] Law on Electronic Communications, *Official Gazette of the Republic of Serbia* 35/23.

2.1. Data Retention

2.1.1. Purpose of Retention

In the text of the original LEC, Article 128, para. 1 stipulated that the operator was obliged to retain data on electronic communications for the purposes of conducting investigations, detecting criminal offenses, and carrying out criminal proceedings, in accordance with the law regulating criminal procedure, as well as for the purposes of protecting national and public security of the Republic of Serbia, in accordance with the laws regulating the work of the security services of the Republic of Serbia and the Ministry of the Interior. The part of the provision referring to these other laws was declared unconstitutional in 2013 by the Decision of the CC.[8] The following year, Article 128 was amended, and the purpose of data retention was completely omitted. The currently LEC currently in effect simply stipulates the operator's obligation to retain data on electronic communications (Article 128, para. 1) and to keep the retained data for 12 months from the date of the communication (Article 128, para. 6), without specifying the purpose for which these obligations are established.

2.1.2. Retained Data

With regard to the data for which operators have obligations, Article 128, para. 1 LEC refers to Article 129, para. 1, which establishes the categories of data that is to be retained to meet specific needs. The answer to the question of which data is specifically retained is provided by the bylaw – the Rulebook on the Requirements for Devices and Software Support for Lawful Interception of Electronic Communications and Technical Requirements for Fulfilling the Obligation of Data Retention on Electronic Communications[9]

[8] The Constitutional Court found that the phrase "in accordance with the law regulating criminal procedure" and the phrase "in accordance with the laws regulating the work of the security services of the Republic of Serbia and the work of law enforcement authorities" are not in compliance with Article 41 para. 2 of the Constitution, as only a court is competent to permit (approve) a deviation from the constitutionally guaranteed inviolability of the secrecy of letters and other means of communication, "and not that this right is determined in accordance with the law." Translation by author. See Decision of the CC, p. 79.

[9] Rulebook on the Requirements for Devices and Software Support for Lawful Interception of Electronic Communications and Technical Requirements for Fulfilling the Obligation of Data Retention on Electronic Communications, *Official Gazette of the Republic of Serbia* 88/2015.

(Rulebook[10]) – which, in Articles 11–16, exhaustively specifies the data that operators are required to retain. The data retained is necessary for: 1) monitoring and determining the source of the communication,[11] 2) determining the destination of the communication,[12] 3) determining

[10] Originally, Article 129, para. 4 LEC stipulated that the ministry responsible for telecommunications would prescribe in more detail the requirements related to the retention of data referred to in Article 129, para. 1, having previously obtained opinions from the ministry responsible for justice, the ministry in charge of internal affairs, the ministry in charge of defense, the Security Information Agency, and the authority in charge of personal data protection,. When the CC of Serbia declared Article 128, para. 5 unconstitutional, it also invalidated Article 129, para. 4 – thus eliminating the legal basis for regulating the obligation to retain data through subordinate legislation. However, such a regulation was adopted nonetheless. Specifically, Article 127, which governs the lawful interception of electronic communications, was amended in 2014 to include, in paragraph 5, a provision that the ministry shall also prescribe technical requirements for fulfilling the data retention obligations under Articles 128 and 129 of the law. The Rulebook in question was adopted based on this provision.

[11] According to Article 11 of the Rulebook, the following data is specified: A. with regard to publicly available telephone service at a fixed location and publicly available telephone service in a public mobile communications network: the number from which the communication was initiated, as well as the name and surname of the individual, or the name of the legal entity, and the address of the subscriber or registered user; B. with regard to internet access, electronic mail, voice transmission services using the internet, and other forms of packet-switched exchange: the assigned user identifier or telephone number for each communication in the public electronic communications network; the name and surname of the individual, or the name of the legal entity, and the address of the subscriber or registered user to whom the IP address, user identification, or telephone number was assigned at the time of the communication; the dynamic or static IP address assigned by the service provider or access provider and the user identification of the subscriber or registered user; the identification of the digital subscriber line or other communication source point.

[12] According to Article 12 of the Rulebook, the following data is specified: A. with regard to publicly available telephone service at a fixed location and publicly available telephone service in a public mobile communications network: the dialed number (the number called), and in the case of additional services (call forwarding, call transfer, and conference call), the number to which the communication was forwarded, or the numbers involved in the conference call; the name and surname and address of the subscriber or registered user; B. with regard to internet access, electronic mail, voice transmission services using the internet, and other forms of packet-switched communication: the dynamic or static IP address assigned by the service provider or access provider and the user identification of the subscriber or registered user at the time of the communication; the user identification or telephone number of the voice transmission service counterpart; the name and surname and address of the subscriber or registered user, as well as the user identification of the communication counterpart; the identification of the digital subscriber line or other communication destination point; communication data (according to Article 2, para. 1, it. 8, this is the data representing signaling related to the targeted electronic

the start, duration, and end of the communication,[13] 4) determining the type of communication,[14] 5) identifying the user's terminal equipment,[15] and 6) determining the location of the user's mobile terminal equipment.[16]

communication service, network, or other user, including signaling used for establishing communication, controlling the flow of communication (for example, communication accepted, communication transferred), whose content and data are available to electronic communication operators (e.g., communication duration).

[13] According to Article 13 of the Rulebook, the following data are specified: A. with regard to publicly available telephone service at a fixed location and publicly available telephone service in a public mobile communications network: the date, time of the beginning, duration, and end of the communication; B. with regard to internet access, electronic mail, voice transmission services using the internet, and other forms of packet-switched communication: the date and time of logging in and out when using the access service, within the corresponding time zone, as well as the date and time of sending and receiving electronic mail and calls via the voice transmission service using the internet, within the corresponding time zone, for services provided by the operator.

[14] According to Article 14 of the Rulebook, the following data are specified: A. with regard to publicly available telephone service at a fixed location and publicly available telephone service in a public mobile communications network: data on the used telephone service; B. with regard to electronic mail, voice transmission services using the internet, and other forms of packet-switched communication: data on the used internet service.

[15] According to Article 15 of the Rulebook, the following data is specified: A. with regard to publicly available telephone service in a public mobile communications network: the IMSI number from which the communication was initiated and the IMSI number to which the communication was directed, as well as the IMEI number of the device used to initiate the communication and the IMEI number of the device to which the communication was directed; B. with regard to prepaid services for publicly available telephone service at a fixed location and publicly available telephone service in a public mobile communications network: the serial number of the card (for publicly available telephone service at a fixed location) and the serial number of the prepaid card, as well as the location from which the electronic top-up was made, if possible, for publicly available telephone service in a public mobile communications network; C. with regard to prepaid services for internet access, electronic mail, voice transmission services using the internet, and other forms of packet-switched communication: the serial number of the card; D. with regard to publicly available telephone service at a fixed location, internet access, electronic mail, voice transmission services using the internet, and other forms of packet-switched communication: the serial number of the device, MAC address, dynamic and static IP addresses assigned by the service or access provider, in the appropriate time zone, and other data that uniquely identifies the user's terminal device.

[16] The Rulebook in Article 16 does not specify which data is retained but rather imposes an obligation on operators to ensure the technical connection of their equipment with the equipment of the relevant state authorities, using an appropriate

Additionally, the LEC stipulates that the obligation of retention also includes data on established calls that were not answered, but not data on calls that failed to connect (Article 129, para. 2), nor data that the operator did not produce or process (Article 129, para. 5). The retention of data revealing the content of communications is explicitly prohibited (Article 129, para. 3).

2.2. Access to Retained Data

2.2.1. Purpose of Obtaining Access

The original LEC (2010) did not state the purpose of accessing retained data, and after Article 128 was amended in 2014, the current LEC (2023) first stipulates that access to retained data is not allowed without the user's consent, and then, as an exception, foresees such a possibility (Article 128, para. 2). Namely, access to retained data is exceptionally allowed "for a specific period and based on a court decision." At the same time, the LEC (2023) clearly defines the purpose of accessing retained data, which is necessary for conducting criminal proceedings or protecting the security of the Republic of Serbia,[17] while referring another law regarding the method.

The regulation that should govern access to retained data when necessary for criminal proceedings is the Criminal Procedure Code[18] (CPC). Article 286 CPC ("Police Powers") stipulates that if there are grounds to suspect that a criminal offense prosecutable ex officio has been committed, it is the duty of the police to take necessary measures and actions to locate the perpetrator, ensure the perpetrator or accomplice does not hide or flee, to uncover and secure traces of the criminal offense and items that may serve

technical interface through which data about all mobile terminal devices appearing at a specific geographical, physical, or logical location are transmitted, in accordance with the technical standards or capabilities of the particular mobile electronic communication technology.

[17] In the original LEC, the legislator defined the protection of national and public security of the Republic of Serbia as the purpose of retaining data (in Article 128, para. 1, before amendments). However, when formulating the amended Article 128 and determining the purpose of accessing retained data (Art. 128, para. 2), the legislator consistently followed the text of Article 41, para. 2 of the Constitution (which states "protection of the security of the Republic of Serbia").

[18] Criminal Procedure Code, *Official Gazette of the Republic of Serbia* 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21 – Decision of the CC, and 62/21 – Decision of the CC.

as evidence, as well as collect any information that could be useful for the successful conduct of the criminal proceeding. In order to fulfill this duty, the police may, upon the order of the preliminary procedure judge and at the proposal of the public prosecutor, 1) obtain the records of already conducted telephone communications, 2) obtain records of the base stations used, and 3) perform location tracking of the place "from which the communication is conducted" (Article 286, para. 3).

2.2.2. Manner of Access

The operator is obliged to retain data in such a way that it can be accessed without delay, or that it can be promptly provided based on a court decision (Article 128, para. 7). By analyzing the LEC and subordinate regulations, it can be noted that the competent state authorities access retained data in two ways: a) directly – by accessing the premises, electronic communication network, associated equipment, or electronic communication equipment of the operator; or b) indirectly – by having the operators provide the requested data.[19]

A clearer answer to what this means can be found in the Rulebook. The Rulebook contains a general provision stating that all data retained in accordance with the LEC must be made available to the competent state authorities, via the appropriate technical interface, for a period of the last 12 months from the date of communication, in accordance with the law (Article 9, para. 2 of the Rulebook). Regarding location data, the Rulebook, in Articles 16 and 21, requires operators to enable technical connection of their equipment with the equipment of the competent state authorities by using the appropriate technical interface, facilitating the transfer of certain communication data.[20]

[19] The clear distinction between the two access regimes to retained data also arises from the obligation to maintain records (Art. 128, paras. 8 and 9 LEC, Article 10 of the Rulebook), as well as the obligation to create a technical interface through which the retained data is made accessible to the competent authorities, as required by the Rulebook.

[20] This applies to: a) data about all mobile terminal devices that appeared at a specific geographical, physical, or logical location, in accordance with Article 16, para. 1; b) data about the current geographical, physical, or logical location of an individual electronic communication device, in accordance with Article 21, para. 1 of the Rulebook.

2.3. Data Retention, Access to Retained Data, and the Constitution

When regulating the retention of data, one important aspect was not sufficiently and appropriately considered, namely the justification for such interference with guaranteed human rights and freedoms. The LEC generally foresees, and bylaws specifically regulate, the retention of a large amount of data, which, when accessed and processed by the competent authorities – even if done for legitimate purposes – can enable the drawing of very precise conclusions about the private life of the individuals whose data is retained. This includes their daily habits, permanent or temporary places of residence, daily or other movements, activities, social relations, and the social environments they visited. All of this can have significant and potentially comprehensive effects on both the right to privacy and data protection, as well as on the right to freedom of expression and movement.

In this regard, it is necessary to consider the alignment of the relevant provisions of the LEC and the CPC with Article 41 of the Constitution of the Republic of Serbia (Constitution),[21] which guarantees the inviolability of the secrecy of correspondence and other means of communication (para. 1),[22] and permits exceptions only for a limited time and based on a court decision, if necessary for conducting criminal proceedings or protecting the security of the Republic of Serbia, in the manner prescribed by law (para. 2).

The decision of the Constitutional Court (CC), from more than 10 years ago, emphasized that constitutional protection encompasses not only the content but also the formal characteristics of communication,[23] which means that deviation from the inviolability of communication data may be permitted only if it is in accordance with the Constitution.

By itself, the general mass retention and storage of data on all communications of all users, based on the LEC, undoubtedly represents a deviation from the guaranteed secrecy of communications and can only be allowed if the conditions prescribed by the Constitution are met. However, it

[21] Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 98/06, 115/21 – amendments I-XXIX and 16/22.

[22] It is interesting to note that both the LEC and the LEC 2023 contain a rule on the confidentiality of communications. However, while Chapter XVII LEC, which contains provisions on data retention, links confidentiality only to the content of electronic communications (Art. 126), the LEC 2023 clearly recognizes both the confidentiality of the content and the confidentiality of traffic data related to electronic communications (Art. 160).

[23] Decision of the CC, p. 78.

seems that the legislator does not treat data retention as a deviation from the constitutional guarantee; it did not specify the purpose for which operators are required to retain and store data (conducting criminal proceedings or protecting the security of the Republic of Serbia). The purpose of data retention cannot be derived from the purpose of accessing retained data, as prescribed in Article 128, para. 2, because retention and access to retained data are two forms of deviation from the guaranteed rights, and each requires separate justification. Additionally, citing certain "needs" for which specific categories of data are retained, in Article 129, para. 1, is not the same as determining the purpose of data retention. Moreover, the requirements that the deviation is allowed "based on a court decision" and "for a limited period" are not considered when prescribing the obligation to retain and store data.

When regulating access to retained data, in Article 128, para. 2 LEC, the legislator consistently followed the formulation from the Constitution.[24] However, it cannot be said that the CPC, which should regulate the deviation from the guaranteed secrecy of communication for the purpose of conducting criminal proceedings, does so in a proper manner, for at least two reasons: a) deviation can only be authorized by a court decision – but a warrant is not a court decision (the CPC recognizes three types of decisions in criminal proceedings: orders, rulings, and judgments – Article 269); b) deviation is allowed only "for a limited time" – but Article 286, para. 3 CPC does not impose such a requirement.

Additionally, the authorization in Article 286, para. 3 CPC relates to the obtaining of certain retained data, specifically data on telephone communication, but not on other types of electronic communication.

[24] It is possible that the legislator, when amending Article 128, took into account the arguments from the Decision of the Constitutional Court. Namely, the Constitutional Court found that although the disputed provision (from the original Article 128, para. 1) established only a general obligation for operators to retain data and determined the purpose for which the retention is prescribed, but not the manner of using the retained data, what is controversial is that the introduction of this obligation is carried out in accordance with other relevant laws. This method establishes an obligation for operators, which may indirectly lead to a violation of the confidentiality of communication, if the retained data is not used in accordance with Article 41, para. 2 of the Constitution. This means that the data would be used without a court decision and without specifying the time frame during which it can be used, but based on resolutions from the mentioned laws. The Constitutional Court emphasized that "[t]he conditions and purpose of the allowed deviation from the confidentiality of communication are determined by the Constitution and, as such, cannot be subject to legal provisions, as the manner of exercising this right can only be prescribed by law" (Decision of the CC, p. 78, translated by author).

Accordingly, this article could not be used to gain access to all the categories and types of data that are retained based on the LEC and the Rulebook, which are not covered by it[25] – in other words, the CPC does not regulate the method of access to this data. Furthermore, a request for the delivery of such retained data, which may be directed to operators by the police or public prosecution based on the general provisions of the CPC, would be questionable from the standpoint of constitutionality.

The issue of the constitutionality of the provisions on data retention was also addressed by the Commissioner for Information of Public Importance and Personal Data Protection (Commissioner), when, more than a decade ago, they conducted oversight of the implementation of the Personal Data Protection Act[26] (PDPA) by the operators of mobile and fixed telephony in the Republic of Serbia (Commissioner 2012).[27] Based on the results of this oversight, the Commissioner and the Ombudsman prepared a Proposal of Recommendations for improving the situation in this area, containing 14 items. Our analysis cannot state with certainty that these recommendations have been fully and adequately applied to this day. The situation is similar when it comes to electronic communications operators providing internet access and internet services (Commissioner 2015).

In addition to the alignment of the legal framework on data retention and access to retained data with the Constitution being questionable, its compliance with EU law and the ECHR is uncertain, due to the failure to take into account the human rights protection standards established in the CJEU's and ECtHR's case law.

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[25] For example, Article 286, para. 3 CPC could not be used for obtaining data about a dynamic or static IP address assigned by the service provider or access provider, which is retained under Article 12 of the Regulation, or data about the date, time of login and logout during the use of access services, within the appropriate time zone, as well as the date and time of sending and receiving emails and calls via the internet voice service, within the appropriate time zone, for services provided by the operator, which is retained under Article 13 of the Regulation – even if the court issues an order to obtain such data.

[26] Personal Data Protection Act, *Official Gazette of the Republic of Serbia* 87/18.

[27] The subject of the oversight was access to retained communication data, and based on the established facts during the oversight, it was concluded that the processing of this data, individually and especially when considered together, over a period of 12 months, constitutes a serious intrusion into the privacy of citizens. It was found that this violates the constitutional guarantee of the inviolability of communication secrecy, as well as the provision that deviations are allowed only for a specific time and based on a court decision, for the purpose of conducting criminal procedure or protecting national security.

3. STANDARDS OF HUMAN RIGHTS PROTECTION

3.1. The CJEU Case Law

Although Directive 2006/24/EC was repealed more than a decade ago because it broadly and especially severely interfered with fundamental human rights, and such interference was not precisely limited to what was strictly necessary,[28] communication data is still retained in EU member states, and national regulations and the actions of competent authorities in several countries have been subject to review by the CJEU.[29] The decisions in the *SpaceNet AG*,[30] *Tele2 Sverige*,[31] *La Quadrature du Net*,[32] *Privacy International*,[33] and *Prokuratuur*[34] cases were analyzed in order to determine the position of the CJEU on data retention and access to retained data by competent authorities in member states.

3.1.1. Data Retention

The CJEU particularly addressed the purpose of data retention in its decision in the *SpaceNet AG* case. First and foremost, regarding the justification for restricting rights, the Court held that the objectives outlined in the first sentence of Article 15, para. 1 of Directive 2002/58/EC[35] are exhaustively listed. Consequently, any legislative measure adopted under this

[28] CJEU, joined cases C-293/12 and C-594/12, Digital Rights Ireland Ltd, ECLI:EU:C:2014:238, 8 April 2014.

[29] For more on this, see Podkowik, Rybski, Zubik 2021, 1608–1609.

[30] CJEU, joined cases C-793/19 and C-794/19, *SpaceNet AG*, ECLI:EU:C:2022:854, 27 October 2022.

[31] CJEU, joined cases C-203/15 and C-698/15, *Tele2 Sverige*, ECLI:EU:C:2016:970, 21 December 2016.

[32] CJEU, joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, ECLI:EU:C:2020:791, 6 October 2020.

[33] CJEU, case C-623/17, *Privacy International*, ECLI:EU:C:2020:790, 6 October 2020.

[34] CJEU, case C-746/18, *Prokuratuur*, ECLI:EU:C:2021:152, 2 March 2021.

[35] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37 of 12/07/2002.; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic

provision must effectively and strictly correspond to one of these objectives. The existence of potential difficulties in precisely determining the cases and conditions under which targeted retention should be implemented cannot justify a member state prescribing general and indiscriminate retention of traffic and location data in such a way that an exception becomes the rule.[36] Namely, the CJEU has taken a clear stance that national legislation providing for data retention must meet objective criteria, establishing a link between the data to be retained and the objective being pursued. The Court found that, according to its case law and the principle of proportionality, there is a hierarchy among these objectives, based on their importance. The significance of the objective sought by such a measure must be proportionate to the severity of the interference, with the guaranteed rights resulting from it. Accordingly, the Court emphasized that EU law is opposed to national legislation which, for the purpose of combating serious crime, provides as a rule for general and indiscriminate retention of traffic and location data, as it exceeds what is strictly necessary and cannot be considered justified in a democratic society. It is highlighted that crimes, even particularly serious ones, cannot be equated with a threat to national security. Such an equivalence would create an intermediate category between national and public security, allowing for the requirements specific to the former[37] to be applied to the latter. This is neither justified nor permissible.

The CJEU has provided member states with clear guidelines on how to regulate data retention in their national laws in a manner consistent with EU law. In its decision in the *Tele2 Sverige* case, the Court left member states the option to provide for targeted retention of traffic and location data in their national legislation, for the purpose of combating crime. However, this must be subject to appropriate authorization and effective oversight during the implementation of such measures, which should be conducted by a court or an independent body, while respecting the principles of time limitation and necessity, and ensuring that the retention is strictly required for a specifically determined and justified purpose.[38] Furthermore, in its decision

communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337/11, of 18/12/2009.

36 *SpaceNet AG*, paras. 104–113.

37 *SpaceNet AG*, paras. 70–74, 92–94 and 117–124.

38 *Tele2 Sverige*, paras. 108–112, 116–125. It should also be noted that in this decision, the CJEU expressed the view that when it comes to the objectives that may justify a national regulation that deviates from the principle of confidentiality of electronic communications, it should be noted that, as established in paras. 90 and 102 of this judgment, the enumeration of objectives in the first sentence

in the *La Quadrature du Net* case, the CJEU provided guidance on certain forms of data retention. It held that specific measures are not contrary to EU law, provided that they are prescribed by clear and precise legal rules, particularly if certain substantive and formal conditions are met. Notably, affected individuals must have access to effective safeguards against risks and the possibility of misuse.[39]

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of Article 15(1) of Directive 2002/58 is exhaustive, and access to retained data must effectively and strictly fulfill one of those objectives. Furthermore, since the aim of this regulation must be linked to the seriousness of the interference with fundamental rights caused by that access, it follows that in the area of preventing, investigating, detecting, and prosecuting criminal offenses, only the fight against serious crimes can justify such access to retained data (see *Tele2 Sverige*, para. 115).

[39] These are measures that allow for: a) general and indiscriminate retention of traffic and location data for the purpose of protecting national security in situations where the member state concerned is faced with a serious threat to national security that is real and present (imminent) or foreseeable, if the decision providing for the retention of data is subject to effective review by a court or an independent administrative body, the decision of which has a binding character, which seeks to verify whether one of those situations exists and whether the conditions and guarantees that must be provided for are respected, and if the said decision may be issued only for a period limited in time to what is strictly necessary, but may be extended in the event of the persistence of that threat, b) targeted retention of traffic and location data for the purpose of protecting national security, combating serious crime and preventing serious threats to public security, which is limited on the basis of objective and nondiscriminatory criteria, depending on the category of persons concerned or by means of a geolocation criterion, and which is determined for a period limited in time to what is strictly necessary, but which may be extended; c) general and indiscriminate retention of IP addresses assigned to the source of the connection for a period limited in time to what is strictly necessary, for the purpose of protecting national security, combating serious crime and preventing serious threats to public security; d) general and indiscriminate retention of data on the civil identity of users of electronic communication means for the purpose of protecting national security, combating crime and protecting public security; e) urgent retention of traffic and location data for a limited period of time held by those service providers for the purpose of combating serious crime and protecting national security, based on a decision of a competent authority subject to effective judicial review, respecting the limits of what is strictly necessary; f) the automatic analysis and real-time collection of traffic and location data in the event that it is limited to situations in which the State is faced with a serious threat to national security that has proven to be real and present (imminent) or foreseeable, if the use of such analysis can be subject to effective supervision by a court or an independent administrative body whose decision has a binding character, which seeks to verify whether there is a situation justifying the said measure and whether the conditions and guarantees that must be foreseen are respected, and g) the real-time collection of technical data on the location of the terminal equipment used, if it is limited to persons in relation to whom there are reasonable and clear grounds for suspecting that they are involved in any way in terrorist activities, and is subject to prior supervision by a court or an independent administrative body whose decision has

3.1.2. Access to Retained Data

In its decision in the *Privacy International* case, the CJEU concluded that EU law is opposed to national legislation allowing a state authority to require providers of electronic communication services to engage in general and indiscriminate transmission of traffic and location data for the purpose of protecting national security. Such a measure exceeds the limits of what is strictly necessary and cannot be considered justified in a democratic society.

Even in cases of specific threats to national security, the Court emphasized that the regulation must not merely stipulate that a request for access to retained data aligns with achieving the stated objective. Instead, it must prescribe substantive and formal conditions governing access to data, based on objective criteria, to define the circumstances and conditions under which the competent authorities may be granted access. Special attention must be paid to whether there is a connection between the data to be transmitted and the threat to national security, as well as whether there is a clear link between the individuals whose retained data would be accessed and the specific threat to national security.[40] This requirement applies even more strongly when access to retained data is granted for the purposes of criminal proceedings.

Furthermore, in its decision in the *Prokuratuur* case, the CJEU took the position that only the objectives of combating serious crimes or preventing serious threats to public safety can justify granting state authorities access to a set of traffic or location data. Such data may provide information about communications conducted by a user via electronic communication devices or the location of terminal equipment used, which could allow for precise conclusions to be drawn about the private lives of the individuals concerned. Other factors cannot justify such access for the purposes of preventing, investigating, or detecting crimes in general.[41] Additionally, in light of the

a binding character, in order to ensure that such real-time collection is authorized only within the limits of what is strictly necessary (*La Quadrature du Net*, paras. 168, 192). For more on this issue, see Bugarski, Pisarić 2020.

[40] *Privacy International*, paras. 74–82.

[41] In this regard, the CJEU has stated that even access to a limited amount of data or access to data from a short period of time may provide precise information about the private life of the user of the means of electronic communication. This is because the amount of data available and the specific information about the private life of the person concerned that emerges from them are circumstances that can be assessed only after access to that data. However, the authorization of a court or a competent independent authority must be given before access to the data and the information that emerges from it can be granted, so that the assessment of the seriousness of the interference that access entails is carried out in the light of the risk generally

goal of combating serious crime, access may, in principle, only be granted in relation to the data of individuals for whom there is a clear suspicion that they intend to commit, are committing, or have committed a serious crime, or have otherwise participated in such an offense.[42] To ensure full compliance with these conditions in practice, it is essential that judicial or independent oversight be conducted before the national authorities access retained data, based on a substantiated request as part of a criminal proceeding. The requirement of independence, which must be met by the body responsible for conducting prior oversight, mandates that the body act as a third party in relation to the authority requesting access to the data. This ensures that it can perform oversight objectively, impartially, and without external influence. Specifically, the requirement of independence in criminal proceedings means that the body responsible for such prior oversight must, on the one hand, not be involved in conducting the criminal investigation in question and, on the other hand, maintain a neutral position in relation to the parties in the criminal proceeding. It must have a status capable of ensuring a fair balance between, on the one hand, the interests associated with the investigative needs of crime-fighting and, on the other hand, the fundamental rights to respect for private life and the protection of personal data of the individuals whose data is accessed.

In conclusion, the CJEU stated that the public prosecutor's office, as a state body responsible for conducting investigations and, where applicable, representing the prosecution, cannot fulfill these criteria. Consequently, the public prosecutor's office is not in a position to conduct prior oversight regarding the application of measures for accessing retained data.[43] In cases of justified urgency, subsequent oversight may be carried out, provided it follows shortly after the access to data has been granted.[44]

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inherent in the category of data sought for the private life of the persons concerned, without it being important to know whether the information about the private life that emerges from it is sensitive in a particular case (*Prokuratuur*, paras. 35–45).

[42] However, in special circumstances, such as those in which terrorist activities pose a threat to essential national security, defense or public safety interests, access to data of other persons may be authorized, in cases where there are objective elements allowing the conclusion that the data in the specific case can make a real and unequivocal contribution to the fight against such activities (*Prokuratuur*, paras. 49–58).

[43] *Prokuratuur*, paras. 51–59. For more on the application of the principle of proportionality and independence of authorities regarding access to retained data, see Rovelli 2021.

[44] Regarding the question of whether the absence of prior supervision by an independent authority can be compensated for by subsequent judicial supervision of the lawfulness of access to retained data, the CJEU has pointed out that subsequent

3.2. The ECtHR's case law

To examine the compliance of domestic legal frameworks with the ECHR, the judgments of the ECtHR in the cases of *Ekimdzhiev and Others v. Bulgaria*,[45] *Škoberne v. Slovenia*,[46] and *Podchasov v. Russia*,[47] were analyzed. These cases involved complaints where applicants claimed that the retention of communication data by service providers and access to that data by competent authorities violated their rights under Article 8 of the ECHR.

3.2.1. Ekimdzhiev and Others v. Bulgaria

In the *Ekimdzhiev and Oothers v. Bulgaria* case, the ECtHR determined that, under Bulgarian law, all communication service providers are required to retain and store all subscriber, traffic, and location data of all users for six months after the end of communication, with the aim of making such data available to various competent authorities for specific purposes. Since providers are required to retain data that can, individually or in combination with other data, relate to "private life", such legally mandated retention constitutes an interference with the right to respect for private life and correspondence, regardless of whether competent authorities subsequently access the retained data.[48] Such interference is attributable to the Bulgarian state, even though it is carried out by private entities, as they are obliged by law.[49] The ECtHR further found that Bulgarian authorities may access retained communication data if it is necessary to achieve one or more legally defined purposes. In the Court's view, since any individual's communication

supervision does not enable the objective of prior supervision, which consists in preventing access to the data in question from being granted in cases that exceed the limits of what is strictly necessary (*Prokuratuur*, paras. 49–58).

45 ECtHR, *Ekimdzhiev and Others v. Bulgaria* (Application No. 70078/12), 11 January 2022.

46 ECtHR, *Škoberne v. Slovenia* (Application No. 19920/20), 15 February 2024.

47 ECtHR, *Podchasov v. Russia* (Application No. 33696/19), 13 February 2024.

48 *Ekimdzhiev and Others v. Bulgaria*, para. 372.

49 *Ekimdzhiev and Others v. Bulgaria*, para. 375. The ECtHR took an identical position in *Podchasov v. Russia* concerning the legal obligation of an internet communications service provider to retain all communications data for one year and the content of all communications for six months, and to provide access to and provide them to law enforcement or security services, in circumstances specified by law, together with the information necessary to decrypt electronic messages if they are encrypted (paras. 50–52); and in *Škoberne v. Slovenia*, which concerned the obligation of telecommunications service providers to retain and store traffic and location data relating to fixed and mobile telephony of all users

data could theoretically become necessary for one or more of these purposes, the applicants could also be affected by the contested legislation. Therefore, the Court concluded that access by competent authorities to retained communication data constitutes further interference with the right under Article 8 ECHR.[50] Regarding the justification for this interference, the ECtHR emphasized that the retention of communication data by service providers and subsequent access by state authorities in individual cases must be accompanied, *mutatis mutandis*, by the same safeguards as those required for the secret surveillance of communications.[51]

Although Bulgarian law prescribes certain safeguards aimed at ensuring that competent authorities access retained communication data only when justified (as prior court approval is required), the ECtHR concluded that this falls below the required standard of effective protection.[52] As for the

of telecommunications services for a period of 14 months and to provide it to competent authorities upon request, for certain law enforcement purposes, with various authorities being able to access such data (paras. 125–128).

50 *Ekimdzhiev and Others v. Bulgaria*, para. 376.

51 The Court pointed out that, given the technological and social developments in the field of electronic communications over the past two decades, communications data can reveal a large amount of personal data and, if collected en masse by the competent authorities, can be used to create an intimate picture of a person, through social network mapping, location tracking, internet browsing, mapping of communication patterns, insight into who the person has communicated with and when, etc. The collection of such data through mass and general retention and access to the retained data can therefore be as intrusive as the mass collection of the content of communications, which is why their interception, retention and use by the competent authorities should be analyzed in the context of the protection measures relating to the content of the communications (*Ekimdzhiev and Others v. Bulgaria*, paras. 394–395).

52 The Court found that requests for access submitted outside the framework of criminal proceedings already initiated must state the grounds and purpose for which access to the retained data is sought, as well as a full account of the circumstances showing that the data is necessary for a specific and relevant purpose. In contrast, although requests for access related to criminal proceedings should contain information on the alleged criminal offence for which access is sought, the competent authorities are not expressly required to explain in the request why the data is actually necessary (it need only contain a description of the circumstances underlying the request), nor to disclose to the judge "fully and honestly" all issues relevant for the assessment of the merits of the request for access, including issues that may "weaken" the justification of the request, nor to provide supporting materials – which may prevent the judge from properly assessing whether the request for access is valid. Furthermore, the law does not oblige the judge examining the request for access to state in the decision granting access the reasons explaining why they decided that the granting was indeed necessary and proportionate, or that less invasive measures could not have achieved the same purpose (*Ekimdzhiev and Others v. Bulgaria*, paras. 400–407).

"fate" of the retained data accessed by competent authorities, the ECtHR found that such data is simply stored in criminal case files, follows the fate of those files, and can be accessed by anyone with access to the file itself. This fails to provide an adequate level of data protection, as there are no provisions adequately regulating the storage, access, review, use, disclosure, and destruction of the data.[53] Regarding the notification of individuals whose retained data was accessed, the ECtHR found that the prescribed notification is inconsistent with established case law,[54] as notification is required in all cases, not only when the data was accessed unlawfully, and should occur as soon as possible without jeopardizing the purpose of the measure.[55] Furthermore, the ECtHR established that neither the Bulgarian Electronic Communications Act nor the Criminal Procedure Code provides a legal remedy concerning the retention or access to communication data.[56]

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[53] The relevant Bulgarian legislation provides that all communications data not used for the initiation of criminal proceedings must be destroyed within three months of receipt by the competent authorities, and that all data accessed under an urgent procedure must be destroyed immediately in the same manner, unless such access has been retrospectively confirmed by the competent judge. By contrast, no such time limit is defined for accessed data in cases where criminal proceedings have been initiated. The ECtHR noted that, although this issue appears to be covered by internal rules issued by the Chief Prosecutor, those rules have not been made publicly available, and it is unclear what they provide. Furthermore, there is nothing to suggest that the provisions of the relevant law transposing Directive (EU) 2016/680 have so far been used to fill this gap (*Ekimdzhiev and Others v. Bulgaria*, paras. 408–409).

[54] Although the Bulgarian Law on Electronic Communications requires a special parliamentary committee to notify an individual in the event that their retained communications data has been unlawfully accessed or access has been unlawfully requested, provided that such notification would not undermine the purpose for which the data was accessed – the ECtHR found such a solution unsatisfactory.

[55] The Court found that there was no indication that such notification system had been made so far on the basis of the amendments to the law transposing Directive (EU) 2016/680, which provided for the possibility for individuals to obtain such information in relation to retained and accessed communications data, nor did it appear that there had been any cases in which individuals had been able to obtain information on the retention or access to their communications data in accordance with the relevant provisions of that law. In the absence of further details, it cannot be accepted that the data protection provisions related to retained communications data are effective in that regard (*Ekimdzhiev and Others v. Bulgaria*, paras. 416–417).

[56] Also, for the newly introduced remedies, in the absence of reported decisions of Bulgarian courts, it was pointed out that, due to the lack of details on the "actual functioning" of the system of remedies related to communications data, it cannot be accepted that they are currently effective, nor is there any evidence that a remedy is available. It follows that public concerns regarding the threat of misuse of access to and use of communications data by state authorities cannot be sufficiently

Finally, in terms of oversight of access to retained data, the ECtHR concluded that existing mechanisms are inadequate to ensure that the power to access data is not abused.[57]

3.2.2. Škoberne v. Slovenia

In the *Škoberne v. Slovenia* case, the ECtHR determined that the (amended) Slovenian Law on Electronic Communications from 2004 specified various purposes for which communication data was to be retained. However, it did not include provisions limiting the scope and application of this measure solely to what was necessary for achieving those purposes, and the state failed to demonstrate that another legislative act contained such provisions. The ECtHR first emphasized that, based on established case law, as part of minimum requirements and in a manner appropriate to the specific surveillance measure, the national law must define the scope of application of the surveillance measure and ensure appropriate procedures

addressed by the present effective remedies in this regard. Namely, it is up to the State to explain that the effectiveness of the remedies it claims to be effective has been ensured and to substantiate the explanations provided, as far as possible, with concrete examples, which was lacking in the case of Bulgaria (*Ekimdzhiev and Others v. Bulgaria*, paras. 376–382).

[57] Namely, the Personal Data Protection Commission is competent to supervise the conduct of communication service providers, but it has no explicit powers in relation to the state authorities that may access retained data. However, through the relevant amendments to the legislation transposing Directive (EU) 2016/680, the Commission and the Inspectorate of the Supreme Judicial Council are tasked with supervising the manner in which state authorities process personal data for law enforcement purposes; there is nothing to suggest that these bodies have so far used these powers in relation to retained communication data. Also, the judge who grants access to retained data is not in a position to ensure effective control, because, although the competent authorities provide them with a report on the implemented measure, they have no authority to supervise or order corrective measures, are not authorized or expected to conduct on-site inspections, and perform their supervisory duties solely on the basis of reports from the competent authorities. Furthermore, although the main oversight body (a special parliamentary committee) can supervise both communication service providers and competent authorities, and has broad powers of information gathering and supervision, and annual reports show that it regularly carries out inspections through officials it employs. The shortcoming is that its members do not have to be persons with legal qualifications or experience in this field, and the committee has no power to order corrective measures in specific cases, but can only issue instructions designed to improve the relevant procedures, and if it discovers irregularities, it can only draw the attention of the competent authorities or inform the heads of the relevant authorities and communication service providers (*Ekimdzhiev and Others v. Bulgaria*, paras. 410–415).

for authorization and/or review, aimed at keeping the measure within the necessary limits. In this context, the minimum requirements also applied to the retention of communication data, considering the nature of the contested interference. The ECtHR highlighted that the clarity of a law prescribing the general and indiscriminate retention of communication data cannot in itself be considered sufficient to ensure compliance with the principles of the rule of law and proportionality. The absence of provisions or mechanisms ensuring that the measure is genuinely restricted to what is "necessary in a democratic society" for specific purposes set forth in the (amended) 2004 Act, along with the requirement to retain the data for a period of fourteen months, rendered such a regime incompatible with the state's obligations under Article 8 ECHR.[58]

To support its findings, the ECtHR referred to the case law of the CJEU and noted that a regime of mandatory, general, and indiscriminate retention of communication data for combating serious crime is inconsistent with the requirement of proportionality. Such retention cannot be systemic in nature and must be subject to independent oversight in specific cases, even in the context of protecting national security, where data retention could be mandated as a general and indiscriminate measure under strict conditions.[59]

When considering the use of data collected under such a retention regime, the ECtHR observed that, even though the CJEU and the Slovenian Constitutional Court had invalidated the retention regime, the relevant factors for assessing compliance with Article 8 ECHR in the specific case was the moment when the data was retained and accessed (prior to the invalidation of the regime) and whether the applicant had adequate legal protection at that time under the Convention – which the Court found was not the case. Furthermore, the ECtHR underlined that, although the applicant's data access was accompanied by certain safeguards (i.e., judicial approval), those safeguards alone were insufficient to render the retention regime compliant with Article 8 ECHR.[60]

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58 *Škoberne v. Slovenia*, paras. 138–139.

59 *Škoberne v. Slovenia*, paras. 140, 68.

60 *Škoberne v. Slovenia*, paras. 142–143. Furthermore, the ECtHR noted that the CJEU had similarly found, in the *SpaceNet* and *Telekom Deutschland* cases, that national legislation, which ensured full compliance with the conditions laid down by the law implementing Directive 2006/24/EC concerning access to retained data, by its very nature could not limit or even remedy the serious interferences resulting from the general retention of data – the retention and access to such data being separate interferences requiring specific justifications (*Škoberne v. Slovenia*, para. 87).

In conclusion, the ECtHR stated that, irrespective of the amount of data retained, what matters under Article 8 ECHR is that the data was retained under a general and indiscriminate regime that was found to be in violation of Article 8 ECHR.[61] In other words, when the retention of communication data is determined to breach Article 8 ECHR due to noncompliance with the "quality of law" requirement and/or the principle of proportionality, the same applies to the access to and the subsequent processing of the retained data by state authorities.[62]

3.2.3. Podchasov v. Russia

In its decision in the *Podchasov v. Russia* case, the ECtHR found, among other things, that the mere existence of a law requiring the continuous and automatic retention and storage of all internet communication data and related metadata by electronic communication providers, as well as the storage of the content of all internet communication services (used for transmitting voice, text, visual, audio, video, or other electronic communications), along with the potential access by authorities to such data and the obligation for the Telegram instant messaging and social media platform to decrypt encrypted data, constituted an exceptionally serious and unacceptable interference with the applicant's rights under Article 8 ECHR. The Court emphasized that this practice effectively impacts all users of internet communications, particularly in situations where there is no reasonable suspicion of their involvement in criminal activities or activities threatening national security, nor any other reason to believe that data retention might contribute to combating serious crime or protecting national

[61] The Court stated that it was not of any particular significance that, in convicting the applicant, the domestic courts had used a limited amount of retained data relating to a (limited) period of one month, since the application concerned a whole range of data retained and stored over a period of fourteen months, which had been obtained by the competent authorities and then processed, stored and examined for the purposes of the criminal proceedings in question (*Škoberne v. Slovenia*, paras. 145, 147).

[62] *Škoberne v. Slovenia*, para. 144. In this regard, the ECtHR referred to the position expressed by the CJEU in the *An Garda Siochana* case, where the CJEU found that communications data cannot be subject to general and indiscriminate retention for the purpose of combating serious crime and that access to such data therefore cannot be justified for that same purpose, and accordingly the ECtHR sees no reason to find otherwise in the applicant's case.

security.[63] Such a broadly prescribed obligation to retain data, without any limitations in terms of territorial or temporal scope or the categories of individuals whose personal data is retained and stored, significantly infringes upon rights protected under Article 8 ECHR.[64]

Moreover, the ECtHR highlighted as particularly invasive the obligation imposed on electronic communication service providers to install equipment providing authorities direct remote access to all retained internet communication data, as well as to the content of the communications. This allows authorities to bypass authorization procedures and access the retained communication data and content without prior judicial approval. According to the ECtHR, such a practice is unacceptable, given that requiring judicial approval before a service provider grants access to retained data constitutes an essential safeguard against abuse by authorities. The absence of such judicial oversight significantly increases the risk of arbitrariness and the likelihood of abuse, thus failing to meet the minimum requirements for protective measures.[65]

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[63] It has been pointed out that the protection provided for in Article 8 of the ECHR would be unacceptably weakened if the use of modern technologies were permitted in the criminal justice system at any cost and without a careful balancing of the potential benefits of the extensive use of such technologies against the important interests of protecting private life, i.e., protecting personal data (*Podchasov v. Russia*, para. 62).

[64] *Podchasov v. Russia*, para. 70.

[65] *Podchasov v. Russia*, paras. 72–75. It is also important to note that in the same decision, regarding the requirement to provide security services with the information necessary to decrypt encrypted electronic communications, the ECtHR notes that encryption provides strong technical guarantees against unlawful access to the content of communications and is therefore widely used as a means of protecting the right to respect for private life and the privacy of online correspondence. In the digital age, technical solutions for securing and protecting the privacy of electronic communications, including encryption measures, contribute to ensuring the enjoyment of other fundamental rights, such as freedom of expression. Moreover, encryption appears to help citizens and businesses defend themselves against misuse of information technologies, such as hacking, identity and personal data theft, fraud and inappropriate disclosure of confidential information. In accordance with the abovementioned, the ECtHR takes into account the dangers of limiting encryption described by many experts in this field, bearing in mind that it would be necessary to weaken the encryption for everyone in order to enable the decryption of communications protected by end-to-end encryption. The measures therefore cannot be limited to certain individuals and would indiscriminately affect everyone, including individuals who do not pose a threat to a legitimate government interest. Weakening the encryption by creating a backdoor would clearly make it technically possible to carry out routine, general and indiscriminate surveillance of personal electronic communications, but criminal networks could also exploit the backdoor and seriously undermine the security of electronic communications of all users. The

4. COMPLIANCE OF THE SERBIAN LEGAL FRAMEWORK WITH HUMAN RIGHTS PROTECTION STANDARDS

Certain positions expressed by the CJEU and the ECtHR in the decisions of the aforementioned cases are potentially applicable to the Serbian legal framework.

4.1. Compliance with EU Law

The Serbian LEC of 2010 was modeled after Directive 2006/24/EC, with certain provisions directly translated and incorporated into the law, adopted uncritically and without the necessary legislative adjustments (considering the legal nature of directives). Subsequent legislative interventions failed to take into account the views of the CJEU, clearly expressed in the decision annulling Directive 2006/24/EC,[66] as well as the positions outlined in several rulings concerning national regulations,[67] which was also not addressed during the adoption of the new law in 2023.

Regarding data retention, the arguments that led to the annulment of Directive 2006/24/EC – specifically its broad and particularly severe interference with fundamental human rights, without such interference being precisely limited to what is strictly necessary – can easily also be applied to Serbian law.[68] The CJEU deemed national legislation that mandates the general and indiscriminate retention of all traffic and location data for all users of electronic communication services to be impermissible and excessive, in its 2016 decision in *Tele2 Sverige*. This position was further reaffirmed in decisions such as in the *La Quadrature du Net* case in 2020 and the *SpaceNet AG* case in 2022. Accordingly, it is not difficult to conclude whether the LEC, which prescribes the obligation for general and indiscriminate retention of electronic communication data without specifying the purpose for which such data is retained, aligns with EU law. In this regard, it is essential to note

Court accordingly concluded that the legal obligation of internet communication providers to decrypt end-to-end encrypted communications poses a risk that providers of such services would weaken the encryption mechanism for all users and that the existence of such an obligation cannot be considered proportionate and legitimate (*Podchasov v. Russia*, paras. 76–79).

66 For more on this, see Pisarić (2019, 187–188).

67 For more on this, see Mitsilegas *et al.* (2023, 182–183).

68 See especially paras. 25–29, as well as paras. 54–69.

that the CJEU has taken a clear stance that both data retention and access to retained data constitute separate interferences with guaranteed rights, each requiring specific justifications.

In this regard, and concerning access to retained data for the purposes of criminal proceedings, it is questionable whether and to what extent the provisions of the CPC meet the requirements established in the case law of the CJEU. The purpose of granting access is derived from Article 286, para. 3 CPC, which states that the police are authorized to access retained data "for the purpose of fulfilling the duty referred to in paragraph 1 of this Article."[69] Such a formulation cannot be said to define the purpose of access in a specific case with sufficient precision, as it is insufficient to merely prescribe that the police may access retained data to achieve a certain goal (i.e., duties outlined in Article 286, para. 1).[70] Although the CPC prescribes conditions for accessing retained data – both material ("If there are grounds for suspicion that a criminal offence which is prosecutable ex officio has been committed") and formal (that the public prosecutor has submitted a request and the pre-trial judge has approved the collection of data by order) – the case law of the CJEU unequivocally indicates that these conditions must be based on objective criteria that more precisely define the circumstances under which access may be granted to the competent authorities in a particular case, which the CPC fails to provide. Regarding the material condition that there must be the lowest level of suspicion that any criminal offense prosecutable ex officio has been committed, it should be noted that the CJEU has taken the position that a regime of general and indiscriminate transfer of retained data to competent authorities, even for the purpose of combating serious crime, does not comply with the requirement of legal quality and/or proportionality. This applies even more strongly to access to retained data for the general purpose of combating crime, as provided for by the CPC. Furthermore, the measure under Article 286, para. 3 CPC can be applied to any individual (including those for whom there is no indication that their behavior might have any connection, even indirect or remote, to the objective of conducting criminal proceedings). The CJEU has emphasized that access should be granted only for data related to individuals for whom there is clear suspicion that they have committed a serious criminal offense,

[69] That is, "to locate the perpetrator of the criminal offence, for the perpetrator or accomplice not to go into hiding or abscond, to detect and secure traces of the criminal offence and objects which may serve as evidence, as well as to collect all information which could be of benefit for the successful conduct of criminal proceedings."

[70] See *Privacy International*, paras 74–81.

while access to the data of other individuals should only be permitted under restrictive conditions.[71] Regarding the formal condition, the case law of the CJEU suggests that particular attention should be paid to whether a connection exists between the data requested and the criminal offense, as well as whether there is a clear link between the individuals whose retained data would be accessed and the specific criminal proceedings,[72] which should be justified both in the request made by the competent authority for access and in the court's decision granting access in a specific case,[73] while the CPC does not impose such a requirement regarding either the proposal or the order.

Furthermore, it appears that Serbia has not yet considered the possibility of regulating targeted data retention and access to such data, as suggested in the decisions of the CJEU, which provide clear guidelines and criteria for a more balanced approach to resolving the relationship between protecting the public interest and interfering with fundamental human rights (for example, as determined in the *La Quadrature du Net* case). Given all of the above, and following the analysis of the relevant case law of the CJEU, it cannot be asserted that Serbia's national regulations are aligned with EU law. As a candidate country for EU membership, Serbia should take into account the positions and guidelines established in the rulings of the Union's highest court. The gravity of the (in)adequacy of the legislative solutions is further evaluated through the (non)alignment with the case law of the ECtHR.

4.2. Compliance With the ECHR

Based on the case law of the ECtHR, it could be stated that all users of electronic communication services in Serbia are victims of interference with their rights under Article 8 ECHR, due to the way regulations obligate operators to retain and store a large amount of data about the electronic communications of all their users (regardless of whether competent authorities later access it), and regulate access to retained data by competent authorities for the purposes of criminal proceedings.[74]

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71 See *Prokuratuur*, paras. 49–58.

72 See *Privacy International*, paras. 74–81.

73 For more on this, see 4.2.1.

74 See *Ekimdzhiev and Others v. Bulgaria*, paras. 372, 376; *Podchasov v. Russia*, paras. 50–52; *Škoberne v. Slovenia*, paras. 125–128.

Furthermore, since the purpose of data retention is not defined in the LEC, and there are no provisions limiting the scope and application of retention to what is necessary to achieve the purpose (instead there is a general and nonselective data retention regime), it could be concluded that such retention is in violation of Article 8 ECHR, as it does not respect the "quality of law" requirement and/or the principle of proportionality. The same would apply to access to retained data and its subsequent processing by competent state authorities for the purposes of criminal proceedings, as regulated in the CPC.[75]

Regarding the justification of such interference with the right under Article 8 ECHR, we will analyze: the provisions of the LEC, as the regulation governing data retention and access to retained data in general; the provisions of the CPC, as the regulation governing access to retained data for criminal proceedings; and the provisions of other regulations. The analysis will be conducted in light of the ECtHR's stance that, considering the importance of communication data, retention by service providers and subsequent access by state authorities in individual cases must be accompanied by the same protective measures as secret surveillance of communications.[76]

4.2.1. Request/Decision

In terms of prior authorization for access to retained data, as a protective measure that should ensure that competent authorities access retained communication data only when justified, the question arises whether the CPC regulates this issue adequately. The CPC does not stipulate what should be contained in the public prosecutor's proposal, as a request for authorization of access by the competent authority, or the judge's order for preliminary proceedings, as a decision granting access.[77] It does not require the provision of any reasoning at all, let alone showing that the condition that less intrusive measures could not achieve the same purpose has been

[75] See *Škoberne v. Slovenia*, para. 144.

[76] See *Ekimdzhiev and Others v. Bulgaria*, paras. 394–395; *Podchasov v. Russia*, para. 72; *Škoberne v. Slovenia*, paras. 119, 133–134, 137.

[77] According to the existing legal solution, it would be sufficient for the request to contain a statement that there are grounds for suspicion that a certain criminal offense has been committed and that access to the retained data is necessary in order to locate the perpetrator of the criminal offense, to prevent the perpetrator or accomplice from going into hiding or absconding, to discover and secure traces of the criminal offense and objects that can serve as evidence, or to collect all the information that could be useful for the successful conduct of criminal proceedings.

met. This implies that the procedure for authorizing competent authorities to access retained communication data does not effectively guarantee that such access will be authorized only when it is truly necessary and proportional in the specific case.[78] Based on the above, it could be said that Article 286, para. 3 CPC does not meet the quality of law standard in relation to access to retained data, as established in the practice of the ECtHR.

Also, since the ECtHR has reacted negatively to the requirement for electronic communication providers to install equipment that allows competent authorities direct, remote access to retained data, it is necessary to consider domestic regulations. Although the LEC clearly states that a judicial decision is a necessary precondition for both methods of obtaining retained data (Article 128, para. 7 LEC), the obligations of operators concerning the technical interface need to be examined carefully.[79] Furthermore, although the data pertaining to the judicial decision that serves as the basis for accessing retained data is entered into the records maintained by operators and the competent authorities that access the retained data (Articles 128, paras. 8–9 LEC), their obligation to keep these records confidential, in accordance with the Data Secrecy Law[80] (DSL), does not eliminate the potential suspicion that competent authorities could effectively bypass the authorization procedure and access the retained data directly, without prior judicial approval.[81]

4.2.2. Notification of Individuals

Regarding the notification of individuals whose retained data has been accessed by the authorities, the ECtHR emphasized that notification is required in all cases as soon as it can be carried out without jeopardizing the purpose for which the measure was taken.[82] However, in Serbia, individuals

[78] See *Ekimdzhiev and Others v. Bulgaria*, paras. 400–407; *Škoberne v. Slovenia*, paras. 142–143.

[79] Operators are obliged to make the retained data available via an appropriate technical interface (Art. 9, para. 2 of the Regulation), i.e., to enable the technical connection of their equipment with the equipment of the competent state authorities by using an appropriate technical interface that enables the transfer of certain communication data (Arts. 16 and 21 of the Regulation).

[80] Data Secrecy Law, *Official Gazette of the Republic of Serbia* 104/09.

[81] See *Podchasov v. Russia*, paras. 72–75.

[82] See *Ekimdzhiev and Others v. Bulgaria*, paras. 416–417.

are not notified that their data has been accessed based on the Article 286, para. 3 CPC,[83] instead, they have the right to file a complaint with the relevant judge for the preliminary procedure (Article 286, para. 5 CPC).[84]

The accused may only learn of the access to their retained data indirectly by reviewing the case files, but only after the court hearing (Article 251, para. 1 CPC). In this regard, it should be noted that, alongside the prosecutor's proposal and the judge's order for the preliminary procedure, the retained data accessed by the authorities should be included in the case files – even though the police are not required to submit a report on the obtained data to the judge for the preliminary procedure or to the prosecutor (there is only a general obligation to notify the prosecutor about the measures taken, as stated in Article 286, paras. 2 and 3).

For the exercise of the rights of individuals whose retained data has been accessed for criminal procedure purposes, including the right to be informed, provisions in the PDPA[85] may be relevant, particularly the provision on the right to access data (Article 27) and the provision restricting this right (Article 28).[86] Regarding submitting a request to the controller to exercise rights related to the processing of personal data (Article 27 PDPA), a question arises: if an individual has no information, or even indirect knowledge, about the retention and access to the data that concerns them, would it be realistic

[83] The CPC regulates the issue of informing persons only in relation to special evidentiary actions (Art. 163 CPC), but it is questionable whether it does so in an adequate manner, i.e., in accordance with the practice of the ECtHR.

[84] In this regard, see 4.2.3.

[85] In particular, the provisions regulating the provision of information and the methods of exercising the rights of data subjects is carried out by competent authorities for specific purposes (Art. 21), the right of the data subject to have certain information made available to them or to provide it (Art. 25), the right to access data (Art. 27), the right to erasure or restriction of processing (Art. 32), and the right to be informed of the correction or erasure of data, as well as the restriction of processing (Art. 34). For more information on the methods of exercising the rights of natural persons in relation to the processing of personal data, see Kalaba, 2023.

[86] These restrictions cannot last forever and indefinitely, but only to the extent and for such duration as is necessary and proportionate in a democratic society in relation to respect for the fundamental rights and legitimate interests of the individuals whose data are processed, and the authorities would have to justify their decision with clear reasons based on law. Further consideration of these issues is beyond the scope of this paper.

to expect them to submit such a request in order to find out whether and how their data has been collected and processed by the relevant authorities for criminal proceedings?[87]

4.2.3. Legal Remedy

The notification of individuals whose retained data has been accessed is a necessary prerequisite for exercising the right to an effective legal remedy concerning access to retained data for the purposes of criminal proceedings. Considering that the individual is unaware that the measure under Article 286, para. 3 has been applied to them – since they are not notified about the access to retained data concerning them – the question arises regarding their right to file a complaint to the investigating judge (Article 286, para. 5). Even if the individual were notified or became aware by inspecting the case files, questions arise about what circumstances the complaint would address, what it would seek, etc. Moreover, it is questionable whether the complaint constitutes an effective legal remedy against the order, partly because the investigating judge to whom the complaint is addressed is the one who issued the order in the first place, and it is unclear what the judge could do in response to the complaint. For all these reasons, it cannot be said that the CPC adequately regulates the right to an effective legal remedy concerning access to retained data for criminal proceedings.[88]

The provisions of the PDPA may also potentially be relevant regarding access to retained data for criminal proceedings. These provisions allow individuals whose data are being processed by competent authorities for specific purposes[89] to exercise their rights through the Commissioner, in accordance with their powers prescribed by that law (Article 35). Individuals whose retained data is concerned may address a complaint to

[87] It should also be noted that the Personal Data Protection Act provides for two regimes for the processing of personal data – general and specific. For more information on the general and specific processing regimes, see Milić, Kalaba 2023.

[88] See *Ekimdzhiev and Others v. Bulgaria*, paras. 376–382.

[89] On the difficulties of determining the entities that can be considered the competent authority that processes personal data for specific purposes, see Milić, Kalaba 2024.

the Commissioner for the protection of their rights under this law (Article 82), with the decision subject to review by the Administrative Court (Article 83) or by filing a lawsuit in court (Article 84). The extent to which these legal remedies can be considered effective is beyond the scope of this paper.

4.2.4. The "Fate" of Retained Data

The ECtHR has examined how the fate of the retained data accessed by competent authorities is regulated in situations where criminal proceedings have not been initiated and where the collected data has been included in criminal case files.[90] Regarding the storage, access, examination, use, disclosure, and destruction of retained data accessed by competent authorities for criminal proceedings, determining whether Serbia ensures an adequate level of protection requires consideration of several legal provisions.

The LEC obliges operators to undertake specific protective measures to ensure that retained data is safeguarded against accidental or unauthorized destruction, accidental loss or alteration, unauthorized or unlawful storage, processing, access, or disclosure (in accordance with the PDPA Article 130, para. 1, it. 3), and destroyed after 12 months from the date of communication (Article 130, para. 1, it. 4).[91] Concerning the data preserved and submitted to competent authorities, the LEC also requires operators (not the authorities receiving the data) to protect such data against accidental or unauthorized destruction, loss, alteration, unlawful storage, processing, access, or disclosure. However, in this case, the obligations align with the DSL.[92] Although the 12-month destruction period does not apply, the LEC provides no further rules, with the issue being regulated by other laws. Unfortunately, Serbia still lacks comprehensive regulation governing the processing of

[90] See *Ekimdzhiev and Others v. Bulgaria*, paras. 408–409.

[91] Supervision of the implementation of these obligations is carried out by the Commissioner (Art. 130, para. 3 LEC).

[92] Supervision of the implementation of these obligations is also carried out by the Ministry of Justice, as the body in charge of supervising the implementation of the DSL (Art. 130, para. 3 LEC).

personal data by judicial authorities. Regarding retained data accessed by the police, protective measures are outlined in the Law on Records and Data Processing in Internal Affairs[93] (Law on Records[94]).

The CPC does not contain provisions on the fate of accessed retained data where criminal proceedings are not initiated (e.g., it does not mandate its destruction within a specific timeframe or under certain conditions),[95] However, we should have in mind that under the Law on Records[96] the police maintain records of access to retained telecommunications data,[97] that such data is classified as secret and is stored permanently (Article 42, para. 2),[98] i.e., regardless of whether criminal proceedings are initiated or

[93] Law on Records and Data Processing in Internal Affairs, *Official Gazette of the Republic of Serbia* 24/2018.

[94] Article 42, which regulates the recording of applied operational and operational-technical means, methods and actions, stipulates that the Ministry collects and processes data in accordance with the regulations governing criminal procedure (CPC) and electronic communication (LEC).

[95] As it does so by an explicit provision on the handling of material collected through the conduct of special evidentiary actions (Art. 163 CPC).

[96] Article 42, which regulates the recording of applied operational and operational-technical means, methods and actions, stipulates that the Ministry collects and processes data in accordance with the regulations governing criminal procedure (CPC) and electronic communication (LEC).

[97] The records contain data from the judge's order for the previous proceedings of the competent court, on the basis of which access to the retained data is granted, which may relate to: the person's name and surname, the name of one of the parents, nickname, personal identification number, date, place, municipality and country of birth, the person's address of permanent/temporary residence, nationality, place of work, telephone number or IMEI number of the phone, user number, e-mail address, type of vehicle and device, vehicle registration plate, which are covered by the court order, i.e., data necessary for monitoring and determining the source of communication, determining the destination of communication, determining the beginning, duration and end of communication, determining the type of communication, identifying the user's terminal equipment, and determining the location of the user's mobile terminal equipment (Art. 42, para. 1).

[98] Although Article 42, paras. 3 and 4 CPC that the Ministry shall retain data processed in accordance with This law until the statute of limitations for criminal prosecution expires, as part of its duty to take the necessary measures and actions to locate the perpetrator of the criminal offense, to prevent the perpetrator or accomplice from hiding or absconding, to discover and secure traces of the criminal offense and objects that may serve as evidence, and to collect all information that could be useful for the successful conduct of criminal proceedings – that is, in accordance with Article 286 CPC, including obtaining records from Article 286, paras. 3–5 CPC – para. 2 of the same article specifically and in a significantly different manner regulates the retention period for records of access to retained data (and thus the retention period for retained data entered into the records).

their outcome. This raises questions about compliance with the PDPA as well as Directive 2016/680. Further analysis of this issue falls outside the scope of this paper.

Regarding the fate of retained data accessed when criminal proceedings are initiated, the CPC stipulates that case files may be reviewed, copied, and recorded by anyone with a justified interest: during the proceedings (including the preliminary investigation),[99] with permission from the prosecutor[100] or the court; and after the conclusion of the proceeding, with approval from the court president or an authorized official (Article 250 CPC).[101] Access to case files is restricted only if classified – however, unlike special evidentiary actions, data regarding the proposal, decision, and execution of the measure under Article 286, para. 3 is not classified. Additionally, the CPC does not explicitly mandate that the prosecutor's proposal, investigating judge's order, or report on collected data be classified in accordance with regulations on secret data,[102] considering the ECtHR's position that an adequate level of protection for retained data cannot be ensured when it is included in case files and follows their trajectory – thus allowing access to anyone with access to the case file. It is necessary to review how this issue is addressed in Serbia.

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[99] Given the meaning of the term "proceedings" within the meaning of Art. 2, para. 2, item 14 CPC.

[100] In this regard, it should be emphasized that when granting permission to review a document or case, or to issue a photocopy of a document, even to persons with a justified interest, the public prosecutor takes into account the stage of the proceedings in the case and the interests of the regular conduct of the proceedings, in accordance with Article 65 of the Rules of Procedure in Public Prosecutor's Offices (Pravilniku o upravi u javnim tužilaštvima, *Official Gazette of the Republic of Serbia* 110/2009, 87/2010, 5/2012, 54/2017, 14/2018 and 57/2019). The CPC also stipulates that the review of a document may be denied by decision or conditioned by a ban on the public use of the names of participants in the proceedings, if the right to privacy could be seriously violated (Art. 250, para. 3 CPC).

[101] In addition, the documents of a legally concluded criminal proceeding are kept in accordance with the Court Rules (Court Rules, *Official Gazette of the Republic of Serbia* 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015, 113/2015, 39/2016, 56/2016, 77/2016, 16/2018, 78/2018, 43/2019, 93/2019 and 18/2022), which regulates the method of archiving and the periods for storing archived cases in criminal proceedings, counting from the date of the legal validity of the proceeding, and depending on the outcome of the proceeding (in particular, considering the type and amount of the imposed sanction).

[102] See *Ekimdzhiev and Others v. Bulgaria*, paras. 408–409.

4.2.5. Supervision

When it comes to overseeing access to retained data, it is questionable whether and to what extent the existing mechanisms in Serbia can ensure that the access powers are not misused.

The Ministry of Information and Telecommunications is responsible for inspecting the implementation of the LEC and related regulations governing electronic communications activities, carried out through telecommunications inspectors (Article 163 LEC 2023).[103] However, inspectors are not authorized to supervise the exercise of access by competent authorities, let alone assess the justification for accessing retained data in specific cases. Moreover, the supervision of compliance with obligations to implement data protection measures (Article 130, para. 3 LEC) does not include oversight of how competent authorities handle such data.

As for monitoring access based on records kept by operators and competent authorities, the records maintained under Article 128, paras. 8 and 9 LEC are classified as secret. Consequently, the declassification of such data or documents containing classified information would be possible only under conditions prescribed by the DSL. Regarding the records of requests for access to retained data (Article 130a LEC), which are submitted annually to the Commissioner for Information of Public Importance and Personal Data Protection, they include only summary statistics on requests and granted access. Importantly, they explicitly do not contain personal data related to the accessed information (Article 130a, para. 3 LEC).[104] This approach limits

[103] In addition to the authority under the law governing the performance of inspection tasks, the inspector is authorized, among other things, to inspect the actions of a business entity in relation to the implementation of measures to protect personal data and privacy (Art. 166, para. 1, it. 6 LEC 2023), and the actions of operators in relation to providing access to retained data (Art. 166, para. 1, it. 7 LEC 2023). If illegalities in the application of regulations are identified during the course of inspection, the inspector is authorized to impose certain measures.

[104] The problem of submitting the aforementioned records to the Commissioner has been the subject of analysis for several years by several nongovernmental organizations dealing with data privacy, digital security and transparency of the work of government bodies. In their reports and analyses, they indicate that in addition to a significant decline in transparency in reporting by operators and competent authorities regarding their practices of accessing retained data, which is most evident in the failure to provide information on independent access to data, the problem is also manifested in visible differences in the reports. It is also emphasized that since Article 130a of the Law on Electronic Communications does not regulate the content of the records to be submitted to the Commissioner with sufficient precision, the scope for arbitrary interpretation of this legal obligation is quite wide and seems to depend on the goodwill or, at best, on the

(but does not exclude) the Commissioner's ability to perform effective oversight in individual cases, considering the powers conferred by the PDPA. Whether these powers are adequately defined and can be efficiently applied in practice is another matter.

Regarding the CPC "oversight mechanism", the investigative judge who issues an access order is not in a position to supervise how the access is exercised or how the retained data is used. Access to retained data must be reported to the public prosecutor immediately, and no later than 24 hours after the action is taken (Article 286, para. 4 CPC) – but not to the issuing judge. Given the jurisprudence of the CJEU and the ECtHR, where a public prosecutor cannot be considered an independent body for supervising data access, the adequacy of Serbia's solution is debatable. The CPC does not require any report on data access to be submitted to the judge, nor that the judge be notified of the destruction of irrelevant or useless accessed communication data. Regarding a judge's potential reaction to a complaint filed by a data subject (Article 286, para. 5), it remains unclear what powers the judge would have in such cases.

5. CONCLUSION

In Serbia, operators are required to engage in mass retention and storage of a vast amount of data on all the electronic communications of their users, for 12 months from the time of communication. This obligation, prescribed by the LEC, lacks a clear purpose and justification. On the other hand, the LEC allows access to such data only in exceptional cases – "for a specific period" and "based on a court decision" if it is "necessary" for conducting criminal proceedings or protecting the security of the Republic of Serbia, as stipulated by other laws. Access to retained data, mandated by the LEC, is exercised for criminal proceedings under the CPC, however, this regulation does not address the issue adequately.

procedures established at the corporate level of a particular provider of electronic communications services. The practice could change if amendments to the law or appropriate secondary legislation (e.g., regulations) were to prescribe a mandatory form for submitting records of retained data, the elements of which would have to contain uniform information. The current practices of operators and competent authorities represent more of a formal fulfillment of the obligation than the substantive intention of the law to prescribe a mechanism for transparency in the retention of electronic communications data and access to that data (SHARE Foundation 2021; 2019; 2018).

The domestic legal framework has thus faced criticism due to potential inconsistencies with the Constitution and misalignment with the ECHR and EU law. It is important to note that Serbia, as a member of the Council of Europe and a candidate for EU membership, is obligated to harmonize its regulations and their implementation with the laws of these international organizations, a task that, so far, appears to have been inadequately or insufficiently addressed. In this paper, the authors clearly identify these inconsistencies, referencing relevant rulings of the CJEU and the ECtHR.

The case law of the CJEU unequivocally indicates that general and indiscriminate retention of communication data, as prescribed by the LEC, cannot be justified in itself and is contrary to EU law. Regarding access to retained data by competent authorities for criminal proceedings, the legal framework in the CPC cannot be considered limited to what is strictly necessary "in a democratic society". Consequently, based on the analysis of the relevant case law of the CJEU presented in this paper, it cannot be stated that the positions and guidelines established in the rulings of the Union's highest court have been considered so far, although it would be desirable for the legislator to address them.

As for the compliance of domestic regulations with the ECHR, the ECtHR's case law suggests that, considering that obtaining communication data through mass and general retention and access to retained data can be as intrusive as the mass collection of communication content, the general retention of communication data by communication service providers and access to such data by competent authorities in individual cases must, *mutatis mutandis*, be accompanied by the same safeguards as secret surveillance of communications. Should proceedings be initiated before the ECtHR against Serbia for violations of rights under the ECHR concerning data retention and access to retained data for criminal proceedings, it is likely that the ECtHR, as in the case of Slovenia, would find that the existing provisions forming the basis for data retention and storage fail to meet the "quality of law" requirement and cannot limit "interference" with the rights under Article 8 ECHR to what is "necessary in a democratic society." Furthermore, the retention, subsequent access, and processing of communication data under such a legal framework would be deemed incompatible with the Convention.

It can also be reasonably assumed that the ECtHR would undoubtedly point out, as it did in the case of Bulgaria, that Serbia must make necessary amendments to its domestic legal framework to end the violation of rights and ensure that its regulations are compatible with the Convention.

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FORMING THE ASSEMBLY AS A LEGISLATIVE BODY IN ANCIENT GREECE

In every democratic society, the role of the assembly is of utmost importance, as it is a political body whose main task is to represent the will of the people. While societies and states have evolved over the centuries and became more complex, both ancient and modern democracies have faced similar issues, the most important one being the creation of efficient democratic mechanisms that will truly allow the voice of the people to be heard and enacted. In this paper, the authors will focus on the evolution of the assembly in ancient Greece, in an attempt to draw conclusions that would also benefit the modern world.

Key words: *National assembly*. – *Legislation*. – *Legislation process*. – *Democracy*. – *Ancient Greece*.

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1. INTRODUCTION

Although they are centuries removed from the present day, ancient civilizations can still offer us insights that are crucial for understanding the roots and essence of many modern institutions. To better understand current issues, it is sometimes necessary to look back to the very beginning and analyze how the first societies overcame similar challenges.

When it comes to the lawmaking process and its challenges, what better role model to turn to than ancient Greece, especially ancient Athens, which is considered the cradle of democracy. The Greeks began to enact laws in the mid-7th century BC,[1] and since that moment legislation became an important element in supporting the development of the polis and its authority, especially in the Archaic Period (Gagarin 2013, 222). Over time, the popular assembly in ancient Greece evolved from the least significant to the most important bearer of legislative and other branches of power. The two most prominent city-states (poleis) typically studied in the context of ancient Greek law and government are Sparta and Athens: Athens, because the preserved sources predominantly reveal information about its constitution and society, and Sparta, as there is no other Greek polis that can be so successfully contrasted with Athens. The constitutions of other poleis are very obscure, and information about them is either fragmentary or nonexistent. While no sources from Sparta have been preserved, there are still a decent number of accounts that document the Spartan legal system and allow us to successfully reconstruct some of its segments.

Some warning must be given: all the information about Spartan law and its institutions comes from various Greek authors and their historical, biographical, philosophical, and theatrical works. Relying solely on these sources always carries the risk of making scientific conclusions based on the ancient authors' subjective perceptions of the topics they focused on. Caution is necessary, especially considering that in the late 5th century BC Athenian intellectuals had a strong fascination with Sparta. Most of them had never even visited Sparta, yet they idealized it and considered it morally superior due to its values and prioritization of common interests over individual

[1] The oldest preserved laws come from the city of Dreros on the island of Crete, enacted between 650 and 600 BC (Jordović 2011, 86). There were also Draco's laws, from around 621 BC, and the laws of Zaleukos of Locris, also from the 7th century BC.

ones (MacDowell 1986, 15).[2] This attitude was especially widespread after Athens suffered defeat at the hands of Sparta in the Peloponnesian War, and its democracy was not as stable as it used to be, which caused dissatisfaction among the Athenians.

Unsurprisingly, more details are available about the ancient Athenian legislative procedure. We will attempt to determine the extent to which the people had an active role in shaping the laws in each of these poleis – whether they had the ability to freely propose laws, discuss their content and form, enact, and nullify them.

2. SPARTA

Ancient Sparta, an oligarchic monarchy, is a typical example of an ancient Greek polis. While ancient Athens managed to outgrow its initial aristocratic organization through a series of reforms and subsequently took pride in its new democratic constitution, it was an exception to the general rule: most ancient Greek poleis were ruled by an aristocratic council, and their assemblies had very limited power. That form of political dynamic was also mirrored in the legislative procedure, leaving the people with little opportunity to influence the form and content of laws.

As mentioned in the introduction, the biggest hindrance to uncovering the Spartan constitution is the lack of sources. There is not a single original legal text preserved, due to the Spartan tradition of keeping their laws (*rhetrai*) in oral form. The main authorities on this topic are various Greek authors, many of whom had never visited Sparta, yet they wrote about it, based on their personal perceptions, combined with information gathered from the other authors. The ones we will primarily focus on are Plutarch, Xenophon, Diodorus Siculus, Aristotle, and Thucydides.[3] Other authors will be mentioned as well, but these five offer some crucial information about the lawmaking procedure in Sparta.

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[2] Even Aristophanes mentioned "Spartan mania" in one of his plays. In a dialogue between a herald and an Athenian citizen, the herald says: "Before your city was built, all men had a mania for Sparta: long hair and fasting were held in honor, men went dirty like Socrates and carried staves. Now all is changed." (Aristoph. *Birds* 1280–1281)

[3] Among them, only Xenophon and Thucydides had actually visited Sparta. Herodotus had visited it as well, though the information he offers about the participation of Spartan people in lawmaking is scarce.

The origins of Spartan constitution are closely connected to the story of Lycurgus – a legendary Spartan king and lawmaker, who is credited with shaping the Spartan state, law, and society, creating the "good order" (*eunomia*), and promoting desirable moral values to his people, by weaving them into every aspect of both private and public life in Sparta. There has been much scholarly debate about the existence of Lycurgus, with some authors believing he was a historical figure, while others argue he was a mythological ruler.[4] Whether Lycurgus was real or not is of no importance for the purpose of this paper. Spartans certainly would not have been the only people who created a mythical shrine around the origins of their state.[5] It was fairly common in the antiquity to connect the state-founders or great law-makers to gods and oracles, as this was a way to shape a people's identity and give the greatest authority and legitimacy to their existence.

2.1. The Great Rhetra

The one thing that is more important than the realness of Lycurgus is the Great Rhetra – the most important Spartan law, which defined the constitution and created the oligarchic political dynamic between the institutions. There are two explanations behind its creation.

The first and most commonly encountered explanation in the texts relies on mythology. Apparently, the state of affairs in Sparta was terrible before Lycurgus: lawlessness and confusion had plagued the state for a very long time (Plut. *Lyc.* 2.3; Hdt. 1.65.2; Plat. *Laws* 691e – 692a). When Lycurgus finally came to power, he first traveled to Delphi to consult the Pythian priestess about the new constitutional order he wanted to establish in Sparta. The priestess gave him a favorable answer, told him he was "rather god than man", and said that the Apollo had granted his prayer for good laws,

[4] What contributes to this confusion is the lack of certain facts about his life. Plutarch acknowledges this, while noting the contradictory information regarding the alleged time of his rule (Plut. *Lyc.* 1).

[5] For example, the Athenians credited their existence to the mythical king Ion, who allegedly divided the population into four tribes, each tribe into 3 phratries, each phratry into 30 gentes, and finally every gens into 30 families. Theseus, a legendary divine hero, was celebrated for unifying these four tribes into one people. Similarly, while the most famous Athenian lawgiver, Solon, was a historic figure, the respect and authority he gained reached an almost mythical level. Decades after his time, he was credited as a maker of many laws, which he actually did not create, simply because his authority was so great that individuals wanted to use it to strengthen or legitimize lesser-known or dubious laws. Similarly, Gortyn had its own legendary figure, King Minos.

promising him the best constitution in the world (Plut. *Lyc*. 5.3). Lycurgus then brought the oracle back to Sparta, established the new order, and later returned to Delphi for final confirmation that the laws were good (Plut. *Lyc*. 29.4; Xen. *Const. Lac.* 8.5). The divine oracle he delivered is what is called the Great Rhetra.

The second explanation encountered in the sources is of a more mundane nature: right before becoming a basileus, Lycurgus spent a certain amount of time traveling around the Mediterranean and becoming acquainted with foreign constitutions. According to the historians, he visited: Crete – whose institutions allegedly impressed him enough that he decided to copy them in Sparta; Asia – whose forms of government he studied and compared to those he was already familiar with; and Egypt – whose laws inspired him to commit to separating the military class from other social classes in Sparta and remove mechanics and artisans from participation in government (Plut. *Lyc*. 4.1, 4.3, 4.5; Arist. *Pol.* 1271b). It is plausible that the Great Rhetra was actually a creation of the Spartan institutions, that Lycurgus, having gathered all this constitutional knowledge during his travels, drafted the laws and initiated their enactment through legislative procedure, where both the Gerousia and the assembly were involved. He could have visited Delphi afterward, to receive confirmation from the god that the constitution he had established was good, thus giving it the necessary divine legitimacy The laws, however, would have been a human creation in this second explanation, unlike in the first one, where they were of divine origin. Herodotus says "Some say that the Pythia also declared to him [Lycurgus] the constitution that now exists at Sparta, but the Lacedaemonians themselves say that Lycurgus brought it from Crete when he was guardian of his nephew Leobetes, the Spartan king" (Hdt. 1.65.4). Chrimes (1971, 476) further explains that at the time, it was probably common knowledge among Spartans that Lycurgus had visited Crete, and that there were similarities between the two constitutions, which undermined the story of the Delphic origins of the laws. Additionally, the Oracle was no longer as trusted by Spartans as before, since control of the shrine had been taken over by the Phocians, who were known to be pro-Athenian. Furthermore, during Cleomenes' war with Argos, the Oracle gave the Spartans bad advice, which resulted in their defeat (Hdt. 6.80.1), and once more, when the Oracle advised them to march against the Tegeatae instead of the Arcadians, which also resulted in a defeat (Hdt. 1.66.2). All of this likely weakened trust in the Oracle, and the belief in the mythological origins of the laws was abandoned by at least part of the population. Wade-Gery also believes that the Great Rhetra was a creation of the Spartan institutions, not the Oracle (Wade-Gery 1943, 62).

Whether the Rhetra was created by the Oracle and delivered to Lycurgus, or it was drafted by him and enacted by the governing bodies through a legitimate legislative procedure, is also of little relevance to our study – what matters is its contents. The existence of the Great Rhetra has been attested to by several ancient authors, and the full text of it can be found in Plutarch's *Lycurgus*. The Rhetra goes as follows: "'When thou hast built a temple to Zeus Syllanius and Athena Syllania, divided the people into 'phylai' and into 'obai,' and established a senate of thirty members, including the 'archagetai,', then from time to time 'appellazein' between Babyca and Cnacion, and there introduce and rescind measures; but the people must have the deciding voice and the power.'" (Plut. *Lyc*. 6.1).

Sometime later,[6] during the reign of Kings Theopompus and Polydorus, a clause was added to this Rhetra: "But if the people should adopt a distorted motion, the senators and kings shall have power of adjournment" (Plut. *Lyc*. 6.4 and 7.1).

We gain some basic information about Spartan institutions from the Rhetra. A senate of 30 members was established, including the *archagetai*, which is probably a term for the kings. This senate was the Gerousia, an aristocratic council consisting of 30 members: 28 were aristocratic men over the age of 60 (the elders), and two were the kings (Plut. *Lyc.* 26.1). The Rhetra further states that they would "from time to time 'appellazein'" in a certain geographic location to introduce and rescind measures. We will not engage in a philological discussion about the exact meaning of the term *appellazein* (see Chrimes 1971, 419–421; Wade-Gery 1943 and 1944), but it does seem that it represents some form of assembling where the people were also included. Obviously, the purpose of those meetings was "to introduce and rescind measures", but the people had the final say, meaning that they probably voted on the suggested measures and decided whether they should be introduced or not. To summarize: there were two kings, a senate (a Gerousia, consisting of 28 elders and two kings), and an assembly of Spartan citizens. They would periodically meet to decide on certain measures (which could have included both decrees and laws, *psephismos* and *nomos*), in such a way that the Gerousia would make a proposal, and the assembly would vote for or against the proposal.

[6] We again encounter the timeline issue, as the exact years of Lycurgus' life are uncertain. Most authors place him in the 8th century BC. Plutarch claims that Theopompus and Polydorus introduced the changes about 30 years after the time of Lycurgus.

The addition to the Rhetra is where things get interesting. Plutarch (Plut. *Lyc*. 6.4) mentions Kings Theopompus and Polydorus as its authors. Apparently, the creator of the Great Rhetra had not intended for the people to have the right to discuss the proposals put forward by the Gerousia, but only to agree or disagree with them. It seems that in the decades following Lycurgus' time, the people's assembly had begun to oppose the proposals, asking that parts of them be removed or added before voting. This distortion of the Lycurgan constitution prompted the creation of the addition to the Rhetra, which clarified the role of the people: they were to simply vote "for" or "against" the proposals without altering them, and if they ever attempted to adopt a distorted motion, the Gerousia had the right of veto. The full text of the Rhetra (main text and the addition) is also confirmed by the Spartan poet Tyrtaios:[7]

> *Phoebus Apollo's the mandate was which they brought from Pytho,*
> *Voicing the will of the god, nor were his words unfulfilled:*
> *Sway in the council and honours divine belong to the princes*
> *Under whose care has been set Sparta's city of charm;*
> *Second to them are the elders, and next come the men of the people*
> *Duly confirming by vote unperverted decrees.* (Plut. *Lyc.* 6.4)

Around the time when the addition to the Rhetra was made,[8] another institution emerged – the Ephorate. Both Plutarch and Aristotle claim that it was King Theopompus who introduced the five ephors to the polis, with the task of controlling the kings (Plut. *Lyc.* 7.1; Arist. *Pol.* 1313b). Over time, the Ephorate became the most powerful body in Sparta (Arist. *Pol.* 1270b, 1271a). The final constitutional order was as follows: two kings, five ephors, the Gerousia, and the assembly.

2.2. The Role of the Assembly

Participation in the assembly was reserved only for Spartiates[9] over the age of 30. Unlike the Gerousia, the assembly was not aristocratic – every Spartiate who met the required conditions (age, land ownership, and income) had the right to attend the meetings and vote.

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7 Tyrtaios seems to have lived at least two generations after Lycurgus, as his grandfather is mentioned as a contemporary of Lycurgus (Wade-Gery 1944, 1).

8 Possibly around the mid-8th century BC.

9 Male citizens, who only participated in military actions and state governing. As mentioned, Lycurgus committed to the separation of the military from other classes, and forbade the Spartiates from engaging in trade and craftsmanship. Every

While the assembly was definitely necessary to enact a law or pass a decree, it seems that its powers were very limited. Firstly, it could not self-assemble; it had to be summoned by the authorized body, which were the ephors.[10] The fact that the assembly was unable to initiate a meeting and request a matter to be discussed and decided, shows that the political power most certainly did not rest with the people. This is not surprising, however, as it seems that Spartans saw democracy as a very dangerous form of government (Plut. *Lyc.* 5.7).[11]

Secondly, even when the assembly had been summoned, it was not allowed to propose anything; its only task was to hear the proposals that came from the Gerousia and vote on them. It was also restricted in the ability to suggest amendments: if the people changed the proposal in any way, and then voted for it, such a decision would have been crooked and the Gerousia could veto it. Discussions were allowed in the assembly, but the people were merely spectators, and the only ones who could participate in the discussions were the ephors, the kings, and the elders. There is one interesting example in the sources, where it appears that some of the common people did in fact participate in the discussion (Aeschin. 1.180–181). If the account is reliable, there is a possible explanation: it seems that the common man who addressed the assembly was summoned by an elder from the Gerousia. Additionally, he seems to have been used by the elder to make a point about how a skilled rhetor could deceive the assembly into voting for a proposal, even if the proposal was harmful. The elder asked this man, who was a talented warrior, but not a gifted speaker, to step forward and say the same thing as the previous speaker (who made a harmful proposal, but almost managed to sway the assembly to support it, because he was an excellent rhetor). Since the common man's speech was not worded elegantly, the assembly eventually realized that the proposal was indeed bad. Technically speaking, the common man did not substantively participate in the debate, but was instead used to emphasize the point the elder was making. It is,

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Spartiate needed to possess two things: landed property (all properties were the same size) and the means to finance *syssitia* (common meals). In the event that a Spartiate lost either of these two (land or income), he would cease being a *homoios* and become a second-class citizen, *hypomeion,* who was not allowed to exercise political rights.

[10] Prior to the existence of the ephors, the assembly was most likely summoned by the kings.

[11] "...since the twenty-eight senators always took the side of the kings when it was a question of curbing democracy, and, on the other hand, always strengthened the people to withstand the encroachments of tyranny." So, neither democracy nor tyranny were the acceptable form of government.

therefore, possible that the common people could address the assembly during the discussion, but only if they were summoned by an elder, a king (Jones 1967, 20), and possibly one of the ephors.

The legislative procedure went as follows. A formal suggestion would be made to the Gerousia to issue a decree or enact a law. The available sources contain only a few mentions of the initiator – and it was an ephor every time (Plut. *Agis* 8.1, 5.2; Thuc. 1.87). Whether only an ephor could initiate a procedure, or others could also but were simply not documented in the surviving sources, is something we cannot know for certain.[12] Once the initiation occurred, the Gerousia would discuss the proposal. It is in this step that a decree or a law would have been drafted, and when the elders and kings would have discussed the matter. The process would end with a vote: if the majority of the Gerousia voted in favor of the proposal, then the ephors would summon the assembly, and the proposal would be put to a vote. Additional discussion could have taken place, but the people were passive in it and merely listened to the arguments. Afterward, the ephors would ask the assembly to vote, and the voting process itself was quite nontransparent – by shouting. The ephors would decide if the crowd was louder for or against the proposal, and then they would declare the results. It seems that the votes were physically counted only in cases of extreme doubt (Thuc. 1.87.2–3; Plut. *Agis* 11.1).

There are two notable cases in the sources that are worth mentioning: one appears in Plutarch's *Agis*, and the other in Diodorus Siculus. Both describe situations where the assembly had been summoned, but the Gerousia did not have a proposal ready to present and vote on.

In *Agis,* Plutarch describes the time of King Agis IV, who reigned during the 3rd century BC and sought to bring change to Sparta. By that time, the Spartans had drifted away from the Lycurgan constitution and the values it promoted; they had embraced a life of luxury and wealth, which stood in stark contrast to the modest and humble lifestyle that had once been considered ideal (Plut. *Agis* 3.1 and 3.6). Agis aimed to return Spartan society to its original form and, in doing so, prompted one of the ephors, Lysander, to introduce a *rhetra* in the Gerousia. This *rhetra* proposed relieving all debtors

[12] In *Agis,* King Agis urges ephor Lysander to propose a *rhetra* to the Gerousia. If he did this because the law prohibited a king from proposing a *rhetra*, it would confirm that only the ephors were allowed to make such proposals. However, we cannot be certain that Agis acted for that reason alone. It is also possible that he had political calculations in mind, such as not wanting the *rhetra* to come from him directly, but rather from someone else, so that it would appear as though there were other prominent supporters backing the proposed reforms.

of their debts, and redistributing the properties to their original sizes, as it was in the time of Lycurgus.[13] This would require the wealthy Spartiates to give up their large estates and suffer significant financial losses. As expected, the Gerousia became heavily divided over the proposal. However, before the Gerousia could even reach a final decision on whether to put the *rhetra* forward, Lysander summoned the assembly to discuss it in front of the people. The debate became heated, with the common people siding with Agis and the wealthy supporting the second king, Leonidas, who opposed the *rhetra*. Ultimately, the votes had to be physically counted, and the *rhetra* was rejected by a margin of just one vote (Plut. *Agis* 8.1, 9.1 and 11.1).

Diodorus Siculus recounts the events of 189 BC (Diod. 11.50.1–2),[14] when the elders were debating whether to go to war with Athens. While the Gerousia was still deliberating the matter, the assembly had already been convened. From the text, it appears that the people were eager to go to war (Diod. 11.50.3–5), however, an elder named Hetoemaridas managed to persuade both the Gerousia and the assembly to abandon the idea of war, and the proposal was ultimately rejected (Diod. 11.50.6–7).

In both cases, the usual course of action was disrupted. Instead of waiting for the Gerousia to decide whether to present a proposal to the assembly, the ephors hastily summoned the people while the elders were still in session. What could have been the purpose of this, especially knowing that any decision made by the assembly in such circumstances would have been crooked and subject to veto? The most likely explanation is that the ephors were deliberately using the assembly to exert pressure on the Gerousia. It would have certainly been more stressful for the elders to deliberate on the proposal with a shouting crowd of warriors nearby, particularly if the Gerousia was inclined toward a proposal that most of the assembly might not support. However, ultimately, it was the Gerousia that had the final say, retaining the power to veto the popular will, regardless of the crowd's influence.

[13] Until the *rhetra* of the ephor Epitadeus, in the early 4th century BC, it was forbidden to dispose of landed property in Sparta. The primary purpose of land division, introduced by Lycurgus, was to ensure that each Spartiate received a plot of equal size, creating an economic balance where no one would be wealthier or poorer than others. However, Epitadeus altered this arrangement, allowing the free transfer of land. As a result, some Spartiates were able to expand their holdings, while others lost their land, leading to an economic imbalance within the state.

[14] "When Dromocleides was archon in Athens, the Romans elected as consuls Marcus Fabius and Gnaeus Manlius. In this year, the Lacedaemonians [...] had lost the command of the sea [...] And when a meeting of the Gerousia was convened, they considered making war upon the Athenians for the sake of regaining the command of the sea."

In conclusion, it is clear that while the assembly played a necessary role in the legislative process, its power was largely limited: it had no legal means to initiate the creation of a law or to directly influence its content. Even when the people attempted to exert pressure on the Gerousia, they remained a tool in the hands of the ephors, rather than an independent body, as they lacked the authority to convene on their own. As a result, in ancient Sparta – and likely in most oligarchic Greek city-states – the assembly's role was reduced to the least influential political body in the state.

3. ATHENS

Ancient Athens had a typically oligarchic constitutional order during the aristocratic period. The polis had magistrates of aristocratic origin, an aristocratic council (Aeropagus), which held all the political and judicial power in the polis, and finally an assembly, which had little influence. It is likely that it was organized similarly to the Spartan assembly, with acclamation being the standard method of voting (Jordović 2011, 130). Situation started to change with the first reforms aimed at diminishing the aristocratic nature of the government. Prior to these reforms, a person's status in society was largely determined by consanguinity and affiliation with clans and tribes. Subsequent reforms sought to make these factors irrelevant. The primary goal was to organize citizens based on the territorial principle rather than their ancestral origins, with the intention of making all citizens equal,[15] regardless of their ancestry.

3.1. The Reforms

The first reform aimed at achieving territorial equality was likely the division of Athens into territorial units known as *naukraroi* (Billigmeier, Dusing 1981, 11–16). This was followed by Draco's reforms, which reduced some of the aristocratic privileges,[16] and later Solon's and Cleisthenes'

[15] The concept of *isenomia* – the equality under the law.

[16] Draco is credited with being the first to codify Athenian law, possibly in 621 BC. By doing so, he created a legal framework for the institutions, providing written laws on which they could rely, instead of relying on oral traditions and the arbitrary decisions of the aristocracy. Although the influence of the aristocrats remained prevalent, their power in the judicial sphere and legal matters was no longer absolute.

reforms. All three reforms spanned the 7th and 6th centuries BC (Avramović, Stanimirović 2022, 107). Solon was the first to reshape the class division by using average annual income in terms of corn, oil, or wine as a parameter. As a result, he created four new classes and introduced a new form of government known as timocracy, where the ability to hold political positions was based on the wealth of the citizen rather than on birth (Jordović 2011, 140–145; Hansen 1991, 29–32; see Leão, Rhodes 2016). This was the first big step towards a more democratic constitution. However, the democratization process was only completed with the final set of great reforms – by Cleisthenes. These were the changes that finally transformed society and laid the foundation for Athenian democracy.

In short, Cleisthenes completely removed the importance of ancestry in the exercise of political rights (Ostwald 1969, 137–160). He divided the entire citizenry into 10 tribes (*phylai*), with the criterion for their creation being purely territorial. He then subdivided the tribes into smaller units – municipalities called demes. Each deme maintained a register of citizens living in its territory and it was from these registers that candidates for political positions were selected, usually by lot. These registers of citizens included all adult male Athenian citizens,[17] regardless of their ancestry or affluence (see Divac 2019). These reforms, along with the rule that the term of every office would last only a year, enabled all citizens to be equal in terms of their political rights[18] and gave them an equal footing in decision-making and legislative procedures. As a result, the assembly evolved from the least influential to the most important governing body in the polis.

[17] Initially, the status of an Athenian citizen was granted to everyone whose father was an Athenian citizen. However, in 451 BC, Pericles introduced a law stipulating that citizenship would only be granted to those whose parents were both Athenian by birth. This change resulted in a reduction of the citizen body and made Athenian citizenship somewhat more exclusive (Plut. *Per.* 37.3–4).

[18] It is important to emphasize that only male Athenian citizens had political rights; women were entirely excluded from public life. Therefore, whenever the participation of citizens in the assembly and other governing bodies is mentioned in this paper, it refers solely to male citizens.

3.2. The Lawmaking Process

3.2.1. Enacting a Law

The aforementioned reforms brought significant changes to many aspects of life in Athens. Not only did they empower the people and completely transformed the structure of government, but they reshaped the perception of the law. Earlier, during the 7th and 6th centuries BC, the word used for a law was *thesmos*, while in the 5th and 4th centuries BC, it shifted to *nomos.* Though both terms referred to rules, they emphasized different aspects. *Thesmos* highlighted that a particular authority enacted a rule, whereas *nomos* emphasized that the rule was generally accepted by the community. This change in terminology underscores the democratization of Athenian society, where the validity of a law depended on its acceptance by the people, rather than the power of the ruler (MacDowell 1978,144; Zartaloudis 2019, xxix-xxxi Canevaro 2015, 10, 13).

The two bodies with legislative powers were the assembly (Ekklesia) and the council (Boule). The Boule first emerged during the time of Solon but reached its final form during the time of Cleisthenes. It was a democratic body consisting of ten divisions known as *prytanies*: ten *prytanies* for the ten tribes. Each tribe selected 50 citizens over the age of 30 by lot to serve as tribal representatives in the Boule for one year, bringing the total membership of the council to 500 members. Furthermore, each *prytany* presided over the Boule for only one month, and the chairman of the presiding *prytany* was elected on a daily basis (Hansen 1991, 246–259; see Rhodes 1972). This system reveals a deeply democratic way in which the council operated: not a single tribe was able to dominate or appropriate more power than they were intended to have.

It is difficult to classify the Boule as belonging solely to one branch of power, since it had certain executive, legislative, judicial, and administrative powers at the same time. This was, in fact, typical of ancient times, as a clear separation of powers was not commonly practiced: the nature of governing bodies was mixed, as they performed various tasks belonging to different branches of power (see Avramović 1998, 11–21). In the legislative process, the Boule played a leading role as the initiator. It was the body in which the proposed laws and decrees[19] were discussed and drafted. Unsurprisingly

[19] *Nomoi* and *psephismata.* There was not always a clear distinction between the two and sometimes the two terms overlapped, especially during the 5th century BC. The general understanding from the sources is that *nomos* had a higher authority than *psephisma.* Rhodes and Canevaro believe that the first serious attempt to

for such a democratic polis, the Boule was not the only body capable of initiating the lawmaking process – every Athenian citizen was allowed to appear before the Boule and propose a law or decree. The Boule would then consider the proposal, and if it approved, it would forward it to the Ekklesia, where the proposal would also be discussed and voted on.

The Ekklesia, as previously mentioned, was the most important governing body in the democratic period. Citizens over the age of 20 (Dem. 44.35)[20] were allowed to participate in all decision-making procedures that took place in the assembly. There were no formal restrictions on the ability to suggest amendments or address the people from the rostrum (see Cammack 2013, 156–161).[21] As for the voting process, the sources mention two methods that were utilized in Athens: public voting by raising hands and secret voting with ballots. The latter was described in detail by Aristotle and was mostly used in courtrooms (Arist. *Ath. Const.* 68–69). However, sources mention it was also used in the Ekklesia on special occasions. It seems that secret ballot voting took place in all cases where a quorum of 6,000 was stipulated by law and where every vote had to be counted precisely (Dem. 24.45; 59.89–90).[22] In all other instances, voting was public, most likely conducted by raising hands (*cheirotonia*). Hansen states that in simple matters, voting was likely conducted in stages: if one proposal was being discussed, the hands raised "in favor" would be counted first, followed by those "against". Similarly, if the Ekklesia was expected to choose between two proposals, the hands raised for the first proposal would be counted first, and then those for the second (Hansen 1977, 124). He argues, however, that the hands were probably not counted precisely, but rather roughly, since the regular meetings of the Ekklesia lasted less than a day and with an attendance of around 6,000

clearly distinguish between the two occurred during the restored democracy of 403–402 BC. Before this, *nomos* referred to rules that were more established and permanent, i.e., rules that were part of the Athenian "statute book", enacted by a legislative commission, such as the one from Solon's time. In contrast, *psephisma* referred to rules enacted by the Ekklesia (Rhodes 1972, 49; Canevaro 2015, 28).

[20] Every male had an obligatory two-year military service starting at the age of 18. The 18- and 19-year-olds were called the *epheboi,* and after completing their military service, they were inscribed in the Assembly register (*pinax ekklesiastikos*) within their respective demes (Hansen 1991, 89). That meant that male citizens gained the right to participate in the assembly at the age of 20.

[21] The right of all citizens to deliver a public speech was called *isegoria,* which literally meant "the equal opportunity to speak". This was a fundamental concept in a democratic society, as it allowed everyone to express their opinion on the matter and prevented individuals from monopolizing the political discourse. For this reason, the art of oratory was highly valued and nurtured in ancient Athens.

[22] Ostracism, for example, along with many other cases concerning citizenship matters (such as granting citizenship to foreigners).

citizens (see also Avramović 1998, 12). It would have been impossible to count every raised hand "for" and "against" every point of the daily agenda as the counting process would likely have taken between five and ten hours (Hansen 1977, 128). Unfortunately, the sources do not reveal much on this topic. It seems plausible that the magistrates who conducted the counting used a visual criterion to determine the will of the majority: if the number of raised hands was obviously higher for one option, there was probably no need to count the exact number of votes. On the other hand, if the number of raised hands "for" and "against" appeared visually similar, we believe that a more precise counting had to take place, especially for important decisions such as enacting a law or a decree, because failing to do so would have compromised the validity of the legislative act.

Slight changes in the lawmaking process took place by the end of the 5th century BC. It seems that the majority of Athenians believed that the existing procedure needed to be modified, as it was not thorough enough.[23] As a result, they decided that enacting, modifying, and nullifying the laws required more than one meeting of the assembly to be properly discussed. Therefore, a committee of 500 *nomothetai*, who were elected by the demes, was introduced in 403/2 BC (Andoc. 1.83–84). While the enactment of *nomos* had not been completely removed from the Ekklesia, an additional step was created: any proposal, after being scrutinized in the Boule, had to be read in the Ekklesia several times. Afterward, the people were asked to vote: if the majority voted in favor of the proposal, it still would not become law immediately; instead, it had to be additionally assessed by the *nomothetai*. Only if the proposal passed their scrutiny would it officially become the law, without further discussion or amendments in the Ekklesia. The purpose of introducing these new magistrates was to create a committee of officials who would dedicate all their attention solely to establishing order in the Athenian legal system. This reform was a part of the efforts to restore democracy after overturning the Thirty Tyrants, the Spartan-imposed oligarchy that had terrorized Athens during 404–403 BC, in the wake of the Peloponnesian War (Arist. *Const. Ath.* 34–40). The goal of the *nomothetai* was to scrutinize and remove all laws that were obsolete or in collision with the rest of the legal system, as well as to oversee the constitutionality and adequacy of future laws (Dem. 3.10, 20.91, 24.20–23, 33; Aesch. 3.38–39; Rhodes 1972, 49–52; MacDowell 1978, 48–49; Gagarin 2013, 229–230). While the introduction of this additional committee, which was seemingly above the Ekklesia and was granted the final say on legal matters, might appear to be a step

[23] Canevaro calls this "a shift from an extreme form of democracy to the sovereignty of the law" (Canevaro 2015, 6).

back from the democratic principle, it was done for the greater good. The Athenians truly believed that this was a necessary measure to allow their beloved democracy to flourish. If the statements found in Demosthenes and Aeschines are accurate, then they provide evidence that the Ekklesia remained the true master of the legislative procedure. The nomination of the *nomothetai* can be seen as analogous to the assembly utilizing its powers to form an expert committee to handle a specific task – namely, a more thorough final check of matters that had already been preapproved by the assembly itself. Finally, the role of the *nomothetai* was restricted solely to the enactment of laws, while the authority to issue decrees remained entirely in the hands of the assembly. Overall, despite these changes, the essence of the lawmaking process remained intact: any citizen could propose a law and any citizen could challenge it.

3.2.2. Challenging a Law

Every law and decree was subject to challenge. In line with the democratic principles upon which Athens was founded, every citizen had the right to dispute any law or decree they believed conflicted with the existing legislation. These legislative acts could be challenged both after their enactment or during their proposal stage. Once a citizen initiated the procedure, the rule in question – or the process of its enactment – became suspended until the matter was resolved. There were two ways to challenge a legislative act: before 403/2 BC, the only available way was by submitting a *graphe paranomon,* essentially an action against the law or a decree that resulted in a trial; After 403/2 BC, the *graphe paranomon* was used only for contesting decrees, while the *graphe nomon me epitedeion theinai* was introduced for challenging laws (Phillips 2013, 14).

While the two indictments seem to have functioned in a similar way, it is apparent that the *graphe paranomon* was more commonly used. In the orators, Hansen found only six speeches that were written for the *graphe nomon me epitedeion theinai,* compared to 35 for the *graphe paranomon* (Hansen 1991, 212). Additionally, sources reveal that the *graphe paranomon* was an especially prevalent procedure, particularly in the 4th century BC. In one of Aeschines' speeches, a man claimed that he was acquitted in at least 75 cases of *graphe paranomon* during his 50-year political career (Aesch. 3.194). This is an astonishingly high number of such indictments. Demosthenes also shares his views on the importance of this procedure: "when indictments for illegality [*graphe paranomon*] are done away with it

is the ruin of your democracy" (Dem. 58.34). What explains this attitude, and does it mean that the Athenians cared so much about their democracy that they scrutinized their laws all day long?

The answer is probably not so surprising. We need to reflect once again on the changes that took place in 403/2 BC. Previously, the *graphe paranomon* was the sole legal action used to contest laws and decrees deemed unconstitutional (either formally or materially) or those that were outright harmful to the interests of the polis. And then in 403/2 BC another action was introduced exclusively for challenging unsuitable laws, while the *graphe paranomon* remained reserved for the troubling decrees. Decrees were legislative acts that applied to individual cases or situations, and in the 4th century BC they often involved honors and grants of citizenship (Hansen 1991, 211). This distinction is important because, by this time, decrees were passed more frequently than laws, which now required a more complicated procedure due to the introduction of the *nomothetai*, while decrees could still be enacted directly by the assembly. Also, decrees were often used as a political weapon. While ostracism was the most powerful tool against political rivals during the 5th century BC, the *graphe paranomon* took over that role in the 4th century BC (Hansen 1991, 205). This explains its popularity – not so much for safeguarding the legal system from damaging decrees, but for political rivalry, allowing Athenians to target enemies, discredit them, or even have them disenfranchised. Among the preserved *graphe paranomon* speeches, at least 19 are directed towards the honorary decrees.

As for the procedure, both of these indictments could be initiated by any citizen, since they were public actions.[24] The person challenging the law or decree took on the role of the prosecutor, while the individual who proposed the legislative act in question became its defender. If the proposer was not available for some reason, the polis would probably appoint a public defender (Avramović, Stanimirović 2022, 111). The trial took place in front of the Heliaia. If the prosecutor was successful, the disputed rule would be rendered null and void, and the person who proposed it could face punishment: sometimes a simple fine, and other times quite a debilitating penalty, such as a crippling debt to the state, combined with *atimia*, i.e., disfranchisement (Dem. 58.1). On the other hand, if the prosecutor failed

[24] Public actions (*graphai*) were intended for the most severe offences, which endangered the polis and its fundamental values. This is why any citizen could initiate them, in contrast to private actions (*dikai*), which could be initiated only by the interested parties.

to secure at least 1/5 of the votes, he was also liable for punishment (Todd 1995, 109). This was a typical outcome in public cases since it served as a safeguard for the polis against groundless and thoughtless proceedings.

4. CONCLUSION

A stark contrast can be noted between the two systems of government and the way they valued the importance of people's participation in the political life of the state. As previously mentioned, most of the Greek constitutions were oligarchic. The political agency of the people was subdued and diminished. They were expected to participate, but only to a limited extent; to enact, but without asking questions. Such was the constitution of Sparta, as well as those of numerous other Greek poleis, one of which is slightly more familiar to us than the rest – the Cretan constitution, at least according to Aristotle (Arist. *Pol.* 1271b, 1272a, 1272b, 1273a). There were ten *kosmoi*, magistrates from the most reputable families, an aristocratic council consisting of former *kosmoi,* and an assembly of citizens. The Dreros law, the earliest surviving inscribed law in Ancient Greece, begins with "The polis has decided", implying that the people were the ones who enacted the law, probably in the presence of the *kosmoi* and the *damioi,* the aristocratic class. Gortyn, apparently, enacted legislation similar to the Dreros law (Gagarin 2013, 223–224). These oligarchies defined qualifications needed for an active political role in the poleis in such a way that it was reserved only for the most affluent members of the citizen body. Even if access to the assemblies was granted to all male citizens, that did not always entail the right to have an active say in the process (Blok 2013, 169–170).

In the beginning, ancient Athens followed the same path, until it took a sharp turn toward a democratic constitution. The ultimate proof of the sovereignty of the people is the importance that was given to the Ekklesia from the 6th century BC on. Athenian democracy was in no way flawless. It came with many challenges and issues, which the polis tried to curb with various legal and political measures. There are many aspects of it that could be criticized: the amateurism of the political actors and their lack of expertise,[25] the voluntarism of their participation,[26], susceptibility to demagoguery and

[25] Everyone who participated in political life was a layman: there were no law schools where people could get educated in the field of law. The only legal knowledge people acquired was that gained through experience.

[26] There was no legal obligation for citizens to attend assembly meetings regularly. The quorum of 6,000 was an exception, not the norm.

pressure, bribery and general corruption, which presented a significant problem in the 4th century BC (Cammack 2013, 162, 167; Finley 1985, 38–75). However, if we want antiquity to teach us, we must move beyond these individual elements and dive into the essence.

It would be naïve to claim that we can directly borrow solutions from ancient times and implement them in modern societies – which are dramatically different and more complex – especially without any adjustments. Nevertheless, we can gain wisdom from them. It is beneficial to reflect on the past from time to time, remind ourselves of the essence of different forms of government, and apply that knowledge to the present by analyzing how far astray we have gone.

In its pure raw core, democracy means that absolute power lies in the hands of the people, and that the will of the people should be the law. Every rule that Athens set, every reform it enacted, and every penalty it imposed was directed toward preserving its people and democratic values.[27] Knowing this, we should reexamine our existing democratic mechanisms and truly investigate whether they are still performing their main purpose – serving as instruments of popular political and civic will – or whether they have become corrupted and politicized, serving the desires of the few. If that is the case, our task is to reshape them and return them to their original function, otherwise, the only thing remaining of democracy will be the illusion of it.

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CHURCH THEFT IN MEDIEVAL SERBIAN LAW

Since ancient times, theft of sacred objects has been recognized as a qualified form of theft, as a typical property crime, but also as an act of sacrilege. In medieval Serbian law, the canonical and secular regulations are found in the two typikons and the Zakonopravilo (Nomocanon) of Saint Sava, as well as in the later compilations of Rhomaian (Byzantine) law of the Serbian redaction during the reign of emperor Dušan – Matthew Blastares' (Abbreviated) Syntagma and the so-called Law of Emperor Justinian. Between these two great waves of reception of Rhomaian law, King Milutin's Banjska and Gračanica charters summarily regulate church theft.

The aim of this paper is to conceptually separate the church theft from other crimes against church property and to gain a better understanding of church theft in medieval Serbian law through analysis of the available sources.

Key words: *Sacrilege (ιεροσυλία, sacreligium). – Church theft. – Zakonopravilo (Nomocanon) of Saint Sava. – Syntagma of Matthew Blastares. – Medieval Serbian and Rhomaian (Byzantine) law*.

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If the illegal appropriation of property belonging to other people is condemned, it must be condemned to an even greater extent when one allows themselves to appropriate that which belongs to God.

Nikodim Milaš (Milaš 2005, 465)[1]

1. INTRODUCTION – CHURCH THEFT AND OTHER OFFENCES AGAINST CHURCH PROPERTY

All religious communities, including the Christian Church, have sought to regulate property issues within their own frameworks, in order to accomplish their mission "in worldly circumstances".[2] Among others, the protection of church buildings and holy places in a broader sense (e.g., cemeteries) and objects of worship is particularly important.

Objects of worship require a twofold approach in said protection – they are viewed as having both religious and property value. Therefore, the concept of an act of sacrilege (*svetotatstvo*, *ἱεροσυλία*, *sacrilegium*) primarily implies the desecration or destruction of things considered sacred or their unlawful appropriation.[3] The first form of sacrilege – sacrilege in the broader sense – is most often consumed by the latter, which involves the theft of consecrated

[1] All of the quotes from the Slavonic-Serbian legal sources, as well as the ones from relevant literature in Serbian, used in this paper have been translated by the author.

[2] A comprehensive consideration of the numerous property issues regulated by the church would go far beyond the modest goals of this paper. For the sake of clarity, these issues are mainly related to the acquisition, maintenance, management and disposition of church property. From the point of view of civil and criminal protection of property, the canons of the Christian Church incriminate property acts of its believers and clergy against third parties (theft, robbery, extortion, usury, etc.) or against the church itself (sacrilege). The Church assesses its jurisdiction according to the (mentioned) personal and real criterion – whether certain acts are committed by believers or clergy and whether within the framework of the church as an institution. When Christianity was established as the official religion of the Roman Empire, these incriminations also entered secular legislation, either through the appropriate application of earlier regulations on temple property (which already recognized the aforementioned forms of sacrilege), or through completely new, Christianized Roman law, as well as in later canons. For the church treatment of "offenses against the property of others" (Milaš 2005, 451–467).

[3] Similarly, although somewhat more broadly, this crime is defined in Đorđević (2023, 27): "Therefore, sacrilege is the desecration of sacred objects, which can be performed by destroying, damaging, stealing, or misappropriating sacred assets."

or sacred objects (vessels, vestments, shrouds),[4] typically from a church. Thus, depending on the manner of commission, Milaš (2005, 404, 465–467) considers sacrilege, as an act against various protected objects, to be *svetotatstvo* (sacrilege) in the case of offenses against religious veneration, and *svetokradstvo* (church theft) in cases against property.[5] However, the latter variant, as a special type of theft qualified by the object and (most often) the location where said crime took place, appears far more often in sources. Consequently, in this paper, the narrower meaning of this act will be used (equating *svetotatstvo* and church theft), unless otherwise indicated in the paper.

Church theft has similarities with other crimes against property punishable by the Church; thus, it is necessary to first distinguish them from each other. Desecration and grave robbery, and sacrilege itself in a broader sense, repeat the aforementioned dichotomy within the same act – the grave is attacked as a sacred place, but also as a source of material value for the thief. The obvious difference is the object of the unlawful attack and the place of commission.[6] In the case of usurpation or desecration of churches, one can also speak of sacrilege, but not of church theft.

Also, Roman law recognizes a certain similarity, and in a similar way regulates *sacrilegium* and *peculatus*, i.e., the unfounded appropriation, theft of temple/church or "national" (state) property, respectively, as well as

[4] On the subjects of this and related works, which are protected by church legislation, see *in extenso* the meaning of "sacred"/"holy" in Popović (1999, 652, translated by author): "Sacred, on the other hand, is everything that is dedicated and belongs to God and his saints and that serves or is intended for the purpose of sanctification: temples, churches, icons, sacred books, sacred vessels (liturgical objects: chalice, diskos, candlesticks, etc.). Sacred are the vestments in which divine services and holy rites are performed, curtains; graves and cemeteries are sacred, holy are the holidays in memory and honor of saints. In a word, sacred is everything that has the function of spiritual enlightenment and elevation. The opposite of that is sacrilege, desecration of the sacred, sin against that which is sacred, holy places, sacred objects, saints or against that which belongs to the sacred. This is precisely expressed by the terms sacrilegious, desecrator of a sacred place, or one who appropriates church property. From this the term sacrilege (church theft) is derived." Of course, on the narrowing of the subject of this work – see in the main text.

[5] Milaš makes the aforementioned conceptual distinction, calling the theft of sacred objects from the church "svetokradstvo", while using "svetotatstvo" mainly in its more comprehensive meaning (Milaš 2005, 404, 453).

[6] For more details on the criminal act of desecration of graves in medieval Serbian law, see Stepić 2024.

related acts (Milaš 2005, 456–457). The Digest of Justinian (D.48.13) devotes the same title to these acts: *Ad legem Iuliam peculatus et de sacrilegis et de residuis*.[7]

Those clerics who, in addition to fraudulently spending funds, also sell church vessels and estates outside the appropriate procedure, and thereby illegally reduce church property, may also be called to account before the local council of the church. This is stated in several canons (Council of Carthage canons 26 and 33, Council of Antioch canon 25, etc.), which are part of the Zakonopravilo of Saint Sava and the Syntagma of Matthew Blastares (chapter E-16). Although each of the previously mentioned acts undoubtedly diminishes the property of the Church, or attacks its sanctity, these acts lack at least one of the necessary elements of *svetotatstvo* (church theft), and are not *the theft of sacred objects from the church.*

2. CHURCH THEFT IN THE LEGAL WORKS OF SAINT SAVA OF SERBIA

The first preserved acts in medieval Serbian law that mention sacrilege are the Hilandar and Studenica typikons of Saint Sava.[8] Namely, the Hilandar Typikon (HT) mentions church theft in several places (in chapters 21, 24 and 37). They are translated chapters 19, 22 and 37 of the typikon of the monastery of Theotokos Euergetis (the Benefactress) in Constantinople (ET). In two places[9] that speak of the inalienability of monastery property (chapters 19 and 37 ET), Greek expressions are used to indicate the act, or the perpetrator of the act of sacrilege – *ἱεροσυλία* and *ἱερόσυλος* (Rakićević, Anđelković 2020, 102, 124).

[7] The text of the Digest used in the rest of the paper will be cited according to Mommsen, Krueger (1870).

[8] As the Studenica Typikon is a later version of the Hilandar Typikon, these references were analyzed according to the text of the Hilandar Typikon (Ćorović 1928) and the Evergetid Typikon, its direct model (Rakićević, Anđelković 2020, 51i140).

[9] The third case (ch. 22. ET and 24. HT) it is about the prohibition of any unlawful appropriation from the monastery (theft, plunder) – *ὁ δέ τι νοσφιζόμενος ἀπὸ τῆς μονῆς* (ET); similar in the Serbo-Slavonic translation: *аще оукрадаѥ ѡд(ь) манастырѣ нѣщо* (HT). For this, if the perpetrator does not repent, he is threatened with expulsion from the monastery. However, interestingly, this case was not treated as sacrilege, probably due to the principled prohibition of unlawful seizure of monastery property, not sacred objects or donations, as in the previous and subsequent cases, which will be discussed below (Ćorović 1928, 109–110; Rakićević, Anđelković 2020, 106).

In the first case, it is about the prohibition of alienating sacred things (vessels, icons, books, etc.), as well as immovable property, with the exception of special circumstances. Anyone who disobeyed this was subject to legal condemnation[10] for sacrilege. The second, monks leaving that monastery or even monastic life as such are prohibited from demanding the return of the property they donated to the monastery. Ch. 37 ET justifies this prohibition: "it should not be given to him, regardless of what it is, because what is once dedicated to God is inalienable, and the one who takes it away [becomes] a church thief, and everyone knows what the punishment is for the one who commits sacrilege, even if we do not say [it]." (Rakićević, Anđelković 2020, 125). Here, the reference is to *epitimia* (penance), an ecclesiastical punishment, which is well-known and severe, so that it does not even need to be explicitly mentioned.

The exact same approach is retained in the Hilandar Typikon, with the only difference being that the terminology is not uniform. In the first spot, *ἱεροσυλία* is translated as *цр҃ь кѵ҇е покраденїе*, and in the second, the verb *с ѵ҇е ѡ҇ є покрастн* is used to denote this criminal act (Ćorović 1928, 105, 132). Neither the Rhomaian nor the Serbian typikons, in both the mentioned case, specify the punishment for sacrilege; it is secular in the first and ecclesiastical in the second. In both places, they are treated as notorious, since the canons and laws regulating this act are known.

Christian tradition attributes the canons relating to church thieves to the Apostles, and they would be followed in subsequent centuries by Gregory of Nyssa, as well as the Holy Fathers of the Council of Constantinople in 861. All the aforementioned rules would be adopted in similar contexts: either independently or as part of the general incrimination of theft, or in connection with sacrilege and other violations of church property. The first Nomocanon in the Serbian written tradition, the Zakonopravilo of Saint Sava, contains these canons, collected in its canonical part.

The Rules of the Holy Apostles prescribe the penalty of excommunication for those who steal wax or oil from the church (Rule 72) and for those who take church vessels and cloths (curtains and shrouds – Rule 73)[11] for their

[10] The expression *ἐπὶ τούτῳ νομίμοις εὐθύναις ὑπόδικος ἔσται* indicates that the typikon refers to secular laws, not (only) canons.

[11] The canon itself mentions "cloth" as a general term, with the aim of encompassing all fabrics intended for the rites and services in temples. Sava (2004, 151) does not find the addition *нлн поставь злать нлн навлака* ("neither the gold lining nor cover") in the Greek manuscripts he examined, which leaves the possibility that this is the redactor's (Sava's) explanation of what is meant by this term. Cf. Milaš 2004a, 146–147.

own needs, thus committing church theft in the narrower sense. In both cases, it is prescribed that the perpetrator is to be punished by excommunication and required to return the confiscated items, also provided that, according to Ap. 72, the stolen wax and oil would have to be compensated fivefold.[12]

The purpose of both punishments is, first of all, to return items necessary for performing liturgy. Johannes Zonara's interpretation of Rule 73 explains that these objects are considered sanctified by their very bringing to the church, without the need for special rites "since all of this is presented to God and it is prohibited to take them for one's own use, because of which one is subject excommunication" (Sava 2004, 151).[13]

Further punishments for church thieves are mentioned by Gregory of Nyssa in his final, 8th canon, after he prescribed them for ordinary thieves and robbers in the sixth. Stating that "Sacrilege – that is to steal from the church" is equated with murder in the Old Testament and carries the penalty of death by stoning, he notes that the rule that such a thief must be punished less than an adulterer, originates from the Church, continuing:

> *подⸯ(о)баѥеть же вь всацѣмь грѣсѣ покаıанниıа тепла смотрити а не врѣмене.*
>
> ("with all sins one should look at the disposition of repentance and not the time") (Sava 2004, 585).[14]

12 Petrović (2002, 34) finds that in Ap. 72, the redactor of the Zakonopravilo cited the abbreviated (synoptic) canon, and gave the full text of the canon as an interpretation. In the following, Ap. 73, the full text of the rule is cited in the appropriate place, as well as Johannes Zonara's interpretation (Petrović 2002, 37).

13 Similar to the example in fn. 8, the redactor of the Zakonopravilo notes that according to Rule 73 even a sacred vessel that is merely hung in the church is considered consecrated, which is repeated in the later interpretation of the canonists (Sava 2004, 151).

14 Regarding this continuation, Milaš states that it is "the conclusion of all eight rules or the Epistle of Gregory" (Milaš 2004b, 468). Therefore, when determining the length of church punishments, it is a general instruction that the quality must always be taken into account, not only the time of repentance, which can be shortened at the discretion of the priest. Basil of Caesarea makes a similar statement, prescribing that the time of repentance can be shortened for those who sincerely and contritely repent (Rule 74), while for those who continue to sin in this way, penance must be maintained or the sinner must be abandoned completely, so as not to jeopardize the priest's own salvation. For the text in Zakonopravilo, see Sava 2004, 538, 542. See also Milaš 2004b, 414–415, 419–420.

Since it also dealt with issues of church property, among other topics, the issue of theft of church property was also regulated by the canons of the Council of Constantinople from 861. Namely, in Rule 10 the fathers of this council refer to the apostolic canons, as well as the canon of Gregory of Nyssa on sacrilege. The motive for adopting this rule was a controversy that arose in church criminal law.

Namely, as mentioned above, the punishment of excommunication was provided for taking sacred things from the church, regardless of the nature of the perpetrator of the act and the object. Accordingly, both a layman and a cleric would be subject to the same (milder) type of church punishment, same as the one who steals, say, a candle and one who steals a chalice or diskos. Recognizing the problem in the broad formulation of Ap. 73, it was specified that those (from the clergy) who steal sacred things that are typically found in the altar "for their own gain or for an unholy use" are subject to the stricter punishment of dethronement and excommunication,[15] explaining in reverse order *ѡвѡ оубѡ ѡскврьнѩющє ѡвѡ же сѵ(є)щєнаꙗ крадоуще* ("for these who desecrate, and these who steal the sacred [objects]") (Sava 2004, 495), thus encompassing both aspects of sacrilege.

Therefore, although they recognize the difference between sacrilege and church theft, the fathers of this council decided to impose stricter punishments on the perpetrator, who, in the case of the theft of sacred altar vessels, is assumed to be a cleric, to whom these objects are more accessible due to the nature of his ministry, and is therefore subject to excommunication (loss of the right to perform clerical duties), which can only be imposed on him.

A milder punishment of minor excommunication remains prescribed for forms of this criminal act that are not predominantly motivated by gain. These are appropriations for unholy use of vessels and fabrics that are kept outside the altar, for the purpose of personal use and gifting to others. However, even such a perpetrator of a lesser crime can be convicted of church theft,

[15] An excommunication (*odlučenje*) in church penitential law means denying a certain person participation in church rituals and can be limited in time as well as in terms of subject matter – whether access to communion, liturgy, or other acts. The most severe form of this punishment is a final excommunication (*konačno odlučenje*), in which "the person who has been excommunicated loses all rights, in the full sense, in the Church that belonged to him as a member of the Church" (Milaš 2005, 203, translated by author). Dethronement or final excommunication implies that a cleric, in the broadest sense an "ordained person", is deprived of his right to perform clerical duties (Milaš 2005, 261), and the degree of this punishment depends on which external rights of the punished cleric's calling are left to him. Alternatively, see Milaš 2005, 190–206, 261–326.

if he “takes/snatches away completely”. This conceptual distinction between the act of ordinary theft and “snatching” (*rapina*, *grabež*) is necessary as justification for this stricter incrimination.[16]

Thus, for the most part, the canons regulating the theft of church property have been exhausted. Naturally, after the Christianization of the Roman Empire, secular legislators also decisively stepped out against church theft, regulating it as a particularly serious form of theft, repeating the already mentioned qualifying circumstances of commission, while prescribing severe penalties. Part of these laws would also be borrowed in the Zakonopravilo. Although their origin is in the law and opinions of jurists from the Principate period, the era of pagan emperors, with appropriate changes, they could also protect Christian sacred objects. As such, the detailed norms on church theft in Justinian’s Digest,[17] transplanted from the civil laws of the Nomocanon in 14 titles (II, 2), are included in Chapter 47 of the Zakonopravilo and, in the translation into English (based on the original text, as well as Petrović’s translation in Sava 2004, 705–706) read:

“The punishment for a church thief is either more lenient or severe, depending on the person in question, and depending on the guilt, and the time, and age and nature, for some are to be handed over to wild beasts, some burned, and some hanged. The measured punishment is when a night church thief is handed over to the beasts; for a daytime one, it is somewhat lenient, because the one who steals from a church during the day is sent to be imprisoned and dig gold ore.”[18]

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16 The verb *вьсхыщати* for the action leads to the perpetrator of this act (*хыщьникь* is the translation of the Greek *αρπαξ* or Latin *raptor*, meaning that the act in question is *rapina*, the violent seizure of someone else’s property, or “*grabež*” in Slavic law) (Taranovskiĭ 2020, 189, 197; Čvorović 2018, 85; Šarkić 2023, 456–457). In narrative and legal sources, *хыщьникь* most often means a robber or brigand, since in medieval Rhomaian and Serbian law robbers did not have to use force directed against a person, or against another’s property (Soloviev 1928, 198). On the conceptual distinction between the aforementioned delicts against property (Čvorović 2018, 83–89). On robbery in Dušan’s Code, see Čvorović 2018, 116–118, 129–145.

17 Although Ch. 47 of the Zakonopravilo is entitled *ωт⟨ь⟩ различныхь титьль. рекше граньи. Иоустиниана ц⟨ѣ⟩с⟨а⟩ра новыхь заповѣдии* (“from different titles, that is branches [of] the new decrees of Emperor Justinian”), the text at hand is a selection of civil laws from the Nomocanon in 14 titles (branches), which come from the entire *Corpus iuris civilis*: Digest, Codex, and Novels. The passages examined are taken from the Digest.

18 This norm from the Zakonopravilo is based on D.48.13.7(6) – the punishment for a nobleman who committed this act was exile (Mommsen, Krueger 1870, 832). For the English translation of the said fragment, Watson 1998, 346.

"And thieves of honorable and great churches are cut down with the sword. Church thieves are those who steal from large public churches, and those who steal from private and small churches that are not guarded, of course, are punished less than church thieves, and more than ordinary thieves who steal. An outsider who steals from a church is punished with the punishment of a church thief. And one who is entrusted with the guarding and watching over a church, if he takes something from it, is not subject to this law."[19]

"If someone puts a person in a chest and places the chest in a church, and if that other person, having come out of the chest, steals something belonging to the church, the guilt for church theft is equal to that of the accomplice who brought the chest into the church, because the property taken from the church will be claimed from them."[20]

In just these few paragraphs, several forms of (church) theft are recognized. According to the time of the commission, there are daytime and nighttime church thefts; according to the object – thefts of public (large) churches and private (small) churches; and according to the connection of the perpetrator with the robbed church – "external" and "internal" thefts, i.e. by those who had the duty to watch over and guard that church, with the latter not being considered a *svetotatac* (a church thief in earnest).

Finally, a special form of sacrilege was prescribed: theft from a chest, committed as an act of cunning, in which the bearer of the chest is also liable as an accomplice (more precisely: a helper), although it seems only in terms of damages. All these fragments are found in the same chapter of the Digest (48, 13), and are minimally adapted to the new, Christian imperial legislation. What once referred to theft from pagan temples now refers to theft from churches.

In *Zakon gradski* (City Law, the Serbian translation of the Prochiron), Chapter 55 of the Zakonopravilo, when punishing sacrilege, the norm from the Ecloga (XVII, 15 = Proch. XXXIX, 58)[21] is fully adopted. According to it, the circumstances that were legally relevant for Roman jurists in the

[19] This norm from the Zakonopravilo is based on D.48.13.11(9), 1–2 (Mommsen, Krueger 1870, 832–833). For the English translation of the said fragment, Watson 1998, 346–347.

[20] This form of theft is mentioned in D.48.13.12(10, 1) (Mommsen, Krueger 1870, 832–833). For the English translation of the said fragment, Watson 1998, 346–347.

[21] In medieval Slavic laws, this norm was first reflected in the Zakón Súdnyi Liúdem (Законъ соудьныи людьмъ), with some changes to the punishments: the punishment for the more serious form is not blinding, but being sold into slavery, and for the less serious form, the perpetrator's exile is specified with the following remark *по ѕемли посълаѥтьсѧ, ꙗко нєтьстивъ* (Bobčev 1903, 91). The literal translation

aforementioned places in the Digest, such as the time, place, and manner of the act, no longer affect the punishment. Čvorović (2021, 156–157), citing Elena E. Lipšic, states that all of them are changed by the "principle of the sanctity of the place", i.e., whether the stolen sacred object was stolen from within or outside the altar. In the former case, the perpetrator faces the penalty of blinding, and in the latter – beating and shearing, and finally, exile from the territory where the act was committed.[22]

It is interesting that the "sanctity of the place", as a qualifying circumstance recognized in the Ecloga from the first half of the 8th century, was repeated as such in the decisions of the First-and-Second Council from 861 and in the Prochiron from the 870s. This shows an enviable continuity in the norming of the essence of this criminal act, as well as a completely logical interpenetration of secular and church legislation in penalizing acts against the property of the Church, bearing in mind the role of the Rhomaian emperors as its protectors. The emperors acted in force and legislated strict punishments for the perpetrators, as in many other cases of criminal acts in which the Church[23] was victimized, at least in part. Such an example, as can be seen above, would be followed by medieval Serbian law, as well as other countries under Byzantine cultural influence.

3. CHURCH THEFT IN THE CHARTERS AND DUŠAN'S LEGISLATION

After exhaustive regulation in the Zakonopravilo, which was completely taken over from canonical and Roman/Rhomaian secular law, theft from the church is mentioned in medieval Serbian law in two monastery charters of King Milutin. The mere mention of this work in the (preserved) particular legislation speaks of its importance, since the largest number of borrowings

can be understood, in the spirit of the Ecloga, "and let him be expelled from the land as a godless man." More in Nikolić 2016, 72. On this legal monument and the hypotheses about its origin, in summary, see Nikolić 2016, 3–10.

[22] For the Slavonic-Serbian text and translation into modern Serbian, see Sava 2021, 210.

[23] Čvorović states that "similar to grave robbing and church theft – although it represents only one form of the crime of theft – in the Ecloga's system of criminal law protection, it belonged to a large group of crimes against the faith" (Čvorović 2021, 153). In Prochiron, however, the punishments for both of these acts (XXXIX, 57 and 58) are set out in the section concerning crimes against property. This is how it is recognized in both Taranovskiĭ (2020, 191) and Soloviev (1928, 195).

from Rhomaian to Serbian law comes and is attested only through compilations in which they are collected (the Zakonopravilo, the Syntagma of Matthew Blastares and the so-called Law of Emperor Justinian).

In the Saint Stephen Chrysobull, King Milutin granted certain villages, as *baština* (patrimonial land), to his subjects, who are obliged "to keep them under this church" (*држе оу црьквь сиє*), i.e., under the monastery in Banjska, as their manor lord. He then confirmed the inviolability of property:

> *догдѣ соу вѣр҃нн цр(ь)кви и крал(евь)с(твоу) ми и по м҃нѣ г(о) с по дьствоующоумоу и догдѣ се не wбрѣтоу татиє цр ь ков҃нии да соу имь и нхъ дѣти по нихъ оу башиноу в҃сегда.*
>
> ("as long as they are faithful to the Church and to my kingdom, and to those ruling after me and unless they are found to be church thieves, let this be theirs and their children's patrimony for all time") (Mošin, Ćirković, Sindik 2011, 464).

Therefore, for the holders of *baština* there is an obligation of loyalty to both the ruler and the Church, i.e., the orderly fulfillment of class obligations and loyalty. Immediately after it, a typical example of church "*nevera*" (breach of faith, treason) is given – church theft.

This arrangement could have arisen under Rhomaian influence, where it was considered that "church theft (sacrilege) is a sin similar to the treason against the emperor".[24] The equating of treason against the state and towards the Church has two dimensions, since the Church here acts as both the secular lord of the manor and the spiritual authority, which stands on an equal footing with the secular one, according to the principle of symphony.

The relevant provisions on the very essence of sacrilege and the jurisdiction for this act are found in the Law of Church People (*ꙁ конь люд(є)ми цр(ь)ков҃нымь*) in the Banjska Chrysobull, or in the Old Law of the Serbs (*Ꙁаконь стары Срьблемь*) in the Gračanica Chrysobull. The former defines the act of church theft as follows:

> *И аще к҃то оукраде ч҃то вьноутрь цр ь кве до свѣще воска или тьминана да моу се коуща распе.*

[24] In Serbian medieval law, this rule is found in chapter I-1 of the Syntagma of Matthew Blastares (both in the complete and abridged versions). For the text of the rule, see Novaković 1907, 325; Florinskii 1888, 407. The translation in Vlastar (2013, 235) is somewhat different – "The crime of sacrilege is equal to insulting the emperor". The rule is taken from the Basilika, and comes from Ulpian's fragment in D.48.4.1.pr. *Ulpianus libro septimo de officio proconsulis: Proximum sacrilegio crimen est, quod maiestatis dicitur* (Mommsen, Krueger 1870, 802).

> ("And whoever steals anything from within the church, whether it be a candle, wax or incense, let his estate be confiscated") (Mošin, Ćirković, Sindik 2011, 465).

This norm is reminiscent of the Rules of the Holy Apostles, especially Rule 72, since it cites the theft of less valuable items from the church as an example. The Serbian legislator was not influenced by subsequent nuances on the forms of this criminal act, in terms of various qualifying circumstances, from later canons and the Ecloga and the regulations based on it, which recognized only church theft within or outside the altar. He explicitly stipulates that sacrilege is any theft within the church, regardless of the value and nature of the stolen item, and imposes the penalty of *rasap* (complete confiscation of the property of the house/family), which is a typical punishment for *nevera* in medieval Serbian law. Thus, the Saint Stephen Chrysobull provides a comprehensive concept of this crime, constructed simply, with slight reliance on ancient Church and later Rhomaian tradition, linking it to the class obligation of loyalty, but without unnecessary detailing and too much room for interpretation.

The issue of jurisdiction for this act is undoubtedly regulated by the subsequent Gračanica Chrysobull, which was issued by the same ruler: "And a person who steals from the church and commits murder, what says His Majesty the King [let it be done]" (Mošin, Ćirković, Sindik 2011, 503). Here, the act of church theft, together with murder, is listed as a typical *reservata* of the ruler's court, probably because of its connection to treason, judging by what has been discussed previously.[25]

The rules on sacrilege (mainly church theft) are also compiled in Dušan's Code, which adds little new to the already existing material. A short chapter in the abbreviated Syntagma (AS,the previously mentioned I-1, and also the complete Syntagma) is devoted to it, and one article of the so-called Law of Emperor Justinian, a Serbian compilation created from several Eastern-Roman laws and legal miscellanies,[26] speaks about church theft, which essentially repeats Ecl. XVII, 15, i.e. Proch. XXXIX, 58.[27]

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[25] However, Mirković (2002, 8) views it only as a form of theft (*tatba*).

[26] Regarding the sources, content and redactions of the Law of Emperor Justinian, see Marković 2007, 32–41.

[27] "These provisions of the AS and LJ have pretty much exhausted the subject in question. That is why the DC. cannot speak of sacrilege, even if it is a criminal act of great importance" (Soloviev 1928, 196). Đorđević believes that these acts can also include the destruction of a church during a military campaign, prescribed in Art. 130. Dušan's Code, Đorđević 2023, 31–32, which is certainly an act of sacrilege in a

In the complete Syntagma (CS), the relevant chapter contains the aforementioned canons, Ap. 72. and 73, Const. 10, as well as canon VIII of Gregory of Nyssa,[28] and several secular laws. All the canons are retained in the abbreviated Syntagma, with the last one being shortened to only the first sentence – that sacrilege in the Old Testament is considered equal to murder.[29] Of the laws, only the first one is retained – that sacrilege is equated to imperial treason – and the last one, taken from Basilika (12. Bas. LX, 45). "The other three [should be 'two' – author's note] laws were removed from the AS, probably because they are not true criminal norms with the usual sanction, but rather reasoning about the concept of sacrilege, that ordinary theft includes both the theft from a church of objects not dedicated to the service of God, and the theft of consecrated[30] objects from buildings not designated for the service of God" (Soloviev 1928, 195). It is possible that these abstract distinctions were superfluous for the Serbian legislator, and that they were implied by the basic understanding of this act – the theft of church items from church buildings.[31]

broader sense – here a sacred place is desecrated, not a sacred movable object. Of course, these cases of desecration of churches and sacred places are also punished by canonical and secular Roman law. In summary, Milaš 2005, 401–403.

28 The differences between the texts of these canons in the Zakonopravilo and the Serbian redaction of the Syntagma mainly stem from the translation and have no greater legal significance. However, it is interesting that in Ap. 72 and 73 in the Zakonopravilo the perpetrator *оукрадєтъ* ("steals") (72) and *вьѕмєтъ (что на свою потрѣбоу* ("takes something for his own need") (73), while the Syntagma in the relevant place condemns *отємшаго* ("he who has snatched") and *на свою потрѣбою посвоѥающа* ("he who has appropriated for his own need"). The somewhat softened terminology and awareness of the later legal development of this institute, and the connection between theft of church property and sacrilege require additional clarification: "even if it is not for church theft, he is guilty of a law violation and is subject to excommunication" (Novaković 1907, 324; a slightly different translation in Vlastar 2013, 235).

29 For the text, see Novaković 1907, 325.

30 Soloviev makes an error here – confusing sacred and consecrated objects. If a certain object is dedicated to God in a special rite, wherever it is stolen, the culprit is liable for sacrilege (Novaković 1907, 325). Also, Soloviev does not mention that the first removed law extends liability for church theft to an accomplice in the act, which, with reference to the case of theft from the coffin, was already stated in Roman (Rhomaian) legislation (see above the borrowing from the Nomocanon in 14 titles (II, 2) in the Zakonopravilo, Ch. 47).

31 Florinskii also considered this, with less detailed explanations: *Изъ гражданскихъ законовъ взяты только два – самые важные – первый и послѣдній. Опущены остальные, касающіеся разныхъ тонкостей оцѣнки священнотатства* ("From the civil laws, only two were taken – the most important ones – the first and the last. The rest, which touch on various subtle assessments of sacrilege, have been left out") (Florinskii 1888, 406).

From the previous analysis of King Milutin's charters, it is obvious that the concept of sacrilege as treason was known to Serbian law (at least) several decades before the creation of the Syntagma and Dušan's legislative work, which in turn indicates the great influence of Rhomaian law and legal reasoning in medieval Serbia. The one remaining law in the AS compromised between the reasoning of postclassical Roman and Rhomaian law after the Ecloga, reintroducing several qualifying circumstances for church theft.[32] Church thieves were punished with the death penalty if, cumulatively, they stole or desecrated objects dedicated to God from the altar at night, and with beatings and exile if they stole "a little something" (likely an unconsecrated church object) within the church – but outside the altar – during the day, and just because of their poverty. This means that the circumstances mentioned in the Digest of Justinian (the time of commission, status of the injured party, etc.) and the Ecloga (place of commission and nature of the object) were all taken into consideration, which created a synthetic concept of this crime.

However, a somewhat modified, stricter form of sacrilege from the Ecloga/Prochiron appears in Article 28 of the Law of Emperor Justinian (LJ), in almost all manuscripts of the older redaction,[33] seemingly competing with the norm from Basilika from the Syntagma. Entitled *ѡ крагїи*, it reads:

> *Аще кто оукрадеть что wт црькве или вь нощи или вь дьне да се wслѣпить Аще ли на дворѣ що црьковно оукрадеть да се бїе и wсмоуди и проженет wт тоган мѣста.*
>
> ("If anyone steals something from the church. either at night or in the day, he shall be blinded. If anyone steals something ecclesiastical from the court, he shall be beaten and singed and exiled from that place.") (Marković 2007, 60).

The differences in relation to Ecl. XVII, 15, i.e. Proch. XXXIX, 58, which clearly served as a model for this norm in terms of structure and language, concern the place and object of the theft, as well as the punishment. Instead of distinguishing forms of sacrilege according to whether they are committed within or outside the altar, here the act is normalized as being committed in the church or "at court". The stolen objects are not defined as sacred, but as "something ecclesiastical" – which could just be a simplification by the local legislator or, alternatively, it could mean any item stolen from the church. Finally, the punishments for the lighter form are beatings, singeing, and

[32] For the text of the rules, see Novaković 1907, 326; Florinskii 1888, 407.

[33] The only exception to this numbering is the Rakovica Manuscript, where it is Article 25, but with identical content (Marković 2001, 105).

then exile, instead of the beating, shearing and exile referred to in the Zakon gradski. This is likely an adaptation of this rule to the Serbian environment, where the punishment of singeing appears as a shameful punishment similar to shearing.

What is the relationship between these two provisions from the AS and the LJ, and does the latter regulate sacrilege? Soloviev believes that these are similar subjects: "We believe that this must be understood not as church theft, but as other types of serious theft. This refers to the theft of ordinary objects from the church and the theft of objects dedicated to the service of God from outside the church building. Neither is sacrilege in the strict sense of the word (that is why Article 28 is entitled "On Theft"), yet due to disrespect for the church, in both cases the penalties are much greater than for ordinary theft" (Soloviev 1928, 195–196).[34] For his part, Šarkić (2023, 446) believes that Article 28 of LJ speaks of sacrilege. Both of these scholars, almost a century apart, recognize the same source of the norms from this article (Ecl. XVII, 15, i.e. Proch. XXXIX, 58), but they come to opposite conclusions.

There are two possible explanations. The first is either the Serbian legislator, having adopted the meaning of sacrilege as treason (*nevera*) from the Basilika (even before the Syntagma of Matthew Blastares, through King Milutin's "legislation", as well as their later precise incrimination of this act), used the earlier regulation from the Prochiron as a basis for punishing other serious acts against church property, which, nevertheless, did not constitute sacrilege. The second is that the legislator regulated the same matter in the AS and LJ in parallel, which is not uncommon, with minor amendments and simplifications of the mentioned sources of Art. 28. LJ. However, the hereditary connection and great similarity between the sources that, unequivocally, concern sacrilege, seem to weigh in favor of the latter option.

Looking at the evolution of the regulation of the act of sacrilege in medieval Serbia, one can notice a certain hesitation regarding the (normative) concept of sacrilege, as well as a pronounced interweaving of the influence of earlier sources of law on the Serbian legal tradition: from the earliest canonical to the subsequent secular Rhomaian (from Digest of Justinian, the Ecloga and Prochiron, to the Basilika and the Syntagma). The Zakonopravilo makes a selection from Justinian's legislation in Chapter 47, and adopts the entire Prochiron as the City Law in chapter 55. Milutin's charters define the act of

[34] This position is only reiterated by Marković (2001, 105), who considers this act only as theft from the church, according to the provisions of the Law of Emperor Justinian.

church theft and determine the sanction and jurisdiction for it, and Art. 28 of the Law of Emperor Justinian introduces certain changes compared to its prominent sources.

However, this legal syncretism reaches its peak during a period that it beyond the chronological framework of this paper, since it is found in the later ("younger") redaction of Dušan's legislation. Namely, almost all of these sources would leave their mark on the regulation of the act of church theft in the Law of Emperor Constantine Justinian (LCJ), in Article 52.[35] It begins with a description of the crime, which resembles Ap. 72. and 73, but with the punishment from the Old Testament:

> *Аще кто възметь отъ црькве свѣщь или оуля или сасѫдъ или ризѫ или нно что и пронаѣет се ѡ нѥмь. Каменїемь да побїен бѫдет отъ народа.*
>
> ("If anyone steals a candle, or oil, or a vessel, or a vestment, or anything other from the church, and it is found on him. Let him be stoned to death by the people")

The explanation of such a strict repercussion is that, by stealing from the house of God, the thief is in fact stealing God, i.e. by stealing from the church and God, he is stealing from all Christians.[36] The other two forms of the crime are punished much more lightly and their stylization most closely resembles the revisions of Article 29 of LCJ (revised according to Article 28 of LJ) and the last law from I-1 of the AS:

> *Аще ли извань црьквѣ что възмет се да платит троньмь и да въсадит се въ тамнїцѫ в҃ѣ дни аще ли оубожства ради что възмет тачїю то едно да платить.*
>
> ("If it is outside the church that something is stolen, let him pay three times and be put to prison for twelve days: if he has stolen due to his poverty, he must repay only once") (Marković 2007, 90)

[35] Theft from the church is also mentioned in Art. 29, which is a more detailed reworking of Art. 28 from the older version. The only difference is in the punishment for theft outside the church: the perpetrator pays triple the value of the stolen item, instead of having his hair and beard sheared, after which he is beaten and exiled. Cf. Marković 2007, 60, 82.

[36] For all the variations of this explanation in the transcripts, see Marković 2007, 90.

Thus, church theft in old Serbian law ends up as an impractical amalgam of biblical, canonical and Rhomaian secular traditions, with great symbolic significance. Its final form, preserved in the LCJ, combines numerous reflections of several norms that regulated said crime, but almost all the nomotechnical finesses and dilemmas that was known to older legislators – were lost.

4. CONCLUSION

Despite the seemingly simple concept by which sacrilege can be defined in a narrow sense – the theft (of sacred things) from the church – numerous dilemmas accompanied its development, in canon law and later in Roman and Rhomaian law. Its path of development began with the Apostolic Canons, only to later be integrated into the tradition of Roman secular legislation – and to be equated in severity with treason against the ruler.

Many of its elements were controversial. Was every appropriation for profane use sacrilege? Was every theft of a sacred object sufficient to constitute this act, or did the object have to be consecrated? Must it be done in the church, within the altar or outside it, or did stealing a sacred object outside the temple render the perpetrator a church thief? All these controversies, especially considering the adoption of the canon at the Third Council of Constantinople in 681, were of practical importance and contributed to the completion of the canonical concept and punishment for sacrilege. For its part, the new Christian Roman legislation – from the Digest, the Ecloga and the Prochiron, and with small changes in the Basilika – resolved these issues. When these canonical and legal norms entered into Serbian law, through the reception in the Zakonopravilo and the Syntagma of Matthew Blastares, they were already adopted as a finished product, perfected for centuries in the Roman setting.

When the Serbian legislator regulated theft from the church and the sanction and jurisdiction for this act, independently, in charters, he did so with simple vocabulary, without finesse or room for quandary: "Whoever steals anything from the church", "let his house be confiscated", "what says the king". However, when he makes changes to the transplanted norms, they are minimal – such as minor clarifications of the canons in the Zakonopravilo, and the punishment of singeing instead of shearing in Art. 28 of LJ.

Sacrilege contained two aspects: as an act against faith, it consisted of an act of desecration, an attack on the house of God; as an act against property, it showed the particular impunity of the perpetrator who stole a sacred thing. As mentioned at the beginning of this discussion, unlike most similar acts, it entered Serbian legislation through both legal collections and

charters, and in the latter case it quickly became recognized as one of the most serious criminal acts: as ecclesiastical treason (*nevera*). As such it was on a par with treason against the ruler, but without the Rhomaian graduality in punishment, which included confiscation of property and the loss of class privileges, and was adjudicated by the ruler. The crime of sacrilege serves as another example of the importance of protecting the Church in medieval Serbian law, as well as the scope of the interpenetration and assistance between secular and ecclesiastical authorities.

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NAČELO KONTRADIKTORNOSTI U POSTUPKU PRED USTAVNIM SUDOM: KOMENTAR PRESUDE EVROPSKOG SUDA ZA LJUDSKA PRAVA

Nakon konstituisanja Ustavnog suda u skladu sa Ustavom iz 2006. godine, strankama u različitim postupcima stavljeno je na raspolaganje još jedno pravno sredstvo za preispitivanje sudskih odluka. Ustavni sud je povodom izjavljenih ustavnih žalbi počeo da poništava sudske odluke, nalazeći da su tim odlukama povređeni ili uskraćeni ljudsko ili manjinsko pravo i sloboda zajemčena Ustavom. To je izazivalo nezadovoljstvo sudova, naročito Vrhovnog (kasacionog) suda. Izmenama Ustava iz 2022. godine izričito je predviđeno da sudsku odluku može preispitivati ne samo nadležni sud u zakonom propisanom postupku nego i Ustavni sud u postupku po ustavnoj žalbi. Krajem 2024. godine Evropski sud za ljudska prava doneo je presudu protiv Srbije kojom je, zbog nedostavljanja ustavne žalbe licu u čiju korist je doneta pobijana sudska odluka, utvrdio povredu prava na pravično suđenje u postupku pred Ustavnim sudom. Predmet ovog rada je analiza te presude i njen mogući uticaj na postupanje Ustavnog suda.

Ključne reči: *Ustavna žalba. – Načelo kontradiktornosti. – Ustavni sud. – Evropski sud za ljudska prava.*

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1. PREDSTAVKE EVROPSKOM SUDU ZA LJUDSKA PRAVA I PRESUDA

Evropski sud za ljudska prava formirao je predmet *Stefanović i Banković protiv Srbije* (*Stefanović and Banković v. Serbia*)[1] na osnovu dve predstavke koje su podnete zbog navodne povrede prava na pravično suđenje iz čl. 6 (1) Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda (dalje: EKLJP), u postupcima pred Ustavnim sudom. U tim postupcima, Ustavni sud je, povodom izjavljenih ustavnih žalbi, poništio pravnosnažne sudske odluke donete u korist podnosilaca predstavki i vratio predmete nadležnim sudovima na ponovno odlučivanje. Podnosioci predstavki nisu bili obavešteni o podnetim ustavnim žalbama niti su imali priliku da učestvuju u postupcima pred Ustavnim sudom. U predstavkama su tvrdili da je Ustavni sud takvim postupanjem povredio njihovo pravo na pravično suđenje.

Prvu predstavku je podnelo lice koje je bilo upucano u prostorijama jedne banke. Nakon što su učinioci pravnosnažno osuđeni, podnosilac predstavke je tužio banku, tražeći naknadu nematerijalne štete. Prvostepeni sud je 29. marta 2012. godine delimično usvojio tužbeni zahtev i tu presudu je 13. juna iste godine potvrdio Apelacioni sud u Novom Sadu. Protiv presude Apelacionog suda u Novom Sadu banka je podnela ustavnu žalbu, koju je Ustavni sud 23. aprila 2015. godine usvojio, poništio presudu Apelacionog suda u Novom Sadu i naložio mu da ponovo odlučuje o žalbi protiv prvostepene presude. Ustavni sud nije obavestio podnosioca predstavke o podnetoj ustavnoj žalbi niti ga je obavestio da je ustavnu žalbu usvojio i poništio presudu donetu u njegovu korist. Nakon donošenja takve odluke Ustavnog suda, Apelacioni sud u Novom Sadu je u ponovljenom postupku presudio na štetu podnosioca predstavke. Podnosilac predstavke je tvrdio da je onemogućen da učestvuje u postupku pred Ustavnim sudom, čime je povređeno njegovo pravo na pravično suđenje (st. 2–5 presude).

Druga predstavka je podneta povodom spora oko prava na zemljištu koje je bilo obuhvaćeno nacionalizacijom. Naime, M. D. je na osnovu ugovora iz 1959. godine preneo pravo korišćenja neizgrađenog građevinskog zemljišta na S. B. i R. B., koji su inače preci podnosioca predstavke. Oni svoje pravo nisu upisali u javnoj knjizi pa je titular ostao M. D., a posle njegove smrti to pravo je prešlo na naslednike, uključujući i A. D. Podnosilac predstavke je 2008. godine pokrenuo parnični postupak protiv Republike Srbije i A. D., zahtevajući da se prizna njegovo pravo korišćenja na predmetnom zemljištu.

[1] *Stefanović i Banković protiv Srbije*, presuda Evropskog suda za ljudska prava od 5. novembra 2024.godine *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 15. januara 2025.

U međuvremenu, A. D. je na osnovu odredaba Zakona o planiranju i izgradnji iz 2009. godine upisan kao vlasnik zemljišta. Prvostepeni sud je 20. juna 2012. godine odbio tužbeni zahtev, da bi u žalbenom postupku Apelacioni sud u Beogradu 29. novembra 2012. godine preinačio prvostepenu presudu i presudio u korist podnosioca predstavke. A. D. je podneo ustavnu žalbu, a Ustavni sud je zbog proizvoljne primene materijalnog i procesnog prava 10. decembra 2015. godine poništio presudu Apelacionog suda u Beogradu i naložio mu da ponovo odlučuje. Ustavni sud nije obavestio podnosioca predstavke o podnetoj ustavnoj žalbi niti o donetoj odluci kojom je ta žalba usvojena. Apelacioni sud u Beogradu je u ponovljenom postupku 2. februara 2017. godine doneo novu presudu, ovog puta na štetu podnosioca predstavke. Protiv te presude podnosilac predstavke je podneo ustavnu žalbu, ali je Ustavni sud tu žalbu odbacio. Podnosilac predstavke se pozvao na povredu prava na pravično suđenje jer mu nije pružena prilika da učestvuje u postupku pred Ustavnim sudom (st. 6–9 presude).

Obe predstavke su zasnovane na sličnim pravnim pitanjima, zbog čega je Evropski sud za ljudska prava o tim predstavkama odlučio istom presudom. Podnosioci predstavki su isticali da ih Ustavni sud nije obavestio o ustavnim žalbama podnetim protiv presuda kojima je odlučeno u njihovu korist, a posledica toga je da nisu mogli da delotvorno štite svoja prava u postupku pred Ustavnim sudom. Vlada Republike Srbije je prigovorila da nisu iscrpljena sva pravna sredstva predviđena unutrašnjim pravom, odnosno da su podnosioci predstavki morali da podnesu ustavne žalbe protiv novih presuda drugostepenih sudova. Evropski sud za ljudska prava je taj prigovor odbio. Naime, poništavanje pravnosnažne presude predstavlja trenutni akt koji ne stvara trajnu situaciju, bez obzira na to što se predmet vraća na ponovno odlučivanje pred nadležnim sudom. Protiv odluke Ustavnog suda ne postoji nijedno pravno sredstvo u unutrašnjem pravu. U svakom slučaju, rezultat postupka po ustavnoj žalbi u slučaju druge predstavke je takav da umanjuje delotvornost tog pravnog sredstva (st. 12–14 presude).

Sledeći argument Vlade odnosio se na sam karakter postupka pred Ustavnim sudom, za koji je Vlada tvrdila da je jednostranački. Iz toga proizlazi da u postupku pred Ustavnim sudom nije neophodno obezbediti poštovanje principa jednakosti oružja (načelo kontradiktornosti). Nijednom odredbom zakonodavstva Republike Srbije nije propisano da se ustavna žalba mora dostaviti na odgovor (izjašnjenje) licu u čiju korist je doneta pobijana sudska odluka niti je takvo postupanje imalo uporište u praksi Ustavnog suda (st. 16 presude).

Suprotno iznetim argumentima, Evropski sud za ljudska prava je zauzeo stav da se pravo na kontradiktoran (adversarni) postupak mora primenjivati i na postupak pred Ustavnim sudom. U konkretnom slučaju, Ustavni sud nije obavestio podnosioce predstavki da su ustavne žalbe podnete protiv pravnosnažnih presuda donetih u njihovu korist. To što ne postoji zakonska odredba koja bi to nalagala, odnosno činjenica da Ustavni sud u svojoj praksi to nije radio, ne znači da je takvo postupanje Ustavnog suda u skladu sa odredbama EKLJP. Shodno tome, podnosioci predstavki nisu imali mogućnost da efektivno učestvuju u postupcima pred Ustavnim sudom. Zbog toga je Evropski sud za ljudska prava utvrdio da je podnosiocima predstavki povređeno pravo na pravično suđenje iz čl. 6(1) EKLJP (st. 17–19 presude).

2. PRAVILA KOJA SE PRIMENJUJU NA POSTUPAK I ODLUČIVANJE O USTAVNOJ ŽALBI

Odredbom člana 170 Ustava propisano je da se ustavna žalba može izjaviti protiv pojedinačnih akata ili radnji državnih organa ili organizacija kojima su poverena javna ovlašćenja, a kojima se povređuju ili uskraćuju ljudska ili manjinska prava i slobode zajemčene Ustavom, ako su iscrpljena ili nisu predviđena druga pravna sredstva za njihovu zaštitu. Sam postupak po ustavnoj žalbi uređen je Zakonom o Ustavnom sudu.[2]

Nakon prvih odluka Ustavnog suda kojima je povodom izjavljenih ustavnih žalbi počeo da poništava odluke sudova, uključujući i odluke Vrhovnog (kasacionog) suda, otvorila se rasprava da li sudske odluke mogu biti predmet preispitivanja u postupku po ustavnoj žalbi i, ukoliko je to moguće, koja su ovlašćenja Ustavnog suda u tom postupku (Trifunović 2009, 167–172; Stanić 2019, 51–71; Draškić 2019, 111–136). Najspornija je bila činjenica da je Ustavni sud poništavao sudske odluke. U tom smislu se isticalo da Ustavni sud treba da se ograniči na utvrđivanje povrede ili uskraćivanja ljudskog ili manjinskog prava i slobode, nakon čega bi se moglo tražiti ponavljanje pravnosnažno okončanog sudskog postupka, u skladu sa odredbama procesnog zakona. Zakonom o izmenama i dopunama Zakona o Ustavnom sudu iz 2011. godine,[3] čl. 89 st. 2 bio je izmenjen tako da su sudske odluke bile izuzete od poništavanja, ali je Ustavni sud u postupku pokrenutom

[2] Zakon o Ustavnom sudu, *Službeni glasnik RS* 109/2007, 99/2011, 18/2013 – odluka US, 40/2015 – dr. zakon, 103/2015, 10/23 i 92/2023.

[3] Zakon o izmenama i dopunama Zakona o Ustavnom sudu, *Službeni glasnik RS* 99/2011.

po službenoj dužnosti utvrdio da je ta izmena zakona neustavna.[4] Nakon toga je nastavio sa poništavanjem sudskih odluka, a ređe se ograničavao na utvrđivanje povrede Ustavom zajemčenog prava i slobode. Takvim postupanjem Ustavni sud je nastojao da pokaže kako stranke pre obraćanja Evropskom sudu za ljudska prava imaju na raspolaganju ustavnu žalbu kao delotvorno pravo sredstvo kojim se može utvrditi i otkloniti povreda ili uskraćivanje prava i sloboda zajemčenih Ustavom (Bodiroga 2019, 187). Izmenama Ustava iz 2022. godine, odredbom čl. 142 st. 4 propisano je da sudsku odluku može preispitivati samo nadležni sud u zakonom propisanom postupku, kao i Ustavni sud u postupku po ustavnoj žalbi. Na ovom mestu treba naglasiti da Ustavni sud kada odlučuje o ustavnoj žalbi ne postupa kao instancioni sud (Marković 2017, 558).

Pravo na izjavljivanje ustavne žalbe ima svako lice koje smatra da mu je pojedinačnim aktom ili radnjom državnog organa ili organizacije kojoj je povereno javno ovlašćenje povređeno ili uskraćeno ljudsko ili manjinsko pravo i sloboda zajemčena Ustavom (čl. 83 st. 1 Zakona o Ustavnom sudu). Osim lica koje je povređeno aktom ili radnjom državnog organa ili organizacije koja vrši javna ovlašćenja, ustavnu žalbu može da izjavi i drugo fizičko lice na osnovu pismenog ovlašćenja, kao i državni ili drugi organ nadležan za praćenje i ostvarivanje ljudskih i manjinskih prava i sloboda (čl. 83 st. 2 Zakona o Ustavnom sudu).

Rok za izjavljivanje ustavne žalbe je 30 dana od dana dostavljanja pojedinačnog akta, odnosno od dana preduzimanja radnje kojom se povređuje ili uskraćuje ljudsko ili manjinsko pravo i sloboda zajemčena Ustavom (čl. 84 st. 1 Zakona o Ustavnom sudu). Ukoliko je rok propušten iz opravdanih razloga, može se podneti predlog za vraćanje u pređašnje stanje. Rok za podnošenje predloga za vraćanje u pređašnje stanje je 15 dana od dana prestanka razloga koji je prouzrokovao propuštanje (čl. 84 st. 2 Zakona o Ustavnom sudu). Po proteku tri meseca od dana propuštanja ne može se tražiti vraćanje u pređašnje stanje (čl. 84 st 3 Zakona o Ustavnom sudu).

Zakonom su propisani obavezni elementi ustavne žalbe. To su: ime i prezime, jedinstveni matični broj građana, prebivalište ili boravište, odnosno naziv i sedište podnosioca ustavne žalbe, ime i prezime njegovog punomoćnika, broj i datum akta protiv koga je žalba izjavljena i naziv organa koji ga je doneo, naznaka ljudskog ili manjinskog prava ili slobode zajemčene Ustavom za koje se tvrdi da je povređeno sa oznakom odredbe Ustava kojom se to pravo, odnosno sloboda jemči, razlozi žalbe i navodi u čemu se sastoji

[4] Odluka Ustavnog suda IUz –97/2012 od 20. decembra 2012. godine, *Službeni glasnik RS* 18/2013.

povreda ili uskraćivanje, opredeljen zahtev o kome Ustavni sud treba da odluči, uz isticanje visine i osnova naknade materijalne ili nematerijalne štete, kada se naknada zahteva, potpis podnosioca ustavne žalbe, odnosno lica kome je izdato specijalno punomoćje za podnošenje ustavne žalbe (čl. 85 st. 1 Zakona o Ustavnom sudu). Uz ustavnu žalbu podnosi se i prepis osporenog pojedinačnog akta, dokazi da su iscrpljena pravna sredstva, dokazi o visini materijalne štete, kao i drugi dokazi od značaja za odlučivanje (čl. 85 st. 2 Zakona o Ustavnom sudu). Zahtev za naknadu štete može biti postavljen samo istovremeno sa podnošenjem ustavne žalbe (čl. 85 st. 3 Zakona o Ustavnom sudu).

Pravilo je da ustavna žalba ne sprečava primenu pojedinačnog akta ili radnje protiv koga je izjavljena (čl. 86 st. 1 Zakona o Ustavnom sudu). Na predlog podnosioca ustavne žalbe, Ustavni sud može odložiti izvršenje pobijanog pojedinačnog akta ili radnje ako bi izvršenje prouzrokovalo nenadoknadivu štetu podnosiocu, a odlaganje nije suprotno javnom interesu, niti bi se odlaganjem nanela veća šteta trećem licu. Traži se da kumulativno budu ispunjena tri uslova: 1) da bi podnosilac ustavne žalbe izvršenjem pretrpeo nenadoknadivu štetu; 2) da odlaganje nije suprotno javnom interesu; 3) da se odlaganjem ne bi nanela veća šteta trećem licu (čl. 86. st. 2 Zakona o Ustavnom sudu). Ako su ispunjeni svi zakonom propisani uslovi, Ustavni sud može ali ne mora odložiti izvršenje.

Ustavni sud odbacuje podnesak kojim se inicira ili pokreće postupak pred Ustavnim sudom: 1) kad utvrdi da Ustavni sud nije nadležan za odlučivanje; 2) ako podnesak nije podnet u određenom roku; 3) ako je podnesak anoniman; 4) kad u ostavljenom roku podnosilac nije otklonio nedostatke koji onemogućavaju postupanje; 5) kad utvrdi da je podnesak očigledno neosnovan; 6) ako utvrdi da se podneskom zloupotrebljava pravo; 7) kad ne postoje druge pretpostavke za vođenje postupka i odlučivanje utvrđene zakonom (čl. 36 st. 1 Zakona o Ustavnom sudu). Kad Ustavni sud utvrdi da nije nadležan za odlučivanje, može podnesak kojim se pokreće postupak, ustupiti nadležnom organu (čl. 36 st. 2 Zakona o Ustavnom sudu). Odredba čl. 36 Zakona o Ustavnom sudu primenjuje se i u postupku po ustavnoj žalbi.

Ako je pojedinačnim aktom ili radnjom povređeno ili uskraćeno Ustavom zajemčeno ljudsko ili manjinsko pravo i sloboda više lica, a samo neki od njih su podneli ustavnu žalbu, odluka Ustavnog suda odnosi se i na lica koja nisu podnela ustavnu žalbu, ako se nalaze u istoj pravnoj situaciji (čl. 87 Zakona o Ustavnom sudu).[5] Postupak o podnetoj ustavnoj žalbi obustavlja se u sledećim slučajevima: 1. ako je ustavna žalba povučena; 2. ako organ koji

[5] Odluka Ustavnog suda Už–8736/2013 od 18. juna 2015. godine.

je doneo osporeni pojedinačni akt poništi, ukine ili izmeni taj akt u skladu sa zahtevom iz ustavne žalbe ili ako je prestala radnja koja je prouzrokovala povredu ili uskraćivanje Ustavom zajemčenog prava i slobode, uz saglasnost podnosioca ustavne žalbe; 3. ako prestanu druge procesne pretpostavke za vođenje postupka (čl. 88 Zakona o Ustavnom sudu).

Ukoliko su ispunjeni svi uslovi za meritorno odlučivanje, Ustavni sud može odbiti ili usvojiti ustavnu žalbu (čl. 89 st. 1 Zakona o Ustavnom sudu). Kada Ustavni sud utvrdi da je osporenim pojedinačnim aktom ili radnjom povređeno ili uskraćeno ljudsko ili manjinsko pravo i sloboda zajemčena Ustavom, može poništiti pojedinačni akt, zabraniti dalje vršenje radnje ili odrediti preduzimanje druge mere ili radnje kojom se otklanjaju štetne posledice utvrđene povrede ili uskraćivanja zajemčenih prava i sloboda i odrediti način pravičnog zadovoljenja podnosioca (čl. 89 st. 2 Zakona o Ustavnom sudu). Odlukom kojom se usvaja ustavna žalba Ustavni sud će odlučiti i o zahtevu podnosioca ustavne žalbe za naknadu materijalne, odnosno nematerijalne štete, kada je takav zahtev postavljen. Ako je zahtev usvojen, Ustavni sud određuje u odluci organ koji je obavezan da isplati naknadu materijalne ili nematerijalne štete i određuje rok od četiri meseca od dana dostavljanja odluke tom organu u kome on dobrovoljno može da plati naknadu štete. Pre isteka tog roka ne može se pokrenuti postupak prinudnog izvršenja (čl. 89 st. 3 Zakona o Ustavnom sudu). Odluka Ustavnog suda kojom je uvažena ustavna žalba ima pravno dejstvo od dana dostavljanja učesnicima u postupku (čl. 89 st. 4 Zakona o Ustavnom sudu).

Ustavni sud donosi odluke, rešenja i zaključke (čl. 44 Zakona o Ustavnom sudu). Odluke, rešenja i zaključci Ustavnog suda sadrže: uvod, izreku i obrazloženje. Sadržina pojedinih delova akata Ustavnog suda bliže se uređuje Poslovnikom, s tim što obrazloženje rešenja o odbacivanju ustavne žalbe, odnosno zaključka može sadržati samo pravni osnov za donošenje (čl. 48 Zakona o Ustavnom sudu).

Ustavni sud rešenjem odbacuje ustavnu žalbu zbog nepostojanja procesnih pretpostavki (čl. 46 t. 9 Zakona o Ustavnom sudu). Rešenje o odbacivanju ustavne žalbe donosi Malo veće koje čine troje sudija Ustavnog suda od kojih je jedan predsednik veća. Ako se ne postigne jednoglasnost članova Malog veća, rešenje donosi Veliko veće (čl. 42v Zakona o Ustavnom sudu). Rešenjem Ustavni sud obustavlja postupak odlučivanja o ustavnoj žalbi (čl. 46 t. 7 Zakona o Ustavnom sudu). Odlukom se ustavna žalba usvaja ili odbija (čl. 45 t. 9 Zakona o Ustavnom sudu). Rešenje o obustavi postupka i odluku o usvajanju ili odbijanju ustavne žalbe donosi Veliko veće, koje čine predsednik i sedam sudija Ustavnog suda. Ako se ne postigne jednoglasnost članova Velikog veća, odluku odnosno rešenje donosi sednica Ustavnog suda (čl. 42b Zakona o Ustavnom sudu).

Odluke Ustavnog suda, izuzev odluke po ustavnoj žalbi, objavljuju se u *Službenom glasniku Republike Srbije*, kao i u službenom glasilu u kome je objavljen statut autonomne pokrajine, drugi opšti akt i kolektivni ugovor, odnosno na način na koji je objavljen opšti akt o kome je Ustavni sud odlučivao (čl. 49 st. 1 Zakona o Ustavnom sudu). U *Službenom glasniku Republike Srbije* može se objaviti odluka po ustavnoj žalbi, kao i rešenja koja su od šireg značaja za zaštitu ustavnosti i zakonitosti (čl. 49 st. 2 Zakona o Ustavnom sudu).

Određena procesna pravila sadržana su u Poslovniku o radu Ustavnog suda.[6] Tim aktom uređeni su: prijem podnesaka i raspoređivanje predmeta, tok postupka (prethodni postupak, javna rasprava, sednica Suda, sednica Velikog veća i sednica Malog veća) i posebni postupci pred Ustavnim sudom. Odredbama čl. 76–78 Poslovnika detaljnije su regulisane pojedine specifičnosti postupka po ustavnoj žalbi kao što su: ispitivanje procesnih pretpostavki, razmatranje ustavne žalbe na odboru i odlaganje izvršenja pojedinačnog akta ili radnje.

Odredbom čl. 8 st. 1 Zakona o Ustavnom sudu propisano je da se na pitanja postupka pred Ustavnim sudom koja nisu uređena tim zakonom shodno primenjuju odredbe odgovarajućih procesnih zakona, a odredbom st. 2 istog člana da će o pitanjima postupka koja nisu uređena tim zakonom ili odredbama procesnih zakona Ustavni sud odlučiti u svakom konkretnom slučaju.

Član 29 Zakona o Ustavnom sudu nosi naziv „Učesnici u postupku" i određuje ko su učesnici u različitim postupcima koji se mogu voditi pred Ustavnim sudom. Odredbom čl. 29 st. 1 t. 9 Zakona o Ustavnom sudu propisano je da su učesnici u postupku po ustavnoj žalbi podnosilac ustavne žalbe i državni organ, odnosno organizacija kojoj su poverena javna ovlašćenja protiv čijeg je pojedinačnog akta ili radnje izjavljena ustavna žalba. U skladu sa odredbom čl. 29 st. 2 Zakona o Ustavnom sudu, u postupku pred Ustavnim sudom mogu učestvovati i druga lica koja Ustavni sud pozove.

Na internet stranici Ustavnog suda mogu se pronaći i stavovi koji se odnose na pojedina procesna pitanja.[7] Ustavni sud je zauzimao stavove o tome koja su to prava i slobode čijom se povredom ili uskraćivanjem stiče mogućnost izjavljivanja ustavne žalbe, protiv kojih akata i radnji se može izjaviti ustavna žalba, kada se smatra da su iscrpljena sva pravna sredstva u sudskom ili u drugom zakonom propisanom postupku, o roku

[6] Poslovnik o radu Ustavnog suda, *Službeni glasnik RS* 103/2013.

[7] Stavovi Ustavnog suda dostupni su na *https://www.ustavni.sud.rs/sudska-praksa/stavovi-suda*, poslednji pristup 25. januara 2025.

za izjavljivanje ustavne žalbe i njenoj urednosti, o dopunama ustavnih žalbi i blagovremenosti naknadnih podnesaka, o sadržini i strukturi odluke o ustavnoj žalbi, o specijalnom punomoćju za izjavljivanje ustavne žalbe i o drugim procesnim pitanjima. Među tim stavovima ne može se naći stav o procesnopravnom položaju lica u čiju korist je doneta sudska odluka koja se pobija ustavnom žalbom, odnosno stav o potrebi njegovog obaveštavanja o tome da je podneta ustavna žalba i pružanju mogućnosti tom licu da učestvuje u postupku pred Ustavnim sudom.

3. PRAVNA PRIRODA POSTUPKA PO USTAVNOJ ŽALBI

Jedan od argumenata koji je Vlada Republike Srbije isticala u postupku pred Evropskim sudom za ljudska prava jeste da je postupak u kojem Ustavni sud odlučuje o ustavnoj žalbi jednostranački postupak. Dalje je navedeno da nijednom odredbom zakona ili drugog propisa nije propisana obaveza dostavljanja ustavne žalbe licu u čiju korist je doneta pobijana sudska odluka, odnosno obaveza obaveštavanja tog lica o postupku koji se vodi pred Ustavnim sudom, povodom izjavljene ustavne žalbe. Takvi stavovi zaslužuju kritički osvrt.

Zakon o Ustavnom sudu govori o učesnicima u postupku. Kao učesnici u postupku po ustavnoj žalbi navedeni su podnosilac ustavne žalbe i državni organ ili organizacija čiji se akt ili radnja pobija (čl. 29 st. 1 t. 9 Zakona o Ustavnom sudu). Odredbom čl. 29. st 2. Zakona o Ustavnom sudu propisano je da u postupku mogu učestvovati i druga lica koja Ustavni sud pozove.

Kada se ustavna žalba izjavljuje protiv pravnosnažne sudske odluke donete u parničnom postupku, za ishod postupka je najzainteresovanija stranka u čiju korist je doneta ta odluka. Na njen pravni položaj će uticati eventualni poništaj pravnosnažne sudske odluke donete u parničnom postupku. Naime, ta stranka je na osnovu poništene pravnosnažne sudske odluke stekla neko pravo. U slučaju poništaja te sudske odluke, pravnosnažno okončan parnični postupak se ponavlja, po službenoj dužnosti. Reč je o ponavljanju pravnosnažno okončanog parničnog postupka koje se ne odvija u skladu sa odredbama Zakona o parničnom postupku.[8] U slučaju da se Ustavni sud ograničio samo na utvrđenje da je pravnosnažnom sudskom odlukom u parničnom postupku došlo do povrede ili uskraćivanja Ustavom zajemčenog ljudskog ili manjinskog prava i slobode, takva odluka

[8] Zakon o parničnom postupku – ZPP, *Službeni glasnik RS* 72/2011, 49/2013 – odluka US, 74/2013 – odluka US, 55/2014, 87/2018, 18/2020, 10/2023– dr. zakon.

Ustavnog suda predstavlja razlog za ponavljanje pravnosnažno okončanog parničnog postupka, u smislu čl. 426 t. 12 Zakona o parničnom postupku. Tada će podnosilac ustavne žalbe morati da podnese predlog za ponavljanje pravnosnažno okončanog parničnog postupka na osnovu odluke Ustavnog suda kojom je usvojena ustavna žalba i utvrđena povreda ili uskraćivanje Ustavom zajemčenog ljudskog ili manjinskog prava i slobode.

Pravnosnažna i izvršna sudska odluka predstavlja izvršnu ispravu, a samo podnošenje ustavne žalbe, po pravilu, ne odlaže izvršenje pobijane odluke. Ustavni sud može odložiti njeno izvršenje, ako su za to ispunjeni uslovi propisani odredbom čl. 86 Zakona o Ustavnom sudu. U suprotnom, može se desiti da Ustavni sud poništi pravnosnažnu i izvršnu sudsku odluku nakon što je na osnovu nje sprovedeno izvršenje.

Već je pomenuto da je posledica poništaja pravnosnažne i izvršne sudske odluke to da će sud čija je odluka poništena morati da ponovi postupak. Osim toga, odredbom čl. 115 st. 1. t. 1. Zakona o izvršenju i obezbeđenju[9] propisano je da ako je izvršna isprava pravnosnažno ili konačno ukinuta, preinačena, poništena, stavljena van snage ili je na drugi način utvrđeno da nema dejstvo, može se podneti predlog za protivizvršenje u roku od 30 dana od dana kada je izvršni dužnik primio odluku kojom je izvršna isprava lišena pravnog dejstva.

Takve situacije stvaraju pravnu nesigurnost za stranku u čiju korist je doneta pravnosnažna i izvršna sudska odluka u parničnom postupku, a koja ne zna da je protiv te odluke podneta ustavna žalba (Bodiroga 2013, 138). Ta stranka će saznati za podnetu ustavnu žalbu tek kada se na osnovu odluke Ustavnog suda pristupi ponavljanju pravnosnažno okončanog parničnog postupka. Ukoliko se Ustavni sud ograničio na utvrđivanje povrede prava, onda će na osnovu takve odluke Ustavnog suda podnosilac ustavne žalbe podneti predlog za ponavljanje pravnosnažno okončanog postupka, u skladu sa čl. 426 t. 12 ZPP (Stanković 2024, 1372). Stranka u čiju korist je doneta pravnosnažna i izvršna sudska odluka će saznati za podnetu ustavnu žalbu tek nakon što joj predlog za ponavljanje postupka bude dostavljen na izjašnjenje.

Svi izneti argumenti dovode u pitanje stav da je postupak odlučivanja o ustavnoj žalbi jednostranački postupak. Tačno je da se u postupku odlučivanja o ustavnoj žalbi protiv sudske odluke ispituje da li je donošenjem te odluke i sprovođenjem postupka koji joj je prethodio došlo do povrede ljudskog

[9] Zakon o izvršenju i obezbeđenju – ZIO, *Službeni glasnik RS* 106/2015, 106/2016 – autentično tumačenje, 113/2017 – autentično tumačenje, 54/2019, 9/2020 – autentično tumačenje, 10/2023 – dr. zakon.

ili manjinskog prava i slobode. Na ovom mestu može se napraviti analogija sa upravnim sporom. U skladu sa čl. 10 Zakona o upravnim sporovima[10] stranke u upravnom sporu jesu tužilac, tuženi i zainteresovano lice. Tužilac u upravnom sporu može da bude fizičko, pravno ili drugo lice, ako smatra da mu je upravnim aktom povređeno neko pravo ili na zakonu zasnovan interes (čl. 11 st. 1 ZUS). Tužilac u upravnom sporu može biti i državni organ, organ autonomne pokrajine i jedinice lokalne samouprave, organizacija, deo privrednog društva sa ovlašćenjima u pravnom prometu, naselje, grupa lica i drugi koji nemaju svojstvo pravnog lica, nadležni javni tužilac i nadležno javno pravobranilaštvo, pod uslovima propisanim zakonom (čl. 11 st. 2–4 ZUS). Tuženi u upravnom sporu jeste organ čiji se upravni akt osporava, odnosno organ koji po zahtevu, odnosno po žalbi stranke nije doneo upravni akt (čl. 12 ZUS). Zainteresovano lice jeste lice kome bi poništaj osporenog upravnog akta neposredno bio na štetu (čl. 13 ZUS). Tužba se dostavlja na odgovor tuženom i zainteresovanom licu (čl. 30 ZUS). Pravilo je da Upravni sud rešava na osnovu činjenica utvrđenih na usmenoj javnoj raspravi (čl. 33 st. 1 ZUS). Na raspravu se pozivaju stranke, što znači da se, osim tužioca i tuženog, poziva i zainteresovano lice.

U postupku odlučivanja o ustavnoj žalbi, osim podnosioca žalbe i državnog organa ili organizacije čiji akt ili radnja je predmet osporavanja, postoji i lice koje bi bilo neposredno oštećeno poništajem osporenog akta u postupku pred Ustavnim sudom. U konkretnom slučaju, ako je ustavna žalba izjavljena protiv pravnosnažne sudske odluke donete u parničnom postupku, poništaj te odluke će imati štetne posledice po stranku u čiju korist je odluka doneta. Upravo zbog toga, stranci koja izvodi neko svoje pravo iz pravnosnažne sudske odluke neophodno je obezbediti da učestvuje u postupku u kojem se odlučuje o njenom poništaju. To se odnosi i na postupak odlučivanja o ustavnoj žalbi.

4. STAVOVI EVROPSKOG SUDA ZA LJUDSKA PRAVA

Evropski sud za ljudska prava je u svojim ranijim presudama analizirao pravnu prirodu postupka po ustavnoj žalbi. Jedna takva presuda doneta je u predmetu *Gaspari protiv Slovenije* (*Gaspari v. Slovenia*).[11] Podnositeljka predstavke je navela da je u postupku pred Ustavnim sudom Slovenije

[10] Zakon o upravnim sporovima – ZUS, *Službeni glasnik RS* 111/2009.

[11] *Gaspari protiv Slovenije*, presuda Evropskog suda za ljudska prava od 21. jula 2009. godine (pravnosnažna 10. decembra 2009.godine). *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 18. januara 2025.

povređeno njeno pravo na pravično suđenje iz čl. 6(1) EKLJP. Prvobitno je vođen parnični postupak radi podele bračne tekovine nakon razvoda braka podnositeljke predstavke i njenog muža. Prvostepeni sud je doneo presudu kojom je usvojio tužbeni zahtev podnositeljke predstavke i odbio zahtev iz protivtužbe koju su podneli naslednici njenog preminulog muža. Viši sud u Ljubljani je ukinuo prvostepenu presudu i vratio predmet prvostepenom sudu na ponovno odlučivanje. Protiv te odluke podnositeljka predstavke je podnela reviziju koju je Vrhovni sud Slovenije odbacio. U ponovljenom postupku pred prvostepenim sudom tužbeni zahtev podnositeljke predstavke je odbijen. Odlučujući o izjavljenoj žalbi Viši sud u Ljubljani je potvrdio prvostepenu presudu. Podnositeljka predstavke je protiv drugostepene presude podnela reviziju. Vrhovni sud Slovenije je utvrdio da su nižestepeni sudovi pogrešno primenili materijalno pravo i u jednom delu presudio u korist podnositeljke predstavke, a u preostalom delu ukinuo presudu drugostepenog i prvostepenog suda i vratio predmet na novo suđenje prvostepenom sudu. Naslednici preminulog muža podnositeljke predstavke su protiv presude Vrhovnog suda Slovenije podneli ustavnu žalbu. Ustavni sud Slovenije je ocenio da su ispunjeni procesni uslovi za meritorno odlučivanje i većinom glasova je usvojio ustavnu žalbu i poništio presudu Vrhovnog suda. Podnositeljka predstavke je primila odluku Ustavnog suda, ali u spisima ne postoji dokaz na osnovu kojeg se može utvrditi kada se to tačno desilo. Ustavni sud je poništio presudu Vrhovnog suda navodeći da se taj sud upustio u preispitivanje činjeničnog stanja koje je bilo utvrđeno u postupku pred nižestepenim sudovima, što u postupku odlučivanja o reviziji nije dozvoljeno. U tom postupku Vrhovni sud kontroliše primenu materijalnog prava, ali ne i činjenično stanje koje je utvrđeno u postupku pred nižestepenim sudovima. Prema nalaženju Ustavnog suda, presuda Vrhovnog suda je proizvoljna i pogrešna jer je doneta prekoračenjem ovlašćenja koja Vrhovni sud ima u postupku odlučivanja o reviziji. Nakon odluke Ustavnog suda, Vrhovni sud je u ponovljenom postupku u jednom delu presudio u korist podnositeljke predstavke, a u preostalom delu je ukinuo presudu drugostepenog i prvostepenog suda i vratio predmet na novo suđenje prvostepenom sudu. Naslednici preminulnog muža podnositeljke predstavke podneli su ustavnu žalbu protiv presude Vrhovnog suda donete u ponovljenom postupku. Ustavni sud je poništio presudu Vrhovnog suda, odbacio reviziju i potvrdio drugostepenu presudu. Razlog za poništaj presude Vrhovnog suda je bio isti kao i u ranijem postupku. Ustavni sud je zaključio da Vrhovni sud nije postupio po prethodnom nalogu Ustavnog suda i da se opet bavio činjeničnim stanjem koje je utvrđeno u postupku pred nižestepenim sudovima. Pozivajući se na to da postupak u ovom predmetu predugo traje, Ustavni sud je iskoristio zakonsko ovlašćenje i meritorno odlučio tako što je potvrdio presudu drugostepenog suda. U

odluci Ustavnog suda je navedeno da je podnositeljki predstavke dostavljena ustavna žalba, ali da ona nije podnela odgovor. Podnositeljka predstavke je tvrdila da nikada nije primila prvu ustavnu žalbu. Iz spisa proizlazi da je Ustavni sud pokušao da izvrši dostavljanje druge ustavne žalbe, zajedno sa odlukom o njenoj dopuštenosti i poukom da podnositeljka predstavke ima pravo da odgovori na ustavnu žalbu u roku od osam dana od dana dostavljanja. Ta pismena su poslata podnositeljki predstavke, ali joj nikad nisu uručena. Dostavljanje je pokušano na adresi koja se razlikuje od adrese podnositeljke predstavke. Nesporno je da je podnositeljka predstavke bila zainteresovana za ishod postupka pred Ustavnim sudom. Odluka Ustavnog suda imala je direktne posledice na ostvarivanje njenih imovinskih prava, a podnositeljka predstavke nije imala priliku da učestvuje u postupku pred tim sudom. Podnositeljka predstavke ne spori specifičnu prirodu postupka pred Ustavnim sudom, ali smatra da joj je moralo biti omogućeno da u tom postupku štiti svoja prava. Uskraćivanje te mogućnosti predstavlja povredu prava na pravično suđenje. Vlada Republike Slovenije se branila isticanjem da nije bilo nikakvih nepravilnosti prilikom pokušaja dostavljanja ustavne žalbe na odgovor. Evropski sud za ljudska prava ističe da je pravo na kontradiktoran postupak jedan od elemenata prava na pravično suđenje. U skladu sa načelom kontradiktornosti, stranke moraju da budu upoznate sa svim dokazima koji su od značaja za donošenje odluke o njihovim zahtevima i da imaju mogućnost da komentarišu sve dokaze i podneske koji mogu uticati na odluku suda. Taj zahtev, koji proizlazi iz prava na pravično suđenje, primenjuje se i na postupak pred Ustavnim sudom. U konkretnom slučaju Ustavni sud je odlučivao o ustavnim žalbama protivne stranke koje podnositeljki predstavke nisu dostavljene. To se desilo zbog razloga koji nemaju nikakve veze sa ponašanjem podnositeljke predstavke. Ustavni sud je ocenio da su obe ustavne žalbe dopuštene i potom ih je usvojio. O kasnije podnetoj ustavnoj žalbi Ustavni sud je meritorno odlučio tako što je odbacio reviziju podnositeljke predstavke i potvrdio odluku drugostepenog suda. Prema shvatanju Evropskog suda za ljudska prava, podnositeljka predstavke je imala legitiman interes da joj ustavne žalbe budu dostavljene kako bi mogla da podnese odgovor. Polazeći od ranije usvojenih stavova, Evropski sud za ljudska prava se nije bavio ispitivanjem da li je propuštanje dostavljanja nekog podneska moglo da ima štetne posledice po podnositeljku predstavke. Na podnositeljki predstavke je ocena da li je reč o podnesku koji zahteva njeno izjašnjavanje. Ustavni sud je imao teret da dokaže da je preduzeo sve u granicama svojih nadležnosti kako bi podnositeljki predstavke omogućio da učestvuje u tom postupku. U slovenačkom Zakonu o Ustavnom sudu, u vreme kada se odlučivalo o ustavnoj žalbi, postojala je obaveza da se ustavna žalba dostavi organu čiji se akt pobija. Ustavni sud Slovenije je, tumačenjem relevantnih zakonskih odredaba, ustanovio praksu da se ustavna žalba

dostavlja protivnoj stranci na odgovor. Izmenama Zakona o Ustavnom sudu iz 2007. godine izričito je propisano da se ustavna žalba dostavlja na odgovor zainteresovanim licima.[12] U konkretnom slučaju, za razliku od predstavki podnetih protiv Republike Srbije, to što u trenutku odlučivanja o ustavnoj žalbi nije postojala zakonska odredba o obaveznom dostavljanju ustavne žalbe drugim zainteresovanim licima nije sprečilo Ustavni sud Slovenije da naloži dostavljanje ustavnih žalbi podnositeljki predstavke, samo što dostavljanje nije uspelo iz drugih razloga. Ustavni sud Slovenije nije preduzeo mere kako bi dostavljanje bilo izvršeno na tačnu adresu, čime je podnositeljka predstavke bila sprečena da štiti svoja prava pred Ustavnim sudom, što je dovelo do povrede njenog prava na pravično suđenje (st. 5–57 presude).

U predmetu *Milatova i drugi protiv Češke Republike* (*Milatova and others v. The Czech Republic*),[13] Evropski sud za ljudska prava bavio se primenom prava na pravično suđenje u postupku pred Ustavnim sudom. Predstavka je podneta povodom parničnog postupka u kojem se odlučivalo o zahtevu za restituciju zemljišta. Nakon dugotrajnog postupka pred sudovima i drugim organima, podnosioci predstavke su podneli ustavnu žalbu. Ustavni sud je pozvao regionalni sud i druge organe koji su postupali povodom zahteva za restituciju da podnesu svoju komentare na podnetu ustavnu žalbu. To su učinili samo regionalni sud i vojna kompanija koja je upravljala spornom imovinom. Nakon toga, bez održane javne rasprave, Ustavni sud je odbacio ustavnu žalbu protiv jedne presude regionalnog suda kao neblagovremenu, dok je ustavnu žalbu protiv druge presude tog istog suda

[12] Odredbom čl. 94 st. 3 Zakona o Saveznom ustavnom sudu SR Nemačke propisano je da ukoliko je ustavna žalba podneta protiv sudske odluke, Savezni ustavni sud će omogućiti licima u čiju korist je doneta sudska odluka da se o ustavnoj žalbi izjasne. *https://www.gesetze-im-internet.de/bverfgg/__94.html*, poslednji pristup 25. januara 2025. Obaveza dostavljanja ustavne žalbe licima zainteresovanim za ishod postupka i omogućavanje tim licima da se o ustavnoj žalbi izjasne propisana je i u zakonodavstvima država nastalih raspadom SFRJ. Odredbom čl. 74 Zakona o Ustavnom sudu Crne Gore propisano je da se ustavna žalba dostavlja licima na čija prava ili obaveze bi direktno uticala odluka kojom bi se usvojila ustavna žalba. Ta lica imaju pravo da se izjasne o ustavnoj žalbi u roku koji odredi Ustavni sud. *https://www.ustavnisud.me/dokumenti/Zakon%20o%20Ustavnom%20sudu%20Crne%20Gore%202015.pdf*, poslednji pristup 25. januara 2025. Slično rešenje postoji i u Republici Hrvatskoj. Odredbom čl. 69 Ustavnog zakona o Ustavnom sudu Republike Hrvatske propisano je da sudija izvestilac, prema potrebi, dostavlja primerak ustavne tužbe zainteresovanim licima i poziva ih da se o njoj izjasne. *https://www.zakon.hr/z/137/Ustavni-zakon-o-Ustavnom-sudu-Republike-Hrvatske*, poslednji pristup 29. januara 2025.

[13] *Milatova i drugi protiv Češke Republike*, presuda Evropskog suda za ljudska prava od 21. juna 2005. (pravnosnažna 21. septembra 2005). *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 20. januara 2025.

odbio kao neosnovanu. Svoju odluku Ustavni sud je zasnovao na podnescima regionalnog suda i vojne kompanije. Iz izjašnjenja Vlade proizlazi da je samo prvi podnosilac predstavke ostvario pravo na uvid u te podneske i omogućeno mu je da ih kopira. Podnosioci predstavke su tvrdili da im je neodržavanjem javne rasprave i uskraćivanjem mogućnosti da se izjasne o podnescima na kojima je Ustavni sud zasnovao svoju odluku povređeno pravo na pravično suđenje. Zakonom o Ustavnom sudu bilo je propisano da je sudija izvestilac dužan da ustavnu žalbu dostavi ostalim strankama na izjašnjenje, ali nije bilo predviđeno da se ta izjašnjenja dostavljaju podnosiocu ustavne žalbe. Činjenica da su podnosioci predstavke imali pravo da izvrše uvid u spis Ustavnog suda i pravo da kopiraju određene podneske nije dovoljna da obezbedi pravičan i kontradiktoran postupak. Ustavni sud je morao da obavesti podnosioce predstavke o podnescima drugih učesnika u postupku i da im omogući da se o tim podnescima izjasne. Tačno je da su odluke u postupcima pred nižestepenim sudovima donete na osnovu održane javne rasprave, usled čega bi se moglo zaključiti da nije neophodno da se javna rasprava ponovo održava pred Ustavnim sudom. Postupak pred Ustavnim sudom bio je ograničen na ispitivanje ustavnopravnih pitanja. Neodržavanje javne rasprave u postupku pred Ustavnim sudom nadomešteno je činjenicom da je prilikom odlučivanja o osnovanosti zahteva podnosilaca predstavke, u postupku pred nižestepenim sudovima, održana javna rasprava. Ustavni sud svoju odluku nije zasnovao na podnescima koji nisu bili prethodno iznošeni u postupku pred upravnim organima i sudovima. Bez obzira na sve navedeno, imajući u vidu da su podnesci regionalnog suda i vojne kompanije sadržali izjašnjenja o ustavnoj žalbi podnosilaca predstavke koja su direktno povezana sa pitanjem njene osnovanosti, podnosioci predstavke su imali legitiman interes da im ti podnesci budu dostavljeni. Na Ustavnom sudu je bio teret da dokaže da je preduzeo potrebne mere kako bi podnosiocima predstavke omogućio da se o tim podnescima izjasne. Ustavni sud to nije učinio, čime je povređeno pravo na pravično suđenje u postupku pred tim sudom (st. 1–66 presude).

Osim prava na kontradiktoran postupak, Evropski sud za ljudska prava razmatrao je i primenu drugih elemenata prava na pravično suđenje u postupku odlučivanja o ustavnoj žalbi. Jedan od tih elemenata tiče se prava stranke na obrazloženu sudsku odluku. U predmetu *Paun Jovanović protiv Srbije* (*Paun Jovanović v. Serbia*)[14] podnosilac predstavke je tvrdio da mu je kao advokatu prilikom saslušanja njegovog branjenika pred istražnim

[14] *Paun Jovanović protiv Srbije*, presuda Evropskog suda za ljudska prava od 7. februara 2023. godine (pravnosnažna 7. maja 2023.godine). *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001–58402%22]}*, poslednji pristup 25. januara 2025.

sudijom Osnovnog suda u Boru bilo uskraćeno pravo da se koristi srpskim jezikom ijekavskog narečja. Podneo je žalbu Ustavnom sudu, navodeći da ga je istražni sudija već prilikom postavljanja prvog pitanja svedoku upozorio da mora da postavlja pitanja na srpskom jeziku (službenom jeziku suda). Na zahtev podnosioca predstavke, to upozorenje sudije uneto je u zapisnik. Advokat oštećenog je upotrebljavao srpski jezik ekavskog narečja i nisu mu izricana nikakva upozorenja. Podnosilac predstavke je istakao da je diskriminisan zbog toga što kao lice crnogorskog porekla govori ijekavskim narečjem srpskog jezika. Pozvao se na povredu čl. 14 EKLJP i čl. 1 Protokola 12 uz EKLJP. Osim ustavne žalbe, podneo je i pritužbu Visokom savetu sudstva. Ustavni sud je odbacio ustavnu žalbu, pozivajući se na čl. 36 st. 1 t. 7 Zakona o Ustavnom sudu, uzimajući u obzir obrazloženje ustavne žalbe te pravnu prirodu i suštinu ponašanja istražnog sudije. Prema oceni Ustavnog suda, nije reč o pojedinačnom aktu ili radnji državnog organa ili organizacije koja vrši javna ovlašćenja, u smislu čl. 170 Ustava. Drugim rečima, ponašanje istražnog sudije na koje se pozvao podnosilac predstavke, ne može biti predmet osporavanja u postupku po ustavnoj žalbi. Odredbom čl. 36 st. 1 t. 7 Zakona o Ustavnom sudu propisano je da će podnesak kojim se inicira ili pokreće vođenje postupka pred tim sudom biti odbačen kada ne postoje druge pretpostavke za vođenje postupka i odlučivanje, utvrđene zakonom. Nakon odbacivanja ustavne žalbe podneo je predstavku Evropskom sudu za ljudska prava, smatrajući da odluka Ustavnog suda nije adekvatno obrazložena, čime je povređeno njegovo pravo na pravično suđenje. Evropski sud za ljudska prava polazi od toga da je pravo na obrazloženu sudsku odluku jedan od segmenata prava na pravično suđenje. To podrazumeva obavezu sudova da daju dovoljne razloge za svoje odluke. Stranka ima pravo na to da njen zahtev bude istinski ispitan. To ne znači da je sud dužan da pruži detaljan odgovor na svaki argument. Pravo na obrazloženu sudsku odluku zavisi od prirode same odluke, ali i od okolnosti svakog konkretnog slučaja. Ustavni sud je odbacio ustavnu žalbu podnosioca predstavke navodeći da nisu ispunjene druge zakonom propisane procesne pretpostavke za vođenje postupka, pri čemu je samim Zakonom o Ustavnom sudu, u čl. 48 st. 2, propisano da obrazloženje rešenja o odbacivanju ustavne može sadržati samo pravni osnov za njegovo donošenje. Evropski sud za ljudska prava je zaključio da Ustavni sud nije naveo koje su to druge zakonom propisane pretpostavke zbog čijeg je nepostojanja ustavna žalba odbačena niti je obrazložio zašto ponašanje istražnog sudije ne može biti predmet osporavanja u postupku po ustavnoj žalbi. Situacija bi bila drugačija da je Ustavni sud to objasnio u konkretnom slučaju ili u dostupnoj i objavljenoj praksi. Ustavni sud je propustio da navede koja pravna sredstva stoje na raspolaganju podnosiocu predstavke kako bi mogao da zaštiti svoja prava. Samo pozivanje na čl. 36 st. 1 t. 7 Zakona o Ustavnom sudu svodi se na puku konstataciju da nisu

ispunjene druge procesne pretpostavke za meritorno odlučivanje. Takvo postupanje Ustavnog suda nije u skladu sa dužnošću nacionalnih sudova koja podrazumeva da se povreda prava garantovanih odredbama EKLJP ili dodatnih protokola mora ispitati sa dužnom pažnjom i strogošću. Sud višeg stepena ima pravo da odbaci žalbu navodeći samo pravni osnov za takvu odluku jedino u slučaju da je postojala detaljna presuda ili rasprava pred nižim sudom o spornim pitanjima. U ovom predmetu to se nije desilo. Zbog svih iznetih argumenata, odlukom da odbaci žalbu podnosioca predstavke Ustavni sud je povredio njegovo pravo na pravično suđenje (st. 1–110 presude).

5. UMESTO ZAKLJUČKA

Pravo na pravično suđenje nesumnjivo obuhvata i pravo na kontradiktoran postupak. Za skoro 20 godina postupanja po ustavnim žalbama, Ustavni sud je poništio brojne sudske odluke nalazeći da je u postupcima koji su prethodili njihovom donošenju povređeno pravo stranke na kontradiktoran postupak kao element prava na pravično suđenje. Posledica toga je bila dužnost suda koji je povredio pravo stranke da ponovi postupak odlučivanja poštujući sva procesna jemstva koja su zaštićena pravom na pravično suđenje.

Imajući u vidu značajna ovlašćenja koja Ustavni sud ima u postupku odlučivanja o ustavnim žalbama, moralo se postaviti pitanje pravne prirode tog postupka, ali i zaštite prava samih stranaka u postupku pred tim sudom. Evropskom sudu za ljudska prava podnose se predstavke u kojima se ukazuje i na povrede prava na pravično suđenje u postupku pred Ustavnim sudom. To je bila prilika da Evropski sud za ljudska prava analizira relevantno zakonodavstvo i zauzme stavove o ovom pitanju.

Odredbom čl. 29 st. 1 t. 9 Zakona o Ustavnom sudu propisano je ko su učesnici u postupku po ustavnoj žalbi. To su podnosilac ustavne žalbe i državni organ ili organizacija koja vrši javna ovlašćenja protiv čijeg je akta ili radnje podneta ustavna žalba. Odredbom st. 2 istog člana propisano je da u postupku pred Ustavnim sudom mogu učestvovati i druga lica kada ih Ustavni sud pozove. Podnošenje ustavne žalbe protiv sudske odluke i sam ishod postupka odlučivanja o ustavnoj žalbi nesumnjivo će imati posledice po lice koje neko svoje pravo zasniva na toj sudskoj odluci. Zbog toga to lice ima pravni interes da mu se dostavi podneta ustavna žalba i da se izjasni o navodima iz ustavne žalbe. Citirane zakonske odredbe to lice izričito ne spominju kao učesnika u postupku po ustavnoj žalbi, ali Ustavni sud svakako ima pravo da ga, u skladu sa odredbom čl. 29 st. 2 Zakona o Ustavnom sudu, pozove da u tom postupku učestvuje. U protivnom, lice u čiju korist je doneta

pobijana sudska odluka će saznati za podnetu ustavnu žalbu tek nakon što se po nalogu Ustavnog suda bude pristupilo ponovnom odlučivanju. Tada će to lice saznati da je Ustavni sud poništio pravnosnažnu sudsku odluku donetu u njegovu korist.

Presudom donetom u predmetu *Stefanović i Banković protiv Srbije*, Evropski sud za ljudska prava ukazao je na nedostatke u postupanju Ustavnog suda. Da bi se ti nedostaci otklonili, mora se unaprediti procesnopravni položaj lica u čiju korist je doneta sudska odluka protiv koje je izjavljena ustavna žalba. To je moguće učiniti izmenama Zakona o Ustavnom sudu kojima bi se izričito propisala dužnost obaveštavanja tog lica o podnetoj ustavnoj žalbi i omogućavanje podnošenja odgovora na ustavnu žalbu. Druga mogućnost je da se čl. 29 st. 2 Zakona o Ustavnom sudu primeni na način koji će omogućiti protivniku podnosioca ustavne žalbe da štiti svoja prava u postupku pred Ustavnim sudom.

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PRINCIPLE OF ADVERSARINESS IN THE PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT: REVIEW OF JUDGMENT OF EUROPEAN COURT OF HUMAN RIGHTS

Summary

The purpose of this paper was to tackle the principle of adversariness in the proceedings before the Serbian Constitutional Court. Two applications have been filed to the European Court of Human Rights because of inability of the applicants to participate in the proceedings before the Constitutional Court in which final judgments in their favour were quashed. The applicants complained under Article 6 § 1 of the Convention that the Constitutional Court had failed to inform them of the constitutional appeals lodged against the judgments in their favour and that, as a result, they had not had an opportunity to participate effectively in the proceedings before the Constitutional Court. According to the case law of European Court of Human Rights the principle of adversariness in court proceedings also includes the proceedings before Constitutional Court. Since the applicants were not provided with an opportunity to participate effectively in the proceedings before the Constitutional Court, there has been a violation of Article 6 § 1 of the Convention on this account. In future Serbian Constitutional Court would have to secure the application of adversariness principle in the proceedings instigated by constitutional appeals.

Key words: *Constitutional appeal. – Adversariness principle. – Constitutional Court. – European Court of Human Rights.*

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Jovana POPOVIĆ, LL.M.*

Katarina Jovičić, Slobodan Vukadinović. 2023. *Neizvršenje ugovora, odgovornost i naknada štete (Nonperformance of contracts, liability, and compensation for damages).* **Belgrade: Institut za uporedno pravo, 228.**

1. INTRODUCTION

The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* (Nonperformance of contracts, liability, and compensation for damages)[1] provides comprehensive insight into legal issues that arise in cases involving breaches of contract, with a particular focus on contractual liability and compensation for damages. The authors approach these topics from both the theoretical and the practical perspectives, offering solutions to problems frequently encountered in business, judicial, and arbitration practices. The focus is on current and significant issues, presenting systematic analyses

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1 The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* is publicly available at: *http://ricl.iup.rs/1868/*, last visited December 8, 2024.

and proposals for resolving problems. Their review includes characteristic solutions from various national laws, international conventions (such as the United Nations Convention on Contracts for the International Sale of Goods, which has been ratified by Serbia), as well as foreign and Serbian case law. This thorough analysis covers both theoretical considerations and practical aspects of contract law (such as issues related to contract performance and the resulting effects), which is of great importance to legal professionals and academics.

The book further provides a comparative approach, which enables a cross-analysis of the legal concepts and trends at the international level.[2]

2. THE DIVERSITY OF SOURCES OF CONTRACT LAW

The first chapter, which addresses the sources of law, clearly highlights the importance of the principle of autonomy of will in contract law, while also pointing out its limitations through mandatory norms and public policy. A key distinction is made between the influence of contracting parties on their relationships and the restrictions that arise from the application of mandatory regulations. These limitations raise the question of whether the autonomy of the parties will can be viewed as absolute or whether it is essentially relative, dependent on the legal and regulatory frameworks within which it operates. In this way, the space for contractual freedom exists but is always subordinate to the broader legal contexts, which can dictate the outcomes of contractual relations.

Furthermore, the authors discuss the significance and application of the principle of freedom of contract, both in the context of substantive law and in the context of conflict of laws. While the principle of autonomy of the will is historically deeply rooted in liberal economic and political ideas (Vukčević 1983, 59), it still occupies a central place in contemporary contract law, particularly with regard to the ability of contracting parties to independently regulate their legal relations (Jovičić 2019, 440). The concept derived from concepts of economic liberalism assumes that each party will

[2] In examining and researching the topics covered in the monograph, the authors have utilized relevant legal literature, appropriate legal sources, and judicial practice. Their analysis encompasses a broad range of sources, including national legislations, international conventions, and principles of international contract law. The authors employ clear language and a straightforward writing style. This approach allows the reader to effortlessly follow and understand the complex legal issues addressed in the book.

best manage its own interests, but it does not account for asymmetric power of the different contracting parties. Limitations on the principle of autonomy of the will often serve as a protection against abuses and power imbalances, but they raise the question of whether contractual autonomy truly exists in the sense presented in theory. Adhesion contracts (Vukadinović 2020, 5–15) illustrate how economically stronger parties can leverage their position to impose terms, while the weaker party has little or no room for negotiation. In today's world, where large corporations and powerful economic entities often dictate the terms of agreements, does the principle of autonomy of will truly allow for fair and equitable application? In this context, limitations on the principle of autonomy of will are not only a necessity but also a reflection of the growing need for legal protection against inequality in contractual relations (Jovičić 2019, 440).[3]

The reader will understand how contracting parties can choose and apply the applicable rules of foreign law, rules from international conventions, customary rules, codified rules of international organizations, as well as rules contained in the principles of international contract law.

3. BINDING NATURE OF THE CONTRACT AND LEGAL CONSEQUENCES OF NONPERFORMANCE

By examining various concepts of nonperformance of contractual obligations, the book offers a deep insight into the theoretical and practical aspects of contractual liability. The authors point out that although Serbian positive law currently lacks a provision that would explicitly formulate the principle of contractual obligation – which does not diminish its significance in practice – progress has been made with the introduction of such a provision in the Draft Civil Code of the Republic of Serbia (Commission for the Drafting of the Civil Code 2015, 109). Although the principle of the binding nature of contracts is theoretically undisputed and deeply rooted in the tradition of contract law, the lack of an explicit provision in current Serbian positive law raises questions about the clarity and transparency of the legislative framework. Comparative law examples, such as those from France and Italy, demonstrate that it is possible to clearly and precisely formulate this principle (Jovičić, Vukadinović 2023, 62–63), which contributes to legal

[3] Jovičić (2019) provides arguments justifying the need for greater limitation of the freedom of contract for traders in consumer contracts, aimed at ensuring a fairer relationship in agreements between consumers, who are less experienced in negotiations, and traders, who are more knowledgeable and financially stable.

certainty. The lack of such a provision in Serbian law opens the door to legal uncertainty and varying interpretations, especially in situations involving disputes. This issue becomes even more relevant considering that legal systems around the world already have explicit norms that articulate this principle, which further encourages reflection on the need for additional steps to formalize the principle of contractual obligation, thereby achieving greater clarity and predictability.

It also explores the issue of why contracts are binding and why legal systems protect contractual obligations as legally binding, while other promises remain in the realm of moral obligation. Although the principle of autonomy of the will is key to contractual autonomy, the question arises as to why legal systems feel the need to protect contracts as legally binding. Is it justified to legally sanction every deviation from contractual obligations, or should legal theory recognize greater freedom for the parties to revise their obligations? Additionally, it examines various perspectives that are significant for the development of contract law theory, from Roman law, which forms the foundation of our contract law, to modern theories of contract law. Thus, the book also analyzes promise theory, reliance theory, transfer theory, as well as the prevailing principle of *pacta sunt servanda*.[4]

The book examines when a contract is considered unperformed in a legal sense and analyzes various concepts of nonperformance in comparative law, which is important for determining contractual liability and compensation for damages. The question arises whether legal systems clearly define the concept of nonperformance or leave room for subjective interpretation and different interpretations depending on the specific case. Comparative

[4] A contract would not be a contract if it did not bind the parties who entered into it. The principle that contracts bind is ancient, having been upheld by the earliest civilizations (Confucianism, Buddhism, Hinduism, and later Islam pay particular attention to the duty of contract performance; in Sharia law, the principle of *pacta sunt servanda* has a divine origin). The essence of the rule is clear and straightforward: contracts must be honored and performed, whether they concern contracts between private individuals or those concluded by a state or sovereign. *Pacta sunt servanda* also means that contractual obligations should be fulfilled in good faith and that the contracting parties express mutual understanding and respect. Contract performance is carried out in accordance with the interpretation of the contract, which consolidates what is required by the contract and how those requirements must be met. The principle of good faith applies equally to both the parties to the contract and to the judge or arbitrator resolving the dispute. Interpretation of the contract in good faith includes, among other things, the assumption that the contracting parties acted fairly, that they made real rather than illusory promises, that nothing unreasonable, contradictory, or impossible was intended, and that terms were used in their usual meaning (Kotuby, Sobota 2017, 90–92).

legal analysis shows that there is no uniform approach to this issue, which can lead to legal uncertainty. A universal definition could contribute to predictability, but the specificities of each contract often require flexibility and tailored analysis. Specifically, the authors of this book examine the unitary concept of nonperformance, which implies that any deviation from contractual obligations constitutes a breach of contract, regardless of the cause or nature of that deviation (Jovičić, Vukadinović 2023, 80–82). They then discuss the application of the unitary concept of nonperformance in the context of international legal sources such as the Vienna Convention, the UNIDROIT Principles, and the Principles of European Contract Law. These sources do not differentiate between complete and partial nonperformance, but they include mechanisms that mitigate the debtor's liability, primarily through remedies available to the creditor. Although this concept provides clarity, there is a risk that a formalistic approach could lead to stricter liability for the debtor, even in cases of unforeseeable circumstances. The book highlights the need to consider more flexible models, which would better balance the interests of the contracting parties and enable fairer dispute resolution.

The value of the book also lies in pointing out the differences between the unitary concept of nonperformance and the approach characteristic of continental legal systems. While the unitary concept emphasizes the legal remedies available to the creditor, continental legal systems focus more on the causes of nonperformance and on determining appropriate legal remedies for each type of breach of contract (Jovičić, Vukadinović 2023, 94–99).

The chapter concludes with an analysis of nonperformance in Serbian positive law, with an emphasis on the theoretical and practical aspects. Although Serbian law clearly distinguishes three general forms of nonperformance – delay, impossibility of performance, and liability for material and legal defects – the challenges that arise in practice can lead to inefficiency. In particular, the distinction between complete and partial nonperformance often results in different legal consequences, which can lead to unfairness in complex cases. Perhaps, instead of insisting on formal distinctions, the focus should be more on the essence of breaching and the fair protection of the contracting parties' interests.

4. CONTRACTUAL LIABILITY: BASIS, LIMITATION, AND EXCLUSION

In the third part of the book, the authors examine proper performance of obligations as the primary goal of any contractual relationship[5] and as the regular way in which an obligation between contracting parties is completed. It is particularly emphasized that deviations from contractual obligations do not always lead to a legally relevant breach of contract, as the circumstances of each case must be carefully considered. Accordingly, the authors discuss contractual liability and analyze it in the context of the Serbian Law on Obligations. They point out that the damages resulting from nonperformance of a contract is considered a consequence of a breach of the primary obligation, and that contractual liability is essentially liability for compensation of damages. However, they emphasize that there are situations in which the debtor may be exempt from liability if they can prove that the nonperformance occurred due to circumstances beyond their control. When it comes to the theoretical aspects of contractual liability, the authors note that in Serbian law there is a dilemma as to whether contractual liability is based on the debtor's fault (subjective liability) or whether the debtor is liable regardless of fault (objective liability). They note that the majority of older local authors, including experts from the former SFRY, believed that the Law on Obligations establishes the basis of contractual liability as subjective liability, which has also been confirmed in national court decisions. Additionally, they point out that in more recent literature, Marija Karanikić Mirić and Nebojša Jovanović also highlight this dilemma (Jovičić, Vukadinović 2023, 117).

The issue of objective and subjective liability of the debtor is examined through the lens of comparative law, with particular focus on the differences between continental and Anglo-Saxon law (Jovičić, Vukadinović 2018, 647–660).

Limitation or exclusion of contractual liability is a topic thoroughly addressed through an analysis of the legal norms governing these legal institutes, as well as exoneration clauses. Therefore, this section also focuses on the issue of impossibility of performance, as it allows the debtor to be released from fulfilling obligations established by the contract. The issue of contractual limitation or exclusion of liability presents a challenge in modern law, which faces the need to allow flexibility in contractual relationships,

[5] The primary obligation of the debtor under a legally valid contract is to perform the obligations undertaken by the contract diligently and in accordance with its provisions.

while also ensuring the protection of the weaker party. Although contracting parties have the right to regulate their own relations, national legislation often limits this freedom to prevent abuses, particularly in cases of power imbalance. This is especially significant in consumer law, where exclusion clauses are frequently considered unfair and may be annulled. Conversely, in contracts between professionals, these clauses can serve as a legitimate means to allocate risks between the parties, though their validity depends on compliance with applicable law. By analyzing the legal basis for the limitation and exclusion of contractual liability through exoneration clauses, the authors highlight their importance and varied application in modern contract law. It is emphasized that, although theoretically these clauses provide greater predictability in contractual relationships, there is a risk of their abuse in practice, especially when the economically stronger party imposes its terms on the economically weaker party.[6] Regarding legal systems that allow for the contractual limitation of liability, the authors point out that although there is theoretical space for the application of such clauses, their practical application is limited, particularly in consumer law where they may be declared void due to an imbalance in the relationship between contracting parties. In commercial contracts, these clauses are used more frequently, but experts exercise caution when negotiating them (Jovičić, Vukadinović 2023, 135).

Although exoneration clauses can be beneficial to contracting parties in terms of reducing legal uncertainty and improving contract predictability, the question arises whether such contractual solutions always reflect true autonomy of will or are also used as tools to protect the interests of economically stronger actors. The increasing use of these clauses in consumer contracts raises concerns about whether it is truly possible to achieve a fair balance between contracting parties, or if they essentially serve as a means to secure the interests of the stronger negotiators at the expense of the weaker ones. The need for transparency and equality in negotiations has never been greater, especially in light of the increasingly complex contractual relationships in the global economy. In this context, the question is whether legislators should provide additional mechanisms to protect weaker parties or if this remains a matter for judicial practice and legal interpretation.

[6] This occurrence is common in cases where contracts are concluded through standard-form agreements or pre-prepared contract models, where the weaker party is effectively in a situation where they must accept the imposed terms.

5. COMPENSATION FOR CONTRACTUAL DAMAGES: PURPOSE, ASSESSMENT OF DAMAGES, AND LIMITATION OF DEBTOR'S LIABILITY

In the final and most extensive chapter, dedicated to compensation for contractual damages, the authors analyze the compensation for contractual damages through four main thematic areas.[7] The distinction between actual damages and lost profit is highlighted especially, along with the dilemmas regarding the recognition of nonmaterial damages in contractual relationships. The book also addresses whether compensation for damages should always be limited to damages that could have been foreseen at the time the contract was concluded, or if there are cases where fairness would require broader compensation. The authors carefully examine the issue of creditor contribution to the occurrence or increase of damages, suggesting that such behavior may influence the reduction or even the elimination of damages compensation. They emphasize that, although the principle of full compensation prevails in tort law, in practice, certain limitations regarding this principle are applied to all rights. These limitations include, among other things, considering only the damages that the debtor could have foreseen at the time of the contract's conclusion, as well as the impact of creditor behavior on the occurrence or increase of the damages. They emphasize the importance of fair assessment of damages compensation, taking into account specific circumstances, and caution against the need for the careful drafting of contractual clauses to avoid potential disputes. They note the challenges in proving the extent of damages and the possibility for the creditors claiming compensation only for costs incurred under the belief that the contract would be fulfilled. The authors stress that damages compensation is not a punitive measure but should reflect the actual incurred damages. In the context of determining the amount of damages, they examine various methods, including specific calculations and preferential assessment methods in situations where the contract is terminated. The principle of

[7] The first section explores the purpose of damages compensation and focuses on protecting the interests of creditors, including compensation for lost profits, compensation for reliance on contract performance, restitution of funds, as well as protection through contract performance and the preventive role of damages compensation. The second section discusses issues related to proving and assessing the amount of damages, with particular emphasis on the mechanisms used in various legal systems. The third section considers the relationship between causation and foreseeability within contractual liability, while the fourth section analyzes the behavior of creditors and their impact on the calculation of damages.

full compensation is predominant, but there are limitations related to the foreseeability of damages and the role of creditor behavior in the occurrence and increase of damages.

The authors reflect on the relationship between causation and foreseeability, emphasizing that evidence of damages is not always straightforward, and that limiting damages to foreseeable losses helps to constrain the debtor's liability to a fair level. They also highlight the importance of the creditor's behavior and its impact on the calculation of damages, noting that the failure to take reasonable measures to prevent or mitigate damages can affect the amount of compensation.[8]

6. CONCLUSION

The academic monograph *Neizvršenje ugovora, odgovornost i naknada štete* (*Nonperformance of contracts, liability, and compensation for damages*) is an essential work for anyone interested in Serbian contract law. The latest analyses and viewpoints of the authors, combined with rich historical and practical examples, make this book a valuable source of information and a stimulating work for further research and practical application. The analysis raises important questions regarding the fair balance between the rights of creditors and the obligations of debtors.

The book provides a comprehensive overview of significant aspects of contract law, focusing on fundamental principles and challenges in regulating contractual relationships. It highlights the importance of the legal framework in ensuring fair relations between contracting parties and the need for further improvement of legal norms with the aim of providing greater protection for weaker parties and fairer application of contractual obligations. Additionally, it examines how different legal systems approach

[8] In the case of contractual damages compensation, it is not necessary to prove damages to the level of certainty. Instead, the injured party is responsible for damages that can be established with reasonable certainty. A lower degree of proof should provide a middle ground by protecting the defendant from liability for damages that are highly speculative, on the one hand, and not requiring proof that a specific damage would certainly occur, on the other, as it is unlikely that any dispute could determine with certainty what would have happened had the contract been properly performed. Considering that this uncertainty was created by a breach of contract for which the defendant is liable, they should not be allowed to avoid all responsibility for damages simply because of this uncertainty (Bix 2012, 93).

issues related to contractual liability and compensation for damages, emphasizing the importance of the flexibility and adaptability of legal solutions in the present conditions.

The conclusions of the book emphasize the need to strike a balance between the strict application of contract law principles and the realities of the dynamic and often unpredictable contractual relationships. This book not only provides an in-depth analysis of contract law but also lays the groundwork for further discussion on how existing legal frameworks and practices can be improved, particularly in the context of protecting the interests of contractual parties. It offers a comprehensive insight into the current challenges and potential directions for the development of contract law, thereby contributing to both theory and practice.

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Tri autora

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Više od tri autora

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Delo bez autora

T: (*Journal of the Assembly* 1822, broj strane)

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Citiranje više dela istog autora

Klermont i Ajzenberg smatraju (Clermont, Eisenberg 1992, broj strane; 1998, broj strane)...

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T: (White 1991a, page)

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Poglavlje u knjizi

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Poglavlje u delu koje je izdato u više tomova

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Navođenje broja izdanja nije obavezno.

Ponovno izdanje – reprint

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Članak

U spisku literature navode se: prezime i ime autora, broj i godina objavljivanja sveske, naziv članka, naziv časopisa, godina izlaženja časopisa, stranice. Pri navođenju inostranih časopisa koji ne numerišu sveske taj podatak se izostavlja.

T: Taj model koristio je Levin sa saradnicima (Levine *et al*. 1999, broj strane)

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L: Vasiljević, Mirko. 2/2018. Arbitražni ugovor i interkompanijskopravni sporovi. *Anali Pravnog fakulteta u Beogradu* 66: 7–46.

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L: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

T: Osiguranje od građanske odgovornosti podrobno je analizirano u časopisu *Anali Pravnog fakulteta u Beogradu* (1982).

L: Anali Pravnog fakulteta u Beogradu. 6/1982. *Savetovanje: Neka aktuelna pitanja osiguranja od građanske odgovornosti*, 30: 939–1288.

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L: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*L:* Tomić, Janko, Saša Pavlović. 2018. Uporednopravna analiza propisa u oblasti radnog prava. Radni dokument br. 7676. Institut za uporedno pravo, Beograd.

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Lična korespondencija/komunikacija

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L: Damnjanović, Vićentije. 2017. Pismo autoru, 15. januar.

T: (Welch 1998)

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L: Zavod za intelektualnu svojinu Republike Srbije. 2018. Godišnji izveštaj o radu za 2017. godinu. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, poslednji pristup 28. marta 2018.

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L: 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.

U štampi

T: (Bogdanović 2019, broj strane)

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L: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Prihvaćeno za objavljivanje

T: U jednom istraživanju (Petrović, prihvaćeno za objavljivanje) posebno se ističe značaj prava manjinskih akcionara za funkcionisanje akcionarskog društva.

L: Petrović, Marko. Prihvaćeno za objavljivanje. Prava manjinskih akcionara u kontekstu funkcionisanja skupštine akcionarskog društva. *Pravni život*.

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L: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Sudska praksa

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T: Za reference u tekstu koristiti skraćenice (VSS Rev. 1354/06; CJEU C-20/12 ili Giersch and Others; Opinion of AG Mengozzi) konzistentno u celom članku.

L: Ne treba navoditi sudsku praksu u spisku korišćene literature.

Zakoni i drugi propisi

F: Zakonik o krivičnom postupku, *Službeni glasnik RS* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014, čl. 2, st. 1, tač. 3; 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, 60, Art 6 (3).

T: Za reference u tekstu koristiti skraćenice (ZKP ili ZKP RS; Regulation No. 1052/2013; Directive 2013/32) konzistentno u celom članku.

L: Ne treba navoditi propise u spisku korišćene literature.

4. PRILOZI, TABELE I SLIKE

Fusnote u prilozima numerišu se bez prekida kao nastavak na one u ostatku teksta.

Numeracija jednačina, tabela i slika u prilozima počinje sa 1 (jednačina A1, tabela A1, slika A1 itd., za prilog A; jednačina B1, tabela B1, slika B1 itd., za prilog B).

Na strani može biti samo jedna tabela. Tabela može zauzimati više od jedne strane.

Tabele imaju kratke naslove. Dodatna objašnjenja se navode u napomenama na dnu tabele.

Treba identifikovati sve količine, jedinice mere i skraćenice za sve unose u tabeli.

Izvori se navode u celini na dnu tabele, bez unakrsnih referenci na fusnote ili izvore na drugim mestima u članku.

Slike se prilažu u fajlovima odvojeno od teksta i treba da budu jasno obeležene.

Ne treba koristiti senčenje ili boju na grafičkim prikazima. Ako je potrebno vizuelno istaći pojedine razlike, molimo vas da koristite šrafiranje i unakrsno šrafiranje ili drugo sredstvo označavanja.

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