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Kenneth Einar HIMMA, PhD[*]

QUINE'S TWO DOGMAS OF EMPIRICISM AND THE CONTINUING VIABILITY OF CONCEPTUAL JURISPRUDENCE[**]

The project of conceptual jurisprudence has been challenged on the ground it lacks normative implications that can help us to improve our legal practices. But the most serious challenge to the project has nothing to do with its practical value; it is has to do with its viability. Willard Van Orman Quine argues, in Two Dogmas of Empricism, that conceptual analysis is impossible because its objective is to explicate so-called analytic claims that, he argues, do not exist. This essay offers a new criticism of Quine's arguments, namely that they misconceive the objective of conceptual analysis and that, in consequence, these arguments fail to refute its viability. The project of conceptual jurispudence remains alive and well.

Key words: *Willard Van Orman Quine. – Modest and immodest conceptual analysis. – Metaphysics. – Analyticity. – Conceptual methodology. – The nature of law*.

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[*] Associate Professor, University of Zagreb Faculty of Law, Croatia, *khimma@gmail.com*, ORCID iD: 0000–0003–2517–6937.

[**] I am very grateful to an anonymous reviewer who helped me improve the paper with the most constructive comments I can remember having received during my career.

1. INTRODUCTION

The modern project of descriptive conceptual jurisprudence has always had critics. Richard Posner argues that the project is "futile, distracting, and illustrative of the impoverishment of traditional legal theory."[1] The problem, on his view, is that descriptive claims about the nature of law have no normative implications that would enable us to make law more just and hence that conceptual jurisprudence has no social value whatsoever:

> I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it.[2]

The problem with the project of conceptual jurisprudence, on this reasoning, is hence that it amounts, in essence, to unconstructive nitpicking which cannot help us improve our legal practices.

Other critics are put off by its abstract character. David Enoch, for instance, rejects the project as "uninteresting:"

> [Conceptual] jurisprudence is not that interesting.... I believe that even intelligent, well-informed and virtuous philosophers may be mistaken in what they take an interest in. It's not impossible for many such philosophers to take an interest in something that doesn't merit interest.[3]

Although he does not say why the project "doesn't merit interest," it is presumably because he believes it is too abstract and therefore too distant from the mundane facts of our lives to tell us anything worth knowing about ourselves. Enoch complains, for instance, that "legal philosophers should make more of an effort to engage the real world rather than just reflect about it from afar."[4]

Neither of these arguments succeed in problematizing conceptual jurisprudence. As to Posner, it is just plain silly to suggest that the only legitimizing rationale for pursuing a line of research is that it has social

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1 Posner (1996). For a response to such concerns, see Himma (2019).

2 Posner (1996, 3). Emphasis added.

3 Enoch (2019, 65–66).

4 Enoch (2019, 1).

benefits. There is much work done in pure mathematics that is not intended, or even minimally likely in the short term, to engender social benefits. Noneuclidean geometries (i.e., those that deny Euclid's Parallel Postulate) were invented, for instance, more than 50 years before Einstein found applications for them in his theory of general relativity.[5] Indeed, it is not preposterous to hypothesize (and this is an empirical hypothesis that requires experimental confirmation) that most theorists specializing in pure mathematics are not in the least motivated by a desire to produce such benefits.[6] That was, for what it is worth, my experience while studying pure mathematics as an undergraduate.

But, either way, the idea that anyone working in areas of mathematics, philosophy, or science that lack normative implications is committing a moral or intellectual wrong – which is what each of these critiques suggests – borders, to put it frankly, on bizarre. Every competent person has a moral right to autonomy that entitles her, within limits, to pursue those interests that endow her life with meaning and satisfaction as long as it does not cause wrongful harm to others.[7] The last I checked, conceptual jurisprudence was harmless, apart from its triggering the incorrigibly incurious.

As to Enoch, it is clear there is no objective standard – at least none that we ordinary mortals have epistemic access to – that determines what counts as interesting and that can hence be applied to dismiss what intelligent, well-informed, and virtuous philosophers find interesting as mistaken.[8] While Enoch concedes this crucial point, he does not realize that it largely repudiates his own argument.[9]

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5 Noneuclidean geometries were invented in the mid 19th Century (Gregorson, n.d.).

6 Werdann (2022), e.g., attributes aesthetic motivations to mathematicians, characterizing mathematics – rightly, on my view – as *art*.

7 But if one adopts a utilitarian standard of what one is morally obligated to do, as seems to be true of Posner, this much is clear: writing journal articles about the law is, absent unusual circumstances, not likely to meet this standard. Even the best scholars are, on this purely consequentialist standard, comparatively useless. And that's fine with me. I didn't get into this business to save the world.

8 It is not absurd to think that the only standards to which we have reliable epistemic access are the empirical ones constituted by our various evaluative practices. If so, the only epistemically accessible standard defining what counts as interesting is what intelligent, well-informed, and virtuous thinkers find interesting.

9 He argues: "One is tempted to go Millian, and say that a topic is interesting if people – certainly intelligent, well-informed, virtuous people – find interest in it. And judging by this standard, it cannot be denied that general jurisprudence is

Moreover, Enoch's argument is vulnerable to the same counterexamples that vitiate Posner's argument. Theorists specializing in pure mathematics do so not only because they find the topic intrinsically interesting but because they see beauty in it.[10] Like Enoch, I do not have a theory of what is objectively interesting, but this I can say with confidence: if there is anything is that is objectively interesting in this world, it is beauty; we are hardwired, after all, to appreciate it. As far as my tastes are concerned, the closest that philosophy ever gets to the beauty of pure mathematics is metaphysics, meta-ethics, and conceptual analysis when done well. That is why I continue to devote the limited hours of my life to conceptual jurisprudence, and that is more than enough to justify my doing so to anyone presumptuous enough to think I need a justifiaction.[11]

But this essay is not concerned with either of these arguments; it is concerned with an argument that Quine articulates in *Two Dogmas of Empiricism*.[12] Quine argues that conceptual analysis of any kind cannot be done because its point is to explicate claims that do not exist.[13] The point of conceptual analysis, on Quine's view, is to explicate analytic truths (i.e. claims that are true "by definition" or "in virtue of meaning").[14] But if there are no analytic truths whatsoever, then there are no analytic truths about law and thus nothing conceptual jurisprudence could teach us about the law. The fatal problem with the project, on this reasoning, has nothing to do with whether it is interesting, useful, or triggering; it is, that its objective is incoherent. It's like squaring a circle; it can't be done.

Quine's arguments against the analytic-synthetic distinction have led a *minority* of theorists to reject the distinction and the project of conceptual analysis.[15] Boghossian (1996, 360) summarizes what he incorrectly regards

fascinating." Enoch (2019, 2). What Enoch doesn't understand is that this is the best anyone can hope to do in articulating an epistemically accessible standard of what counts as interesting.

[10] See e.g., Werdann (2022).

[11] If more is needed, I think the abstract problems of metaphysics, meta-ethics (which is just the metaphysics of ethics), and conceptual analysis are far more challenging than normative problems. But that's just me.

[12] Quine (1951).

[13] General terms, like *law*, *water*, *blue*, *proposition*, define kinds (of thing). Our concepts pick out kinds.

[14] More than anyone else, Brian Leiter is responsible for bringing Quine's criticisms of conceptual analysis to legal theory. See Leiter (1999, 80). See also Leiter, Etchemendy (2021).

[15] Bourget and Chalmers (2023) conducted a poll of philosophers to ascertain their views on a variety of contentious questions. According to the most recent results, 62.5% of philosophers accept the analytic-synthetic distinction whereas

as the consensus on Quine's arguments as follows: "Quine showed there can be no distinction between sentences that are true purely by virtue of their meaning and those that are not ... [and hence] *devastated* the philosophical programs that depend upon a notion of analyticity."[16]

This essay offers a novel critique of Quine's arguments. In particular, it argues that Quine's arguments in *Two Dogmas* mischaracterize the point of conceptual analysis and, for this reason, do not get out of the blocks. Properly understood, its point is *not* to explicate claims that are true by *definition* or in virtue of the *meanings* of the words.[17] Its point is to identify any underlying assumptions that *there may be* about the nature of the relevant kind that condition the application of those terms in borderline or hard cases. Understanding these assumptions can help us to see why we adopted and use those terms (i.e., what work we need them to do) and can therefore tell us something important about how we conceive ourselves in relation to others and what we value. Once its point is righly understood, it becomes evident, as is argued below, that conceptual jurispudence is viable.[18]

I am not suggesting that conceptual jurisprudence is so important that philosophers should drop whatever they are doing to pursue it. It is clear that the *objectives* of normative political and legal theory are far more important, on any plausible conception of importance – although I doubt much of that work actually succeeds in producing any salutary changes in our legal practices.[19] But if some social pay-off is needed to justify pursuing

72.8% believe that there are *a priori* truths (i.e. claims that can be epistemically justified and hence known without recourse to empirical experience beyond what is necessary to understand the meanings of the terms used).

16 Emphasis added. This is hyperbole. Only 37.5% of theorists reject the analytic-synthetic distinction (see Note 15), and many continue to explicate socially important concepts like law, mind, justice, and free will. Although I argue here that the distinction is not relevant, Chalmers (2011) argues that it can be rescued with the help of Carnap's ideas and some technical logical tools.

17 At least, not in the ordinary senses of those terms. Those terms are used here and in Quine (1951) to refer to the meanings of those words as they are constituted by our semantic conventions for using them and summarized in dictionary definitions.

18 This should be obvious given that it continues to be done with some success. It cannot be plausibly denied, for instance, either that it is a conceptual truth that law consists of norms or that we are epistemically justified, on any standard that does not require Cartesian certainty, in believing that claim.

19 I have no idea how many law review articles are published each year – though I would guess it is well over 1,000. On the basis of my limited experience practicing law, I would hypothesize that much fewer than 1% of these articles are cited by a court as justifying a change in our legal practices. If one wants to do something likely to engender favorable changes in the law, writing law reviews articles is not

conceptual issues, it is enough that doing so can teach us something about our self-understanding and shared values. As Joseph Raz puts this point in connection with conceptual theorizing about the nature of law:

> The notion of law as designating a type of social institution is ... entrenched in *our* society's self-understanding.... In large measure what we study when we study the nature of law is the nature of *our* self-understanding.... It is part of *our* self-consciousness, of the way we conceive and understand *our* society.... That consciousness is part of what we study when we inquire into the nature of law.[20]

That is enough to constitute the project as *interesting*, on any plausible analysis of what counts as (objectively) interesting – assuming, of course, that some of us have reliable epistemic access to the relevant objective standards. Investigating our self-understanding regarding an institution that typically, if not necessarily, backs some of its prohibitions with painful sanctions can tell us much about how we conceive ourselves and our social relations to others; although these claims are descriptive and thus lacking in normative implications, they can help us in diagnosing problems with the law and can thereby enable us to address them more effectively. Indeed, I would go further: this suffices to constitute the project as not merely justified, but as one that is worth pursuing because of what it can teach us about *us*.

2. TWO METHODOLOGIES: MODEST AND IMMODEST CONCEPTUAL ANALYSIS

To get at the problem with Quine's arguments, it is important to distinguish two approaches to conceptual analysis. Modest conceptual analysis (MCA) is concerned to explicate the nature of a kind as it is determined by *our* semantic conventions for using the term together with shared philosophical assumptions about its nature, if any, that condition or qualify the application of these conventions in hard cases. Immodest conceptual analysis (ICA) is, in contrast, concerned to explicate the nature of a kind as determined

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the best way to go about it. Indeed, since there is disagreement on most issues, I would surmise that writing law review articles is as least as likely to produce unfavorable changes. One of the great tragedies in philosophy is that Marx's utopian vision of a classless, stateless society has been used to justify some of the most horrific violence in history.

[20] Raz (2009, 31). Emphasis added.

independently of what we do with words.[21] Otherwise put, MCA is concerned to explicate the nature of a kind as determined by our conceptual practices, whereas ICA is concerned to explicate the nature of a kind as determined independently of our conceptual practices.

Both methodologies proceed in two steps. The first step is to identify and explicate conceptual truisms that we are (presumptively) justified in believing because they are obvious – though each methodology must produce a plausible explanation of why we are justified in believing these claims are obvious. The second step is to identify certain implications of those truisms as they apply in cases that count as hard because it is not clear whether and how those cases fall under the relevant concepts.

It is crucial to grasp how the two approaches differ on the *epistemic* justification of these steps. The requisite justification is straightforward on MCA. Because *our* conceptual practices are constructed by *our* semantic conventions, we are justified – on any ordinary non-skeptical standard of epistemic justification that does not require Cartesian certainty – in believing a truism identified in the first step because it is transparently entailed by the core content of these conventions. (e.g, law consists of norms), which are described in rigorous lexicographical surveys that are roughly summarized in dictionary "definitions" as their "meanings."[22] The second step is to identify any assumptions *there might be* that qualify the application of *these* conventions in hard cases by utilizing the same techniques utilized by ICA – and, for that matter, any other serious analytic theorizing. These techiques include formulating thought experiments that test the application of a concept in hard cases and deploying formal logical methods that identify the possible outcomes and implications of these thought experiments.[23]

The two methodologies differ, then, only as to how these basic truisms are justified. MCA justifies them as being transparently entailed by the obvious content of our semantic conventions for using the constituent terms. For instance, we share the intuition, on the assumptions grounding

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21 For a well-known defense of MCA, see Jackson (1998).

22 Lexicography is an established social science and has a rigorous, well-developed methodology that satisfies the relevant social scientific standards; it is the sociology of word usage. See Section 4 for more on its subject matter and methodology.

23 The first step might appear to suggest that MCA is concerned just to explicate definitions or meanings, but the second makes clear that MCA is concerned, more broadly, to explicate our conceptual practices pertaining to a term of interest *in their totality*. These practices sometimes, though not always, incorporate shared assumptions about the nature of the corresponding kind that qualify the application of these conventions in hard cases (e.g., whether the Pope is a bachelor) and that therefore transcend what they transparently entail by themselves.

MCA, that all bachelors are unmarried because, and only because, we use the term *bachelor* to refer *only* to unmarried men – i.e., because it is a conceptually necessary condition for someone to count as a bachelor that he is unmarried. This cannot, of course, resolve more difficult issues about the term's conceptually sufficient conditions, such as, whether it is sufficient to constitute the Pope as a bachelor that he is unmarried. However, it is enough to refute any worries about whether those intuitions are epistemically reliable because they concern aspects of our conceptual practices every competent speaker can plausibly be presumed to know just in virtue of being competent with the language. Since, after all, it is the practices of competent speakers pertaining to the use of a term that determine the content of the corresponding semantic conventions, it is the knowledge of these practices that constitutes a speaker as competent with that term.

It is not altogether clear how ICA justifies them, but the justification would have to assume, unlike MCA, that we have reliable epistemic access to the objective nature of kinds – i.e., to the nature of a kind as it is determined independently of our conceptual practices.[24] Although this justification is not grounded in our conceptual practices, it would *presumably* explain why we have adopted the practices that we have adopted, rather than some others. We use the term *bachelor*, on this reasoning, to refer only to unmarried

[24] I am not aware of any theorists who have either endorsed ICA or rejected MCA. But this is, in part, because legal theorists are not as transparent as they in articulating their methodological assumptions or in grounding their conceptual claims in claims about *our* conceptual practices. For that reason, it is not unusual to see theorists defend conceptual claims about law that are utterly untethered to empirical claims about how we use the term *law*.

For instance, Scott Shapiro never attempts to ground his view that norms and plans are ontologically identical in our conceptual practices; and there is simply no way to defend this preposterous view by reference to such practices. First, if you are trying to make romantic plans with your partner for the weekend, it would be confusing *in the extreme* to tell them you would like to make *norms* with them for the weekend; conversely, if you are a legislator and want to make constituents aware of an upcoming session where the legislature will vote on enacting a new norm, it would be confusing *in the extreme* to say that the legislature will be convening in that session to make *plans*. Second, the existence conditions for plans and norms differ in this important respect on our conceptual practices: it is a necessary condition for a plan to bind a person that she accepts the plan; however, it is not a necessary condition for a norm to bind a person that she accepts the norm. As far as our conceptual and evaluative practices are concerned, objective moral norms, if there are any, and legal norms bind subjects regardless of whether those norms are accepted. Whatever it is that Shapiro takes himself to be explicating in that part of *Legality*, it has nothing to do with how we use the words *norm* and *plan*. It is false, and quite transparently so, that our conceptual practices equate norms and plans. See Shapiro (2011).

men because we are justified in believing it is a *prelinguistic* objective truth that only unmarried men count as bachelors.[25] Otherwise put, we adopt a convention for using *bachelor* that transparently entails that only unmarried men can count as bachelors because we immediately understand intuitively that it is an obvious prelinguistic objective truth that only unmarried men count as bachelors

Quine assumes in *Two Dogmas* that the only viable methodology for conceptual analysis is MCA. He acknowledges, for instance, that the application conditions for any term in the language are contingent and can hence change – a claim that is compatible *only* with MCA:

> Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system. Even a statement very close to the periphery can be held true in the face of recalcitrant experience by pleading hallucination or by amending certain statements of the kind called logical laws. Conversely, by the same token, no statement is immune to revision. Revision even of the logical law of the excluded middle has been proposed as a means of simplifying quantum mechanics; and what difference is there in principle between such a shift and the shift whereby Kepler superseded Ptolemy, or Einstein Newton, or Darwin Aristotle?[26]

This mirrors the assumptions grounding MCA. MCA assumes that the world of our experience is structured by the conceptual framework that we impose on it to think and talk about it – which is what makes it interesting to many of us who pursue conceptual analysis. Indeed, I do not think it overstates the matter to claim that *the world of our experience* is a continuing construction of our conceptual practices – although the material world itself is not.[27] Inasmuch as Quine assumes that the application conditions of a term are contingent and can thus be changed when needed, his arguments in *Two Dogmas* are most plausibly interpreted as directed at MCA.

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[25] If we lack reliable epistemic access to such objective truths, as I have suggested above, then this belief is unjustified.

[26] Quine (1951, 40). This suggests that our conceptual practices with respect to the material world express a working hypothesis about what it is really like and thus about the nature of natural kinds as it is determined independently of what we do with words. This is discussed in more detail below.

[27] The world appears to a newborn infant, for the most part, as a two-dimensional canvas of undifferentiated shapes and colors (think of the "snow" that appeared on TV screens in between broadcasting channels before cable and streaming became

3. LINGUISTIC COMPETENCE, MCA, AND BORDERLINE CASES

It is crucial to note that our semantic conventions, and the definitions that purport to report them, do not decide all issues of word usage – at least not in the formal mathematical sense that a question counts as decidable just in case there is an algorithm that answers it correctly in every case. Our conventions for using a term, and the dictionary definitions that purport to report them, merely establish a baseline for linguistic competence; as such, they govern only easy cases – i.e. those that ordinary people are, at least, minimally likely to encounter in the world and do not require philosophical reflection to resolve.

Linguistic competence does not require the ability to apply a word in hard cases. I doubt, for instance, that anyone *knows* – in the sense of having a justified true belief on even ordinary epistemic standards – whether a hot dog counts as a sandwich. I would hypothesize that our conceptual practices pertaining to *sandwich* are ontologically indeterminate on this fascinating issue. Nevertheless, I am certain that every fluent English-speaking adult I have ever known is competent using the term *sandwich*. If one understands that it applies to any object comprised by an edible filling[28] enclosed in two slices of bread, then one counts as competent with the term *sandwich*.[29]

Competence with a term does not require an ability to apply it in hard cases because a case is hard only if our conventions for using it are *facially* indeterminate, as an epistemic matter, on whether or how they apply to that case and thus only if it is not obvious whether and how they apply in that case.[30] An instance counts as a hard case of a term *t*, then, if and only if it

available). As infants begin to acquire concepts, which happens to some extent long before they learn a language, they begin to identify some of these shapes and colors as objects that have significance. See, e.g., Johnson (2010).

[28] The term *sandwich* is often used in conjunction with fillings that are not edible, as when someone describes something as a "shit sandwich." But that usage, absent somewhat disturbing circumstances, is not literal.

[29] The question of whether a hot dog counts as a sandwich arises, I think, because it is unclear whether a hot– dog bun counts, even when separated, as two slices of bread. In contrast, it is uncontentious that a hamburger bun does and hence that a hamburger counts as a sandwich.

[30] The relationship between epistemic and ontological indeterminacy differs according to whether one adopts a modest or immodest approach. Since we cannot presume to have epistemic access to immodest truths about the nature of a kind, a conceptual issue can be epistemically indeterminate to us without being ontologically indeterminate. But since we manufacture our conceptual practices

falls within the penumbra – or open texture – of our conventions for using *t* in the following respect: it is *not* obvious *either* that *t* applies to that instance *or* that *t* does not apply to that instance.

It is true, of course, that any speaker who understands the shared assumptions about the nature of a kind conditioning the applicable conventions counts as competent with the associated term. But linguistic competence with a term does not require understanding any shared underlying philosophical assumptions or understanding whether and how the term applies to hard cases; if it did, only the most philosophically sophisticated speakers would count as competent with terms implicating significant areas of open texture. But in the case of terms picking out complex institutions like *law*, this would exclude the vast majority of people lacking a university education – an obvious refutation of any claim that implies this patently false, and offensively elitist, view.

Bracketing Quine's worries about meaning and definition, competence with a term requires just enough understanding of the applicable conventions as reported in a dictionary definition to use it correctly in the vast majority of cases one is likely to encounter. Since (1) the lexicographical reports grounding a dictionary definition of a term's "meaning" are concerned to *roughly* summarize our semantic conventions for using that term and (2) those conventions govern only easy cases, it suffices to constitute a speaker who understands the *syntactic* conventions of the language as competent with a term, on the views challenged in *Two Dogmas*, that she understands its *definition* and *meaning* well enough to apply it reliably in easy cases.[31]

4. METAPHYSICS, NECESSITY, AND CONCEPTUAL ANALYSIS

Conceptual analysis is concerned to explicate the nature of some kind picked out by a term of interest: an analysis of the concept of law is concerned to explicate the nature of the kind picked out by the term *law*; an analysis of the concept of authority is concerned to explicate the nature of

through processes that are epistemically transparent, it is plausible to think that what explains epistemic indeterminacy on a conceptual issue is that our practices are ontologically indeterminate on that issue.

[31] Henceforth the term *meaning* should be read as enclosed in quotation marks as indicating "if there are such things" so as to avoid my begging any questions against Quine.

the kind picked out by the term *authority*; and an analysis of the concept of bachelor is concerned to explicate the nature of the kind picked out by the term *bachelor*.[32]

The nature of a kind is determined by the properties that constitute something as an instance of that kind (i.e., its *constitutive properties*) – that is, the properties something must have to count as an instance of that kind: the nature of law is determined by the properties that constitute something as a law; the nature of authority is determined by the properties that constitute someone as an authority; and the nature of bachelorhood is determined by the properties constituting someone as a bachelor. As it is more typically put, the nature of a kind is defined by its *existence conditions* (i.e., its constitutive or inherent properties).

Claims about the nature of a kind are necessarily true if true: to say it is in the nature of a legal system that it consists of norms is to say it is necessarily true that legal systems consist of norms; to say it is in the nature of authority that it tells people what they must do is to say it is necessarily true that authorities tell people what they must do; to say it is in the nature of bachelorhood that bachelors are unmarried is to say it is necessarily true that bachelors are unmarried; and so on.

There are three principal kinds of *descriptive* necessity: logical, metaphysical, and nomological.[33] A claim is logically necessary just in case it is legitimately deducible[34] from just the relevant class of favored logical axioms, which are presumed to express logically necessary truths.[35] The claim expressed by the schema "if *p*, then *p*" is presumed to be logically necessary in virtue of being legitimately deducible from these favored

[32] As *Oxford English Dictionary* reports this usage, the term *nature* means "the basic or inherent features, character, or qualities of something." *https://www.lexico.com/en/definition/nature*, last visited March 22, 2025.

[33] Objective moral claims are thought to be *normatively* necessary.

[34] I say "legitimately deducible" instead of "validly deducible" because any claim that is necessarily true can be validly deduced from any set of claims, including the empty set. The proof is as follows: an inference of a claim from a set of premises is valid if and only if it is impossible for the premises to all be true and the conclusion false. But this means that any claim that *cannot* be false can be *validly* deduced from every set of claims because it is impossible for that claim to be false – regardless of whether the premises are true. The problem, of course, is that a valid deduction of a claim from a false claim is not persuasive on our evaluative practices. For a classic introduction to propositional and quantificational logic, see Enderton (2001).

[35] I use the term *presumed* here to indicate that our assessments of what is necessarily true ultimately rest on claims that have to be assumed. Though this is true of each of the various types of necessity discussed below, I will omit the qualification *presumed* in what follows for purposes of brevity.

logical axioms by means of truth-preserving inference rules. Insofar as (i) these favored logical axioms are logically necessary and (ii) the application of these truth-preserving inference rules cannot result in the inference of a false claim from a set of true claims, any claim that is legitimately – and hence validly – deducible from these favored axioms using just these inference rules is also logically necessary.[36]

A claim is metaphysically necessary just in case it is legitimately deducible from the union of some class of favored logical axioms and a set of claims that are presumed to be true no matter which laws describing causal regularities in this world are true but which does not follow from just the class of favored logical axioms. The claim that nothing can be simultaneously red and green all over is metaphysically necessary if it is true, as seems obvious, regardless of what the laws of nature had turned out to be. However, this claim is not legitimately deducible from a set consisting of just logical axioms and laws describing causal regularities in this world. It can be legitimately deduced only from a set that includes necessary truths not entailed by those two classes of claims. Accordingly, one particularly salient difference between logical and metaphysical necessity is that the logical necessity of a claim is wholly explained by its *form* whereas the metaphysical necessity of a claim is, at least, partly explained by its *content*.

There are two species of metaphysical necessity: conceptual and nonconceptual. A metaphysically necessary truth counts as *conceptual* if and only if it is true in virtue of how we use the constituent words: the notion that every bachelor is unmarried is conceptual because it is true in virtue of the way that we use the constituent terms. In contrast, a metaphysically necessary truth counts as *nonconceptual* if it is true but not wholly in virtue of how we use the constituent terms: the idea that nothing can be red and green all over counts as nonconceptual because it is true no matter what the laws of nature happened to be but is not legitimately deducible from just the union of the set of favored logical axioms and a set of claims that exhaustively describes our conceptual practices. The descriptive necessity of each of these claims, then, is explained, at least in part, by its content.

[36] It should be noted that the set of legitimate deductions is a proper subset of the set of valid deductions. It is also a proper subset of the set of *sound* deductions (i.e., valid deductions from a set of all true premises). A deduction of one necessary truth from another completely unrelated necessary truth is sound, but it is not legitimate, as I use the term, because such an argument cannot be used to persuade, except in very artificial formal circumstances.

A claim is nomologically necessary if and only if it is legitimately deducible from the union of some set of favored logical axioms, some set of favored metaphysical claims, and a set of claims describing *necessary* causal regularities in our world (such as those of physics) but is not legitimately deducible from just the union of the sets of favored logical axioms and metaphysical claims. The claim that water freezes at 32^{o} Fahrenheit counts as nomologically necessary in virtue of being legitimately deducible *only* from a set including claims we believe correctly describe these causal regularities..

Claims about the nature of a kind count as metaphysical since they are necessarily true, if true at all, *and* cannot be deduced from any set consisting entirely of favored logical axioms and claims describing causal regularities in our world. Logical axioms are formulas that are assumed by the system they construct, which can be combined with inference rules to deduce other formulas. It is clear, for instance, that nontrivial *substantive* claims about the nature of a kind cannot be legitimately deduced from logical axioms like p® (q® p) – regardless of how the sentence variables are interpreted.[37] It is also clear that claims about the nature of a kind cannot be validly deduced from nomological laws like $e=mc^2$. Since (1) there are three kinds of descriptive necessary truths and (2) true claims about the nature of a kind are descriptively necessary truths but cannot be deduced from any set consisting only of logical axioms and statements describing causal regularities, it follows that claims about the nature of a kind count as metaphysical – and, further, that claims describing its constitutive properties also count as metaphysical.

The content of *our* conceptual practices regarding a term supervene on the content of our semantic conventions for using it. Since our conventions for using a term can change, the truth-value of claims about the nature of a kind change when the applicable conventions change. Although conceptual claims, given that they are metaphysical, are necessarily true, if true, they are necessarily true *only* relative to some set of contingent practices for using the constituent terms; if the content of the relevant practices changes in any salient respects, then so will the truth-value of any claims supervening on that content. Thus, the necessity of conceptual claims is *conditional* because whether a conceptual claim is true depends on the underlying contingent social practices defining the semantic conventions for using its constituent terms.

[37] I say "nontrivial" to exclude logically necessary claims. If, for instance, one substitutes the proposition that "it is the nature of law that it consists of norms" for both p and q in the above schema, the resulting sentence is logically necessary. However, assuming that this claim is properly construed as a claim about the nature of law, it is truth-functionally tautological and hence trivial.

Quine points out, believing it is a criticism of conceptual analysis, that there are no claims, metaphysical or otherwise, that cannot be revised if needed or expedient.[38] But this is neither surprising nor problematic. Our language is always evolving, either because we are inventing new words or because we are revising our semantic conventions for existing words. Since our semantic conventions can change, what is conceptually necessary at one moment may not be conceptually necessary at another if the applicable conventions change in certain ways.[39] The syntactic and semantic conventions constituting a language impose a conceptual framework on the world that incorporates a revisable hypothesis about how it is objectively structured[40] – a point that Quine explicitly accepts and one that harmonizes with *Two Dogmas*.[41]

5. EVALUATING THE QUINEAN ARGUMENT

The argument that matters for my purposes is straightforward: Quine conceives conceptual analysis as concerned to explicate analytic truths – i.e., claims that are true "by definition" or "in virtue of meaning" – and

[38] See the quote referenced in Note 26.

[39] Our conceptual practices pertaining to gender, for instance, are undergoing profound changes – though the underlying disagreements are commonly expressed in immodest terms of what *objectively* or *really* defines its nature. This is problematic if, as I have suggested, we lack reliable epistemic access to the nature of a kind as it is determined independently of our conceptual practices.

[40] It is worth reiterating that the assumptions grounding MCA differ from those grounding ICA. ICA assumes that we adopt a set of conceptual practices because we are epistemically justified in believing they mirror the objective structure of the world; MCA assumes no more than that we believe that the conceptual practices we adopt mirror the objective structure of the world.

[41] *Two Dogmas* assumes, as does MCA, that our ontology is constructed – or "posited" – by our conceptual practices; as Quine puts it: "Now I suggest that experience is analogous to the rational numbers and that the physical objects, in analogy to the irrational numbers, are posits which serve merely to simplify our experience.... Positing does not stop with macroscopic physical objects. Objects at the atomic level and beyond are posited to make the laws of macroscopic objects, and ultimately the laws of experience, simpler and more manageable." Quine (1951, 42). These posits express working, and hence rebuttable, hypotheses about what the material world is like independent of the structure we impose on it with our conceptual practices to talk about it and organize our experience – i.e. how the natural world is *really* structured.

argues there are no such claims. The problem, on his view, is that there is no noncircular way of formulating the distinction between claims "grounded in meanings independently of matters of fact" and claims "grounded in fact."

Quine's argument rests on a number of concerns about the concepts of meaning and definition that underwrite the analytic-synthetic distinction. He questions, for instance, the idea that meanings exist:

> [W]hat sort of things are meanings? They are ... ideas, somehow – mental ideas for some semanticists, Platonic ideas for others. Objects of either sort are so elusive, not to say debatable, that there seems little hope of erecting a fruitful science about them.[42]

Quine surmises, further, that even if there are things to which the term *meaning* refers, such entities play no useful role in explicating the distinction: "if a standard of synonymy should be arrived at, we may reasonably expect that the appeal to meanings ... will not have played a very useful part in the enterprise."[43]

Quine denies that the notion of meaning can be explained in terms of, or analytically reduced to, that of definition because he believes the concept of definition is also in need of clarification:

> There are those who find it soothing to say that the analytic statements of the second class reduce to those of the first class, the logical truths, by *definition*; 'bachelor,' e.g., is *defined* as 'unmarried man.' But how do we find that 'bachelor' is defined as 'unmarried man'? Who defined it thus, and when? Are we to appeal to the nearest dictionary, and accept the lexicographer's formulation as law? Clearly this would be to put the cart before the horse.[44]

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[42] Quine (1951, 3). It might be difficult, as Quine claims, to construct a "fruitful science" about meanings, depending on what he means by this. But lexicography *is* a social science devoted to ascertaining meanings and seems as fruitful as any other area of sociological theorizing. Either way, they are as fairly characterized as *posits* as irrational and imaginary numbers, which are subjects of mathematical theories. Our conceptual practices presuppose that any noncontradictory noun or noun-phrase picks out a set of abstract objects. This is an important point that Quine consistently overlooks in *Two Dogmas*.

[43] Quine (1951, 3).

[44] Quine (1951, 4). To answer Quine's question of who decided *bachelor* means *unmarried man*: *we did. We* collectively decided that when *we* converged on adopting and practicing a convention dictating that *bachelor* applies only to unmarried men.

Quine argues that the only remotely viable way to explicate the related notions of definition and meaning is in terms of the notion of synonymy but rejects the claim that synonymy can be defined in a noncircular way; he concludes that there cannot be any such entities in the world because he assumes, without argument, that entities that can be defined or otherwise explicated only in circular terms cannot exist.[45]

These arguments are problematic. If sound, they would require rejecting, as Grice and Strawson (1956) point out, many useful distinctions with important ontological and discursive implications: Quine's arguments entail, for instance, that numbers, sets, and the evaluative entities purportedly corresponding to terms like *good*, *bad, right, wrong, moral*, *immoral*, etc., do not exist.[46] Rejecting these distinctions would, then, require banning indispensable areas of discourse from our conceptual practices[47] – assuming that there is no less objectionable set of conceptual practices that would enable us to talk about them in non-circular ways: if there is nothing that is good, bad, moral, or immoral, we cannot sensibly apply these terms in ethics; if there are no sets, classes, or numbers, we cannot sensibly apply these terms in mathematics; and so on.

Although I find such arguments persuasive, there is a more fundamental theoretical problem here missed by Quine's critics, namely that his arguments misconceive the point of conceptual analysis. It is true, of course, that conceptual analysis is concerned to identify and explicate the implications of claims that are true wholly in virtue of how we use words; however, it is false that it is concerned to explicate the ordinary meanings of words. Hart's analysis of the concept of law goes well beyond what can be found in any

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And it is not putting "the cart before the horse" to "accept the lexicographer's formulation as law" because these formulations are grounded in scientifically rigorous empirical surveys of our semantic conventions.

45 Although I see no reason to accept this claim, it assumes our language defines our ontology – an assumption that is consistent only with MCA.

46 Grice, Strawson (1956, 141–158).

47 It is not clear, for instance, how we could live together without concepts incorporating behavioral standards, such as right and wrong. Without a language to express our grievances about the acts of others, it is plausible to hypothesize that there would be much more violence in the world than there is.

dictionary report of the meaning of *law*[48] – though it is consistent with all of them.[49] One way to see this is to compare the length of Hart's book with that of the lengthiest dictionary definition of the term *law* that one can find.

Quine misconceives the division of labor between lexicographers and philosophers in explicating our concepts. It is the task of lexicographers, who have the requisite training in social scientific methodology, and not that of philosophers, to identify our conventions for using the terms and to explicate them in the form of definitions that report their ordinary meanings. It is the task of philosophers, and not that of lexicographers, to ascertain whether there are shared assumptions about the nature of a kind that qualify the application of those conventions in hard cases and to explicate those assumptions.[50]

The underlying problem is that Quine falsely assumes that our conceptual practices pertaining to a word are *necessarily* fully determined by our semantic conventions for using it. How we use a word depends on those conventions, of course; but it can also depend on shared assumptions about the nature of the kind that condition their application in hard cases.[51] Neither

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[48] *Merriam-Webster* defines the relevant usage of the term *law* as follows: "a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority." *https://www.merriam-webster.com/dictionary/law*, last visited March 24, 2025. There is no mention here of many important notions that figure prominently in Hart's theory, such as validity, rules of recognition, obligation, etc.

[49] That is, in part, what makes Hart's analysis plausible.

[50] Even here, there may be a division of labor between the philosophical and the empirical. The philosophical task is to identify any assumptions about the nature of the relevant kind that cohere to some sufficient extent with our conventions for using the word and that would explain why we have adopted the term. But in more contentious cases, it might be necessary to survey competent speakers to ascertain whether these assumptions are, in fact, *shared* by the community of speakers. One of the most significant recent developments in legal philosophy has been the use of experimental methods in addressing various philosophical issues, including conceptual issues; however, the proper role of these methods in addressing conceptual issues is still being worked out. See, e.g., Himma (2023).

[51] The claim that these assumptions must be shared to count as being part of our conceptual practices suggests that identifying these assumptions is a wholly empirical issue that can be addressed by surveying speakers. The problem with this reasoning is that these assumptions are often latent in the minds of speakers; this is why philosophical analysis is needed to expose them as well as the role they play in our conceptual practices. But there might be cases where the assumptions identified by a philosophical analysis are not shared among the population of speakers. In these cases, it is not absurd to conclude that the indeterminacy in our practices is not merely *facial* – unless it can be shown that speakers are committing enough of a logical error to discount their intuitions. But the issue of how to handle

the semantic conventions for using a term nor the descriptions of them roughly summarized in dictionary reports as their *meanings* and *definitions* tell us whether there are any such assumptions and, if so, what they are.

A familiar example will help make the point. Notwithstanding that every dictionary defines the term *bachelor* as an "unmarried man" and that someone must be an unmarried man to serve as Pope, many speakers balk at characterizing the Pope as a *bachelor* because the Roman Catholic Church does not allow a married man to serve as Pope. The underlying assumption is that it is a necessary condition to count as a bachelor that a man be eligible, institutionally or psychologically, to marry – and the Pope is not eligible in either of these respects. Indeed, it is plausible to think that the reason we adopted the term *bachelor* was to distinguish adult males who are marriageable or otherwise partner-able from those who are not, because most people hope eventually to find a long-term companion with whom to share their lives.

Disagreements about whether the Pope counts as a bachelor ultimately concern the properties constituting someone as a bachelor and thus concern the nature of bachelorhood. People who disagree on whether the Pope is properly characterized as a *bachelor* disagree, at bottom, on whether the nature of bachelorhood is exhausted by the properties of being unmarried, adult, and male. Those who believe the Pope counts as a bachelor assume that the nature of bachelorhood is exhausted by these properties, whereas those who believe that the Pope does not count as a bachelor assume that the nature of bachelorhood includes, in addition, the property of being eligible in some appropriate way. But, without more, in neither case should a speaker be construed as having *asserted* a claim about the nature of bachelorhood as it is determined independently of how *we* use the term *bachelor* – i.e., as an immodest claim about its nature.[52]

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such conflicts is an extremely difficult issue that requires more attention from those defending the use of such techniques in conceptual jurisprudence. There is a reason that these borderline cases are characterized as *hard*.

[52] Although our conceptual practices are plausibly conceived as expressing an immodest hypothesis about the nature of the kinds picked out by natural-kind terms, this does not entail that speakers are articulating that hypothesis when they take a position on a hard case involving such a term. I would surmise, for instance, that we use the word *Moon* to refer to the object we take to be the Moon because we believe it really exists and is distinct from other material objects we have named like the Earth. But this does not entail that we are *asserting* such claims when we talk about the Moon. While a speaker will surely endorse that claim, it is not expressed by every utterance about the Moon; that claim is merely presupposed.

These underlying philosophical beliefs about the nature of bachelorhood condition the views of speakers on whether the Pope counts as a bachelor, but those beliefs are neither entailed nor expressed by claims about whether the Pope counts as a bachelor. For instance, and I have heard this on more than one occasion, a speaker might deny that the Pope counts as a bachelor on the ground that he is *married* to the Church.[53] A speaker who endorses this view believes that the Pope does not count as a bachelor because he is married and hence that he does not fall within the core content of our semantic conventions for using the term. In contrast, a speaker who believes the Pope counts neither as married nor as a bachelor believes the Pope falls within the core content of these conventions but that these conventions are qualified in this case by the assumption that a man must be institutionally eligible for marriage to count as a bachelor.

Accordingly, the argument of *Two Dogmas* is grounded in two misconceptions about conceptual analysis. The first is that, contra Quine, it is not the meanings of a term, as reported in dictionaries, that determine how that term is used. It is, rather, our semantic conventions and any shared underlying assumptions there might be about the nature of the corresponding kind that determine how it is used.

The term *meaning* is just a shorthand way of referring to the dictionary reports of those conventions. It might be true that conceptual analysis requires a sophistication with empirical methods that most analytic philosophers do not have, but that is a different point. It is not necessarily true that all one *ever* needs to do to *fully* understand a term's application conditions is consult a dictionary or otherwise identify the semantic conventions governing its use because the content of our concepts is not necessarily fully determined by those conventions. Indeed, though there may be terms with just easy applications, any term worth obsessing over from the nurturing safety of the philosophical armchair, like *law*, will have some challenging applications.

The second misconception is that it is false that the concerns motivating conceptual analysis are limited to explicating the content of these semantic conventions in the form of meanings and definitions. Quine's arguments

[53] This reasoning strikes me as problematic. Our conceptual practices appear to assume that only personal beings can be married, and the Church is an abstract institutional object. The claim that the Pope is married *to God*, which I have also heard, is problematic, on my view, on both substantive theological and conceptual grounds.

overlook the important point that it is the job of lexicography, and not philosophy, to describe those conventions in the form of meanings and definitions. As Bergenholtz and Gouws (2012, 38) explain:

> There are two types of lexicography: 1. The development of theories about and the conceptualization of dictionaries, specifically with regard to the function, the structure, and the contents of dictionaries. This part of lexicography is known as metalexicography or theoretical lexicography. 2. The planning and compilation of concrete dictionaries. This part of lexicography is known as practical lexicography or the lexicographic practice.

Accordingly, the practical dimension of lexicography is concerned with the compilation of dictionaries whereas the theoretical dimension is concerned with the study of dictionaries; both are ultimately concerned with the study of our conventions for using words. But these conventions, as discussed above, may not completely determine the application conditions of the corresponding terms.

Conceptual analysis is concerned with a complementary task – namely, to explicate the application conditions of words (and thus the nature of the associated kinds) when they are partly determined by shared assumptions that qualify the application of our conventions to hard cases that fall within their penumbra. It is thus concerned to identify statements that are true wholly in virtue of our comprehensive practices for using the constituent words – and not statements that are true by definition or in virtue of meanings. While any statement that is true by definition or in virtue of meaning will also be true in virtue of these practices, the converse is not true. The claim that every legal system has a rule of recognition is true in virtue of how we use the constitutent words; but it misdescribes the matter to claim that it is true *by definition* or *in virtue of meaning*.

MCA is grounded in the uncontentious claim that our semantic conventions are not *necessarily* the sole determinants of a term's constitutive properties and hence need not be the sole determinants of its application conditions. How we use a word is also sometimes determined, as argued above, by shared assumptions about the nature of the corresponding kind which qualify the application of the relevant conventions in hard cases. If the point of conceptual analysis is to ascertain whether there are any such assumptions in a hard case, as argued in this essay, then it is false, contra Quine, that its point is to identify *analytic* truths – i.e. claims that are true *by definition* or *in virtue of meanings*.

There is nothing problematic about the project of conceptual analysis as conceived by MCA. MCA is concerned to explicate the content of *our* practices pertaining to the use of a term, which are determined by our semantic conventions for using it and certain shared assumptions, if any, about the nature of the corresponding kind that qualify the application of these conventions in hard cases. If the concepts of a convention and constitutive property are, as appears plausible, coherent and refer to existing kinds, the concept of a conceptual practice is also coherent and refers to some existing kind. Quine's arguments might succeed in problematizing our conceptual practices pertaining to the terms *meaning* and *definition* – though I see no reason to think that is true. However, they fail to problematize the project itself. It is obvious there are conceptual practices warranting philosophical explication, like those defining our concepts of mind, law, and free will.[54]

And, perhaps surprisingly, there is little reason to think that Quine would find fault with the analysis here. MCA assumes (1) that the structure of world of our experience is a continuing social construction determined by the framework we impose on the world with our conceptual practices and (2) that it evolves as these practices evolve. Indeed, it should be emphasized here that Quine himself defends this view in *Two Dogmas*:

> The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, *is a man-made fabric* which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Re-evaluation of some statements entails re-evaluation of others, because of their logical interconnections – the logical laws being in turn simply certain further statements of the system, certain further elements of the field. Having re-evaluated one statement we must re-evaluate

[54] Moreover, it should be clear that getting clear on at least some of these concepts is socially important. If it is true, as is commonly believed, that we are morally accountable for our behavior only if we have free will, then we must get clear on the concept of free will. If we do not know what free will is, then we cannot know whether we may justly be held morally accountable for our acts. Similarly, if we do not know whether law is inherently coercive, we cannot articulate an informed theory of normative political legitimacy – at least not one that would apply to all systems that count as law. It is clear that substantive moral conditions of legitimacy depend on whether laws are enforced by coercive means.

> some others, whether they be statements logically connected with the first or whether they be the statements of logical connections themselves. But the total field is so undetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.[55]

Our conceptual practices as they pertain to the material world of our experience, as discussed in the last section, are best conceived as assuming a revisable theory about the nature of natural kinds as it is determined independently of our conceptual practices – i.e., as an immodest hypothesis about the *real* structure of the world.[56] We create the institutions we create because we believe they benefit the community; however, we adopt the natural-kind terms we adopt because we believe they accurately describe the material world as it really is. These decisions, as Quine observes, can be revised to accommodate recalcitrant experiences. However, the fact this may require "redistributing truth-values" over some set of related statements illustrates the flexibility of our conceptual practices – which assumes, of course, that these practices manufacture or *construct* our concepts.

Indeed, the idea that *our* conceptual practices can evolve in response to recalcitrant, or otherwise problematic, experience is not merely uncontentious; that idea comprises the theoretical foundation of conceptual engineering, a project of increasing philosophical and social importance.[57]

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[55] Quine (1951, 39). Emphasis added. Quine's analysis assumes that we can make these adjustments to the truth values of a statement. But this can be coherently done only to the extent that we can change the way we use the relevant words, which assumes that we can understand and explicate the application conditions for those words. And this entails, of course, that some form of conceptual analysis is viable.

[56] As long as our conceptual practices enable us to do what we contrive them to do, it does not matter from a practical point of view whether these hypotheses are true. What ultimately matters from this point of view is that the structure we impose on the world with our conceptual practices enables us to do things in the world that conduce to our wellbeing. For instance, even if it is true, as Descartes worried, that our perceptions are induced by an evil deceiver and unreliable, we are still managing to get by in the world being guided by our perceptual beliefs as they are structured by our concepts – or so it appears.

[57] Indeed, Quine's text associated with Note 55 presupposes the viability of conceptual *engineering*, which, as is discussed immediately below, assumes the viability of conceptual *analysis*.

As Chalmers describes the project, conceptual engineering comprises "the design, implementation, and evaluation of concepts ... [which] includes conceptual re-engineering (fixing an old concept)."[58] Conceptual engineering is concerned, then, to study our existing conceptual practices and to commend changes to improve them where change is believed to be necessary or expedient.

While there is nothing in the methodology of conceptual engineering that *explicitly* challenges *Two Dogmas*, the project of conceptual engineering assumes that conceptual claims can be fruitfully distinguished from nonconceptual claims, as argued in this essay. However, more importantly, the project of conceptual engineering assumes that conceptual analysis is not only possible but is also worth doing because the structure that we impose on the world with language can have morally problematic effects.

Regardless of whether we can explicate the concepts of meaning and definition with enough precision to satisfy Quine, it is clear that there are two kinds of *true* claim: (i) claims that are true wholly in virtue of how we use the constituent words (e.g., every bachelor is unmarried) and (ii) claims that are not true wholly in virtue of how we use the constituent words (e.g., some bachelors are tall). *Two Dogmas* might succeed in problematizing our conceptual practices regarding the terms *meaning* and *definition* – though I doubt this.[59] But it fails to problematize MCA.

That said, the point is not just that the project of conceptual analysis remains viable in the aftermath of *Two Dogmas*. It is that the increasing social importance of conceptual engineering show that conceptual analysis can be interesting and useful. Indeed, regardless of what one thinks about the debates about the utility of gender concepts, they are, on any plausible account of the notions, interesting, useful, and worth pursuing.[60] Quine's analysis will always be deservedly revered for its rigor, insight, and creativity. However, philosophy has begun to move away from *Two Dogmas* – and justifiedly so.

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[58] Chalmers (2020).

[59] This would make those terms suitable candidates for a conceptual re-engineering.

[60] Even if much of this debate is couched in immodest terms having to do with what is objectively, or really, true about gender, it is clear that our gender practices can have morally problematic implications. See Note 39, above.

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Maja STANIVUKOVIĆ, PhD*

INTERIM MEASURES IN ARBITRATION: THE SERBIAN PERSPECTIVE

This paper discusses interim measures that can be ordered by Serbian arbitral tribunals and the possibility of their domestic enforcement. The introduction examines the legal framework for interim measures under Serbian law and the arbitration rules that govern the majority of arbitrations in Serbia. Subsequent chapters discuss the interpretation of the domestic legislation available to the courts and arbitrators in Serbia when facing legal gaps concerning interim measures. The best practices are identified by using comparative legal models, paving the way for optimal judicial and arbitral decisions and better legislative solutions in the future. In the second chapter, the limits of the arbitral tribunal's jurisdiction to order interim measures are determined based on a hypothetical example. The third chapter focuses on the decision-making process, types, conditions, and judicial enforcement of interim measures by domestic arbitral tribunals. The conclusion highlights the limited interpretative possibilities, which supports the need for legislative amendment.

Key words: *Arbitration in Serbia. – Interim measures. – Enforcement.*

* Professor, University of Novi Sad Faculty of Law, Serbia, *m.stanivukovic@pf.uns.ac.rs*, ORCID iD: 0000–0002–0803–9191.

1. INTRODUCTION

Arbitration has evolved into the predominant method of resolving commercial disputes with a foreign element on a global scale. Consequently, its framework must be adapted to meet all the requirements of efficient dispute resolution, including the need to impose an interim measure or another form of security before or during the arbitral proceedings. The necessity for interim measures is dictated by the time factor (Ortolani 2020, 327). Every arbitration lasts for a certain period, during which external or party-induced changes may occur, potentially jeopardizing the outcome of the arbitration. To effectively address these needs, in addition to arbitrators having the power to impose interim measures, there must also be a mechanism for the compulsory enforcement of such measures through the courts if voluntary compliance is lacking (Kojović 2001, 512).

The subjects of this paper are the interim measures that can be ordered by an arbitral tribunal seated in Serbia and the possibility of their enforcement within the country. The introductory chapter examines the legal framework for interim measures under Serbian law and the arbitration rules that govern the majority of arbitrations in Serbia. The subsequent chapters address the interpretation of legislation that domestic courts and arbitrators in Serbia should apply when faced with legal gaps related to interim measures in arbitration. The best practices in applying the sparse provisions of Serbian legislation are identified using comparative legal models, thereby paving the way for the adoption of optimal judicial and arbitral decisions and better legislative solutions in the future. The limits of the arbitral tribunal's power to order interim measures are determined in the second chapter, using a hypothetical example. The third chapter focuses on the decision-making process of arbitrators regarding interim measures, the types of interim measures, the conditions for their issuance, and the judicial enforcement of interim measures ordered by arbitral tribunals in Serbia. Finally, the article concludes by highlighting the limited interpretative possibilities that support the need for legislative intervention.

Before delving into the subject matter, an important note should be made. Serbian arbitration law is rooted in international and comparative arbitration law. The concept of "interim measures" in international and comparative arbitration law does not fully align with the concept of "interim measures" in domestic enforcement law, despite the identical terminology. For instance, international arbitration law treats the preservation of evidence as an

interim measure,[1] whereas domestic procedural law regulates the procedure for preserving evidence separately in the Civil Procedure Act, specifically in Articles 284–288. In comparative law, arbitrators lack the power to apply coercion and therefore cannot rule on the compulsory enforcement of interim measures, among other things. Consequently, when interpreting terms used in domestic arbitration law, one should always strive for a characterization that is tailored to the specific nature of arbitration and is not strictly tied to concepts from the domestic civil enforcement procedure.

1.1. Interim Measures Before and During Arbitration under Domestic Legislation

In arbitration proceedings, interim measures can be granted only at a party's request.[2] The power to grant interim measures in arbitration disputes rests with both the courts and the arbitrators.[3] Their power is concurrent, allowing the party to choose whom to approach. If the party opts for the court, the existence of an arbitration agreement in the dispute does not prevent the court from ruling on the interim measure.[4] A party that applies to the court for the determination of an interim measure does not thereby violate the arbitration agreement or waive it.[5] The domestic court may order interim measures regardless of the agreed place of arbitration or the fact that the arbitral tribunal has already been constituted.[6] When

1 UNCITRAL Model Law on International Commercial Arbitration 2006 (2006 UML), Article 17(2); UNCITRAL Arbitration Rules, Art. 26(2).

2 Art. 26(1) UNCITRAL Arbitration Rules.

3 Zakon o arbitraži (Serbian Arbitration Act, SAA), *Official Journal of the Republic of Serbia* 46/2006, Arts. 15 and 31.

4 The legislative trend in the arbitration law of developed countries is to limit the parties' right to seek interim measures from the courts only to situations where urgency requires it and the arbitral tribunal has not yet been constituted, or when the arbitral tribunal lacks jurisdiction to grant the requested interim measure. Born (Born 2020, 2601–2758) cites as examples Section 44 of the English Arbitration Act, Art. 1449(1) of the French Code of Civil Procedure, Schedule 1, Art. 17J of the South African International Arbitration Act, Section 8(b)(2) of the United States Uniform Arbitration Act, Section 9 of the Arbitration and Conciliation Act of India, Section 12A(6) of the Singapore International Arbitration Act, etc.

5 Art. VI(4) European Convention on International Commercial Arbitration; Art. 26(9) UNCITRAL Arbitration Rules; Art. 28(2) ICC Arbitration Rules; Art. 28(5) Swiss Arbitration Rules.

6 Art. 15(2) SAA. The Appellate Court in Kragujevac, Serbia, Gž 2307/2010, 4 November 2010: "the court of first instance has the power to rule on the claimant's proposal for the determination of an interim measure, regardless of whether, by

deciding on an interim measure, the court determines its jurisdiction and proceeds according to the rules of the Serbian Enforcement and Security Act (ESA).[7] The local court with jurisdiction is the one that has territorial jurisdiction for enforcement in accordance with the provisions of that law (Stanivuković 2013, 191).[8] The power to order interim measures is also granted to the arbitral tribunal under Article 31 of the Serbian Arbitration Act, but it is not elaborated in detail. For instance, it is not specified what nature the arbitral tribunal's decision on an interim measure has, in what procedure it is issued, or in what form. It is not stated whether the request for an interim measure must first be served on the other party. Additionally, the conditions for ordering an interim measure are not defined. The only provision is the possibility for the arbitrators to request that a party provide appropriate security. The provision of security may be requested from the opposing party, although it would be reasonable to interpret that the provision of security may also be requested from the party proposing the interim measure, as the interim measure is imposed on the assets of the opposing party, which may suffer loss as a result.[9] That loss should be compensated from the security provided by the applicant if it is determined that the interim measure was not justified (Stanivuković 2013, 192; Krvavac, Belović 2017, 459). The purpose of the opposing party providing security may be to serve as a substitute for an interim measure aimed at securing a claim (Schäfer 2015, 233; Bodiroga 2024, 354).

A more detailed elaboration of the power under Article 31 of the Arbitration Act is necessary because arbitrators are not obligated to follow the ETA when deciding on interim measures. The Arbitration Act does not prescribe such an obligation, nor does comparative law require arbitrators to adhere to national enforcement laws. The Arbitration Act applies to arbitral proceedings, including the arbitrators' decisions on interim measures, but it does not regulate all outstanding issues.[10]

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applying the relevant substantive law, it will establish that the arbitration clause, being valid, applies to the specific dispute between the parties" (translated by author).

7 Zakon o izvršenju i obezbeđenju (Enforcement and Security Act, ESA), *Official Journal of the Republic of Serbia*, 106/2015 as amended, Art. 414 *et seq*.

8 Art. 258(4) ESA.

9 For instance, Arts. 451 and 452 ESA provide for a guarantee as an alternative to or a prerequisite for ordering an interim measure.

10 Art. 2(1) SAA.

Another important issue that is insufficiently regulated by the Arbitration Act is the enforcement of interim measures issued by an arbitral tribunal. Since the arbitral tribunal lacks coercive powers, it cannot ensure the compulsory enforcement of such measures without the cooperation of a state court (Stanivuković 2013, 192). The Arbitration Act and the Enforcement and Security Act do not stipulate that an interim measure ordered by an arbitral tribunal constitutes an enforceable instrument. Additionally, the relationship between the court and the arbitral tribunal is not defined in cases where parties seek interim measures from both bodies.[11]

Furthermore, the Arbitration Act does not provide for the possibility of appointing an emergency arbitrator before the constitution of the arbitral tribunal, which is something that exists in many arbitration rules. The power of such an arbitrator is limited to deciding on a request for an interim measure, and their decision is subject to review by the arbitral tribunal, once it has been constituted.

The concurrent jurisdiction of courts and arbitrators in ordering interim measures can be resolved through party autonomy. It is undisputed that the contracting parties may exclude the power of arbitrators to order interim measures,[12] although they do this rarely (Ortolani 2020, 324). On the other hand, it is controversial whether the parties have the power to mutually exclude or limit the power of courts to order interim measures after the initiation of arbitration proceedings and the constitution of the arbitral tribunal. Some arbitration rules aim to restrict the possibility of approaching the court after that point.[13] Nevertheless, the possibility of excluding recourse

[11] German and Austrian law deny court assistance for the enforcement of an interim measure issued by an arbitral tribunal if a party had previously requested an interim measure from the court. The purpose of this provision is to prevent the issuance of contradictory decisions. In other countries, the right of a party to approach the court is restricted once the arbitral tribunal has been constituted. See below for more details.

[12] Art. 31(1) SAA; Art. 17(1) 2006 UML.

[13] For instance, the 2020 London Court of International Arbitration Rules, provide in Art. 25(3) that "[a] party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award."

to court by agreement ultimately depends on the domestic enforcement law, i.e., whether it allows parties to waive their right to request the court to order an interim measure.[14]

1.2. Interim Measures Before and During Arbitration under Arbitration Rules Applicable in Serbia

Among experts in Serbian arbitration law, there was significant skepticism regarding the possibility of arbitrators ordering interim measures prior to the adoption of the Arbitration Act. However, it should be noted that provisions on interim measures had existed almost from the outset in the Chamber of Commerce of Yugoslavia Rules of Foreign Trade Arbitration, although they were not applied.[15]

The opportunity to introduce more detailed provisions on interim measures into the domestic system arose following the adoption of the Arbitration Act, when the rules of arbitration institutions based in Serbia were enacted. However, this opportunity was not fully utilized.

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[14] Bodiroga considers that waiving the right to initiate enforcement proceedings would be inadmissible, just as waiving the right to legal protection is inadmissible (Bodiroga 2024, 250).

[15] Poznić (1973, 121) comments on Art. 37 of the Rules of Foreign Trade Arbitration at the Federal Chamber of Commerce, adopted on 26 June 1958, and amended on 9 October 1967, read as follows:

> "Some arbitration rules provide for the arbitral tribunal itself to order a security measure. [The Rules of Foreign Trade Arbitration] contain a provision reflecting this idea, although in a wording that does not align with common terminology. Specifically, during the proceedings, the rules state that arbitral tribunals may order the parties (but not third parties) to undertake certain actions or refrain from certain actions related to the subject matter of the dispute (Art. 37) [...]
>
> Regarding the provisions on the possibility of ordering such measures, it should be noted that the arbitral tribunal may authorize such a measure, at the request of a party. However, when necessary, the enforcement of the measure through coercive actions is exclusively within the competence of the state court. The arbitral tribunal is not authorized to enforce coercion.
>
> This raises the legitimate question whether the provision allowing the arbitral tribunal to authorize a security measure is necessary at all. There is no doubt that such measures can be ordered and enforced by the state court. In practice, the provisions on ordering security measures [in Foreign Trade Arbitration] have not been applied" (translated by author).

The 2007 Rules of Foreign Trade Arbitration vested the competence to order an "interim measure deemed necessary in view of the subject matter of the dispute" in the arbitration institution itself (rather than the arbitrators) at the request of a party. At the same time, the institution could also require the opposing party to provide appropriate security.[16] This solution was something of a curiosity, as it deviated from common practice. In the rules of this institution adopted in 2013, the competence to order interim measures was assigned to the arbitral tribunal or a sole arbitrator. The provision regarding the opposing party was also corrected, allowing the arbitral tribunal to require the party requesting the interim measure to provide appropriate security. Additionally, a second paragraph was introduced, stipulating that the measure may be issued in the form of an order or an arbitral award.[17]

The 2013 Rules of the Belgrade Arbitration Centre (Belgrade Rules) regulate interim measures and security measures in Article 31. The first paragraph adopts part of Article 31 of the Arbitration Act, which establishes the power of the arbitral tribunal to order interim measures. Paragraph 4 incorporates another part of Article 31 of the Arbitration Act, which allows the arbitral tribunal to require the party requesting an interim measure to provide security. The provision explicitly states that the arbitral tribunal may condition the granting of an interim measure on the provision of security. Additionally, Article 31 of the Belgrade Rules introduces a limitation on a party's right to be heard regarding the opposing party's requests, which is an important procedural principle under the Arbitration Act.[18] According to Article 31(2), an interim measure is generally ordered only after the opposing party has been given the opportunity to comment on the request for its issuance. However, an exception is allowed if notifying the other party would render the interim measure meaningless or significantly reduce its effectiveness. These are interim measures where urgency is particularly pertinent. If an interim measure is granted without informing the other party and giving it an opportunity to respond, the opposing party must be allowed to present its position immediately after the measure has been issued.[19] In the

[16] Rules of the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce, *Official Journal of the Republic of Serbia* 52/2007, Art. 43, translated by author.

[17] This provision was inspired by Art. 28(1) of the contemporary ICC Rules (Pavić, Đorđević 2016, 331).

[18] Art. 33(2) SAA.

[19] One might question whether it is legally permissible for the rules of an arbitration institution to regulate this issue (i.e., deciding on interim measures ex parte, without giving the opposing party prior opportunity to respond) differently

Belgrade Rules, the manner of termination of interim measures is regulated in Article 31(3). The Arbitral Tribunal may revoke, suspend, or modify an interim measure at any time, on its own initiative, if the circumstances of the case no longer justify its existence. The Belgrade Rules do not contain provisions regarding the form, in which a decision on an interim measure is made, nor the conditions and procedure for its ordering.

The first Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia were adopted on 15 June 2016.[20] Shortly thereafter, on 8 December 2016, they were replaced by a new set of rules, which came into force on December 24.[21] One of the amended provisions was contained in Article 40, concerning interim and security measures. Article 40(1), which later became Article 37 in the subsequent version, replicates the text of Article 31 of the Arbitration Act, addressing the power of the arbitral tribunal to order interim and security measures at the request of a party. The difference, however, was that the arbitral tribunal could require the requesting party (rather than the opposing party) to provide appropriate security. Articles 40(2) and 40(3) contained provisions allowing for the ordering interim measures even before the opposing party had been given the opportunity to respond to the request. Article 40(4) included a provision stipulating that an interim measure "shall be ordered in the form of an arbitral award." The apparent purpose of this provision was to facilitate the enforcement of interim measures ordered by the arbitral tribunal (Pavić, Đorđević 2016, 331). However, this provision was deemed at odds with legal doctrine and criticized, with its intent considered unattainable, as the authors argued that domestic law does not allow for the enforcement of interim measures issued in the form of an arbitral award (Pavić, Đorđević 2016, 332). Whether for this reason or others, this provision was revoked after only six months, so Article 37 of the current Rules of the Permanent Arbitration no longer

from Art. 424 ESA. After all, are the provisions of the ESA not mandatory, meaning they must also be applied in arbitration?

The answer is that the ESA does not apply as a binding regulation in arbitration proceedings. Arbitrators do not have the power to conduct enforcement proceedings. The wording that they may "order" interim measures should not be understood in that sense, as their competence to "order" such measures is significantly limited. Although these limitations are not explicitly stated in the Arbitration Act, they stem from the nature of their jurisdiction, which is based on the arbitration agreement. These limitations will be discussed in the following chapter.

[20] Pravilnik o stalnoj arbitraži pri Privrednoj komori Srbije, *Official Journal of the Republic of Serbia* 58/16.

[21] Pravilnik o stalnoj arbitraži pri Privrednoj komori Srbije, *Official Journal of the Republic of Serbia* 101/16. The date of entry force available in the *Paragraf Lex* database.

regulates the form in which interim measures are issued. Instead, the new Article 37(4) provides that during the proceedings the arbitral tribunal may revoke, modify, or temporarily suspend an interim measure if it concludes that the circumstances of the case no longer justify its existence.

Provisions regarding interim measures are also included in Article 26 of the 2021 UNCITRAL Arbitration Rules, which are in some cases agreed upon in arbitrations in Serbia (Stanivuković 2018, 137–166). The UNCITRAL Rules first define the concept of an interim measure. In short, it is any temporary measure by which the arbitral tribunal, prior to issuing a final arbitral award, orders a party to maintain or restore the status quo pending the final resolution of the dispute, to take action or refrain from taking action that could cause harm to the arbitral proceedings, to secure funds for the enforcement of the final arbitral award, or to preserve evidence.[22] The UNCITRAL Rules also include conditions for ordering interim measures, which the requesting party must prove have been met. However, these conditions are optional when it comes to interim measures aimed at preserving evidence.[23] The termination or modification of an interim measure is possible at the request of a party, while the arbitral tribunal may initiate such actions on its own only in exceptional circumstances, provided that the parties are notified in advance.[24] The parties also have certain obligations regarding interim measures. First, they are required to inform the arbitral tribunal of any material changes in the circumstances that formed the basis for the issuance of the interim measure.[25] Second, they are obligated to compensate for any damage caused to the opposing party by an unjustified interim measure.[26]

It is also necessary to mention the provisions of the 2021 Arbitration Rules of the International Chamber of Commerce (ICC), as in practice parties often agree to resolve disputes under the rules of the ICC International Court of Arbitration with the place of arbitration in Serbia, thereby opting for domestic arbitration conducted in accordance with these rules. The

22 Art. 26(2) UNCITRAL Arbitration Rules.

23 Arts. 26(3) and 26(4) UNCITRAL Arbitration Rules.

24 Art. 26(5) UNCITRAL Arbitration Rules.

25 Art. 26(7) UNCITRAL Arbitration Rules.

26 Art. 26(8) UNCITRAL Arbitration Rules. This provision can be compared to Art. 458 ESA, which also provides for the right to compensation for the loss resulting from an unfounded or unjustified interim measure, but within a separate civil proceeding. In the absence of a specific provision on this matter, in arbitration proceedings it may be debatable whether compensation for the loss can be sought within the same arbitration proceeding in which the unjustified interim measure was ordered. Some arbitration statutes explicitly regulate the right of a party to claim compensation for the loss in such cases.

ICC Rules contain two articles dedicated to interim measures: Article 28 – Conservatory and Interim Measures, and Article 29 – Emergency Arbitrator. Additionally, Appendix V of the ICC Rules sets out the rules governing the procedure of the emergency arbitrator.

Article 28(1) regulates common issues: the power of the arbitral tribunal to order an interim measure as soon as the case is submitted for decision, the right of the parties to agree on excluding such power, and the right of the arbitral tribunal to require the applicant to provide security as a condition for granting an interim measure. However, in the last sentence, unlike other arbitration rules, the ICC Rules also address the form of the decision. An interim measure may be issued in the form of a reasoned order or an arbitral award, at the discretion of the arbitral tribunal.[27]

Article 28(2) of the ICC Rules regulates the effects of turning to the courts. It informs the parties that they may seek recourse to a court to request the issuance of interim or security measures or the enforcement of such measures ordered by the arbitral tribunal, even after the case has been submitted to the arbitral tribunal. However, if the arbitral tribunal has been constituted and the case has been submitted for decision, recourse to the court is only allowed "in appropriate circumstances".

According to one interpretation, after the constitution of the arbitral tribunal, parties in ICC arbitration may turn to the courts only to request interim measures that the arbitral tribunal itself would not be able to grant or when court-ordered interim measures are necessary to protect the purpose of the arbitration proceedings (Ortolani 2020, 325).[28]

Recourse to the court is not considered a violation or waiver of the arbitration agreement, nor does it affect the power of the arbitral tribunal to order an interim measure.[29] The parties are required to inform the Secretariat of the ICC Court of Arbitration of any recourse to judicial authorities and any measures taken by the courts at their request, and the Secretariat, in turn, notifies the arbitrators. The ICC Arbitration Rules also explicitly provide the right for a party to seek court enforcement of an interim measure ordered by the arbitral tribunal.[30]

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[27] Art. 28(1) ICC Arbitration Rules.

[28] *Toyo Tire Holdings of Americas, Inc. v. Continental Tire North America, Inc.*, 609 F.3d 975, 980 (9th Cir. 2010); Supreme Court of British Columbia, CLOUT Case 1654, *African Mixing Technologies Ltd v. Canamix Processing Systems Ltd* [2014] BSCS 2130.

[29] Art. 28(2) ICC Arbitration Rules.

[30] Art. 28(2) ICC Arbitration Rules.

A particular problem arises when a request is submitted prior to the constitution of the arbitral tribunal, or even before the request for arbitration is filed, and the measure must be urgently enforced to prevent irreparable harm. The solution provided by the ICC Arbitration Rules is the appointment of an emergency arbitrator.[31] The emergency arbitrator's power is limited exclusively to ruling on emergency measures and ceases once the case is submitted to the arbitral tribunal.[32] The party requesting the institution to appoint an emergency arbitrator is required to initiate arbitration proceedings within ten days.[33] Arbitrators are not bound by the decisions of the emergency arbitrator and may modify or revoke them.[34]

Neither the Belgrade Rules nor the Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia provide for the institution of an emergency arbitrator. Thus, in Serbia, prior to the initiation of arbitration, interim measures can only be requested from the courts, with the exception of arbitrations conducted under the ICC Rules.[35] Despite the fact that by agreeing to any of the aforementioned rules the parties mutually entrust the arbitral tribunal with the power to order interim measures, the aforementioned ambiguities in the regulations[36] discourage parties from proposing interim measures and hinder domestic arbitrators who would

[31] Art. 29 ICC Arbitration Rules. Emergency arbitrators are also provided for in the Swiss Arbitration Rules (Art. 43), as well as in the rules of the London, Hong Kong, Singapore, and Chinese arbitration centers, along with many other modern rules of arbitral institutions.

[32] The Swiss Rules specify that an emergency arbitrator may rule on a previously submitted request for emergency measures even if the case has been referred to the arbitral tribunal in the meantime. The same follows from Art. 29(1) of the ICC Arbitration Rules (Stanivuković 2013, 191).

[33] Emergency Arbitrator Rules (Appendix V: ICC Arbitration Rules, Art. 1(6)).

[34] Art. 29(3) ICC Arbitration Rules.

[35] The essence of the emergency arbitrator mechanism lies in the speed of their appointment and the swiftness of their decision on interim measures. The ICC Rules state that an emergency arbitrator should be appointed within two days of receiving the request and must issue a decision within fifteen days from the time the matter is referred to them. Such short deadlines for appointment are impossible to achieve in the context of the regular procedure for appointing an arbitral tribunal.

[36] These omissions include the failure of the SAA to elaborate on provisions regarding the power of the arbitral tribunal to issue interim measures, the nature of the decision on interim measures (whether it is a substantive or procedural decision), the procedure and form in which it is issued (arbitral award or procedural order), the conditions for determining interim measures, and the types of interim measures that the arbitral tribunal may impose. Additionally, it is unclear whether the request must be delivered to the other party before a decision is made, what is the status of the emergency arbitrator, the priority of decision-making in cases where a party seeks interim measures from both the court and the arbitral tribunal,

otherwise be willing to order them. In the nearly two-decade-long practice of applying the Serbian Arbitration Act, there is a notable absence of court decisions interpreting Article 31, which may indicate that arbitrators are not utilizing these powers.

2. THE POWER OF THE ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURES

2.1. Hypothetical Example

Inadequate regulation of arbitral interim measures in Serbian law carries risks, especially for foreign parties as defendants. We will illustrate this with a hypothetical example that could easily occur in practice. In this fictional scenario, the claimant is a domestic business entity, while the defendant is a branch of a foreign business entity.[37] The dispute is valued at 4 million euros. The parties agreed to the following arbitration clause:

> The contracting parties agree to submit their disputed relationship to arbitration organized in accordance with the Rules of the Permanent Arbitration at the Chamber of Commerce of Serbia. The seat of arbitration shall be in Belgrade. The language of arbitration shall be English. The dispute shall be resolved by an arbitral tribunal composed of three arbitrators, who shall be appointed in accordance with the Rules of the Permanent Arbitration, whereby each party shall appoint one arbitrator, and the appointed arbitrators shall then jointly select the third arbitrator as the president of the tribunal. The applicable substantive law shall be the law of the Republic of Serbia. The arbitral tribunal shall render its arbitral award unanimously, rather than by majority vote.

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and, above all, how interim measures are to be enforced. Neither the ESA nor the SAA stipulate that an interim measure issued by an arbitral tribunal constitutes an enforceable instrument.

[37] According to the interpretation of the Supreme Court of Cassation, although a branch of a foreign legal entity does not have the status of a legal entity in Serbia, it may exceptionally be granted the status of a party in civil proceedings by a court decision, based on Art. 74(4) of the Civil Procedure Act. A branch of a foreign legal entity may also be recognized as having party capacity in arbitration proceedings, even though the Arbitration Act contains no explicit provisions on this matter.

Along with the claim, the claimant submits a motion for the imposition of an interim measure to secure the claim, stating that the defendant is established as a branch of a foreign legal entity without assets in the territory of the Republic of Serbia; that it was engaged by a third party as a contractor for construction work; that it entered into a subcontracting agreement with the claimant from which the dispute arose; that the third party terminated the contract with the defendant in the meantime, due to multiple breaches of contract; that based on the evidence submitted with the claim (primarily expert reports and opinions) there is a likelihood of the existence of the claimant's claim; that there is a risk to the claimant's claim, which would ultimately have to be enforced abroad because the parent company is liable without limitation for the obligations of the branch; and that, consequently, the conditions prescribed by Articles 449 and 450 of the ESA for ordering an interim measure to secure a monetary claim have been met.

Accordingly, the claimant proposes that the arbitral tribunal order an interim measure securing the monetary claim under Article 459(1)(4) of the ESA and proposes the following operative part of the decision – ruling:

> The claimant's motion for the imposition of an interim measure is granted as well-founded, and therefore an interim measure securing the claimant's monetary claim in the amount of EUR 4 million euros, in dinar equivalent, according at the middle exchange rate of the National Bank of Serbia (NBS) on the day of the transfer, is ordered. The NBS – Department for Forced Collection in Kragujevac is ordered to transfer funds in the amount of the secured claim from the defendant's business accounts to the deposit of Public Enforcement Officer Ljiljana Radovanović from Belgrade. This interim measure shall remain in effect pending the conclusion of the arbitration proceedings, and in the event that the proceedings are concluded in favour of the claimant, the measure shall remain in effect until the enforcement of the arbitral award. This ruling has the effect of a final and enforceable decision.

The defendant disputes the claimant's request for the imposition of an interim measure, arguing that the conditions under Articles 449 and 450 of the ESA (the likelihood of the claim's existence and the risk to the

claim) have not been met.[38] The defendant neither files an objection to the jurisdiction of the arbitral tribunal nor requests an oral hearing on the tribunal's jurisdiction to order the interim measure.

Given the formulation of the proposal described, the need arises to decide on the power of the arbitral tribunal to order the specific interim measure. Before explaining the fundamental principles for making such a decision, we will first examine the origin of Article 31 of the Serbian Arbitration Act, whose careful interpretation is essential in this context.

2.2. The Genesis of Article 31 of the Serbian Arbitration Act

The draft of the Arbitration Act was prepared by a working group of the Serbian Ministry of Foreign Economic Relations (Mitrović 2006, 79). The draft was submitted to the Ministry on 31 May 2005, and was published in the Yearbook *Arbitraža* by the Foreign Trade Court of Arbitration in Belgrade (2006, 109).

For many years, Serbian law did not recognize the power of arbitrators to order interim measures (Poznić 1973, 85). A similar situation existed in other continental legal systems. The change occurred under the influence of the 1985 UNCITRAL Model Law on International Commercial Arbitration (1985 UML). Article 17: Power of arbitral tribunal to order interim measures, which was adopted in many countries and influenced legislation even where it was not explicitly incorporated[39] states:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

[38] According to the position expressed in a decision of the Higher Court in Belgrade, the enforcement of a monetary claim based on a contract with a branch of a foreign business entity implies that the claim must be enforced abroad. The fulfillment of the condition regarding the risk to the claim is assessed in light of this fact. Decision of the Higher Court in Belgrade, Gž. No. 611/14 of 5 December 2014, *Bulletin of the Higher Court in Belgrade* 86/2015, 45–46 (Bodiroga 2024, 572).

[39] For example, the influence of this article is discernable in the original text of Art. 183 of the Swiss Act on Private International Law.

The working group took into account Article 17 of the 1985 UML. However, it also considered two other models: Article 16 of the Draft Croatian Arbitration Act, which was prepared by Siniša Triva,[40] and Article 1041 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO). Both provisions are based on the 1985 UML but provide additional elements.

The Triva Draft includes an important addition in its Article 15(2) concerning the enforcement of interim measures:

Article 16: Interim measures in arbitral proceedings

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. (2) If a party to which interim measures relate does not agree to undertake them voluntarily, the party that made the motion for such measures may request their enforcement before the competent court.

Section 1041(1) of the German Code is much more detailed on the provision on interim measures and bears less resemblance to Article 17 of the UML because it does not contain the formulation "may [...] order any party":

Section 1041: Measures of temporary relief

> (1) Unless otherwise agreed by the parties, the arbitral tribunal may order, at the request of a party, such interim measures or measures of protection as it considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may require either party to provide reasonable security in connection with such a measure.

[40] This provision was incorporated into the 2001 Croatian Arbitration Act. The provisions of the Croatian Arbitration Act are modeled after the 1985 UML, but with a significant influence from the German adaptation of that model (Dika 2016, 373).

> (2) On request by a party, the court may permit the enforcement of a measure pursuant to subsection (1), unless an application for a corresponding measure of temporary relief has already been filed with a court. It may recast the order if this is necessary for the enforcement of the measure.
>
> (3) On request, the court may set aside or amend the order pursuant to subsection (2).
>
> (4) Where a measure ordered pursuant to subsection (1) proves to have been unjustified from the outset, the party that has obtained its enforcement is under obligation to compensate the opposing party for the damage the latter has suffered as a result of the measure being enforced or as a result of their having provided security in order to avert the enforcement. The claim may be asserted in the pending arbitral proceedings.[41]

It should be noted that both this provision and the Triva Draft envisage the assistance of the court in the enforcement of interim measures by the arbitral tribunal. Based on the aforementioned models, the following text of the provision on interim measures was initially drafted by the working group:

Article 26: Power of the Arbitration[42] to Order Interim Measures

> (1) If the parties have not agreed otherwise, the arbitration may, at the request of a party, order an interim measure of protection that it considers necessary in view of the subject matter of the dispute, and may simultaneously order that the party provide appropriate security in relation to the ordered measure.
>
> (2) If the party against whom the interim measure has been imposed voluntarily fails to comply with that measure, the party who requested the measure may seek the enforcement of the imposed interim measure of protection from the court designated by law.[43]

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[41] Translation to English: *https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.*

[42] During the drafting of the SAA, the members of the working group consistently referred to the dispute-resolving body (the arbitral tribunal) using the term "arbitration".

[43] Translated by author.

A note was included along with this text, stating that Article 26(2) could be included in a separate chapter on the relationship between the arbitral tribunal and the court, or in a separate provision on enforcement issues, if necessary.

In the draft version of the Croatian Arbitration Act published in May 2005, the provision was, for unknown reasons, reduced to just the first paragraph.

After the preparation of that version, the Draft Arbitration Act was translated into English and French, and comments were requested from three French jurists: Bertrand Ancel, Pierre Mayer, and Charles Jarrosson. Ancel had no comments on Article 29, while Mayer and Jarrosson made similar remarks:

- Jarrosson: What is the relationship between Article 29 and Article 15, which grants the power to the state court to issue interim measures?[44]
- Mayer: What if there is a potential conflict between the measure ordered by the arbitrator and the measure ordered by the judge (Article 15)?[45]

The report analysing the comment by the French jurists, regarding the comment on the relationship between Article 29 and Article 15, states the following:

> The same ambiguity exists in Articles 9 and 17 [1985 UML]. The issue is that both the court and the arbitration have power to order interim measures, and the party practically has the option to choose whom to approach. There is an interest in allowing the parties both options; for instance, due to urgency, a party may be interested in approaching the court if the arbitral tribunal has not yet been formed. Additionally, court intervention is necessary when the interim measure concerns third parties (such as a bank where the debtor holds funds). Some foreign laws stipulate that if the arbitral tribunal has already been formed, a party can only approach the court in specifically outlined cases. The sanctions for noncompliance with the decision of the court and the arbitration differ, as arbitration does not have enforcement powers over the parties. If these measures are mutually conflicting, the arbitral tribunal's decision to issue an interim measure will not be

[44] Unpublished. Author's personal records.

[45] Unpublished. Author's personal records.

> recognized or enforced by courts in our country, as this is not a final arbitral award, but a decision of the arbitral tribunal, for which recognition and enforcement are not provided under the law or international treaties. If it concerns a domestic arbitration decision, the question is whether such a decision can acquire the status of enforceability, since under this draft this status is reserved only for final arbitral awards. Thus, the enforcement of an arbitral decision regarding an interim measure is most often left to the goodwill of the parties and their awareness that noncompliance with the arbitration's orders may negatively affect the final outcome of the dispute. I note that in the Austrian draft, which also concurrently allows the jurisdiction of both the court and the arbitration to issue interim measures, the issue of compulsory enforcement of arbitral decisions determining interim measures is specifically regulated, especially if the arbitration seat is abroad, and particularly if the seat is domestic (see Article 593).[46] Perhaps we should also consider this, but it requires another meeting of the working group to find the appropriate formulations.[47]

This meeting never took place. The final formulation, which remained unchanged, was presented to the public by the chairman of the working group, Dobrosav Mitrović (2006, 82), with the following words:

> The new law gives arbitration the right and ability to issue interim measures and protective measures, which, under previous legal regulations, arbitration was unable to do. This was exclusively within the jurisdiction of state courts. Now, in addition to state courts, these measures can also be issued by arbitration. In practice, this will cause problems, as the question arises whether state courts will enforce such measures issued by arbitration. Arbitration itself does not have the ability to enforce its own measures; they can only be effective if the parties comply with them voluntarily. When such measures are issued by arbitration abroad, domestic courts do not have to

[46] The report submitted to the members of the working group shows that during the drafting of the Draft Law, the then-current content of Art. 593 of the Austrian Arbitration Act was also taken into consideration, which will be discussed below.

[47] Unpublished. Author's personal records. Translated by author.

enforce them, and if they are made in the form of an arbitral award, which is rarely the case, recognition and enforcement (exequatur) must be requested in Serbia.[48]

2.3. Limits of Arbitrator Power: The Arbitral Tribunal Has Power Only for Interim Measures Addressed to a Party, not to a Third Party

In the Serbian legal system, only one limitation of the power of arbitrators to order interim measures is mentioned: in the parties' agreement, as under Article 31, the parties may agree to limit or completely exclude such jurisdiction.[49]

Unlike Article 17 of the 1985 UML and the Triva Draft, the Serbian law does not explicitly state that the arbitral tribunal may order only interim measures that impose an obligation to act or refrain from acting on a party to the dispute. Like the German provision, the subjective limits of the arbitrator's power are not expressly defined in the national law, which at first glance may suggest that they are identical to those of state courts.

However, the subjective limits of the arbitrator's power arise from the very nature and effect of the arbitration agreement and are generally assumed in legal literature. The powers of the arbitrator are confined by the arbitration agreement; they extend only to the parties covered by the arbitration agreement and involved in the proceedings (Knežević 2008a, 278; Stanivuković 2013, 191).[50] Accordingly, the arbitral tribunal has the power to order only interim measures directed at a party, but not at a third party that is not bound by the arbitration agreement. This is explicitly stated in both versions of the UML (Holtzmann *et al.* 2015, 193; Lew, Mistelis, Kröll 2003, 593) and is also recognized in Germany, whose legal framework has had the greatest influence on the wording of the Serbian provision.[51]

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48 Translated by author.

49 Art. 31 SAA.

50 For Swiss law, see the analysis in Boog (2018, 161–162).

51 As outlined in the previous chapter, the genesis of Art. 31(1) shows that the greatest influence on its formulation came from Art. 1041(1) ZPO, which does not specify the type of measure that an arbitral tribunal may order.

Commentators on Article 1041 of the German Code of Civil Procedure emphasize that this provision aligns with Article 17 of the 1985 UML and that an arbitral tribunal has no power to order interim measures against third parties (Schäfer 2015, 227–228). Regarding the limits of arbitrators' power, commentators on the German Code note the following:

a) Based on a prima facie assessment, a valid arbitration agreement must exist;

b) The arbitral tribunal has no power to order interim measures against third parties, e.g., banks, that are not parties to the arbitration agreement;

c) When deciding whether to grant an interim measure, the arbitral tribunal exercises discretion and is not obligated to issue the measure even if the legal requirements for its issuance are met (Schäfer 2015, 228).

Arbitrators may order the interim measure of protection they consider necessary.[52]

The members of the working group for the Serbian Draft Arbitration Act did not explicitly state that the power conferred on arbitrators in Article 31(1) of the Draft was limited to measures directed at a party, as this was assumed. This assumption is evident in Article 31(2), which regulates the enforcement of an interim measure: "If the party against whom the interim measure has been issued *does not voluntarily comply with it*" (emphasis added). There was no doubt that an arbitral tribunal's interim measure could only be issued against a party to the arbitration proceedings.

Article 31(2) was later removed from the Draft, likely due to the belief that the enforcement of arbitral interim measures would fall under the then-applicable Enforcement Proceedings Act.[53] As a result, the adopted provision remained ambiguous – not due to the legislator's intent to depart from the 1985 UML or to grant arbitrators broader powers than those recognized in most jurisdictions, but simply due to an oversight in explicitly stating what was already implied.

52 Art. 1041 ZPO.

53 Such expectations also arise from Art. 65(3) of the Arbitration Law. A more detailed discussion of this article can be found in Section 3.3.

For illustration purposes, even though arbitrators are not required to abide by the ESA when ordering interim measures, they could impose types of interim measures such as those listed in ESA Article 459(1), points 1, 2, and 6. However, they would not be able to order the measures specified in points 3–5 of the same article.

Even when ordering interim measures under Article 459(1), points 1, 2, and 6, arbitrators could not mandate actions that are not actions of the party, such as registering a prohibition of alienation with the cadastre. Such measures could only be ordered by a court, either when issuing an interim measure itself or when supporting the arbitral tribunal by enforcing its interim measure.

The Serbian legal doctrine unanimously holds that an arbitral tribunal may order an interim measure only against one of the parties to the proceedings, not against third parties. An arbitration agreement operates inter partes. It creates obligations for the parties to the agreement and establishes the arbitrator's powers, which extend only to the contracting parties, i.e., the parties to the proceedings.[54]

Arbitrators do not have the power to bind third parties who are not parties to the arbitration agreement.[55] For instance, as is the case in Germany, they do not have the power to compel a bank (or the NBS Forced Collection Department) to transfer funds from the debtor's account to the creditor's account through an interim measure.[56]

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[54] "[T]he strength and weakness of arbitration lie in the arbitration agreement: the tribunal derives its jurisdiction from it, but at the same time, it must respect the limitations arising from such a mandate formed *intuitu personae*" (Knežević, Pavić 2009, 130, translated by author).

[55] "A party may also approach the arbitral tribunal to order an interim measure, provided that the arbitral tribunal is only competent to order interim measures in relation to the parties to the proceedings, and not to third parties" (Stanivuković 2013, 191, translated by author).

[56] "The jurisdiction in this case is agreed upon by the parties, so the arbitral tribunal cannot issue an interim measure against third parties (e.g., a bank) [...] instead, only a court can order such an interim measure" (Krvavac, Belović 2017, 452, translated by author).

The power of the arbitral tribunal is regulated in this manner in countries that have adopted the UML.[57] For example, in Austria,[58] Croatia,[59] and Slovenia,[60] as well as in Germany, the arbitral tribunal's power is limited to issuing orders to a party to take a specific action, and does not include making decisions on enforcement, as requested in the hypothetical example. Even without precise wording, Article 31 of the Serbian Arbitration Act should be interpreted in this manner. One should assume that the legislator did not intend to grant domestic arbitrators broader power than what is typically granted to them in comparative law, because if such an intention had existed, more detailed provisions on the operationalization of this unlimited power would have been adopted.

The power of the arbitral tribunal to order interim measures cannot be equated with the general power of the arbitral tribunal to decide on the conduct of the arbitration proceedings, which exists under Article 32(3) of the Arbitration Act. The power to order interim measures is specifically regulated by a separate provision of the Arbitration Act. A decision on an interim measure is not a decision on the conduct of the proceedings, as it often significantly impacts the parties' substantive rights; it temporarily

[57] "A State court can (within the limits of its jurisdiction as determined by the applicable *lex fori*) grant such a measure, authorising e.g. an attachment against the assets out of which satisfaction may be sought once a final judgment on the merits has been issued. By contrast, an arbitral tribunal is generally unable to do so, as its jurisdiction derives from the parties' agreement and thus does not extend to third parties" (Ortolani 2020, 338).

[58] Art. 593 (1) 2013 Austrian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order against the other party such interim or protective measures it deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm. The arbitral tribunal may request any party to provide appropriate security in connection with such measure." (translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber).

[59] Article 16 (1) Croatian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

[60] Article 20 (1) Slovenian Arbitration Act: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, at any time before the issuance of the final award, grant against the other party an interim measure it considers appropriate having regard to the subject matter of the dispute, after giving that other party an opportunity to present its case with respect to the request. The arbitral tribunal may require any party to provide appropriate security in connection with the measure." (translation published by Stalna arbitraža pri Gospodarskoj zbornici Slovenije).

regulates the relationship between the parties or requires the parties to perform or refrain from a specific action, which can affect the presentation of evidence or the enforcement of the final arbitral award (Kojović 2001, 522).

In principle, the power of arbitrators to order interim measures cannot be derived from their power to manage proceedings (Poudret, Besson 2007, 521). This is illustrated by the fact that comparative law includes arbitration statutes that limit the arbitral tribunal's power to order interim measures,[61] or exclude certain types of interim measures from its power,[62] even though they generally grant the arbitrator the power to decide on the conduct of proceedings when there is no agreement between the parties.

2.4. Limits of the Arbitrator's Power: The Arbitral Tribunal is not competent to Issue Enforcement Orders

In the hypothetical example, the claimant included in the dispositive of the proposed interim measure the statement that the decision/ruling has the effect of a final enforcement decision. Although a layperson may think that the arbitral tribunal is competent to issue enforcement orders because it is equated with a court in all respects, this is not the case, neither in Serbia nor elsewhere. In countries influenced by the Germanic law system, which includes Serbia's procedural law, arbitral tribunals do not have the authority to issue enforcement decisions. On the contrary, the law provides for the mandatory assistance of the courts in enforcing arbitral decisions that order interim measures.

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[61] For example, prior to the 2022 reform, which came into effect in 2023, the Italian Code of Civil Procedure (Art. 818) excluded the possibility for arbitrators to order interim measures. The reform introduced the power for arbitrators to issue such measures, but only if the parties had provided for this in the arbitration agreement, which may be by agreeing to the application of specific arbitration rules.

[62] The Belgian Judicial Code (Art. 1696(1)) stipulates that the arbitral tribunal cannot order interim measures such as attachment against the debtor's property for the purpose of security (*saisie conservatoire*). The same applies to the Dutch Code of Civil Procedure, Art. 1043b (*conservatoir beslag*).

The Serbian Arbitration Act grants the arbitral tribunal the power to order interim measures, but this does not mean that the arbitral tribunal was automatically granted the power to order the compulsory enforcement of those measures. Based on this wording, the tribunal is not granted the power to issue an enforcement decision, as per the provisions of the ESA.[63]

The authors of the monograph on arbitration law, published during the validity of the previous version Enforcement Procedure Act, state:

> The term "interim measures", used in the Arbitration Act, fully corresponds to the terminology of our Enforcement Procedure Act (EPA). However, it would be incorrect to conclude that the Arbitration Act simply allows arbitrations operating in the territory of Serbia to follow the provisions of the EPA when ordering interim measures. From a purely formal perspective, the provisions of the EPA were designed for judicial, not arbitration proceedings, and therefore they should not even be subsidiarity applied to arbitration (Knežević, Pavić 2009, 131, translated by author).

The law applicable to arbitration proceedings is determined in Article 2 of the Arbitration Act. The provisions of the Arbitration Act apply to arbitration proceedings when the place of arbitration is in Serbia. Just as the provisions of the Civil Procedure Act do not apply to arbitration proceedings, even by analogy – neither do the provisions of the ESA.[64] In other words, arbitrators, when exercising their powers under Article 31 of the Arbitration Act, are not required to apply the ESA, and it cannot be considered that they are issuing enforcement decisions within the meaning of the ESA. Even though the provision of Article 31 of the Arbitration Act is not well articulated, we cannot agree with the view that the determination of interim measures by the arbitral tribunal entails the application of coercion and represents an ad hoc conduct of enforcement proceedings (Knežević 2008b, 877).

[63] Arts. 2(1)(7), 3(5), 23(2), 70(1), 133(1), 418, and 419 ESA.

[64] The Arbitration Act establishes that its provisions apply to arbitration proceedings conducted in Serbia, while the provisions of the Civil Procedure Act only apply to the decision-making process related to the setting aside of an arbitral award (Art. 61). The provisions of the ESA apply to decisions on the enforcement of domestic arbitral awards (Art. 64(1)), to the recognition of foreign arbitral awards as a preliminary issue (Art. 65(2)), and to (court) decisions on interim measures issued during arbitral proceedings and their enforcement (Art. 65(3)).

The formulation in Article 31 of the Arbitration Act that "the arbitral tribunal may order an interim measure" should not be interpreted as meaning that the arbitral tribunal conducts enforcement proceedings within the arbitration process or that it can issue decisions on securing claims, equivalent to a court's enforcement decision. The key distinction between interim measures in court and arbitral proceedings is that the enforcement of an interim measure ordered by an arbitral tribunal cannot occur without an (additional) court decision. This is supported by the provisions of German, Swiss, Austrian, Croatian, and Slovenian law, as well as the lack of legal basis for direct enforcement in Serbian law. Furthermore, a decision on securing claims issued in court proceedings is subject to appeal (Articles 420 and 423 ESA), while no such remedy is provided for decisions made by an arbitral tribunal regarding interim measures.

An arbitral tribunal's interim measure is not equated with a court enforcement decision in its legal effect because this is not provided for in the law (Pavić, Đorđević 2016, 330). If the interim measure ordered by the arbitral tribunal were to be treated as an enforcement decision equivalent to one made by a court, a public enforcement officer could execute it. However, enforcement by a public enforcement officer only begins after an enforcement decision has been made (Bodiroga 2024, 289). Treating an arbitral tribunal's interim measure as an enforcement decision would adversely affect the procedural rights of the parties, which will be discussed below.

Arbitrators do not have coercive powers over the parties – and even less so over third parties – and cannot forcibly enforce the interim measures they impose. When they "order" a party to take a certain interim measure, arbitrators lack the ability to enforce it against the party's will.[65] Undoubtedly, the arbitrators will consider the fact that the party has not complied with the interim measure they have ordered, but they cannot compel the party to comply with that interim measure against their will. The monopoly on the use of force remains with the state.

In the hypothetical example, the plaintiff requested the arbitrators to order the NBS Forced Collection Department to remove foreign currency from the defendant's account and deposit it into an escrow account with a public enforcement officer. The inconsistency of the dispositive part of this interim measure with the legislator's intentions can be verified by comparing it with the potential dispositive of the final arbitral award. If such a proposal

[65] In Swiss doctrine, there is a discussion about whether an arbitral tribunal could combine an interim measure with the threat of a monetary penalty (*astreinte*), but there is no consensus on this matter. However, there is agreement that an arbitral tribunal cannot impose an interim measure under the threat of criminal sanctions.

for an interim measure were lawful, and if the arbitrators had the power to order the NBS Forced Collection Department to apply coercion against a party, then they could (why not?) also directly order the NBS Forced Collection Department to transfer money from the defendant's account to the plaintiff's account, in the final award in favour of the plaintiff. However, in the dispositive part of the arbitral award, the arbitral tribunal can only order the defendant to pay a certain amount to the plaintiff, and every well-informed plaintiff would formulate their claim in such a way. The dispositive of the final arbitral award must be formulated in this manner because the arbitral tribunal is not authorized to order state authorities to forcibly enforce its decision. The execution of its final decision, which includes an order to the defendant rather than to the NBS Forced Collection Department, will be handled by the courts in the enforcement procedure, if necessary, and when the final decision becomes enforceable by law.

Based on the proposal in the hypothetical example, the decision of the arbitrators would have the character of an enforcement decision, for which the courts have exclusive jurisdiction, according to Article 419 of the ESA. According to this law, the NBS Forced Collection Department acts on the order of the court and the public enforcement officer, not on the order of the arbitral tribunal.

If the arbitrators were to adopt a decision or ruling based on the proposal in the hypothetical example, obliging the NBS Forced Collection Department to transfer funds from the defendant's account to an escrow account with the public enforcement officer, such a measure – representing a significant infringement on the defendant's property rights and interests – would escape the control of legality. If this interim measure were to be equated with an enforcement decision made by the court, then there would be no possibility to apply Article 423(1) of the ESA, which provides for the right to appeal against a decision made on a request for securing the claim, as there would be no second-instance authority where the arbitral tribunal's interim measure could be appealed. This would violate the right to appeal or other legal remedies, as provided in Article 36(2) of the Constitution of Serbia, and undermine the parties' right to a fair trial.[66] In such cases the parties would be left at the mercy of the arbitrators, who are a private court entrusted by the state with a mandate of limited scope.

[66] The Constitutional Court holds the position that the right to a legal remedy in enforcement proceedings must be guaranteed even against a decision regarding a request for enforcement, as well as in other procedural situations where a court or a public enforcement officer resolves a party's rights. This is stated in the decision of the Constitutional Court, Už-9179/2012.

Accordingly, the provision of Article 31 of the Arbitration Act should be interpreted in line with the inherent limitations of the arbitrator's power, which stem from the arbitration agreement as its foundation. Courts should interpret provisions modelled after Article 17 of the 1985 UML in a way that does not grant the arbitral tribunal the power to order or permit enforcement (UNCITRAL 2012, 86; similarly, for German law, see Schäfer 2015, 227).

2.5. Is the Respondent's Objection to the Arbitral Tribunal's Jurisdiction Necessary?

One could discuss whether, in the hypothetical case, a respondent, who did not contest the arbitral tribunal's jurisdiction to order the requested interim measure in their response to the claim, has lost the right to invoke the tribunal's lack of power, in arguing against a decision granting the requested interim measure in the form sought by the claimant.

This issue is also linked to the question whether an arbitral tribunal may determine its own jurisdiction, on its own initiative, when requested to issue an order requiring a third party to act or to issue an enforcement decision.

In the case of interim measures, the general rule under Article 29 of the Arbitration Act should apply, which states that objections to jurisdiction and exceeding power must be raised before the arbitral tribunal as soon as the matter alleged to exceed the tribunal's power is introduced in the arbitration proceedings.

However, the Arbitration Act provides that an arbitral tribunal may decide on its jurisdiction on its own initiative, even in the absence of an objection from the respondent.[67] The tribunal should do so when the disputed matter is not arbitrable or when ruling on the matter, as requested by a party, would exceed the boundaries of the arbitration agreement.

[67] "The arbitral tribunal may decide on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement." Art. 28(1) SAA (translated by author in ICCA International Handbook on Commercial Arbitration, ed. Lise Bosman, Kluwer Law International, Supplement No. 80, July 2014, 1–19).

2.6. Conclusion on the Power of the Arbitral Tribunal

Considering the legislator's intention for the Arbitration Act to align with the 1985 UML, thereby harmonizing Serbian arbitration law with other national laws in this field (Mitrović 2006, 80), the concept of interim measures under Article 31 of the Arbitration Act should be interpreted in accordance with the preparatory materials, i.e., Article 17 of the 1985 UML, comparative legal practice in its application, and doctrinal views. The UN General Assembly resolution adopting the 1985 UML emphasizes the desirability of uniformity in laws governing arbitration proceedings.[68]

This interpretation implies that, under Article 31 of the Arbitration Act, an arbitral tribunal has the power only to issue an interim measure requiring one of the parties to take (or refrain from taking or endure) an action deemed necessary. Conversely, the tribunal does not have the power to issue an enforcement order directing a public enforcement officer or the NBS Forced Collection Department to carry out enforcement.

It follows that the arbitral tribunal lacks jurisdiction to grant the interim measure requested in the hypothetical case. If the arbitrators were to grant such a request, the affected party could seek their disqualification and claim damages for exceeding their power, pursuant to Articles 154 and 158 of the Code of Obligations.

3. WHICH INTERIM MEASURES ARE POSSIBLE AND HOW CAN THEY BE ENFORCED?

The introduction of the arbitrator's power to order interim measures into the Serbian legal system has not significantly enhanced the effectiveness of arbitration as a dispute resolution mechanism. It appears that the most crucial interim measures – those needed when the opposing party does not voluntarily comply – remain beyond the arbitrators' reach.

[68] "The General Assembly [...] Recommends that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice," UN Resolution No. 40/72 of 11.12.1985 on Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law.

Nevertheless, the lack of more precise provisions in national legislation should not discourage arbitrators from granting interim measures at the request of parties. Judicial assistance and a favourable interpretation of existing legal provisions are essential for improving the effectiveness of arbitration within the domestic legal system (without waiting for the legislator to awaken from years of inertia and enact the necessary legal reforms[69]).

3.1. The Nature of the Decision on an Interim Measure

Neither the Arbitration Act nor the rules of procedure specify how arbitrators should decide on interim measures. In the hypothetical case, an atypical situation arises where the contracting parties have agreed in the arbitration agreement that arbitral decisions must be made unanimously.[70] This brings to the forefront the nature of the decision on an interim measure.

Is it a decision of a substantive nature, or is it a procedural ruling concerning the management of the arbitration? Unanimity would be required in the former scenario, whereas in the latter a majority vote would suffice, since applying the unanimity rule to procedural decisions could paralyze the arbitration process.

The classification of the interim measure decision is crucial, as it can determine different outcomes and different resolutions of the request. The specific terminology used for the decision is irrelevant – what matters is its legal qualification.[71]

Starting from the systematic approach, we note that the provision on interim measures is systematized in both the 1985 UML and the Serbian Arbitration Act within the section on the jurisdiction of the arbitral tribunal, under the heading Power of the Arbitral Tribunal to Order Interim Measures. In the 2006 UNCITRAL Model Law on International Commercial Arbitration (2006 UML), it is systematized in a separate chapter IVa titled Interim

[69] Legal scholars have pointed out the need for the amendment of the Arbitration Act (Stanivuković, Pavić 2021, 11–22).

[70] Such an agreement is possible under Art. 51(3) of the Arbitration Act, although it may complicate or entirely prevent the issuance of an arbitral award.

[71] The possibility that a decision referred to as a "procedural order" may still be qualified as an arbitral award and set aside by the court, was confirmed long ago by the French Court of Cassation in the case GMRA v. Brasoil, *Arrêt de la Cour de cassation (Première chambre civile) 99–20.925*, dated December 11, 2001.

Measures and Preliminary Orders, positioned between the fourth chapter – Jurisdiction of Arbitral Tribunal, and the fifth chapter – Conduct of Arbitral Proceedings. On the other hand, in arbitration rules, the provision on interim measures is located within the chapters on arbitral proceedings.

Nevertheless, these differences in systematization are not decisive for qualification; it is more important to assess the significance and effect of such a decision on the position and rights of the parties. A decision on an interim measure is not an ordinary procedural decision because, albeit temporarily, it interferes with the substantive rights and interests of the parties. In terms of its significance and effect, it differs from decisions such as scheduling a hearing or determining the manner of examining witnesses, and even from decisions on the admissibility and probative value of certain evidence (Kojović 2001, 522). At times, it comes close to an arbitral award on the merits of the dispute (Bodiroga 2024, 591). Granting such a measure creates an expectation that the arbitrators will award the claimed amount in the final arbitral award. Moreover, it alters the substantive position of the parties during the proceedings (Kojović 2001, 522). Although temporarily, a party may be deprived of the ability to dispose of a significant amount of its own financial resources for a relatively long period. This can negatively impact its business operations and, over time, lead to a loss in the value of assets due to inflation and exchange rate fluctuations. Finally, deciding on an interim measure also involves deciding on the jurisdiction of the arbitrators.

For these reasons, in the absence of explicit provisions, the rules governing the issuance of an arbitral award should apply by analogy to the decision on an interim measure.[72] In ordinary situations, where the arbitration agreement does not require unanimity, such a decision is made by a majority vote of the arbitrators.[73] However, if the parties have explicitly agreed in the arbitration agreement that an arbitral award must be made unanimously, then the interim measure should also be adopted unanimously. Therefore,

[72] The 2013 Austrian Arbitration Act provides for the analogous application of the provisions on issuing an arbitral award in Art. 593(2). Additionally, this provision stipulates that "measures referred to in paragraph 1 shall be in writing; a signed exemplar of the order shall be served upon each party. In arbitral proceedings with more than one arbitrator the signature of the chairman or, if he is prevented from signing, the signature of another arbitrator shall suffice, provided that the chairman or another arbitrator records on the order the reason for any omitted signature." (translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber).

[73] Art. 51(3) SAA.

in the hypothetical example, the arbitral tribunal would have to adopt the decision on the request for an interim measure unanimously, in accordance with the parties' will, expressed in the specific arbitration agreement.

The decision on an interim measure should be made in writing, signed, and reasoned unless the parties have agreed to exclude the reasoning.[74] The decision must include the date and place of its issuance.[75]

3.2. Types of Interim Measures and Conditions for Ordering an Interim Measure

The types of interim measures that an arbitral tribunal may order are specified in Article 17, with the conditions elaborated in Article 17A of the 2006 UML. In drafting the Arbitration Act, the working group of the Ministry of Foreign Economic Relations considered only the original version of the UML from 1985. However, arbitrators conducting arbitration proceedings in Serbia may use the 2006 UML as a guideline, with the aim of harmonizing the national legislation as well as the arbitral practice.

According to Article 17 of the 2006 UML, an interim measure is "any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) Maintain or restore the *status quo* pending determination of the dispute; (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) Preserve evidence that may be relevant and material to the resolution of the dispute."

Sometimes a party requests an interim measure requiring the other party to immediately pay the amount claimed in the lawsuit or at least a part of that amount. As stated in the commentary to the 2006 UML, such an interim measure is not provided for in the 2006 UML because it could be perceived as prejudicial to the outcome of the dispute.[76]

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74 Arts. 51(1) and 53(1) SAA.

75 Art. 53(2) SAA.

76 "[T]his type of interim relief leads to more invasive and delicate effects, as it effectively anticipates the payment at a stage when the tribunal has not yet made its final determination" (Ortolani 2020, 340).

Under Article 17A of the 2006 UML, the party requesting an interim measure under Article 17(2)(a), (b) and (c) must establish that "Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination." These requirements apply to a request for interim measure under Article 17(2)(d) (preservation of evidence) only to the extent that the arbitral tribunal considers appropriate.

Serbian doctrine considers that one of the most important conditions for ordering an interim measure in arbitration proceedings is the need to prevent the occurrence of irreparable damage. Furthermore, an interim measure in arbitration proceedings should not prejudge the outcome of the dispute, and, ultimately, it must be proportional, meaning it should not infringe more than necessary on the rights of the party against whom it is directed (Knežević, Pavić 2009, 132). Additionally, an interim measure should not exhaust the claim for relief (Knežević, Pavić 2009, 132; Krvavac, Belović 2017, 456).

When a request for an interim measure is made at the beginning of the proceedings, the arbitral tribunal cannot decide on it until it determines whether it has jurisdiction to resolve the merits of the dispute. It is sufficient for the arbitral tribunal to assess that it is prima facie competent to resolve the merits of the dispute in order to be able to rule on the interim measure (Stanivuković 2013, 191).

The party whose request for an interim measure has been granted may be required to provide security for any potential damages (Stanivuković 2013, 192). While the arbitral tribunal cannot order an interim measure on its own initiative, the decision to require the requesting party to provide security is not conditional upon the proposal of the party against whom the measure was imposed. Additionally, the decision to lift or modify an interim measure in the event of changed circumstances is not conditional on the proposal of the party, unless the parties have otherwise agreed.

3.3. Enforcement of the Arbitral Tribunal's Decision on an Interim Measure

In its explanatory note on the 1985 UML, the UNCITRAL Secretariat states that "[i]t may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard" (UNCITRAL 1994, 20).

The Serbian Arbitration Act fails to provide for court assistance in the enforcement of interim measures, as recommended by the drafters of the 1985 UML in their guidance for its implementation in national legislation. As discussed in the section on the genesis of Article 31 of the Serbian Arbitration Act, unlike many other national laws, the Arbitration Act does not contain provisions on court assistance in enforcing interim measures (Pavić, Đorđević 2016, 330).

National laws that include such a provision can be divided into two groups, depending on whether the enforcement procedure is the same as or somewhat different from the one applied to arbitral awards (Kojović 2001, 513). This distinction leads to another: laws that prescribe the same enforcement procedure treat decisions on interim measures as arbitral awards and apply the provisions on the enforcement of arbitral awards to them, whereas laws that prescribe a different system treat decisions on interim measures as a distinct type of decision requiring court assistance for enforcement.

Systems of court assistance in enforcing an arbitral tribunal's decision on an interim measure have been adopted in countries that have traditionally influenced Serbian civil procedure (Austria, Germany, and Switzerland), as well as in Croatia and Slovenia (Schäfer 2015, 227).

Article 593(3) of the Austrian Arbitration Act provides:

"Upon request of a party the District Court ('Bezirksgericht') in whose district the opponent of the party at risk has its seat, domicile or habitual residence within Austria at the time of the first filing of the request, otherwise the District Court ('Bezirksgericht') in whose district the enforcement of the interim or protective measure shall be carried out, shall enforce such measure. Where the measure provides for a means of protection unknown to Austrian law, the court may, upon request and after hearing the other party, enforce such measure of protection under Austrian law which comes closest

to the measure ordered by the arbitral tribunal. In this case the court may also, upon request, reformulate the measure ordered by the arbitral tribunal in order to safeguard the realization of its purpose."[77]

The content of Article 1041(2) of the German Code of Civil Procedure is provided in Chapter 2.2.

Article 183(2) of the Swiss Private International Law Act (PIL) provides:

"If the party concerned does not comply voluntarily with the measure ordered, the arbitral tribunal or a party may request the assistance of the competent court. The court shall apply its own law."[78]

Article 16(2) of the Croatian Arbitration Act is identical to the Triva Draft, which is discussed in Chapter 2.2.

Article 20(4) of the Slovenian Arbitration Act provides:

> "If the party fails to comply with the interim order issued by the arbitral tribunal, the court shall permit, at the request of the other party, the enforcement of the measure in accordance with article 43 of this Law, unless a request for the issuance of such an interim measure has already been made before the court."[79]

Article 31(2) of the Draft Serbian Arbitration Act originally contained a similar provision, which was later omitted for unknown reasons (see Chapter 2.2). However, Article 65 of the Arbitration Act, which governs the jurisdiction and procedure for the recognition and enforcement of foreign arbitral awards, contains a provision that could be interpreted as granting the court the power to enforce an interim measure, regardless of whether it concerns an interim measure from a domestic or foreign arbitral tribunal. Article 65(3) reads:

"The provisions of this Act shall not exclude the application of provisions of the statute that regulates enforcement procedure concerning jurisdiction to decide on interim measures and *their enforcement*." (emphasis added)

There are two possible interpretations of this provision. According to one, it refers to the court's decision-making regarding interim measures and the enforcement of judicial interim measures. According to the other

[77] Translation published by International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber.

[78] Translation published by Swiss Confereration on Fedlex.

[79] Translation published by Stalna arbitraža pri Gospodarskoj zbornici Slovenije.

interpretation, the provision refers to the decision-making regarding arbitral tribunal's interim measures and their enforcement. It is preferable to adopt the second interpretation for several reasons.

A linguistic interpretation shows that the pronoun "their" refers to interim measures, which, according to Article 31 of the Act, may also be issued by the arbitral tribunal. Chapter IX of the Act, which encompasses Article 65, regulates the recognition and enforcement of arbitral awards, and Article 65 itself addresses the recognition and enforcement of foreign arbitral awards. Therefore, the provision in Article 65(3) could also refer to the enforcement of a special type of arbitral award – the decision on interim measures, the enforcement of which is decided by the court according to the provisions of the ESA.

It would be redundant and inappropriate to include a provision on the enforcement of judicial decisions on interim measures in the chapter on the recognition and enforcement of arbitral awards. The courts' right to independently decide on interim measures is already reserved in Article 15, and this right also includes decisions regarding the enforcement of their own interim measures under the provisions of the ESA. Furthermore, it is unnecessary for the Arbitration Act to address this because it is already regulated in the ESA.

The third reason, perhaps the most important, is the fact that for an efficient national system of arbitral dispute resolution, there must be the possibility of judicial enforcement of interim measures issued by an arbitral tribunal. Hence, if there is no better-formulated provision, perhaps this one is sufficient, for domestic courts to accept, through a lenient interpretation, the power to rule on the enforcement of interim measures issued by the arbitral tribunal. In response to possible criticism that the basis for the decision is found in an article that regulates the recognition and enforcement of foreign arbitral awards, it could be argued that this systematization is not decisive because the provision itself is not limited to foreign interim measures and can therefore be viewed and interpreted separately from the other provisions of the same article.

At the time the Serbian Arbitration Act was adopted and came into force in 2006, the jurisdiction for the enforcement of arbitral awards and interim measures was entrusted to the court.[80] Article 7 of the Arbitration Act clearly defines the role of the court: "A state court [...] may only take those actions

[80] Arts. 64–68 SAA. Translated by author in ICCA International Handbook on Commercial Arbitration, ed. Lise Bosman, Kluwer Law International, Supplement No. 80, July 2014, 1–19.

regarding arbitration that are expressly specified in this Act." One of these actions is the enforcement of a final domestic or foreign arbitral award: "A domestic arbitral award [...] shall be enforced in accordance with provisions of the statute regulating enforcement procedure."[81] "The court determined by the statute shall decide on the recognition and enforcement of a foreign arbitral award."[82]

The second action, which is somewhat less clearly regulated, is the enforcement of interim measures.[83] Analogous to Article 7 of the Arbitration Act, public enforcement officers are not authorized to take actions related to arbitration, nor to directly enforce the arbitral tribunal's decisions on interim measures, as this is not explicitly provided for in the Arbitration Act. In comparative legislation, the compulsory enforcement of interim measures by an arbitral tribunal is placed in the jurisdiction of the courts. Similarly, in the Serbian legal system, the compulsory enforcement of interim measures cannot be legally achieved without the involvement of the courts.

If Article 65(3) of the Arbitration Act is accepted as the basis for the court's decision-making on the enforcement of interim measures ordered by an arbitral tribunal, the question arises as to whether these interim measures must be adopted in a specific form in order to be enforced by the courts. Additionally, under what conditions could the enforcement of interim measures ordered by the arbitral tribunal be permitted?

According to Article 17 of the 2006 UML, an interim measure is any temporary measure issued in the form of an arbitral award or in some other form. Among the group of laws that treat interim measures by an arbitral tribunal as arbitral awards, inter alia, is the law of the Netherlands. According to Article 1043b(4) of the Dutch Arbitration Act (as contained in the Code of Civil Procedure):

> "Unless the arbitral tribunal determines otherwise, a decision by the arbitral tribunal on the request to grant provisional relief shall constitute an arbitral award to which the provisions of Sections Three to Five inclusive of this Title shall be applicable."[84]

[81] Art. 64(1) SAA.

[82] Art. 65(1) SAA.

[83] Art. 65(3) SAA.

[84] Section Three: The Arbitral Award, Section Four: Enforcement of the Arbitral Award, Section Five: Setting Aside and Revocation of the Arbitral Award.

The Serbian Arbitration Act does not specify the form of an interim measure. Additionally, it does not provide that the arbitrator's decision ordering an interim measure constitutes an enforceable document nor that it is final. According to Article 64(1) of the Arbitration Act, only a domestic arbitral award has the effect of a domestic final court decision and is enforced in accordance with the provisions of the law governing enforcement procedure.[85] This fact directs arbitrators to issue an interim measure in the form of an arbitral award. In addition to the final arbitral award on the merits of the dispute, which resolves all party claims, the Arbitration Act allows an arbitral tribunal to issue an interim or partial award that would decide only on one of the claims.[86] It seems that the provisions of the ESA regarding the enforcement of arbitral awards leave sufficient room for the enforcement of interim measures if they are treated as interim awards.

The enforcement procedure is initiated when the creditor submits a proposal for enforcement based on an enforceable document.[87] The status of an enforceable document must be recognized by law (Bodiroga 2024, 217). An enforceable document includes, among other things, an arbitral interim award issued in proceedings before a domestic arbitral tribunal.[88] An arbitral interim award that mandates action or inaction becomes enforceable once it is final and the deadline for voluntary compliance with the obligation has passed. If no deadline for voluntary compliance is specified in the award, the default is eight days from the delivery of the enforceable document to the debtor.[89] An arbitral award requiring nonaction or forbearance becomes enforceable when it becomes final, unless otherwise stipulated.[90] The court in the enforcement procedure decides by ruling on the proposal for enforcement.[91] The court is not authorized to examine the legality or correctness of the enforceable document.[92] The enforcement ruling does not need to be reasoned.[93] The court's ruling on the enforcement of an interim award can be challenged in the enforcement procedure through an

85 "A domestic arbitral award shall have the effect of a final judgment of the domestic court and shall be enforced in accordance with provisions of the statute regulating enforcement procedure." Art. 64(1) SAA.

86 Arts. 48(1) and (2) SAA.

87 Art. 3(1) ESA.

88 Arts. 41(1)(1) and 42(1) ESA.

89 Art. 47(1) ESA.

90 Art. 42(3) and (4) ESA.

91 Arts. 3(2) and 23(2) ESA.

92 Art. 5(2) ESA.

93 Art. 23(3) ESA.

appeal.[94] The appeal against the enforcement ruling ensures the right to legal remedy in the enforcement procedure, which would be lacking if the interim measure of the arbitral tribunal were incorrectly treated as an enforcement ruling.[95] When the court issues a ruling on the enforcement of an arbitral interim award, the enforcement is carried out. The execution of enforcement is solely the responsibility of the public enforcement officer.[96]

While the Arbitration Act explicitly provides that a domestic arbitral award has the effect of a domestic final court decision, the order of an arbitral tribunal is not granted finality. The orders of an arbitral tribunal are not considered enforceable documents in the sense of Article 41 of the Arbitration Act (Bodiroga 2024, 216–217). Commentators of the 2006 UML argue that recognizing measures taken in forms other than an arbitral award may complicate matters and cause problems (Brekoulakis, Ribeiro, Shore 2015, 877).

Arbitrators could possibly issue an interim measure in the form of a procedural order, and the courts could still treat that procedural order as an arbitral award based on its content rather than its title. However, since there is no complete legislative framework in place for enforcement of procedural orders, a safer approach for arbitrators in Serbia would be to decide on the interim measure through an interim award.

Thus, an arbitral tribunal sitting in Serbia can adopt an interim measure in the form of an interim award under Article 48(2), which facilitates its judicial enforcement, or in the form of a procedural order, which is more suitable for situations where there is no interest in its compulsory enforcement.

It is important to note that domestic arbitral awards, including interim awards, are subject to judicial review for legality within the prescribed time limits and in the detailed procedure. Articles 57–63 of the Arbitration Act govern the procedure for the setting aside of an arbitral award, ensuring judicial control over the legality of the arbitrator's work. However, control of legality is not explicitly provided for interim measures issued by the arbitral tribunal. What should be done when the subject of the arbitral interim award is the determination of an interim measure? Should the court allow for the review of the legality of interim measures issued in the form of an arbitral award through a setting aside action?

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94 Art. 73(1) ESA.

95 Art. 24(1) ESA.

96 Arts. 3(5) and 4(3) ESA.

Speaking about the 2016 draft of the new Croatian Arbitration Act, Professor Mihajlo Dika (Dika 2016, 386, translated by author) states that "[t]he decision on an interim measure is made in the form of a final award, i.e., a substantive decision, and should be reasoned. Insisting on a final award is necessary in order to eliminate any doubt that this decision can be challenged like any other substantive award."

In contrast to this view, Swiss case law does not allow for a setting aside action against an "interim arbitral award", which the court qualified as an interim measure, based on its content rather than form,[97] because an interim measure is not a final or interim arbitral award, as it does not definitively resolve any of the substantive claims and is of a temporary nature.[98]

The 2006 UML aims to fill the legal gap left in the 1985 UML regarding the procedure and conditions for the enforcement of interim measures by arbitral tribunals and the control of their legality. Article 17H of the 2006 UML provides that an interim measure issued by an arbitral tribunal is recognized as binding and enforced upon application to the competent court, regardless of the country in which it was issued. Recognition and enforcement may be refused at the request of the party against whom the interim measure is directed or ex officio.

Article 17I of the 2006 UML outlines the reasons for refusing recognition and enforcement, which are similar to those in Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with additional reasons tailored to the specifics of interim measures. For instance, a party may argue that the security required by the arbitral tribunal in connection with the interim measure has not been provided, or that in the meantime, the arbitral tribunal has terminated or suspended the interim measure. The court may ex officio refuse recognition and enforcement of an interim measure if it contradicts the court's powers, unless it decides to reformulate it to adapt it to its own powers and procedure for enforcement, without modifying its substance.

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97 The Swiss court, when qualifying an arbitrator's decision as an arbitral award, focuses on the content rather than the title of the decision. Tribunal fédéral, Arrêt 4A_600/2008 of 20 February 2009, consid. 2.3. In this case, the decision requiring one party to immediately transfer ownership of the clothing stocks, which were the subject of the disputed contract, to the other party, with the value of the transferred goods to be ultimately determined in the final arbitral award, was classified as an interim measure within the meaning of Art. 183 of the Swiss Private International Law Act.

98 Tribunal fédéral, Arrêt 4A_582/2009 of 13 April 2010.

The Slovenian legislator has adopted the provisions of the 2006 UML in a specific provision related to the recognition and enforcement of interim measures issued by arbitral tribunals. These measures are recognized and enforced in enforcement proceedings. The court that is competent under the law on enforcement and security rules on whether to accept the proposal for the enforcement of an interim measure, by examining reasons related to the setting aside of an arbitral award and the recognition and enforcement of a foreign arbitral award, depending on whether the interim measure is issued by a domestic or foreign arbitral tribunal.

The court may refuse the proposal if the party opposing the enforcement demonstrates that the other party has not complied with the arbitral tribunal's decision regarding the provision of security or if the arbitral tribunal has modified, postponed, or revoked the interim measure. Finally, the court may refuse the proposal if it determines, ex officio, that it is not possible to enforce the interim measure in the form in which it was issued. Instead, the court may, at the request of a party, reformulate the interim measure in an appropriate manner and to the necessary extent, provided that its substance remains unchanged.

Since there are no explicit provisions in Serbian law that grant the competence of the enforcement court to decide on the legality of a domestic interim award as an enforceable document, it is most appropriate to allow the party to challenge the legality of an interim award containing an interim measure through a setting aside action. This means treating such an interim award as any other arbitral award. It also implies that two parallel proceedings may occur simultaneously – one for the setting aside of the interim award and another for its enforcement.

The doctrine highlights the problem that, according to the provisions of the Arbitration Act and the regulations of domestic arbitration institutions, an arbitral award may be corrected, interpreted, or supplemented, but not terminated, modified, or revoked, as can be the case with an interim measure. An arbitral award is not subject to subsequent changes, except in the case of setting aside by the court. Therefore, the provision of the original Rules of the Permanent Court of Arbitration, which required the arbitral tribunal to issue an interim measure in the form of an arbitral award, while simultaneously allowing the arbitral tribunal to revoke, modify, or terminate the interim measure, was criticized as unsustainable (Pavić, Đorđević 2016, 333). This criticism concerns the lack of finality of the interim measure, despite being issued in the form of an arbitral award.

If the fact that the interim measure can be changed or revoked over time within the same arbitral proceeding, depending on the change in circumstances, is considered decisive, this would lead to the nonrecognition of the finality of the interim award that contains it. As a result, the possibility of it being enforced as an enforceable document would be denied. This justified objection, however, does not prevent many national courts from enforcing interim measures issued by arbitral tribunals based on their binding nature. An interim measure is binding on the parties, even though it can subsequently be modified or revoked. The binding nature of the interim measure, coupled with the inability to challenge it with any legal remedy, supports its recognition as enforceable.

Case law rightly emphasizes that the enforcement of an interim measure should occur when it is ordered, not at some later point in time, as delaying enforcement would undermine the effectiveness of the interim measure. It is a specific form of legal protection that can only achieve its purpose if the security measure is enforced without delay (Bodiroga 2024, 551). For this reason, a decision on an interim measure is sometimes classified as a decision on one of the claims that can be separated from the other claims, and it is argued that it represents a final decision on that particular claim.

Problems that can arise when an interim measure enforced by the arbitral tribunal later turns out to be unjustified are resolved by a new decision by the arbitrators, which revokes the earlier interim measure, or by a court decision that, at the request of a party, sets aside or modifies the court's decision regarding the enforcement of the arbitral interim measure. The decision of the arbitrator to revoke the interim measure is also enforceable (Van den Berg 2001, 143). If the interim measure proved to be unjustified because the claim for which it was ordered was not upheld, it could be revoked in the operative part of the final arbitral award, with a determination that the party against whom the measure was imposed has the right to restitution and possibly, compensation for the loss.

According to Article 17H of the 2006 UML, the competent court that the party approaches will decide on the enforceability of the interim measure issued by the arbitral tribunal. When drafting the 2006 UML, consideration was given to whether the request for the recognition and enforcement of the interim measure should be made by the arbitral tribunal or the party. The members of the working group concluded that this should be left to the party, as the independence and impartiality of the arbitral tribunal could be called into question if it requested the enforcement of an interim measure that was issued in favour of one party and to the detriment of the other (Gómez 2020, 463).

In future amendments to the law, it would be advisable to adopt the rule included in the 2006 UML and German law, according to which the court may, if necessary, reformulate the interim measure issued by the arbitral tribunal in order to enable its enforcement. For instance, if the arbitral tribunal incorrectly required a party to make a payment in foreign currency in Serbia, such a decision could not be enforced, and under the current legislation, the domestic court has no ability to reformulate that part of the dispositive in the enforcement decision of the arbitral tribunal's interim measure and oblige the party to pay the equivalent amount in dinars. In line with the principle of formal legality, the enforcement court cannot change, correct, or supplement the enforcement instrument (Bodiroga 2024, 241–243). The aim of this provision in German arbitration law is to ensure that interim measures issued by the arbitral tribunal can be "translated" into enforcement orders as provided by German civil procedural law. It also shows that arbitrators are not required to follow the provisions of the German Code of Civil Procedure regulating the procedure and conditions for issuing interim measures (Schäfer 2015, 233). Arbitrators in Serbia can also be foreign nationals who may not be sufficiently familiar with domestic enforcement rules, so it could easily happen that they issue an interim measure that is, for some reason, unsuitable for enforcement. Therefore, it would be beneficial to grant the court the power to adapt the arbitral interim measure to the requirements of the ESA.

The territorial jurisdiction of the court for the enforcement of domestic arbitral awards that have ordered interim measures is also not specified in the Serbian Arbitration Act but could be determined based on the provisions of the ESA. Under German law, it is specified that the court for the enforcement of arbitral awards issued by an arbitral tribunal with its seat in Germany is the court designated in the arbitration agreement, or, in the absence of such a designation, the court in the place of arbitration. For the enforcement of awards by foreign arbitral tribunals, the competent regional court is the district court in the area where the party against whom the enforcement is sought has its place of business or habitual residence, or where the property affected by the measure is located. The regional court in Berlin has jurisdiction if no other court has territorial jurisdiction.[99]

From everything presented above, it follows that the claimant from the hypothetical example could obtain an interim measure if they formulated the request differently. If the arbitral tribunal were to grant the interim measure in the form of an interim award, obligating the opposing party to temporarily execute payment to the designated account of a public enforcement officer,

[99] Art. 1062(1) and (2) ZPO. For more details, see Kojović 2001, 518.

that decision would have been enforceable just like any other domestic arbitral award after the expiration of the deadline for voluntary enforcement, and it would also have been subject to judicial review of legality, through a petition for setting aside. The claimant could then turn to the court for its compulsory enforcement, if the opposing party failed to voluntarily comply with it.

Poznić (1973, 85) long ago raised the issue of the utility of interim measures by arbitral tribunals. Why would a party approach arbitrators for an interim measure that is enforced through the court, when they can directly approach the court with a request for the same measure, which the court (now the public enforcement officer) can enforce immediately? Contemporary literature offers several reasons why parties increasingly do so. The first is confidentiality, as approaching the court for an interim measure would often result in the disclosure of details about the dispute that the parties would prefer to keep private (Ortolani 2020, 331). Furthermore, arbitrators are more familiar with the facts of the dispute and can better assess whether there is a risk to the claim, whether it is reasonable to assume that the claim will be granted, and whether the interim measure would be proportional. A court's decision on an interim measure would require the court to become familiar with the details of the dispute and the circumstances of the case, which would not be efficient. Therefore, after initiating the arbitration process and constituting the arbitral tribunal, the tribunal deciding on an interim measure with the possibility of judicial enforcement represents a more economical solution. Additionally, arbitrators are not bound by provisions of national procedural law, except within the scope of public policy, so they can also order interim measures that the national law does not recognize and thus adapt them to the specific needs of the parties. Finally, the arbitral tribunal's decision on an interim measure is typically in accordance with the will of the parties, as by agreeing to the application of institutional rules, the parties generally accept the arbitration rules that grant primary jurisdiction to the arbitrators.

3. CONCLUSION

In this paper, we have examined the provisions of domestic law regarding interim measures that may be ordered by arbitral tribunals in Serbia and observed that there are legal gaps that currently must be filled through purposive interpretation of domestic law in accordance with the need to develop and enhance the efficiency of arbitration, while safeguarding legality and the parties' right to a fair trial. Arbitrators resolving disputes in Serbia

may order interim measures only against parties who have entered into an arbitration agreement and participate as parties in the dispute. A party may request the enforcement of interim measures only before the court, based on the provisions of the ESA concerning the enforcement of arbitral awards. Decisions of the arbitral tribunal on interim measures may be qualified as arbitral awards, and domestic arbitral awards become final and enforceable upon the expiration of the period for voluntary compliance by the parties. Such decisions may also be subject to setting aside actions.

Given that the provisions of the 2006 UML enabling the recognition and enforcement of interim measures per se have not been implemented in Serbia, it is highly likely that the domestic courts will consider an interim measure issued in another form, such as a procedural order, as suitable for recognition and enforcement. Therefore, it is recommended that arbitrators adopt interim measures that are to be enforced in Serbia in the form of an interim award, respecting the decision-making process, form, and content as prescribed by the arbitration agreement and the applicable law.

It is suggested that the legislator, in the upcoming amendments to the legislation, explicitly include provisions that would regulate in more detail the power of arbitrators for determining interim measures and for judicial enforcement and adaptation of those measures. In search for appropriate solutions, the legislator can benefit from the comparative law experiences and the provisions of the 2006 UML, a legal instrument whose main goal is the harmonization of national arbitration laws and arbitration practices.

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Marko DOŠLIĆ*

*SETTLEMENT FACILITATION BY ARBITRAL TRIBUNALS: BOOSTING EFFICIENCY OR ENDANGERING DUE PROCESS RIGHTS?***

The paper explores the concept of settlement facilitation by arbitral tribunals. After a brief overview of the relevant legislation regarding this practice, the paper focuses on different facilitating settlement measures that are available to arbitral tribunals. Finally, the author evaluates the advantages and disadvantages of arbitral tribunals encouraging the parties to find an amicable resolution of their dispute after the arbitration proceedings commence. While it is evident that an early settlement can significantly increase the dispute resolution process efficiency, are there also risks associated with the practice of settlement facilitation?

Key words: *Amicable solution. – Informed consent. – International arbitration. – Preliminary views. – Settlement facilitation.*

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* Junior Teaching Assistant, University of Belgrade Faculty of Law, Serbia, *marko.doslic@ius.bg.ac.rs*, ORCID iD: 0009–0006–1969–2993.

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1. INTRODUCTION TO SETTLEMENT FACILITATION IN INTERNATIONAL ARBITRATION

When analyzing the role of the arbitrator and hence the arbitral tribunal, it is commonly observed that their primary mission is to resolve disputes between parties and produce an arbitral award (Knežević, Pavić 2013, 89; Kröll, Kerkhoff 2023, 917; Perović Vujačić 2019, 138). By contrast, seeking an amicable solution is traditionally viewed as the goal of other forms of alternative dispute resolution mechanisms, such as mediation and conciliation (Kröll 2017, 209; Knežević, Pavić 2013, 226).

Mediation, which is the most widely used form of alternative dispute resolution besides arbitration, is a process in which the parties, with the help of an intermediary who has no power to finally settle the dispute, attempt to find an amicable solution to their dispute (Knežević, Pavić 2013, 226; Pavić, Đorđević 2014, 257). Therefore, a mediator, unlike an arbitrator, possesses only advisory powers and cannot impose a solution to the dispute on the parties (Knežević, Pavić 2013, 226; Pavić, Đorđević 2014, 257; Shaughnessy 2023, 1489).

Therefore, it is far from self-evident whether seeking an amicable solution by facilitating settlement during the arbitral process constitutes part of the arbitrator's mandate.

Firstly, what is understood to fall under the umbrella term "settlement facilitation"? When looking at the usual definition of what it means to facilitate, it is understood that it is the act of making something easier, or rather, helping bring something about (Garner 2004, 627). Therefore, when talking about settlement facilitation by the arbitral tribunal, this paper deals with "any activity by an independent third party (in this case the arbitrator) that may be of assistance to the parties for the purposes of reaching an amicable settlement of their dispute" (Taivalkoski, Toivonen 2020, 60).

One of the reasons why the arbitrator's role in settlement facilitation is controversial is that most national arbitration laws, as well as the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration[1] (Model Law), remain silent regarding the entitlement of an arbitrator to facilitate settlement (Kaufmann-Kohler

[1] Most national arbitration laws today are based on or have at least been heavily influenced by the UNICTRAL Model Law. In more detail: *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.*

2009, 193; Kröll 2017, 215; Wilske, Braüninger 2023, 355). There are however exceptions, such as the arbitration acts of India,[2] Japan,[3] and the Netherlands.[4]

The arbitrators themselves have different perceptions of settlement facilitation, based on their legal background. While arbitrators coming from common law backgrounds usually do not view the facilitation of settlement as part of their duties,[5] those coming from civil law jurisdictions are usually aware of the possibility of facilitating a settlement between the parties (Kröll 2017, 210). Furthermore, the parties tend to believe that the arbitrator does have a role in fostering settlement.[6]

Finding a universal answer to the dilemma whether an arbitrator can and whether he or she should facilitate settlement is important for multiple reasons. Firstly, there is currently no transnational consensus on the possibility and desirability of such a practice (Kaufmann-Kohler 2009, 189; Taivalkoski, Toivonen 2020, 59).[7] Furthermore, the importance of reaching a transnational consensus arises from the fact that multiple arbitration rules have addressed the issue in their latest versions, albeit in various manners.[8] At the same time, many jurisdictions encourage the state courts to promote settlement between the parties in dispute, leading some scholars to advocate similarly encouraging arbitrators (Berger 2018, 504; Kaufmann-Kohler 2009, 190). Finally, the question is very much of practical importance, as there are concerns that certain manners of arbitrator participation in settlement negotiations can endanger the duty of impartiality and therefore jeopardize the enforceability of the resulting arbitral awards.

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2 The Arbitration and Conciliation Act, 1996, No. 26 of 1996 (India), Sec. 30(1): "It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute..."

3 Japanese Law on Arbitration, Law No. 138 of 2003, Art. 38(4): "An arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties." (Sato 2008)

4 Dutch Arbitration Act 2015, Art. 1043: "At any stage of the proceedings, the arbitral tribunal may order the parties to appear in person for the purpose of [...] attempting to arrive at a settlement."

5 According to Stipanowich, Ulrich (2014, 6), in a study conducted by the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution amongst leading arbitrators in the US, more than 50% of respondents were not concerned at all with settlement.

6 Sussman (2021) reports that 78.38% of respondents replied "Yes" to the question "Do you think an arbitrator has a role in fostering settlement?"

7 For the opposite view, see Alleman 2022, 231.

8 For example, the DIS Arbitration Rules, the VIAC Rules, the Swiss Rules.

In an effort to answer these questions, this paper will look at the general possibility of arbitrators engaging in settlement facilitation, the different instruments available to them, as well as the desirability of settlement facilitation in general and of each particular instrument available to the tribunal.

2. THE ENTITLEMENT OF THE ARBITRAL TRIBUNAL TO ACT AS A SETTLEMENT FACILITATOR IN THE COURSE OF ARBITRATION PROCEEDINGS

Whether the arbitral tribunal should be allowed to facilitate settlements during the arbitration process can be explained from a theoretical standpoint, as well as through the current normative framework. From a theoretical standpoint, each arbitrator's power to engage in settlement facilitation is explained through the nature of their mandate. It is largely undisputed today that the arbitrator's mandate is hybrid in nature (Lew, Mistelis, Kröll 2003, para. 5–26; Born 2009, 1991; Gaillard, Savage 1999, 1122; Fan 2023, 995). On the one hand, it is defined by the contract between the parties and the arbitrator (*receptum arbitri*). On the other, the arbitrator's mandate is also judicial in nature (Lew, Mistelis, Kröll 2003, para. 5–26; Born 2009, 1991; Gaillard, Savage 1999, 1122). Arguments affirming the arbitrator's role as a settlement facilitator hence rely on the contractual nature of the arbitrator's mandate, the part of it that arises out of party autonomy. The parties are free to define the arbitrator's mandate as they see fit, including the possibility to act as a settlement facilitator. However, authors who do not perceive the arbitrator's mandate to include the duty to seek an amicable solution lean toward the quasi-judicial function of the arbitrators (Berger, Jensen 2017, 66–67). Therefore, "any discussion of that or another aspect of the arbitrator's role does involve or imply, consciously or unconsciously, a certain (subjective) idea or concept of arbitration itself – in other words a certain philosophy or 'view of the world' (*Weltanschaung*) of arbitration" (Lalive 2005, 557).

The analysis from a normative framework standpoint starts by looking at the applicable procedural law (*lex arbitri*) in each case. As previously mentioned, the Model Law does not mention the possibility of settlement facilitation by the arbitral tribunal. We are, therefore, of the opinion that settlement facilitation would be allowed in general, as long as it does not leave the award susceptible to annulment under one of the reasons listed in Article 34 of the Model Law. In any case, the parties are free to agree on the procedure to be followed by the tribunal, pursuant to Article 19(1) of

the Model Law. Therefore, if one party opposes the tribunal engagement in settlement facilitation, it should be avoided as the ensuing award could be "attacked" under Article 34(2)(a)(iv) of the Model Law,[9] as well as Article V(1)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (NYC).[10]

The next step of the analysis should look at different arbitration rules that parties can incorporate into their arbitration agreements, which would allow the tribunal to actively seek settlement. The most affirmative position on settlement facilitation is undertaken by the rules of the German Arbitration Institute (DIS Arbitration Rules). Article 26 of the 2018 DIS Arbitration Rules reads that "unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues". Under the DIS Arbitration Rules, encouraging settlements is not only a possibility – it is rather the obligation of the arbitral tribunal. The arbitrators are encouraged to take a proactive approach by always searching for opportunities to reach an amicable solution. The DIS Arbitration Rules approach is actually in line with the proactive role undertaken by judges in the proceedings before the German courts (Busse 2020, 412–413).

Several other arbitral institutions also supply the arbitral tribunal with the power to facilitate settlement between the parties, although none of them explicitly encourage the tribunals to do so. Mutually similar provisions can be found in the 2021 ICC Arbitration Rules,[11] the 2021 VIAC Rules of Arbitration,[12] the 2021 Swiss Rules of International Arbitration,[13] and the 2023 CAM Arbitration Rules.[14]

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

[10] Article V(1)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards: The composition of the arbitral authority or **the arbitral procedure was not in accordance with the agreement of the parties**, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place (emphasis added).

[11] As an example of case management techniques recommended to an ICC arbitrator, it is provided in Appendix IV: (h) Settlement of disputes: (i): encouraging the parties to consider settlement of all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules (ii): where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Finally, there are a number of rules that do not mention whether a tribunal is entitled to facilitate settlements, but rather only deal with the possibility of issuing a consent-based award. The AAA Rules, the ICDR Rules, the LCIA Rules and the SIAC Rules, for example, all fall within this group.

Looking beyond the institutional rules of arbitration, facilitating settlements is also in line with the UNCITRAL Notes on Organizing Arbitral Proceedings,[15] the 1987 IBA Rules of Ethics for International Arbitrators,[16] the IBA Guidelines on Conflict of Interest in International Arbitration,[17] the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration).[18] Furthermore, the tendency toward seeking an amicable solution is present in the rules for pre-arbitration solving of construction disputes arising from projects based on FIDIC contracting terms.[19]

Considering that different arbitration rules provide tribunals with the power to take steps toward finding an amicable solution between the parties, it is our opinion that encouraging settlement – and under certain

[12] Article 28 (3): "At any stage of the proceedings, the arbitral tribunal is entitled to facilitate the parties' endeavors to reach a settlement."

[13] Article 19 (5): "With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. Any such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps."

[14] Article 25 (3): "At any time in the proceedings, the Arbitral Tribunal may attempt to settle the dispute between the parties, including by inviting the parties to refer the case to the Mediation Service of the Milan Chamber of Arbitration."

[15] Paragraph 72: "In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. [...] Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations."

[16] Rule 8: "Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other".

[17] General Standard 4 (d): "An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings".

[18] Article 9.1: "Unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration."

[19] Namely, newer editions of FIDIC contracting terms expand the role of the Dispute Adjudication Board (DAB), which is no longer focused only on solving, but also on avoiding disputes between the parties and solving them amicably. Hence, the body is now called the Dispute Avoidance and Adjudication Board (DAAB).

conditions even getting directly involved in the parties' efforts to settle – should be possible, provided that the tribunal approaches such facilitation in a way that does not endanger its duty of independence and impartiality.[20] However, the conditions for ensuring that the tribunal stays impartial and independent need to be analyzed further.

3. MEASURES AVAILABLE TO TRIBUNALS FOR FACILITATING SETTLEMENTS

The result, as well as the legitimacy of undertaking efforts aimed at facilitating settlements during the arbitration proceedings, usually depends on the approach of the arbitral tribunal. The measures available to tribunals vary in the degree of the tribunal's participation in the settlement process; in methods that require the lowest amount of involvement, the tribunal merely mentions the possibility of settlement to the parties, while some methods entail the tribunal almost acting as a mediator (Berger, Jensen 2017, 60). Consequently, "the more a measure tends to resemble a mediation technique deviating from the 'normal tasks' of an arbitrator, the more likely it is to require explicit consent by the parties" (Kröll, Kerkhoff 2023, 928). The following paragraphs look at each of these methods individually and analyze the adequacy of each one.

3.1. Informing the Parties about the Possibility of Settlement

At any point during the arbitral proceedings, the tribunal can inform the parties that they are free to attempt to settle the dispute (ICC 2018, 11; Kröll, Kerkhoff 2023, 928; Collins 2003, 336). Merely informing the parties about this possibility clearly falls within the discretion of the tribunal to conduct the proceedings as it sees fit (Kröll, Kerkhoff 2023, 928).

While at first it may seem that informing the parties that they are free to attempt to settle is unlikely to yield a result, the parties often interpret such a "move" by the tribunal as an indication that neither of the parties will be entirely successful if the dispute is decided by an award (Petsche, Platte 2007, 96).

[20] The same conclusion is drawn by Berger and Jensen, Bjorklund and Vanhonnaeker, as well as Taivalkovski and Toivonen (Berger, Jensen 2017, 66–67; Bjorklund, Vanhonnaeker 2023, 1033–1034; Taivalkovski, Toivonen 2020, 59).

This is precisely the reason for the tribunal to indirectly attempt to propose settlement negotiations to the parties. After becoming aware that they will not be entirely successful, their willingness to attempt to reach a settlement might increase (Petsche, Platte 2007, 96).

3.2. Giving Preliminary Views on the Relevant Issues in Dispute and the Evidence Needed

The tribunal can also take a slightly more proactive approach by providing the parties with its preliminary views on the issues that will be relevant in the dispute and the evidence needed to rule on those issues (ICC 2023, 6; Kröll 2017, 217; Kröll, Kerkhoff 2023, 929).[21]

The reasoning behind the tribunal providing preliminary information about what it finds to be relevant in the dispute is that the parties to the dispute usually have a distorted view on the strength of their position, which can present an insurmountable obstacle on the road to settlement (Kröll 2017, 217–218). After being provided with the said information, it is to be expected that the parties and their counsels will be able to see the chances of their success in the dispute more objectively. After the parties gain a more realistic view of their respective chances, the possibility of reaching an amicable solution should increase significantly (Kröll 2017, 217–218; Taivalkoski, Toivonen 2020, 62–63).

To avoid any doubt that this technique might be viewed as prejudging the case, it is key to determine the appropriate time when the tribunal could provide such information. If the tribunal identifies these preliminary findings at a case management conference held between the written submissions and the oral hearing, it could streamline the hearing and clarify misunderstandings, all while indirectly inspiring settlement (Kröll, Kerkhoff 2023, 929–930).

Besides the positive effect that it could have on the efforts to reach an amicable settlement, the tribunal providing preliminary views of this kind also poses no additional effort for the arbitrators. Namely, it is reasonable to assume that arbitrators, after having read the submissions, documents and

[21] Such a mechanism is provided, for example, in Prague Rules Article 2.4., CEDR Rules Article 5.1.1. The tribunal taking this approach is also supported by Article 2(3)(a) of the IBA Rules on Taking Evidence in International Arbitration, which provides that: "The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues that the Arbitral Tribunal may regard as relevant to the case and material to its outcome".

the witness statements, will form an opinion on the facts that they consider to be relevant for resolving the dispute. Informing the parties about the said opinion in no way constitutes prejudging a case (Raeschke-Kessler 2005, 530; Kröll 2017, 219; Kröll, Kerkhoff 2023, 929).

Whether the consent of the parties is necessary to utilize this measure will depend on the applicable arbitration rules. While prior consent would be required under institutional rules not mentioning the possibility of the tribunal engaging in settlement facilitation, the opposite would likely be true for the other two groups of rules (Kröll, Kerkhoff 2023, 930).[22]

3.3. Providing Preliminary Nonbinding Findings on Law or Facts on Key Issues

While similar to the above-mentioned measure, the giving of preliminary views basically involves an arbitral tribunal giving the parties its nonbinding and preliminary assessment of the issues in dispute in the arbitration.[23] The tribunal may give its preliminary views on the whole case or on specific issues (ICC 2023, 14; Allemann 2022, 239). This is not an uncommon practice in certain German speaking countries; the Commercial Court of Zurich, for instance, has utilized such a method since the early 20th century (Stutzer 2017, 598–599; Kozmenko, Groselj 2021). It is important to note that this technique could be applied at different points in time during the proceedings. The most controversial option would be providing early notion, before the evidentiary hearing takes place, where the case has not been fully pleaded (Taivalkoski, Toivonen 2020, 68). This can potentially be a problem as it raises concerns of unconscious arbitrator bias (Taivalkoski, Toivonen 2020, 68; Petsche, Platte 2007, 97), since the arbitrator might not look at the dispute objectively after already giving their view on the likely outcome. On the other hand, these concerns could be significantly reduced by providing a preliminary view following the evidentiary hearing. In that situation, the only chance the parties have at changing the tribunal's opinion is through their post-hearing briefs, hence the concerns of the tribunal's bias are not as justified (Kröll 2017, 220).

[22] Referring to the DIS Rules as the first group, and ICC, VIAC, Swiss and CAM as the second group.

[23] Such a mechanism is expressly provided for in the Prague Rules (Article 2.4.(e)), as well as the CEDR Rules (Article 5.1.2).

The reasoning behind this technique is essentially the same as the previous one. The parties can significantly benefit from knowing where the tribunal stands at any given time. Knowing the strength of their position in the tribunal's eyes can help them return to the negotiation table and seek a settlement.

As previously mentioned, the problems arising from this method include the parties doubting the tribunal's impartiality after notifying them of its preliminary views. It is reasonable to assume that the tribunal is less likely to "change its mind" after revealing to the parties where it stands. To avoid these concerns, it seems it is now generally accepted that the tribunal should aim to receive the parties' informed consent before giving preliminary nonbinding views on the likely outcome of the dispute (IBA Guidelines, General Principle 4(d); ICC 2023, 14; Kröll 2017, 221; Raeschke-Kessler 2005, 530; Busse 2020, 416; Berger, Jensen 2017, 69; Taivalkoski, Toivonen 2020, 68). The institutional rules that provide the possibility of the tribunal promoting settlement between the parties usually also require the parties' consent in order for the tribunal to be able to take this approach.[24] Informing the parties of the tribunal's early notions without receiving their consent could be seen as a violation of the rules on the independence and impartiality of the arbitrators.

Some authors also go even further, as they consider that the tribunal wishing to provide its preliminary views on the likely outcome of the proceedings "should obtain a waiver from each party of its right to challenge the impartiality of the arbitrators due to them providing an early neutral evaluation if settlement fails and the proceedings continue" (Berger, Jensen 2017, 72; Plant 2000, 146). The IBA Guidelines on Conflict of Interest in International Arbitration even provide that express consent to the tribunal assisting in the settlement efforts of the parties, by itself constitutes an effective waiver of any potential conflict of interest (IBA Guidelines, General Principle 4(d)). This would, of course, reduce the likelihood of the parties accepting such a method, but it would be a possible solution in line with the principle that a party can waive its procedural rights in arbitration proceedings.[25]

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[24] See ICC Rules, DIS Rules, Swiss Arbitration Rules.

[25] In *Tabbane v. Switzerland* (Tabbane v. Switzerland, App. No. 41069/12, ECtHR, 1 Mar. 2016), the European Court of Human Rights held that a party waiving its right to initiate set-aside proceedings is not a violation of Article 6 of the European Convention on Human Rights.

To best utilize this method, we believe that it is recommended that the tribunal, in each individual case, consult the relevant provisions of the *lex arbitri*, as well as the provisions of the law in which recognition and enforcement is likely to be sought, to avoid the possibility of the award's enforceability being endangered in the event that the settlement negotiations fail.

3.4. Proposing Settlement Terms

Tribunal involvement in settlement efforts is also possible through not merely encouraging the settlement, but rather directly engaging in the negotiation of settlement terms. One of the ways tribunals can do this is by proposing possible settlement terms to the parties, which can serve as a basis for future negotiations (Kröll 2017, 222; Allemann 2022, 239).[26] A proposal of this kind would usually follow the preliminary nonbinding view on the likely outcome of the case (Kröll 2017, 222). It is, of course, reasonable to expect that the tribunal will be in a better position than the parties to view the realistic state of the dispute and hence propose settlement terms that could be acceptable to both of them.

Suggesting the terms of settlement is, however, likely to cause potential bias of the tribunal. Therefore, to suggest a proposal of this kind, the tribunal would have to acquire prior explicit consent by the parties, regardless of the applicable procedural rules (Kröll, Kerkhoff 2023, 932). In the event that this proposal was preceded by a written request by the parties and the tribunal can reasonably explain how it arrived at the proposed terms of the settlement – there should be no obstacles to the tribunal proposing possible settlement terms (Kröll 2017, 222).

3.5. Chairing Settlement Negotiation Meetings

One of the possible consequences of the tribunal providing its preliminary views to the parties is that the parties may wish to engage in settlement discussions that take those views into account (ICC 2023, 16). It is also possible that the parties will agree to, or invite, the arbitral tribunal to chair those discussions (ICC 2023, 16).[27] To avoid possible issues arising from the

[26] See Article 5.1.3. of the CEDR Rules.

[27] See Article 5.1.4. of the CEDR Rules.

application of this technique, the arbitral tribunal should also obtain express consent from the parties (IBA Guidelines, General Principle 4(d); ICC 2023, 16; Plant 2000, 145).

However, even with the express consent of the parties, this method of facilitating settlement raises specific issues. As the role of the arbitrator chairing settlement negotiations closely resembles that of the mediator,[28] the degree to which the arbitration becomes mediation is going to depend on the degree of activity of the role that the tribunal takes on. Chairing settlement negotiations is usually going to entail much more than a purely technical role.

As the tribunal getting involved in the negotiations would closely resemble mediation (the so-called Arb-Med procedure) (Berger, Jensen 2017, 74), the question is whether an arbitrator is the right person to conduct such a procedure.[29] Unlike a mediator, an arbitrator (or rather, the tribunal) is tasked with solving the dispute even if the settlement discussions fail. Hence, the parties will generally be less open to conveying their true interests to an arbitrator than a mediator (Kröll 2017, 223). A tribunal chairing settlement discussions also poses the risk of arbitration turning into mediation in cases where that was not what the parties wanted (Berger, Jensen 2017, 74).

Since a tribunal undertaking chairing settlement conferences is never devoid of the risk that one party will consider such an activity to be unfair and biased, the tribunal should aim to obtain a waiver of the right to challenge the tribunal on this ground (Kröll, Kerkhoff 2023, 933).

3.6. Caucusing

In the case of caucusing, the border between arbitration and mediation is entirely erased. In addition to chairing settlement negotiations, the tribunal also partakes in caucusing, acting as a mediator. This includes meeting with the parties separately (caucusing) with the aim of finding room for an

[28] However, some rules expressly provide for the interchangeability of the roles of mediator and arbitrator in the same case. See SCC Mediation Rules Article 14 and CIETAC Arbitration Rules Article 47.

[29] This is why the ICC Commission Report on Facilitating Settlement in International Arbitration explicitly provides that a tribunal should not agree to chair settlement discussions if the arbitrators do not possess specific skills that would allow them to do so effectively and safely (ICC 2023, 16).

amicable solution to the dispute.[30] The main issue with caucusing is whether it endangers the parties' right to be heard (*audiatur et altera pars*), as the tribunal receives confidential information that would otherwise remain undisclosed (Shaughnessy 2023, 1504; Plant 2000, 143). Some authors argue that this is a textbook example of depriving the parties of this right, creating grounds for setting aside the award (Blackaby *et al.* 2015, 6.192; Born 2015, 1236). Namely, the arbitration remains arbitration even during caucusing and the tribunal is bound by the *lex arbitri*, including the guarantees of due process (Berger 2018, 512–513). However, on the other hand, some authors believe that a written consent of the parties can nullify these concerns (Berger, Jensen 2017, 74), while others even consider that the parties who agree to arbitrators acting as mediators may have waived any objection to their due process rights being violated (Shaughnessy 2023, 1504).[31]

There are certain institutional rules that deal with situations where caucusing was conducted, but the settlement negotiations failed. The CIETAC Arbitration Rules provide that the tribunal cannot use the facts revealed to it during the process of caucusing in the remainder of the arbitral process (CIETAC Rules 2015, Article 40(9)).[32] This solution, however, does not eliminate the risk of arbitrators being influenced by the facts revealed during caucusing (Kaufmann-Kohler 2009, 198). On the other hand, the Hong Kong Arbitration Ordinance provides that the tribunal, in this situation, would have to brief the other side on the information revealed during caucusing that could be relevant for the remainder of the dispute (Hong Kong Arbitration Ordinance, Article 33(4)). The pitfall of this option is that it reduces the likelihood of the parties being open with the tribunal during their discussions, as they would also effectively be talking with the other side (Kaufmann-Kohler 2009, 199).

Seeing as caucusing poses serious threats to the award's "life expectancy" and that there is no clear-cut solution to eliminate them, it is the author's opinion that tribunals should generally avoid caucusing as a method of facilitating settlements.[33]

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[30] Article 9.2. of the Prague Rules, for example, allows the tribunal to act as a mediator during the proceedings, provided that the parties gave prior written consent.

[31] Also see Yeoh, Ang 2012, 290–293.

[32] A similar solution is contained in Article 16 of the Serbian Law on Intermediation in Dispute Resolution, *Official Gazette of the Republic of Serbia*, 55/2014.

[33] Shaughnessy draws a similar conclusion (Shaughnessy 2023, 1503).

4. THE ADVANTAGES AND SHORTCOMINGS OF SETTLEMENT FACILITATION BY TRIBUNALS

When looking at the desirability of tribunals engaging in settlement facilitation, one needs to bear in mind the general tendencies of international arbitration, especially the discussion regarding the procedural economy and efficiency of the arbitral process. The main users of arbitration usually find that the need for a time and cost-efficient process leading to an adequately reasoned award is not met (Berger, Jensen 2016; Allemann 2022, 231). Typically, the process moves through several phases of written submissions, requests for the delivery of documents, often lengthy oral hearings, all followed by proceedings for setting aside, recognition and enforcement of the award. Under these circumstances, regardless of its advantages over lengthy and uncertain court proceedings, arbitration is losing its reputation as a time and cost-efficient dispute resolution method (Friedland, Brekoulakis 2018, 7–8; Allemann 2022, 231). Resolving the dispute early, based on the settlement of the parties, resolves many of these issues. This has also been recognized by users of international arbitration, as around 60% of the participants in a 2017 survey identified "greater emphasis on collaborative instead of adversarial processes for resolving disputes" as the number one priority in international arbitration moving forward (International Mediation Institute 2018, 21).

Furthermore, settlements can be particularly useful in disputes between parties that are in an ongoing business relationship, one that is to continue after the arbitration (Shaughnessy 2023, 1486). Solving such disputes with an award clearly marking one of them as the "loser" and the other as a "winner" can prove to be an inadequate decision (Fisher, Ury 2005, 6).

Therefore, there obviously is an interest of many arbitration users for increased efficiency of the proceedings and a number of disputes that would be better resolved by a settlement than by an award (Reeg 2017, 271–273), which shows that settlement itself is very beneficial in general. This does not, however, show us that it is the tribunal that should encourage it.

There are multiple advantages of the tribunal being the one to facilitate settlement. Firstly, the tribunal understands the core of the dispute better than a third party ever could, therefore duplication of work is avoided and considerable savings in time and cost are achieved (Kaufmann-Kohler 2009, 197; Allemann 2022, 232). Secondly, the tribunal is in a position to evaluate the right moment at which settlement becomes a realistic option (Kaufmann-Kohler 2009, 197). Finally, a settlement concluded during the arbitral process can lead to an award by consent (Model Law, Article 30; Krivoi, Davidenko 2015, 836), which is enforceable under the rules of the

New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (Kaufmann-Kohler 2009, 197; Shaughnessy 2023, 1487–1488; Allemann 2022, 232). A settlement concluded outside arbitration, on the other hand, does not provide the same level of certainty regarding its future enforcement.

However, there are also clearly negative sides to tribunals getting involved in the parties' settlement efforts. These are especially prevalent if the settlement negotiations fail, and the arbitration needs to be continued before the same tribunal that attempted to get the parties to settle the dispute. In that case, the impartiality of that tribunal can be brought into question. These issues are drastically increased if the method used by the tribunal was caucusing. In such cases, due process rights are also endangered (Kaufmann-Kohler 2009, 197).

Therefore, to best utilize the advantages of settlement facilitation, while avoiding the potential pitfalls as best as possible, the tribunals engaging in settlement facilitation should follow certain recommendations (Wilske, Braüninger 2023, 355). Firstly, the arbitrators should never attempt to facilitate settlement if one of the parties opposes it (Reeg 2017, 275; Wilske, Braüninger 2023, 355; Collins 2003, 334). On the contrary, before engaging in settlement facilitation, the tribunal should acquire informed consent from both parties (Kaufmann-Kohler 2009, 204; Wilske, Braüninger 2023, 355; Collins 2003, 341; Plant 2000, 146). The tribunal should also not engage in caucusing (Kaufmann-Kohler 2009, 204; Reeg 2017, 275) as it simply carries too many risks to the parties' due process rights. Finally, if settlement negotiations fail and the arbitrator considers that they can no longer remain impartial, they should withdraw. If the threat of partiality were to materialize later on in the proceedings, settlement facilitation would be counter-productive in terms of the efficiency of the arbitral process, as it would entail additional costs and delays (Kaufmann-Kohler 2009, 204).

Therefore, the advantages of the tribunal engaging in settlement facilitation are very present and the parties can significantly benefit from them. However, some ways of approaching settlement encouragement can lead to problems if the conciliation process fails. By adhering to the above-mentioned recommendations, tribunals can boost efficiency and utilize the good sides of settlement facilitation while making sure to avoid the risks it entails.

5. CONCLUSION

With the recent legislative developments in international arbitration, it seems that it might not be necessary to ask the question whether a tribunal has the power to facilitate settlements. Whether a tribunal will perceive this as its power, and especially as its duty, is going to depend on the composition of that tribunal, i.e., on each individual arbitrator and the way they view its role.

It is, furthermore, evident that settlement facilitation brings numerous advantages, the main one being boosting the efficiency of the dispute resolution process. It is also undisputed that the specific position of the arbitrator makes them the perfect person to recognize the right moment when reaching a settlement becomes a realistic option for the parties.

On the other hand, a tribunal engaging in settlement facilitation is undoubtedly walking a thin line between arbitration and mediation. In order to remain in the domain of the arbitration process, the tribunal needs to constantly keep in mind where that line is drawn. If these precautions are followed, it appears that a proactive tribunal can reap the benefits of reaching a settlement early on, without risking the possibility of their impartiality being questioned in a later phase of the process or the enforceability of an award resulting from it, in the event that the conciliation does not work.

Therefore, in the author's view, there is no reason for settlement facilitation to be overlooked as a technique available to arbitral tribunals. Tribunals should be aware of the entire range of efficiency-enhancing methods that they have at their disposal. Furthermore, when considering case management techniques, the tribunal should not be bound by the legal or cultural background of its respective jurisdiction, but rather by what the parties' needs are and what is required by the case at hand. Settlement facilitation should, thus, be viewed as a natural part of the arbitral process – not only in jurisdictions that traditionally embrace settlement encouragement as a regular part of the dispute resolution process,[34] but also in those that have so far not had a culture of encouraging amicable resolution of disputes after the proceedings have commenced (Reeg 2017, 277).[35]

[34] Such as Germany and Switzerland.

[35] The author refers mainly to *common law* jurisdictions.

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Paula ŠAMANIĆ MATIJEVIĆ, LL.M.[*]

Martina TIČIĆ, LL.M.[**]

A NEW CHAPTER IN ACCOUNTABILITY: TRANSPARENCY AND ANONYMISATION IN THE CROATIAN COURTS[***]

The ongoing digitalisation of judicial systems has intensified the debate over balancing the requirement of transparency and the right to privacy. In Croatia, recent legislative amendments mandate online publication of judgments, which marks a significant step toward ensuring transparency. However, this raises questions about reconciling public access to information with individual privacy protection. This article thus evaluates the implications of these changes, examining their compliance with privacy standards and their impact on judicial practices. It assesses whether current legal provisions adequately balance transparency and privacy, particularly by evaluating the existing anonymisation measures. By situating Croatia's reforms within a comparative legal context, the study also highlights the challenges and opportunities in implementing the obligation of online publication of judgments. The findings aim to assess whether the current solution represents a balanced approach to achieving transparency in the judiciary while safeguarding privacy rights, and offer recommendations for potential improvements.

Key words: *Anonymisation*. – *Croatia*. – *Online publication of judgments*. – *Right to privacy*. – *Transparency*.

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[*] Teaching Assistant, University of Rijeka Faculty of Law, Croatia, *psamanic@uniri.hr*, ORCID iD: 0000–0002–3826–8753.

[**] Teaching Assistant, University of Rijeka Faculty of Law, Croatia, *mticic@uniri.hr*, ORCID iD: 0000–0002–5055–607X.

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1. INTRODUCTION

In recent years, digital transformation of judicial systems has become a key focus of legal reforms across the globe, especially in the European Union (EU) (see, for example, European Commission 2020; European Commission 2023).[1] One of the most significant advancements in this area is the online publication of judicial decisions, which serves not only as a tool for promoting transparency but also as a catalyst for enhancing public trust in the judiciary. Croatia, as a Member State of the EU, has undertaken substantial steps to modernise its legal infrastructure, with online dissemination of court judgments emerging as an important component of this shift. Thus, the Croatian legal framework has been evolving to ensure that judgments are accessible to both the general public and legal professionals, as especially apparent in the recent amendments to the Croatian Courts Act.[2] This move towards transparency can help foster more informed citizens, streamline legal research, and ensure consistency and accountability within the judiciary.

However, the implementation of online publication of judgments also presents a variety of challenges, one of which is achieving the balance between the requirement of transparency and the right to privacy. These two important aims of the EU – also highlighted in other legal instruments and fundamental EU legal acts such as the Charter of Fundamental Rights of the EU and the European Convention on Human Rights[3] – may actually clash at times. In terms of the issue of publication of judicial decisions particularly, publishing all judgments online would certainly help achieve the abovementioned aims of the requirement of transparency. However, while the online publication of judgments is heralded for promoting transparency, it also brings forth significant concerns related to the right to privacy. The very nature of legal proceedings often involves sensitive personal information, ranging from details about individuals' general personal data to the data on their health, finances or private relationships. In Croatia,

[1] See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '2030 Digital Compass: the European way for the Digital Decade', COM(2021) 118 final of March 9, 2021.

[2] Zakon o sudovima (Courts Act), *Official Gazette of the Republic of Croatia*, 28/2013, 33/2015, 82/2015, 82/2016, 67/2018, 126/2019, 130/2020, 21/2022, 60/2022, 16/2023, 155/2023, 36/2024 (Courts Act).

[3] Charter of Fundamental Rights of the European Union (CFREU), OJ C 202/389 of 7 June 2016, Arts. 7, 8, 42; European Convention on Human Rights (ECHR), as amended by Protocols Nos. 11, 14 and 15, ETS No. 005, 4 November 1950, Arts. 8, 40.

as in all jurisdictions, the tension between the public's right to know and the individual's right to privacy is a contentious issue that requires careful balancing.

This article thus explores the development, current state, and implications of the online publication of judgments in Croatia. By examining legal and technical aspects, it aims to provide a comprehensive overview of the benefits and challenges that come with making court decisions available on the Internet. This will be done through the analysis of the requirement of transparency and the right of privacy, with particular emphasis on their development in the EU. Additionally, this study will assess the impact of this practice on the Croatian judiciary, legal community and public at large, while offering recommendations for enhancing the effectiveness of the online publication system in the future.

The article is structured as follows. Following the introduction, Chapter 2 presents the Croatian legal framework regarding the online publication of judgments, including the steps that preceded the newest amendments to the Croatian Courts Act. Afterwards, Chapter 3 provides a detailed analysis of the requirement of transparency, and also discusses the effects that this produces in terms of the new Croatian system. Chapter 4 focuses on the right to privacy, with an emphasis on the assessment of different possibilities for anonymisation of judgments. Finally, Chapter 5, i.e. the Conclusion, summarises the findings of the analysis and provides suggestions for potential improvements of the Croatian system of online publication (and anonymisation) of judgments. It additionally raises a general question about how the issue of balancing transparency and the right to privacy could be addressed at the EU level in the future.

2 LEGISLATIVE FRAMEWORK IN CROATIA

The adoption of the new amendments to the Courts Act introduced an obligation in the Croatian legal system to publish all court decisions by which proceedings are concluded.[4] According to this Act, 'the public disclosure of court decisions is carried out to ensure the transparency of court operations, enable continuous access to information about court activities, and

[4] The relevant provisions of the Act on Amendments to the Courts Act, *Official Gazette of the Republic of Croatia*, 36/2024, which regulate the publication of court decisions, came into force on 1 January 2025.

strengthen public trust in the judiciary'.[5] The obligation to publish court judgments can also be derived from the European Convention on Human Rights, which in its Article 6(1) mandates public hearings and, specifically, the public pronouncement of judgments.[6] Additionally, the Constitution of the Republic of Croatia, in its Article 117, stipulates that court hearings are public and that judgments are pronounced publicly in the name of the Republic of Croatia.[7]

This amendment to the Courts Act introduces significant changes regarding the publication and anonymisation of court decisions. Previously, only select decisions were published, primarily through the Supreme Court's information system known as *SupraNova*. However, this database was limited in scope, and the anonymisation process was conducted manually by court staff, without automated tools. The new Article 6 of the Courts Act explicitly states that 'all court decisions concluding proceedings shall be publicly disclosed on a dedicated website, following prior anonymisation and compliance with data protection regulations'.[8] In other words, all court decisions must undergo anonymisation and be made publicly available online.[9]

The procedures for anonymising, publishing, and searching court decisions are detailed in the Ordinance on the Method of Anonymisation, Publication, and Searching of Anonymised Court Decisions (Ordinance on

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5 Courts Act, Art. 6(6), translated by author.

6 '[T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' ECHR, Art. 6(1).

7 'The public may be excluded from proceedings or part thereof for reasons necessary in a democratic society in the interest of morals, public order or national security, in particular if minors are tried, or in order to protect the private lives of the parties, or in marital disputes and proceedings connected with custody and adoption, or for the purpose of the protection of military, official or trade secrets and for the protection of the security and defence of the Republic of Croatia, but only to the extent which is, in the opinion of the court, absolutely necessary in the specific circumstances where publicity may harm the interests of justice.' Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, Art. 117(2).

8 Courts Act, Art. 6(5), translated by author.

9 See Tražilica odluka sudova Republike Hrvatske (Search engine for decisions of the courts of the Republic of Croatia), *https://odluke.sudovi.hr/*, last visited March 5, 2025.

Anonymisation).[10] With the adoption of this Ordinance, the 2018 Decision of the Supreme Court on the Publication and Anonymisation of Court Decisions and the 2003 Guidelines of the Supreme Court on the Method of Anonymising Court Decisions, which previously governed this matter, are no longer in effect.[11] The new Ordinance on Anonymisation introduces updated rules on anonymisation methods for personal data, with a particularly notable change being the automation of anonymisation through the use of specialised software, which will be further discussed in Chapter 4.

3. THE REQUIREMENT OF TRANSPARENCY

When discussing possibilities of online publication of judgments, it is necessary to first analyse the goal behind it – which is primarily the achievement of transparency. This requirement of transparency holds significant importance in EU law. As such, the requirement is enshrined in the Treaties,[12] as well as in the Charter of Fundamental Rights of the EU.[13] It is also reflected in other EU instruments, e.g. the establishment of a European Ombudsman, which functions as an independent mechanism of public scrutiny (van Bijsterveld 2004, 4). Additionally, this requirement may also be derived from other EU principles, e.g. the principle of equal treatment or the principle of effective judicial protection, or relevant provisions of EU law (Buijze 2013, 3).

Although its roots may be found in the core EU instruments and legislative principles, the notion of transparency has started to become more prominent in recent years, as apparent from multiple EU instruments in different fields,[14] particularly in private law (see Mišćenić 2024, 81–118; Josipović

[10] Ordinance on the Manner of Anonymisation, Publication, and Search of Anonymised Judgements, *Official Gazette of the Republic of Croatia*, 134/2024.

[11] Supreme Court of the Republic of Croatia, Odluka o objavi i anonimizaciji sudskih odluka, Su-IV-140/2018–1, 12 March 2018; Supreme Court of the Republic of Croatia, Upute o načinu anonimizacije sudskih odluka, Su-748-IV/03–3, 31 December 2003.

[12] Treaty on the Functioning of the European Union, OJ C 202/47 of 7 June 2016, Art. 15; Treaty on the European Union, OJ C 202/13 of 7 June 2016, Art. 1.

[13] CFREU, Arts. 41, 42.

[14] See, e.g. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265/1 of 12 October 2022; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital

2020, 118–129). The relevant obligations that are prescribed based on the requirement of transparency may differ depending on the case in question, but generally relate to providing access to select documents and providing the public or the relevant shareholders with the necessary information and data (Buijze 2013, 3). In other words, all transparency obligations concern 'availability, accessibility, and comprehensibility of information' (Buijze 2013, 4). Understandably, the requirement of transparency in general thus aims to promote social engagement, secure proper handling in all areas and avoid any improper activities such as corruption.

Although the requirement of transparency is becoming more prevalent in various fields, it is necessary to focus specifically on the transparency of justice in order to come to the necessary findings on the topic of this paper. In that vein, two aspects of the transparency of justice may be differentiated – these include the transparency of judicial bodies and the transparency of the substantial functioning of the courts (Musa 2017, 5). While the former points to public availability of information about the work of these bodies, the latter deals with the matter relevant to the analysis in this paper – publication and availability of court decisions, including the openness of the decision-making process. It is thus visible that (online) publication of judgments represents an important facet of the transparency of justice itself. This also stems from the modern doctrine of civil procedure laws, which highlights the need for the publicity of judicial proceedings as an element of ensuring accountability and access to the elements of decision making of the judges (Uzelac 2021, 136).

In that sense, publication of judicial decisions allows for social control of the judiciary, with the subsequent aim of reversing the general trend of declining trust in the judiciary by the citizens, as well as ensuring the legitimacy of the judiciary itself. Moreover, transparency is meant to ensure and encourage excellence and independence of the judiciary, as well as reduce any corruption or potential abuses. Finally, publication of judicial decisions also enables the public to become familiar with the work of the courts and the correct application and development of the law itself, including the

Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1 of 27 October 2022; Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57 of 11 July 2019; Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186/105 of 11 July 2019; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36 of December 27, 2006.

potential prediction of litigation outcomes, which is particularly important for other legal practitioners and academics (Uzelac 2021, 136; Musa 2017; LoPucki 2009). This can subsequently improve the quality of judicial decisions and enhance legal certainty (Council of Europe 2023, 13–14). It thus comes as no surprise that, at the international and the EU level, judicial decisions of the relevant courts are easily available online. This includes the decisions of the European Court of Human Rights (ECtHR), whose rulings are available through the HUDOC database,[15] as well as the Court of Justice of the EU (CJEU), whose rulings are available both through CURIA[16] and the EUR-Lex websites.[17]

It is evident that transparency holds significant importance in the area of justice. However, it can be noted here that, although the notion of transparency is being increasingly heralded as a positive one, some negative connotations may also be found. To start with, the term 'transparency' may be viewed as a floating signifier, which signifies terms that may also apply to numerous other notions and are thus continuously subject to contestations over their true meaning (Sivajothy 2019, 58; Mehlman 1972, 23). In other words, 'transparency' as such does not hold much essential meaning in itself. Despite this, in the recent years it has certainly been one of the leitmotivs used in the legal sphere of the EU and its Member States to the point that it may be said that it became the new norm (Koivisto 2022, 3, 7). Some even refer to such practice as a 'transparency fetishism' (Pozen 2020, 328; Zalnieriute 2021). This led to the potential overuse of the term itself, given that some authors now criticise transparency, defining it as 'a term that is becoming increasingly warped to sustain exploitative power relations and ideologies – as it creates the illusion that something that is seen, can be trusted' (Sivajothy 2019, 58), as well as a 'palatable buzzword alluring us to believe that it tempers power' (Zalnieriute 2021, 153). Despite the fact that these negative connotations of transparency must definitely be taken into account, the current EU legal system focuses strongly on the positive elements of the notion and thus requires a certain amount of transparency in all legal areas to be present. Moreover, in the field of justice, it seems that the benefits of transparency outweigh the negative connotations mentioned above. In that vein, transparency in justice is not only a buzzword used in particular legal instruments, but instead, it actually allows the citizens to have the ability to be better acquainted with the functioning of the courts and the developments of the law itself.

15 HUDOC, *https://hudoc.echr.coe.int/*, last visited March 5, 2025.

16 CURIA, *https://curia.europa.eu/*, last visited March 5, 2025.

17 EUR-Lex, *https://eur-lex.europa.eu/homepage.html*, last visited March 5, 2025.

Based on all that was mentioned above, and given the evolvement of the requirement of transparency in view of the online publication of court decisions, which is visible at the international/EU level, the relevant amendments to the Croatian Courts Act seem like a natural progression of legal rules, which is especially necessary in this day and age. Looking at the abovementioned positive aspects of publishing judgments, some aspects stick out as particularly important in a country such as Croatia. In that vein, one of the major issues in Croatia is the lack of trust in the judiciary. This is particularly apparent from the EU Justice Scoreboard, which is published every year and consistently highlights Croatia as the Member State where the public perception of judicial independence is the lowest.[18] Such public opinion seems unsurprising given that in other international reports Croatia has also been ranked as having an inefficient legal framework for settling disputes (Schwab 2019, 175). Thus, ensuring the publication of judicial decisions online and providing access to all citizens can represent a small, but important step towards strengthening the trust of the Croatian citizens in the courts (see Mišćenić 2024a). Similarly, Croatian citizens also recognise the widespread problem of corruption (Budak, Škrinjarić 2024; Transparency International 2023). As mentioned above, transparency is often used as a means of deterring corruption, which makes it a perfect tool for minimising this issue in Croatia. Ultimately, the obligation to publish judicial decisions online will undoubtedly help strengthen legal certainty, which is why the new amendments to Croatian law should be primarily viewed in a positive light.

Despite such conclusion, some space for improvements still remains. On that note, it could be questioned whether all judicial decisions should be published, or whether it would be more beneficial to implement a process of selecting which decisions are published. If one were to opt for the former, this choice would benefit the goal of providing access to all court judgments, and enabling the correct and equitable application of law (van Opijnen 2016, 33). However, this aim (and its fulfilment) is mostly theoretical – with the number of decisions that are being issued by courts, it is practically impossible to substantially assess and analyse all of them in order to secure correct application of the law. While limited assessment can usually be performed by legal practitioners or academics, it is highly unlikely that an in-depth assessment will be conducted by laypersons.

[18] See every EU Justice Scoreboard from 2018 onwards, *https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en*, last visited March 5, 2025.

As highlighted by Opijnen, it 'is illusory to propound that the judiciary can be effectively monitored by just putting hundreds of thousands of anonymised, untagged and unstructured decisions online' (van Opijnen 2016, 38). Thus, the possibility of choosing the second option, i.e. establishing a process of selection, should be considered carefully. This option would be a better choice for achieving the aim of informing the public on the developments of law (van Opijnen 2016, 33), given that it would avoid surplus judgment, and instead focus on publishing only the most 'important' ones, i.e. the ones that are best suited for providing a clear illustration of how the law is ought to be applied in a certain area and are 'generally representative' of the development of law (Council of Europe 2023, 56).

This option was also highlighted in Council of Europe Recommendation No. R 95 (11) from 1995, where it was noted that 'selection should ensure, on the one hand, broad and comprehensive access to information on court decisions and, on the other hand, that the accumulation of useless information is avoided'.[19] Opting for selection also seems reasonable given the fact that Croatia is not a common law state; even in such states, not all judicial decisions amount to case law, in the sense that they establish new legal principles (Magrath 2015, 189). Additionally, for a country such as Croatia, opting for publishing only selected judgments could be beneficial, as it is a country with a very high number of judges, court proceedings, and, consequently, judicial decisions,[20] which makes it easy for one to 'become lost' in the abundance of (sometimes unnecessary) information if absolutely all judicial decisions are published.

The obstacle that would need to be overcome, if opting selecting the judgments for publication, is the existence or lack of specific rules for such selection. In order to decide on the right path for Croatia, solutions from other EU Member States may be taken into account. In that vein, the criteria-based selection for publication may be found in different Member States. While some states, such as Latvia and Lithuania, offer detailed criteria for negative selection, meaning all judgments are generally published unless any of the specified grounds applies, other Member States impose rules for positive selection, meaning judgments are generally not published unless they meet the selected criteria (van Opijnen *et al.* 2017, 11–12). In many

[19] Recommendation No. R. (95) 11 Concerning the selection, processing, presentation and archiving of court decisions in legal information retrieval systems of 11 September 1995 by the Committee of Ministers of the Council of Europe.

[20] See the Supreme Court of the Republic of Croatia, *Izvješća o stanju sudbene vlasti*, *https://www.vsrh.hr/izvjesca-o-stanju-sudbene-vlasti.aspx*, last visited March 5, 2025.

states, a hybrid of both positive and negative selection criteria is used, usually with the negative criteria being used for judgments of higher courts, and the positive criteria being used for judgments of lower courts (van Opijnen 2016, 33). One example of a detailed positive and negative selection criteria can be found in the Netherlands, which offers elaborate guidelines outlining which judgments are to be published (e.g. all judgments of the Supreme Court, judgments in which a preliminary ruling has been requested, judgments concerning selected criminal cases, etc.).[21] On the other hand, some states leave the decision on selection up to individual judges, offering only vague requirements for publication, such as the judgment having 'relevance' or being of 'academic interest' (van Opijnen 2016, 34).

Given that the lack of specific guidelines may result in a limited number of judgments being published, and given that judges in Croatia frequently face a surplus of unresolved cases and high workload in general, it may be advisable to avoid leaving the decision for selection to the judiciary – instead, the formulation of relevant guidelines seems more appropriate for Croatia, if the legislator opts for introducing the selection of published judgments. The Dutch guidelines may serve as a source of inspiration here, as they offer the most comprehensive and detailed approach.

4. THE RIGHT TO PRIVACY – ANONYMISATION OF COURT DECISIONS

As stipulated above, publication of court decisions ensures the transparency and accountability of the judicial system, thereby strengthening public trust in the courts. However, such publication of judgments may also come into conflict with the right to privacy, particularly when the content of such judgments discloses sensitive information about the parties involved in the dispute or other individuals associated with the proceedings (Council of Europe 2023, 9).

The right to privacy encompasses an individual's ability to conduct their personal, family, and home life independently and separately from others, free from unauthorised interference, while respecting the rights of others and adhering to legal restrictions (Toth 2023). This right is guaranteed under Article 8 of the European Convention of Human Rights, as well as by

[21] See Decision on the selection criteria for the case law database Rechtspraak.nl (Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl), *https://www.rechtspraak.nl/Uitspraken/Paginas/Selectiecriteria.aspx*, last visited March 5, 2025.

the Constitution of the Republic of Croatia, which in its Article 35 guarantees every individual respect for and legal protection of 'their personal and family life'. When publishing court decisions, it is therefore essential to prioritise the protection of the privacy rights of the parties involved and any other individuals connected to the dispute. To balance the right to privacy with the need for transparency and openness of the judiciary, anonymisation is often employed as an effective measure. This practice ensures public access to court decisions while simultaneously protecting the identities and sensitive information of the individuals involved, thus harmonising these two important principles (Terzidou 2023).

With the enactment of the latest amendments to the Courts Act, anonymisation in Croatia has become mandatory for all publicly disclosed court decisions. The Ordinance on Anonymisation introduces significant reforms to the process of anonymising court decisions. Prior to its adoption, anonymisation was conducted in accordance with the abovementioned Decision of the Supreme Court on the Publication and Anonymisation of Court Decisions from 2018, which replaced the names and surnames of parties with initials. However, this practice did not achieve true anonymisation but rather implemented a form of pseudonymisation (Novak, Jurić 2023, 66). While anonymisation and pseudonymisation are frequently conflated, these concepts have distinct implications. Pseudonymisation does not provide complete anonymity of information, as it may still be possible – albeit with greater difficulty – to determine the identity of the individual to whom the data relates (Novak, Jurić 2023, 56).[22] In contrast, anonymisation refers to the process of fully de-identifying data, ensuring that the data can no longer be used to identify the individual (Novak, Jurić 2023, 56; Sciolla, Paseri 2023, 108–109).[23] To achieve a higher standard of anonymisation in published

[22] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1 of 4 May 2016 defines pseudonymisation in Article 4(5), as 'the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'.

[23] According to the Ordinance on Anonymisation, Art. 2, anonymisation is defined as a process in which 'parts of the original text of a court decision are replaced or omitted to comply with rules on personal data protection' (translated by author). While anonymisation involves the complete de-identification of data, it is important

court decisions, the new Ordinance on Anonymisation prescribes the replacement of names, surnames, and nicknames with randomly assigned capital letters.[24]

The Ordinance on Anonymisation mandates the implementation of such anonymisation to ensure compliance with personal data protection rules. However, it is important to emphasise that the General Data Protection Regulation (GDPR)[25] does not impose a general obligation to anonymise court decisions, as it applies to judicial authorities, but with certain exceptions. As stated in the preamble to the GDPR, the Regulation applies, among other things, to 'the activities of courts and other judicial authorities'. Nonetheless, Member States are granted the discretion to establish their own procedures for processing personal data within the judiciary. Moreover, supervisory authorities lack jurisdiction over the courts when they act in their judicial capacity, a limitation derived from the principle of judicial independence (Gruodyte, Milčiuviene 2018, 61). Furthermore, every data processing activity (including publication) must have a lawful purpose and a relevant legal basis. Article 6(1)(e) of the GDPR stipulates that processing is lawful only if and to the extent that, it 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller'. The same applies to the processing of special categories of personal data, which may be processed 'whenever courts are acting in their judicial capacity', as specified in Article 9(2)(f) of the GDPR.

Since the GDPR does not explicitly mandate the anonymisation of court decisions, there are significant differences among the EU Member States regarding the anonymisation regimes. Croatia, under its new legal framework, along with countries such as Austria, France, Germany, Hungary, Lithuania,

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to note that truly irreversible anonymisation may be considered impossible, given the broad scope of personal data that can be used to identify an individual, on the one hand, and the capabilities of technology, on the other.

[24] When replacing names, surnames, and nicknames of individuals with randomly selected capital letters, the algorithm generates random initials and always assigns a new combination for each new person. See Ordinance on Anonymisation, Art. 4(1).

[25] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR), OJ L 119/1 of 4 May 2016.

and Spain, is part of the group where anonymisation of court decisions is a standard practice that requires no separate initiatives or requests (van Opijnen *et al.* 2017).[26]

Conversely, in some Member States, anonymisation is an exception rather than the rule: it is carried out only upon request by an interested party, ex officio, or when specific regulations define which types of decisions and data should be anonymised (van Opijnen *et al.* 2017, 77).[27] This group of Member States includes Cyprus, Estonia, Ireland, Italy, and Malta. For instance, in Italy, anonymisation of court decisions can be approved at the request of an interested party, who does not necessarily need to be a party to the proceedings, provided the request is based on legitimate reasons. The practice of the Italian Constitutional Court reveals that 'legitimate reasons' encompass any situation where individual interests in confidentiality outweigh the public interest in publishing the decision in full (Tormen 2022).[28] Furthermore, even without a submitted request, Italian judges may decide to anonymise a decision ex officio to protect the rights or dignity of the interested parties. Finally, in specific cases, such as those involving minors, parties in family law or personal status proceedings, or victims of sexual violence, anonymisation is mandated by law (Tormen 2022).

Beyond national jurisdictions, the practices of the ECtHR and the CJEU concerning the anonymisation of decisions are especially noteworthy. According to its Rules of Court, the ECtHR publishes its decisions in a non-anonymised format; anonymisation is permitted only at the initiative of the Court's President or upon a substantiated and justified request by a party

[26] Anonymisation is also the standard practice, for example, in the Czech Republic, Latvia, and Slovenia, except for decisions of the Constitutional Court.

[27] It is interesting to note that in Estonia, the name of a convicted person must not be anonymised in relation to certain criminal offenses.

[28] For example, courts have considered 'the sensitivity of the subject matter of the proceedings' or 'the specific nature of the data contained in the decision (e.g. sensitive data)' as legitimate reasons. (See Sciolla, Paseri, p. 111.) Additionally, in 2021 the Court of Cassation clarified that there is no obligation to assess the legitimacy of a request for anonymisation unless such a request is substantiated. In other words, if someone requests anonymisation, they must provide justification as to why it is necessary. The Court explained that the legitimacy of an anonymisation request must be interpreted in accordance with fundamental legal principles. A balance must be struck between the individual interest in confidentiality (protection of personal privacy) and the public interest in access to court decisions (transparency of the judicial system), as the publication of the full content of judgments is essential for democracy and legal awareness. See: Cass. Civ., Sez. V, ordinanza del 10 agosto 2021, n. 22561. *https://www.gazzettanotarile.com/news-e-sentenze/corte-di-cassazione/cass-civ-sez-v-ordinanza-del-10-agosto-2021-n-22561/*, last visited March 5, 2025.

or any interested individual.[29] Similarly, the CJEU, according to its Rules of Procedure, respects the anonymity ensured by national courts in preliminary ruling proceedings and may also anonymise a decision upon a substantiated request by a party or on its own initiative.[30]

Regarding the types of personal data anonymised in court decisions, there are also differences among the EU Member States.[31] However, the general rule is that the principle of anonymisation applies only to natural persons and, exceptionally, to legal entities and public authorities. Furthermore, in most countries, the names of professionals involved in the proceedings (e.g. judges, lawyers) are not anonymised (Sciolla, Paseri 2023, 114). Although the GDPR provides no specific guidelines on the anonymisation of court decisions, it establishes a uniform definition of personal data applicable across the EU. According to Article 4(1), 'personal data' refers to 'any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'. This definition does not provide an exhaustive or definitive list of all potential personal data but instead offers a framework and examples to clarify what qualifies as personal data.

Gruodyte and Milčiuviene analysed this definition and divided it into three components: a general rule and two categories of data considered personal under the definition. The GDPR's general rule states that personal data encompasses any information that enables the identification of an individual, either directly or indirectly. The second component identifies common types of personal data, including names, identification numbers, location data, and online identifiers. The third component highlights that personal data also includes any specific factor or combination of factors

[29] See Rules of Court, March 28, 2024, Registry of Court, Strasbourg, Arts. 33 and 47. *https://www.echr.coe.int/documents/d/echr/rules_court_eng*, last visited March 5, 2025.

[30] Rules of procedure of the General Court, OJ L 105/1 of 23 April 2015, Art. 66; Amendments to the Rules of Procedure of the General Court, OJ L 2024/2095 of August 12, 2024.

[31] Due to the limited scope of this paper, differences among Member States in the types of personal data anonymised will not be considered.

related to an individual's physical, physiological, genetic, mental, economic, cultural, or social identity that facilitates their identification (Gruodyte, Milčiuviene 2018, 64–65).

Unlike the definition of personal data under the GDPR, the Croatian Ordinance on Anonymisation provides an exhaustive list of personal data that must be anonymised.[32] Additionally, the Ordinance specifies exceptions to anonymisation, such as the names and surnames of judges, presiding judges, members of judicial panels, and court clerks.[33] Beyond the explicitly listed personal data subject to anonymisation, the Ordinance on Anonymisation grants judges the authority to determine whether specific parts of the text in a court decision require additional anonymisation. This

[32] According to the Ordinance on Anonymisation, Art. 3(1), the following personal data must be anonymised in court decisions: names, surnames, and nicknames of natural persons; names of sole proprietorships; addresses of natural persons (street name, house number, postal code, floor number, building number, apartment number, city, municipality, settlement, county, region, state, post office box number, and other data identifying a physical address); email addresses of natural persons; personal identification numbers, registration numbers, unique identification numbers of entities, tax identification numbers, registry numbers, numbers of personal documents and permits, bank account numbers, insurance policy numbers, securities numbers, cadastral parcel numbers, land registry entry numbers, sub-entry numbers in deposit contract books, communication numbers (telephone, mobile phone, IP addresses, IMEI numbers, SIM card numbers), chassis and engine numbers, serial and factory numbers of weapons, meter numbers, and subscription numbers; names of cadastral municipalities; letters and numbers in license plates; as well as days and months in dates of birth and death.

[33] Exceptions to anonymisation also include the names, surnames, and addresses of participants in court proceedings acting in an official capacity (e.g. public prosecutors, deputy prosecutors, attorneys, notaries, bankruptcy trustees, consumer bankruptcy commissioners, permanent court experts, permanent court interpreters, ad hoc appointed experts and interpreters, etc.); names and surnames of individuals mentioned in the title or text of court cases published in a non-anonymised format; names and surnames of individuals in the names of public authorities and legal entities; names and surnames of authors of literature cited in the decision; and historical figures, fictional, mythological, or religious characters (Ordinance on Anonymisation, Art. 3(2)). The list of specific data subject to anonymisation, as well as the exceptions to anonymisation, applies to all types of proceedings (civil, commercial, administrative, criminal, and misdemeanour). Prior to the Ordinance on Anonymisation came into force, according to the 2023 Instruction of the President of the Supreme Court, the decisions of commercial courts were exempt from the anonymisation process, except in cases where the public was excluded from the proceedings (such as when required by interests of morality, public order, or state security, for the preservation of military, official, or trade secrets, or for the protection of a party's private life or public health). Novak and Jurić expressed their disagreement with this Instruction, asserting that a natural person acting as a trader should, in principle, be entitled to the right to personal data protection (Novak, Jurić 2023, 49–50).

is applicable if, without such measures, individuals whose identities are protected by anonymisation could still be identified, or if it is necessary to prevent the disclosure of confidential information.[34] Therefore, it is the judge's responsibility to assess whether the decision contains specific information that could enable the identification of a person, in line with the GDPR definition, and to issue an order for its anonymisation.

Furthermore, it is important to highlight that anonymisation can sometimes affect the clarity of court decisions, potentially diminishing transparency. While a Croatian judge may choose to further anonymise certain parts of a court decision, they do not have the authority to independently determine the level of anonymisation, as the Ordinance on Anonymisation explicitly prescribes which data must be anonymised. Nevertheless, ensuring the clarity of court decisions is crucial, as it is a prerequisite for judicial transparency. This approach is also noted in other countries where anonymisation is the general rule. For instance, in Germany, if a text cannot be fully understood without certain names, a lower level of anonymisation is applied (e.g. place names may be written out). Similarly, the Austrian Supreme Court Act prescribes that personal data has to be anonymised in such a way that the transparency of the decisions is not lost (van Opijnen *et al.* 2017, 73, 119).[35]

Additionally, the general obligation to anonymise all court decisions in Croatia raises the question of whether an optimal balance between privacy protection and transparency has been achieved. Bobek, for example, holds the view that judicial openness and transparency should remain fundamental principles, with exceptions permitted only in special, clearly defined cases. When specific interests so require, the anonymity of private parties can and should be granted. However, except in situations where judicial openness entails something substantially different, there cannot be a general right to conduct court proceedings anonymously. By filing a lawsuit, the plaintiff enters the public sphere, effectively seeking the administration of justice in a manner that must not be concealed from public scrutiny and oversight (Bobek 2019, 187). Pađen expresses a similar viewpoint, stating that a party seeking the protection of their rights before a court can hardly claim an absolute right to anonymity, except in specific situations (e.g. family disputes, proceedings involving children) (Pađen 2022). Although this view is not common in countries where anonymisation is the general rule, some countries, such as Germany and Hungary, do allow exceptions when it comes to public figures and information of public interest (see van

[34] Ordinance on Anonymisation, Art. 3(3).

[35] See also Art. 15(4) Bundesgesetz vom 19. Juni 1968 über den Obersten Gerichtshof (OGHG), BGBl. Nr. 328/1968 idF BGBl. I Nr. 112/2007.

Opijnen *et al.* 2017, 73, 110). It would be beneficial if the Croatian Ordinance on Anonymisation stipulated that court decisions involving individuals of public interest be published with fewer anonymised details, provided that this serves the public interest and enhances judicial transparency. We can agree that in cases of significant public interest (e.g. corruption, abuse of power), the legitimate public interest in transparency outweighs the involved parties' right to anonymity.

Since there is no universal approach to the anonymisation of court decisions, balancing privacy and personal data protection with the need for transparency and public access to court decisions remains a crucial topic of theoretical discussion. To achieve consistency in anonymisation approaches among EU Member States, some authors advocate for the development of a common framework which would harmonise the diverse national practices. For instance, Sciolla and Paseri highlight that traditionally, matters related to the operation of courts in their judicial function (e.g. trials and decision-making) fall under the sovereignty of the Member States, limiting the EU's authority in this area. However, the publication and accessibility of court decisions for legal information purposes do not strictly pertain to the 'judicial function', thereby allowing the EU to take action in this domain (Sciolla, Paseri 2023, 114). Thus, the drafting of common EU rules on anonymisation and publication of court decisions can be expected in the future.

Finally, court decision anonymisation models vary widely, ranging from fully automated systems, which rely on predefined textual templates, to semi-automated models, which use text recognition technologies and flag data for review for final decision by a human, and systems where anonymisation is carried out entirely manually by court staff. However, it can be observed that an increasing number of countries are adopting automated anonymisation tools for court decisions.

Croatia started using the ANON software in early 2025, aligning the country with countries like Austria, Finland and Luxembourg, where anonymisation is already an automated process (see Terzidou 2023).[36] The

[36] Since artificial intelligence systems designed for the anonymisation of court decisions do not impact legal analysis, interpretation of the law or decision making, but are limited to the technical management of data, they are not classified as high-risk under the European Artificial Intelligence Act. See Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ L 2024/1689 of 12 July 2024, Preamble 61.

anonymisation systems operate by identifying entities, such as parties to the proceedings and their personal data throughout the text of a court decision, to replace them with generic, non-identifiable terms (Terzidou 2023). Prior to the adoption of the new Ordinance on Anonymisation, the anonymisation of court decisions in Croatia was conducted exclusively manually by court staff. This process often took several months or even years, delaying the publication of court decisions (Uzelac 2021, 141).

With the introduction of the ANON system, the availability of court decisions to the public is to be expected significantly faster. According to the new rules, an anonymised court decision must be published within 15 days, and no later than 60 days, from the dispatch of the court decision. The ANON system is integrated with the eSpis information system, which provides it with the metadata about court cases and decisions, as well as documents containing court rulings.[37] This integration enhances system acceptance among court staff and ensures its consistent application in daily operations.

Although the digitalisation of court decision anonymisation is a necessary step towards improving public access to case law while respecting the right to anonymity, it is important to highlight potential risks. For example, the system may recognise the same individual as multiple different entities due to variations in how their name appears in the document. Another issue may arise if the system incorrectly identifies the role of an entity in the court proceedings, leading to, for example, the anonymisation of a judge's name, which, according to applicable rules, should not be anonymised (see Terzidou 2023). To avoid such errors, particularly in the initial stages of implementing anonymisation software when it is still evolving and learning, human oversight is crucial. The Ordinance on Anonymisation defines different anonymisation methods for first-instance court decisions compared to those used for higher courts and the Supreme Court. For first-instance court decisions, automated anonymisation is applied with manual supervision and corrections. In contrast, decisions of higher courts and the

[37] Ordinance on Anonymisation, Art. 5. 'The *eSpis* system is a unified information system for managing and working on court cases. It consists of a standard application, computer and telecommunication equipment and infrastructure, system software and tools, as well as all the data entered, stored, and transmitted through this system from all types of registries at municipal, county, and commercial courts, the High Commercial Court of the Republic of Croatia, the High Misdemeanour Court of the Republic of Croatia, the High Criminal Court of the Republic of Croatia, and the Supreme Court of the Republic of Croatia'. Pravilnik o radu u sustavu eSpis [Ordinance on Working within the eSpis System], *Official Gazette of the Republic of Croatia*, 35/2015, 123/2015, 45/2016, 29/2017, 112/2017, 119/2018, 39/2020, 138/2020, 147/2020, 70/2021, 99/2021, 145/2021, 23/2022, 12/2023, 9/2024, 136/2024, Art. 2(1), translated by author.

Supreme Court are anonymised manually with software support, i.e. based on automated anonymisation suggestions.[38] This distinction in the approach to anonymisation serves as a mechanism for quality control and oversight, to ensure that anonymisation remains effective and legally compliant, balancing the efficiency of processing a large volume of decisions with the precision of privacy protection, particularly in more complex cases handled by higher courts.

5. CONCLUSION

The recent amendments to the Croatian Courts Act have substantially enhanced judicial transparency, a principle that is of significant importance within the EU law. The mandatory online publication of all court decisions that conclude proceedings represents a progressive step towards fostering more informed citizens, streamlining legal research, and ensuring consistency and accountability within the judiciary. By formalising this obligation through legislation, Croatia is making meaningful progress in addressing the persistent challenge of restoring public trust in its judicial institutions.

However, publishing all judicial decisions risks overwhelming users with excessive and often irrelevant information, undermining the practicality of fostering public understanding of legal developments. Implementing a selective publication strategy could provide a more effective approach by enhancing clarity, prioritising judgments that exemplify key legal principles, and aligning with the Council of Europe's recommendations for broad yet manageable access to judicial information. In the Croatian context, where the volume of judicial decisions is notably high and the legal system follows the civil law tradition, such an approach could significantly reduce information overload and better serve both legal professionals and the general public. Thus, the authors suggest that criteria-based selection for publication be considered for a next step, followed by the development of clear guidelines for selecting judgments for publication.

Furthermore, to balance the right to privacy with the need for transparency, Croatia has adopted anonymisation as a standard practice for court decisions. However, the authors argue that anonymisation must not compromise the clarity of decisions and they emphasise the need for greater attention to this issue when publishing court decisions in Croatia, in order

[38] Ordinance on Anonymisation, Art. 7(1) and (2).

to ensure true transparency. Additionally, the authors are of the opinion that exceptions to anonymisation should be made in cases of significant public interest. Issues such as corruption, which remains a serious concern among Croatian citizens, and other matters with profound societal implications require full transparency. In these scenarios, the public's right to be informed about judicial proceedings and outcomes takes precedence over individual privacy concerns. Therefore, ensuring full transparency in such cases is essential for building trust in the judiciary and promoting accountability. Finally, the authors agree that the introduction of automated anonymisation in Croatia represents a significant step forward, facilitating timely public access to judicial information while protecting personal privacy. However, it also introduces the risk of potential errors, underscoring the need for rigorous quality control and oversight of the automatic anonymisation process, particularly during the initial stages of implementing the ANON system.

To conclude, Croatia's new legal framework for online publication of judicial decisions represents a significant step towards the digital transformation of its judicial system. However, critical questions remain about how best to balance transparency and privacy in the context of online judicial publications. These challenges extend beyond Croatia and resonate across the EU, underscoring the need for a unified framework to ensure transparency and effective anonymisation of judicial decisions. This raises an important question: could the development of a coordinated European approach deliver the much-needed clarity, consistency, and guidance to reconcile these competing priorities and promote more uniform and effective practices across Member States? A definitive answer to this question cannot be given at this point; thus, it remains to be the aim for future research.

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Nasir MUFTIĆ, PhD*

Petar LUČIĆ**

THE INTERNET AS A PUBLIC PLACE: FRAMING THE DEBATE IN BOSNIA AND HERZEGOVINA

The Internet and digital platforms are often portrayed as public spaces, hosting both private conversations and discussions of public interest. Political campaigns are conducted and business transactions are also carried out there. This paper challenges this view by highlighting the differences between the Internet and traditional public places. Instead, it argues that the Internet increasingly resembles a mosaic of private domains controlled by a few powerful entities that dictate the flow of information. This paper examines the issue from the perspective of the benefits that public places provide in modern democratic societies and posits the debate within Habermas's understanding of the public sphere, providing for differences in how public place is typically perceived regarding the Internet and especially digital platforms. Finally, it outlines the ongoing legislative debate in Bosnia and Herzegovina on this issue, with comparative insights from the legal frameworks of Serbia and Croatia.

Key words: *Public place. – Public square. – Disinformation. – Freedom of expression. – Digital technologies*.

* Assistant Professor, University of Sarajevo Faculty of Law, Bosnia and Herzegovina, *n.muftic@pfsa.unsa.ba*, ORCID iD: 0000–0002–5688–3565.

** Master's student, University of Sarajevo Faculty of Law, Bosnia and Herzegovina, *petar.lucic@student.pfsa.unsa.ba*.

1. INTRODUCTION

One of the recent debates in Bosnia and Herzegovina concerns the question of whether the Internet should be classified as a public place in the way that streets, squares, parks and other physical places are treated.

In light of the emergence of recent legislative proposals in Bosnia and Herzegovina that extend the concept of a public place to the digital area through laws regulating misdemeanor liability, this paper offers answers to the question whether the Internet can be legally defined as a public place and what consequences this may cause. First, this paper explores whether there is theoretical justification for applying the current legal rules concerning public places to the Internet, it being a relatively new phenomenon that has its specifics. The second part of the paper analyzes the legislative frameworks and practices in Bosnia and Herzegovina, with comparative insights from Serbia and Croatia. Finally, the discussion revisits the theoretical considerations to evaluate the broader implications of defining the Internet as a public place.

Unlike physical public places, where the monopoly over the rules of conduct is in the hands of the state), the Internet primarily operates on the basis of contracts between private individuals. The relationship between users and digital platforms is increasingly in focus. They are the actors that create value by bringing two or more different types of economic entities together and facilitating interactions between them (Evans, Schmalensee 2014, 405) They can do this by providing digital infrastructure, facilitating the exchange of information, aggregating supply and demand, increasing the level of trust between actors, etc. (Murati 2021, 20). Digital platforms, primarily motivated by commercial interests, are not obligated to consider individual rights unless explicitly required to do so, which often results in rules that prioritize profits over user rights. Therefore, the idea that citizens can influence the regulation of public place through their political rights does not apply to the Internet, since they have a negligible influence on the policies of global technology giants, whose platforms have become indispensable in the life of modern humankind. The second goal of this paper is to highlight the risks and consequences of treating the Internet as a public place, based on examples from Bosnia and Herzegovina and other jurisdictions.

The paper provides an overview of the comparative practice of neighboring countries, which extends the general definitions of a public place to the Internet by practical application. Focusing on the specific case of Bosnia and Herzegovina, the paper highlights the potential shortcomings of the proposed legislative solutions that do not take into account the unique characteristics of digital environments. Ultimately, the paper advocates for

a nuanced approach to Internet regulation, an approach that recognizes the specific characteristics of the digital place and seeks innovative legal solutions.

2. THE PUBLIC SPHERE AND PUBLIC PLACES

The originator of the concept of the public sphere (public opinion) is Jürgen Habermas. His approach to the public sphere represents a key theoretical basis for understanding the democratic process and communicative rationality in contemporary societies. He describes the public sphere in Europe in the late 17th and 18th centuries as rational-critical and relates to the emergence of civil society (Habermas 1989). This era has been marked by the emergence of places where individuals can exchange ideas and discuss, such as cafes, public squares, salons, etc. Over time, the public sphere becomes transformed, due to social, economic and political structural changes. Industrialization, the growth of the mass media, and the commercialization of communication have been some of the main catalysts, often to the detriment of the original function of the public sphere as a place for rational discussion. Habermas (1989, 270) considers these phenomena to be harmful since the development of mass media (print and radio) – made possible by technology – made the public sphere susceptible to commercial interests and political pressures, leading to the manipulation of public opinion and the erosion of the quality of public discussion.

Before Jürgen Habermas's influential articulation of the public sphere, significant groundwork had been laid by earlier thinkers, most notably John Dewey and Walter Lippman. Their debates on deliberation, democracy, and public discourse set the stage for understanding how public spaces and communication shape democratic society. Dewey championed the idea of robust public participation and free exchange of ideas as a cornerstone of democracy, arguing that an informed public could effectively guide societal progress (Festenstein 2019, 3). Meanwhile, Lippman presented a more cautious view, questioning the public's capacity to engage meaningfully in complex political discourse given the challenges of information asymmetry and the cognitive limitations of individuals (Bieger 2020, 4).

These foundational debates not only predated but also enriched Habermas's conceptualization of the public sphere. Building on this intellectual tradition, Habermas framed the public sphere as a vital space for rational-critical discussion and democratic engagement. His vision traces its origins to 17th and 18th century Europe, where physical venues like coffee houses and salons provided forums for civic discourse.

The Internet – and especially social media – has once again led to the transformation of the public sphere. There is a decline in print readers (VOA 2023) and television viewers (Rizzo 2023). Almost without exception, print media have developed their own online editions or have completely replaced the press with the online place. Television programs are also increasingly available to watch online, and linear media is changing with on-demand content.

Social media has enabled even greater connectivity, speed and diversity of place, and discussion of news of public interest and the exchange of information about everyday life, leading to an increase in the complexity of the modern media environment. This has led to the merging of the individual public spheres that existed within the framework of nation-states into an increasingly global network of information flows, although the fact that national boundaries often still correspond to specific cultural attitudes, interests, and practices should not be ignored. Reporting on news that the public finds interesting has changed from the environment dominated by large media companies providing content to a wide audience. Today, the media scene is more diverse, complex and sometimes confusing. As asserted by Bruns and Highfield (2015, 101) mass and niche news from around the world compete for increasingly specific segments of an audience that is defined by common interests far more than by shared geographic origin or ethnicity. According to Mancini and Hallin (2004, 11), media systems can be classified into several model categories: the polarized pluralistic model, the democratic corporate model, and the liberal model.

However, with the advent and development of social media, the basic premise on which this categorization was based ceased to exist. Social networks such as Twitter and Facebook have empowered individuals to create "personal publics", allowing them to engage in public debate and share information through these digital platforms (Schmidt 2014, 4). Some believe that social networks have made the differences between private and public place ambiguous for an individual, so they propose the use of the term "private sphere". As Mancini (2020, 5767) notes, the division of media systems according to the work he co-authored has become untenable because of this. As a result, comparative studies of media systems tend to lag behind the digital technologies that influence most political and communication practices at the national level. Each individual has become a certain medium through social media because a huge number of people are available to them as an audience – all those who use social networks or even the Internet. Mancini calls this phenomenon deinstitutionalization and describes it as the development of unofficial organizations that produce and distribute news, commentary and other content, and where clear rules on creation and

distribution are no longer evident. This, however, does not mean that today's media place – and then the public sphere – is unbounded by rules and that there are no central points that have taken an important place in such confusion. Mancini calls this reinstitutionalization, and the phenomenon describes the transfer of the ability to create rules from the state to new institutions. Facebook and other social media outlets possess the authority to establish rules and boundaries for content circulation that transcend national borders, often persisting despite extensive criticism (Mancini 2020, 5767). Because of all of the above, there are also voices advocating that the use of the term "public sphere" be completely removed because it no longer corresponds to the reality dominated by places controlled by large private individuals – primarily digital platforms (Webster 2013, 19).

The state should maintain order in public places and ensure that all participants respect the basic rules of conduct, but it should not exercise control over them as long as they adhere to the rules. The public sphere entails that the state allows individuals to exchange ideas on anything, including criticism of the state. The dialogue between persons appearing in the public sphere is not always a face-to-face dialogue, where physical presence would be required. When this is the case, the public sphere manifests itself in the public place. There are other areas of life in which the public sphere manifests itself. These are, for example, the press, television and other media, as discussed by Habermas. The development of technologies has raised the question of whether it is necessary to approach the concept of a public place differently. This arises from the growing realization that an increasing number of information exchanges now occur in virtual spaces. The need for such a transformation is not only theoretical, i.e., it does not only aim to ensure methodological consistency and the need for law to follow what is a social reality. It should also solve a number of problems that arose when virtual places became forums for discussions on important and less important social issues, a tool for conducting political campaigns and a meeting place for sellers and buyers who have an unprecedented opportunity to place their advertisements to those customers who have a likelihood of being interested in their products or services. This transformation has caused many issues, some of which are already known and only appear in a new guise or with a much greater intensity. These include, for example, fake news, propaganda and hate speech. The Internet has provided an incomparably greater potential for the rapid creation and dissemination of such information. On the other hand, there are completely new issues that we have not faced before, such as the creation of deepfake content, which can faithfully deceive the audience by appearing true.

With the acceptance of the possibility that legislators may not have been guided by the reasons we have described above, there has been a tendency to rethink the concept of a public place, in order to tackle problems in the public sphere.

3. ANALYSIS OF THE LEGAL FRAMEWORK OF BOSNIA AND HERZEGOVINA

Legislative activity in Bosnia and Herzegovina regarding the regulation of misdemeanor liability on the Internet, i.e., the definition of the Internet as a public place, began in 2015 when the Law on Public Order and Peace of Republica Srpska was adopted. Talks on defining the Internet as a public place at other levels of government in BiH began after 2021; previously, the legislative framework at other levels of government in the domain of misdemeanor liability did not define the Internet as a public place. Due to the importance of extending misdemeanor liability on the Internet, it is important to point out that in 2022, 61 Internet service providers, 875,598 broadband Internet subscribers and 3,705,589 Internet users were registered in Bosnia and Herzegovina (European Commission 2023, 98). The number of users of Internet services speaks of the importance of the Internet as a medium, and points to the conclusion that expanding the definition of the public sphere to the Internet would have far-reaching consequences, encompassing a significant part of the population of Bosnia and Herzegovina.

3.1. Legislative Framework in the Federation of BiH

More recent indications about the need to expand the definition of public places to an online place were pointed out in 2021 by the then Member of Federation of BiH Parliament Irfan Čengić. An initiative has been launched to declare websites and social media a public place. The initiative has been passed on to all cantonal governments. As justifications for the new legal solutions, Čengić points out that a "serious series of violations in Republica Srpska and Croatia have been prosecuted. This cannot stop cyberbullying, but we can protect a small segment" (N1 2023, translated by author). Activities at the cantonal level of government, aimed at defining the Internet as a public place, were actualized in 2023 with the adoption of the Draft Law on Public

Order and Peace of the Sarajevo Canton (Draft CS, translated by author).[1] In addition to treating the Internet as a public place through misdemeanor legislation, the Draft Law on Information (USC Draft) was adopted in 2022 in the Una-Sana Canton,[2] which includes the regulation of the work of the media, social networks and other means of electronic communication.

At the federal level, the Bill on Amendments to the Law on Misdemeanors was sent to the parliamentary procedure in 2024, without changes focused on treating the Internet as a public place.[3] The Federation Government has the authority to address this issue, but Article 3 of the Constitution of the Federation of Bosnia and Herzegovina highlights that "Cantons and the Federation Government shall consult one another on an ongoing basis with regard to these responsibilities." However, the regulation of misdemeanor matters typically falls under the jurisdiction of the cantons.[4]

Defining the Internet as a public place by misdemeanor legislation is becoming a legislative issue at all levels of government, and such a tendency of the legislator is evidenced by the fact that certain local self-government units, specifically Bihać, Cazin and Velika Kladuša, have included provisions on the violation of public order and peace through digital platforms in their decisions on public order and peace (Išerić, Turčilo 2022, 40).

By analyzing the statistics of the Ministry of the Internal Affairs of the Federation of BiH (FMUP) by the place of the committing of a misdemeanor, we can see that only after 2024 there is the notion of "other places" and the number of misdemeanors committed in other places is 159 (Ministry of Internal Affairs FBiH 2024, translated by author).

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1 See Draft Law on Misdemeanors against Public Order and Peace in the Sarajevo Canton, 2023. Ministry of the Internal Affairs Sarajevo Canton. *https://mup.ks.gov.ba/sites/mup.ks.gov.ba/files/2023–05/nacrt_zakona_o_prekrsajima_protiv_javnog_reda_i_mira_na_podrucju_kantona_sarajevo.pdf*, last visited April 15, 2025. Translated by author.

2 See Draft Law on Amendments to the Law on Public Information of the Una-Sana Canton, Ministry of Education, Science, Culture and Sports Una-Sana Canton. *https://vladausk.ba/v4/files/media/pdf/623a026240d084.03943493_Prijedlog%20Zakona%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20javnom%20informiranju.pdf*, last visited April 13, 2025. Translated by author.

3 See Draft Law on Amendments to the Law on Misdemeanors of the Federation of BiH *https://fbihvlada.gov.ba/uploads/documents/prijedlog-zakona-o-prekrsajima-b_1718285594.pdf*, last visited April 13, 2025. Translated by author.

4 See Constitution of the Federation of Bosnia and Herzegovina, III Art. 3(2), *Official Gazette of the Federation of Bosnia and Herzegovina*, 1/94, 13/97.

3.1.1. Sarajevo Canton

The Draft Law on Misdemeanors against Public Order and Peace,[5] adopted in April 2023 by the Government of the Sarajevo Canton, which defines the Internet as a public place raised the issue of defining public places and started the conversation about more adequate regulation of the media, with an emphasis on online place and online media. The European Commission's 2023 Report on BiH states that the provision defining the Internet as a public place could be abused to restrict online communication and intimidate journalists, further emphasizing that all such norms must fully respect the standards of freedom of expression (European Commission 2023).

This is why the Draft CS has been criticized by a number of domestic and foreign organizations, such as the OSCE and Transparency International: "'Anything that gives the police the power to regulate freedom of speech is very dangerous' [...] the police could easily abuse the law on misdemeanors if it is adopted in this form" (Zatega 2023, translated by author).

The OSCE sent a letter to the Prime Minister of the Sarajevo Canton in which it indicated "that the text of the draft is indefinite, which leaves significant room for multiple interpretations" (F. H. 2023, translated by author) The Minister of the Internal Affairs of Sarajevo Canton pointed out that the proposer of the law would refine the criticized articles in the draft, but that "the fundamental commitment to punish people's misconduct on the Internet remains, as is the case with the dedication to finding a way to protect citizens and introduce order on the Internet, as well as on the streets." (I. M. 2023, translated by author).

A innovation is the determination of the manner of committing a misdemeanor and the inclusion of the provision that the misdemeanor can be committed through the media and social networks. Article 5, paragraph 2 reads: "It shall be considered that the misdemeanor referred to in this Law was committed in a public place when the action was committed in a place that is not considered a public place in the sense of paragraph (1) of this Article, [...] if the consequence occurred in a public place or if it was done through the media, social networks or other similar means of electronic

[5] See 2023 Draft Law on Misdemeanors against Public Order and Peace in the Sarajevo Canton, Art. 5(2), *https://mup.ks.gov.ba/sites/mup.ks.gov.ba/files/2023–05/nacrt_zakona_o_prekrsajima_protiv_javnog_reda_i_mira_na_podrucju_kantona_sarajevo.pdf*, last visited April 13, 2025. Translated by author.

communication."[6] The work of the media and social networks is subject to a detailed analysis regarding liability for offenses, in particular in relation to Articles 24 and 30 (insult, hate speech, fake news).[7] In modern legal systems, these areas are usually regulated through content moderation and self-regulation; however, in this case, they are simply sanctioned as violations (Dias 2022). In addition to the above-mentioned innovations, Articles 11, 24 and 30 of the Draft CS define three distinct types of misdemeanor offenses that can be committed through the media, social networks, and other similar electronic means. Article 11 regulates the misdemeanor of serious threat; Article 24 regulates the misdemeanor of insulting religious, national, racial, and gender feelings of the citizens; and Article 20 regulates the misdemeanor of presenting or transmitting false news and claims. Article 30 of the Draft CS stipulates a fine in of BAM 600 to BAM 1,800 for a person who presents or transmits false news or claims that cause panic or seriously disturb public order and peace, or prevent or significantly hinder the implementation of decisions and measures of competent authorities and institutions exercising public powers. The prevention of fake news dissemination and the elimination of hate speech are the declared objectives in defining the Internet as a public place in the Draft CS. The provision on the prohibition of the spread of fake news can be perceived in the broader context of the legislative trend of prohibiting and punishing the spreading of fake news, which exists in some European Union (EU) countries. Ó Fathaigh, Helbeger and Appelman (2021) state that 11 EU member states have adopted applicable laws to tackle spread of disinformation. However, the OSCE Joint Declaration on Freedom of Expression argues that "there should be no general or ambiguous laws on disinformation, such as prohibitions on spreading 'falsehoods' or 'non-objective information'." (OSCE 2020, 2).

Ultimately, the proposed Draft Law, by explicitly defining the Internet as a public place, does not achieve the goal of eliminating hate speech and fake news, while at the same time it subjects online media and users of social networks to the arbitrary application of the misdemeanor system by the police on the Internet. Following the initial publication of the Draft CS and the reaction of nongovernmental bodies dealing with media freedom and

6 See Draft Law on Misdemeanors against Public Order and Peace in the Sarajevo Canton, Art. 5 (1). *https://mup.ks.gov.ba/sites/mup.ks.gov.ba/files/2023–05/nacrt_zakona_o_prekrsajima_protiv_javnog_reda_i_mira_na_podrucju_kantona_sarajevo.pdf*, last visited April 13, 2025. Translated by author.

7 See Draft Law on Misdemeanors against Public Order and Peace in the Sarajevo Canton, Arts. 23, 24. *https://mup.ks.gov.ba/sites/mup.ks.gov.ba/files/2023–05/nacrt_zakona_o_prekrsajima_protiv_javnog_reda_i_mira_na_podrucju_kantona_sarajevo.pdf*, last visited April 13, 2025. Translated by author.

media activists, there has been no indication of a potential adoption date for the new Cantonal Law or any information suggesting that the legislator has abandoned this effort.

3.1.2. Una-Sana Canton

The tendency of the legislator to regulate the media place and treat the Internet as a public place is not reflected only in the amendments to the laws that regulate misdemeanors and public order. In 2022, the Una-Sana Canton launched an initiative for the adoption of the Law on Information, and the USC Draft was created.[8]

In the explication of the new Law points out that "the goal is to prescribe how to remove comments in online media, and to define the reduction of hate speech on social networks to suppress any intolerance, which has taken hold and become an everyday occurrence in the Una-Sana Canton and Bosnia and Herzegovina."[9]

Article 16 prohibits the distribution of information or other media content provided there is necessity in a democratic society.[10] Furthermore, it is prescribed that the proposal for the prohibition of the distribution of information is submitted to the competent prosecutor's office. The proposal for a ban may require that the dissemination of such information be prohibited through public media, web portals, social networks, via the Internet, other electronic media, and other types of media. Such provisions raise the question of how the competent prosecutor's office is to prohibit the distribution of information on privately owned digital platforms that are located outside the jurisdiction of BiH prosecutors office.

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[8] See Draft Law on Amendments to the Law on Public Information of the Una-Sana Canton. *https://vladausk.ba/v4/files/media/pdf/623a026240d084.03943493_Prijedlog%20Zakona%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20javnom%20informiranju.pdf*, last visited April 13, 2025. Translated by author.

[9] See Draft Law on Amendments to the Law on Public Information of the Una-Sana Canton. *https://vladausk.ba/v4/files/media/pdf/623a026240d084.03943493_Prijedlog%20Zakona%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20javnom%20informiranju.pdf*, last visited April 13, 2025. Translated by author.

[10] See Draft Law on Amendments to the Law on Public Information of the Una-Sana Canton, Art. 16. *https://vladausk.ba/v4/files/media/pdf/623a026240d084.03943493_Prijedlog%20Zakona%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20javnom%20informiranju.pdf*, last visited April 13, 2025. Translated by author.

At the suggestion of the Prosecutor's Office, the competent court may issue a decision on the temporary ban on the distribution of information until a final decision on the prohibition is passed. The competent court is required to immediately deliver the decision on the temporary ban to the publisher, the editor-in-chief, as well as the distributor or printing house, i.e., the authorized person representing the public media, web portal or other electronic publication.[11]

In January 2025, despite the failure of the initial attempt to regulate digital media through the 2022 draft, efforts to introduce a new Law on Information in Una-Sana Canton have been revived in a similar manner by largely the same group of policymakers. In light of ongoing legislative efforts, the Una-Sana Canton has initiated the drafting of a new Law on Information, aiming to address challenges posed by digital media and online discourse. The working group, composed of representatives from the media, academia, and government institutions, emphasizes the need for clearer regulations to combat misinformation and hate speech while safeguarding media freedoms (Hadžić 2025, translated by author). These developments highlight the continued relevance of the 2022 draft, necessitating a reassessment of its provisions in the context of evolving regulatory discussions. In addition to the circumstances related to the organization of BiH which stipulate that cantons should not adopt such law, a canton has dubious enforcement power due to complexity of the subject matter and limited resources as a lower-level government.

3.2. Legislative Framework of Republika Srpska

The modification of the definition of a public place has been the subject of legislative activities in Republika Srpska (RS) since 2015. After much criticism from nongovernmental organizations and media activists, the Law on Public Order and Peace of RS (ZJRM RS) was adopted in 2015.

Criticism from the opposition, international and nongovernmental organizations has put forward the thesis that the provisions of Articles 7 and 8 of the ZJRM RS, which define basic violations of public order and peace, may lead to an impermissible interference with basic human rights and

[11] See Draft Law on Amendments to the Law on Public Information of the Una-Sana Canton Art. 16, *https://vladausk.ba/v4/files/media/pdf/623a026240d084.03943493_Prijedlog%20Zakona%20o%20izmjenama%20i%20dopunama%20Zakona%20o%20javnom%20informiranju.pdf*, last visited April 13, 2025.

freedoms, i.e., the right to freedom of expression (Transparency International BiH 2015). These provisions were debated during the legislative process and were amended from the original Draft and Proposal of the ZJRM RS.[12]

Clear and specific definitions of the fundamental elements of public order and peace infringements are necessary to ensure that there is no opportunity for arbitrary or uneven interpretation and application (Muratagić 2015, 6). Paragraphs 3 and 4 of Article 2 define the concept and scope of a public place, encompassing "any place where there is free access for individually unspecified persons, without conditions or under certain conditions", or "any other place where an offence has been committed and the consequence has occurred in a public place."[13] The criticism of the nonexistent resources and professional competence of the police for the implementation of the misdemeanor system on the Internet, addressed to the Draft CS, also applies to the existing legislative solutions in RS.

Išerić (2022, 39) states that it is not possible to examine the implementation of this legislative solution, because the data of the RS Ministry of Internal Affairs on the implementation of the Law on Public Order and Peace of RS and the Law on Misdemeanors of RS is not available to the public. Without the adequate analysis of the implementation of the existing legislative framework, we cannot answer the question of what negative or positive impact such solutions have in terms of freedom of expression and regulation of the Internet. The impossibility of public analysis of the application of the law supports the thesis that such solutions leave room for the unsystematic application of misdemeanor provisions on the Internet. The lack of access to statistical data maintains the concern that the misdemeanor provisions are not applied on the Internet and that such solutions do not meet the goals advocated by legislators. The fact that statistics are not available does not mean that these rules do not have any effect. As media law doctrine teaches, the threat of sanction for the spoken word leads to self-censorship (the so-called "chilling effect"), which consequently leads to some people not daring to express themselves, resulting in no need to apply the sanctions (Pech 2021, 5).

[12] See Law on Public Order and Peace of Republika Srpska, Art. 6, *Official Gazette of Republika Srpska* 11/ 15 and 58/2019.

[13] See Law on Public Order and Peace of Republika Srpska, Art. 2 (3–4), *Official Gazette of Republika Srpska* 11/15 and 58/2019. Translated by author.

4. A COMPARATIVE OVERVIEW OF THE LEGISLATIVE FRAMEWORKS IN CROATIA AND SERBIA

Certain jurisdictions define the Internet as a public place in the laws on offenses against public order and peace. As previously stated, legislators in BiH justify the future definition of the Internet as a public place on the grounds that neighboring countries and a significant number of EU countries extend misdemeanor liability to the Internet. To present the actual situation, and the exact legal definitions and applications of misdemeanor liability, we will provide a brief overview of the laws on misdemeanors in Croatia and Serbia and their application, with emphasis on the expansion of misdemeanor liability to the Internet by equating the Internet with a public place.

4.1. Croatia

The Law on Misdemeanors against Public Order and Peace of the Republic of Croatia,[14] in addition to not defining public places, does not define provisions related to possible unlawful misdemeanor behavior on new platforms. However, the police in the Republic of Croatia does initiate misdemeanor proceedings, for example, for insulting and belittling authorized state officials through social media platforms. According to Juras (2015, 97), the definition of a public place in legal theory and jurisprudence is understood to include both places where access is possible for an infinite number of people (a public place in the narrow sense, or a real public place) and places where access is not possible for an infinite number of people but where the public can still access the act or its consequences (a public place in the broad sense, or a fictitious public place).

Peulić, Matijević and Palić (2023, 55) point out that such an interpretation could raise doubts regarding Article 2 of the Law on Misdemeanors against Public Order and Peace,[15] which, among other things, states that no person may be punished if the act was not prescribed as punishable.

[14] See Act on Misdemeanors against Public Order and Peace, *Official Gazette of the Republic of Croatia* 41/77, 52/87, 55/89, 5/90, 30/90, 47/90, 29/94.

[15] See Act on Misdemeanors against Public Order and Peace, *Official Gazette of the Republic of Croatia*, Art. 2 41/77, 52/87, 55/89, 5/90, 30/90, 47/90, 29/94.

Although insulting and belittling is indisputably a misdemeanor, the dilemma exists if the public place and networks – as a place where a misdemeanor can be committed – have not been defined (Peulić, Matijević, Palić, 2023, 63). There is still no consensus on the status of the Internet as a public space, despite attempts to compare it to public places, due to the broad interpretation of the definition of public place (Despot 2022).

The Law on Misdemeanors against Public Order and Peace has undergone changes to the provisions exclusively related to currencies and the amount of the fine. The 2023 amendments, in which the amount of the fine has been significantly increased, have been criticized that such a law borders on censorship, and that it is necessary to adopt a new law adapted to the changes in social circumstances (HRT 2023).

By analyzing the statistics of the Ministry of the Internal Affairs of the Republic of Croatia (MUP), we can conclude that out of the 15,266 recorded offenses against public order and peace in 2022, only 10 cases are listed under "spreading fake news", of which four occurred in "streets, squares, etc.", and six were in "other places" (Ministry of Internal Affairs of Croatia 2023). It is important to point out that there are no separate category for the Internet in the statistics, and clearly cases taking place on the Internet are marked as occurring in "other places". Nine of these misdemeanors were committed individually, and one case is "in a group". In the 2021 report, the Ministry of Internal Affairs recorded 19 cases (Ministry of Internal Affairs of Croatia 2022) and in 2020, a year marked by the COVID-19 pandemic, out of a total of 17,006 violations of public order and peace, 59 were "spreading fake news", of which 23 were on the street, square, etc., 3 in a facility, and 33 in other places (Ministry of Internal Affairs of Croatia 2021).

The attached statistics show that the application of misdemeanor provisions by interpreting the Internet as a public place results in an insignificant number of misdemeanor fines, and there is no clear way of applying misdemeanor provisions to the Internet. It is also necessary to point out that an indictment has been filed for committing the offense of insulting officials (Torpedo.media n.d.) due to a comment in which a user insulted and belittled police officers with derogatory words in connection with actions during the COVID-19 pandemic. Statistical analysis shows that even with the application of such an interpretation, the number of misdemeanors committed in "other places", i.e., on the Internet, is insignificant, but the lack of clear determinants of when and why misdemeanor provisions will be applied does not dispel the fear of arbitrariness.

4.2. Serbia

In the Republic of Serbia, Article 3 of the Law on Public Order and Peace defines a public place as "a place accessible to an indefinite number of persons whose identity has not been predetermined, under the same conditions or without special conditions."[16]

The Law on Public Order and Peace defines the concept of a public place by determining the characteristics of the place that constitutes a public place, without specifically citing the example of a public place, allowing the possibility of reviewing whether a certain place meets the criteria of a public place.[17]

Jeličić (2023, 811) lists several violations committed on the Internet that meet the criteria of the definition of being committed in a public place. Furthermore, Jeličić points out that the act of committing the offense of indecent, insolent, and reckless behavior, referred to in Article 8 of the ZJRM, can undoubtedly be undertaken on the Internet, in various ways: by posting indecent comments or photos on social networks and websites or other inappropriate actions, insolent comments or messages that are distributed on the public network (Jeličić 2023, 823).

Jeličić (2023) analyzes in detail the possibility of applying other offenses to the Internet, such as the offenses from Article 9 insults and threats, which takes place on social networks.[18] These violations, which have already been discussed, can occur in a public place and public Internet.

The Internet is suitable for the commission of violations referred to in Article 14 (ticket scalping).[19] The act consists in the unauthorized offering, sale or resale of tickets for cultural, sporting and other events, or unauthorized organization or facilitation of the resale of tickets for such events.

Disturbing citizens by witchcraft, divination or similar deception is the name of the misdemeanor referred to in Article 15, and entails the engagement in witchcraft, fortune telling, interpretation of dreams or similar

[16] Law on Public Order and Peace, Art. 3, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018, translated by author.

[17] See Law on Public Order and Peace, Art. 3, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018.

[18] See Law on Public Order and Peace, Art. 9, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018.

[19] See Law on Public Order and Peace, Art. 14, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018.

deception in a way that disturbs citizens or disturbs public order and peace. This offense can also be committed via the Internet in different ways and its existence requires the occurrence of a consequence.[20]

The analysis of these articles confirms that it is possible to apply the misdemeanor framework to the Internet with a broad definition of public places, and the concept of public place can also be applied to the Internet by interpreting the characteristics of individual cases using the existing misdemeanor framework. It is necessary to emphasize the difference between defining the Internet as a public place and other definitions that allow for expanding misdemeanor liability online. The fact that a significant number of violations can be carried out on the Internet, however, does not confirm that the Internet meets the criteria for a public place. In the next sections we reflect on the similarities and differences between the Internet and a physical public place, in order to demonstrate the possibilities of treating the Internet as a public place.

5. THE SIMILARITIES AND DIFFERENCES BETWEEN THE INTERNET AND A PUBLIC PLACE

The idea of treating the Internet as a public place is based on finding analogue solutions in the physical world that could be applied to the digital one, which would avoid the uncertainty and risks that are immanent to the creation of new legal institutes and their application. This concept is also referred to in the literature as a "digital public square" and refers to online places where people participate in discussions, share ideas, and participate in democratic decision-making (Franks 2021, 427). Just like a physical public square, it is a place for open dialogue and expression. The concept is not only academic, but also recognized by decision-makers. The U.S. Supreme Court ruled in *Packingham v. North Carolina*[21] that the Internet is a modern public square.[22] Consequently, the Supreme Court declared that a law prohibiting registered sex offenders from using social media sites was unconstitutional, deeming it inconsistent with the First Amendment's protection of freedom

[20] See Law on Public Order and Peace, Art. 15, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018.

[21] U.S. Supreme Court, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

[22] Justice Alito wrote a concurring opinion stating that "if the entirety of the internet or even just 'social media' sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders."

of expression. As Franks (2021, 428) observes, the concept of a digital public square is descriptive and normative. The descriptive value is reflected in the previously given description, where a new phenomenon is explained using existing categories. If the public square as a concept has been known for millennia, then the risks and opportunities associated with it are also known. Normative value refers to the rules that the Internet needs to regulate, relying on the rules that apply in the previously known. This is a question of value to which jurisdictions on opposite shores of the Atlantic Ocean give different answers. While in the United States freedom of expression to be perhaps considered the most valuable, as exemplified by its First Amendment position to the U.S. Constitution, in European countries it is considered it one of the freedoms that competes with others and can be restricted by them.[23] The normative value of the concept of the public square can therefore be understood differently. In the United States, the Internet is viewed as a "marketplace of ideas" (Blocher 2008, 824–825), a traditional concept historically applied to physical spaces and now upheld by the U.S. Supreme Court (Weiland 2017).

To consider a physical public place and the Internet as public places would mean that they meet the conditions envisaged by the terms, which would enable a comparison between them. For example, the Law on Public Order and Peace of Serbia[24] stipulates that a public place is "a place accessible to an indefinite number of persons whose identity has not been predetermined, under the same conditions or without special conditions." In the Sarajevo Canton, the Law on Misdemeanors against Public Order and Peace regulates a public place as "a place where there is free access to an indefinite number of persons without any conditions (streets, squares, public roads, parks, picnic areas, waiting rooms, hospitality, trade and craft shops, means and facilities of public transport, etc.) or under certain conditions (sports stadiums and playfields, cinema, theater and concert halls, exhibition halls), as well as other places that serve for such purposes during certain periods of time (land or premises where public gatherings, competitions are held, etc.)."[25] The criteria provided in these legal definitions do not clearly define what constitutes a public place in the comparative legal analysis of Bosnia and Herzegovina and neighboring systems. What is indisputable is that these are

[23] See, inter alia, Nieuwenhuis 2000). Freedom of Speech: USA vs Germany and Europe. Netherlands Quarterly of Human Rights, 18(2), 195–214 (2000), *https://doi.org/10.1177/092405190001800203*.

[24] See Law on Public Order and Peace, *Official Gazette of the Republic of Serbia* 6/2016 and 24/2018, Art. 3(2), translated by author.

[25] See Law on Offenses Against Public Order and Peace, Art. 4, *Official Gazette of the Sarajevo Canton* 18/2007, 7/2008, and 34/2020.

places that are not private and, as such, closed to an unlimited number of people. They should be accessible to anyone who wishes to do so, provided that they respect the basic rules of conduct.

Defining the Internet as a public place presents numerous challenges, both theoretically and practically, as this disregards the unique characteristics of digital environments. The proliferation of different AI models makes the comparison untenable. A large number of interactions between users on the Internet are not done with other people, but with chatbots, generative artificial intelligence models, and other types of computer programs. Unlike the physical world, it is often impossible to assess whether the interaction is occurring with humans or with any of these forms of human creation.[26] It is estimated that the number of AI-generated content on the Internet will account for 90% of all content by 2025 (Garfinkle 2023). Thus, the recently adopted EU Artificial Intelligence Act (Regulation (EU) 2024/1689) provides for special rules on generative AI models that can create content (including text) so successfully that users cannot be sure whether the content is created by humans or artificial intelligence. This situation can hardly occur in the case of a physical public place where encounters take place between natural persons.

Furthermore, the Internet ensures anonymity, a characteristic that users can use to express views that they would not otherwise express or that would cause them discomfort. Anonymity is a value because it ensures that the truth is told and famously – "The emperor is naked." Anonymity, on the other hand, is a tool for concealing hate speech or presenting disinformation for the purpose of manipulating public opinion, thereby influencing one's reputation or public opinion on a particular topic. Numerous studies have shown that people are more likely to engage in violent behavior when they feel isolated from the consequences, especially when their identity is hidden (Winhkong 2017, 1228). Anonymity allows for disinhibition, which can have positive effects on the free exchange of ideas, but can also encourage reckless and destructive behavior that many individuals would avoid in personal contact in the physical world. Anonymity makes it difficult to discover the identity of the speaker and consequently makes them shielded from liability for such behavior (Franks 2021, 436). Related to this is a trait that streets and other physical public places have, but which cannot be attributed to the Internet or to traditional media, such as radio or television: what is said on the street will reach those present, who cannot easily ignore it. In relation

[26] In this way, Chat GPT has passed the so-called Turing test, which means that it can successfully mimic human behavior to the extent that other people cannot easily notice that they are interacting with an artificial intelligence. See Biever 2023.

to other means of communication, any individual faced with an unpleasant message can always turn the page, change the channel, or leave the website. On the other hand, on the street or other public place, the listener is often confronted with speech that could otherwise be abolished.

Another key difference lies in how these environments are tailored to meet anticipated needs and preferences. Streets as public places are unchangeable, regardless of who steps on them. The architecture of the streets, the number of people walking through them, the smells they can smell and so on will always be unchanged, no matter who the person on the street is. The street, like other physical public places, is relatively static, regardless of who is in it. In theory, the Internet works on the same principles. In the earlier stages of the use of the Internet, it was conceived as an unbounded place. John Perry Barlow, founder of the Electronic Frontier Foundation, wrote the Declaration of Independence of Cyberspace in 1996 (Barlow 1996). This document expresses an early optimism about the Internet as a place of freedom and aptly expresses the spirit of the times: "Governments of the industrial world [...] You have no sovereignty where we gather. [...] I declare the global social place we are building to be naturally independent of the tyrannies you seek to impose on us. Cyberspace does not lie within your borders. Do not think that you can build it. [...] It is an act of nature." The cyberspace in question has been significantly reduced today. This does not mean that it does not exist, but that users do not spend their time in it for the most part. A large part of our being on the Internet is not in certain non-administered parts where there is freedom of movement and choice of what is seen and how to react to what is seen. In fact, much of the time that users spend on the Internet takes place in centralized parts managed by Internet intermediaries, usually large technology companies that have been becoming larger over time. So, contrary to the expectation that the state is a source of danger to the rights and freedoms of individuals on the Internet, large technology companies have come forward.[27] Due to the specific business model (Zuboff 2018, 32) – and other reasons such as unadjusted competition law and a widespread belief in the correctness of deregulation of the Internet (Tyagi, Anselm, Cauffman 2024) – the wide availability of digital technologies has made these digital companies indispensable when using the Internet. These

[27] That doesn't mean that countries around the world aren't getting more and more involved in cyberspace. Sometimes their intervention is initiated by a specific social problem or incident related to the use of the Internet such as various types of fraud, terrorist financing or money laundering. On the other hand, certain jurisdictions have decided to set national rules for Internet users on their territory, creating parts of cyberspace that are de facto national. See: *https://www.economist.com/the-economist-explains/2016/11/22/what-is-the-splinternet*.

are large places that, due to their universality and unavoidability, sometimes resemble the Internet, and it seems that nothing but them comprises the Internet. As Slavoj Žižek (2009) noted, "the market has invaded new spheres which were hitherto considered the privileged domain of the state [...] We are thus in the midst of a new process of the privatization of the social, of establishing new enclosures."

There are at least two major differences between such private places as digital platforms owned by intermediaries and the Internet as a public place. Users who use the digital platforms of large online intermediaries conclude contracts before they start using them. These agreements stipulate rules of conduct, the authority of the intermediary to remove activity or access to the user, as well as a number of other rules governing their interaction. One of the rules is so-called algorithmic profiling. This refers to the ability of Internet platforms to adapt to the user's habits. After processing data collected through the analysis of access and all the activities of each individual user on the digital platforms, intermediaries use algorithms to gain the ability to predict the user's preferred content, as well as those that they will like less. As Citron and Richards (2018, 1357) stipulate, "the most important legal instruments governing free speech on the Internet today are not derived from the Constitution, but from contract law – the terms of service governing the relationship between Internet companies and their customers."

Guided mainly by commercial interests, technology companies design specific environments that favor our preferences and interests. As a result, the Internet becomes personalized and is not static, as is the case with the street. The information received by one user may not be received by another, so the Internet is no longer a place that guarantees that the person on it will be able to hear different voices. This phenomenon is recognized and these are called echo chambers, places that provide their users with information they want to hear, which at the same time means that they do not make available information that the algorithm considers unfavorable or undesirable to them. Echo chambers refer to communities of like-minded people who mutually strengthen their own worldviews and reinforce certain beliefs that they already have (O'Hara, Stevens 2015, 2). Moreover, the digital platforms are not inherently intended to pursue truth, ensure governmental accountability, or promote democratic deliberation. Instead, their primary design focuses on capturing and maintaining user attention through the constant flow of compelling content, which often favors extreme and polarizing information (Weiland, Morgan 2022, 371). Echo chambers are not necessarily a product of the digital platforms' end goal to polarize public. Rather, as platforms seek to increase user engagement, an effective

way to achieve this is to intensifying polarization. They seek engagement because the time users spend interacting with content – such as liking, sharing, and retweeting – correlates with the time they are exposed to paid advertisements, which are the primary source of revenue for digital platforms. Content that evokes partisan fear or outrage is particularly viral, thereby effectively supporting this advertising-driven business model (Barrett, Hendrix, Sims 2021, 17).

Therefore, users of Internet platforms are not exposed to different ideas and content that would question their preconceptions and attitudes, but to those that confirm them. Internet platforms facilitate the rapid dissemination of information and viewpoints, regardless of their quality, innovation, and societal importance. The criteria are primarily popularity, i.e., public interest in what is presented. If the content has the potential to shock, then the potential to capture the attention of a wide range of people is greater. Furthermore, the interactions typically take place on Internet platforms, which are private companies whose primary goal is to generate profits for shareholders. They have an incentive to support attention-grabbing speech, regardless of whether it is harmful or not, and thus to obscure other topics that could be more important to the public. Moreover, content that has become available on the Internet is very difficult to remove permanently, despite the existence of the right to be forgotten, which is recognized in the law of the EU and the Council of Europe (CoE) (Article 19 2016).

Another important difference between the street as a public place and the Internet is that state laws directly govern conduct in physical public spaces, while online behavior is typically regulated by the terms of service set by private entities. The rules of conduct on digital platforms are prescribed in the contract between the user and the Internet intermediary, which is usually referred to as terms of use. According to Kim (2022, 88) this is a form contract whose main feature is that the user does not have the possibility to modify its content.[28] Over 90% of users do not even read their content, according to a study conducted in the United States (Deloitte 2017). According to Savin (2020, 263) the user would probably not even notice if there are certain contractual provisions in the text that could be

[28] Kim (2022) observes that the legal fiction according to which the imposition of terms of business is equal to consent to the will ignores the centrality of the consent to the contract by the user. Allowing the stronger party to characterize the forced imposition of adhesive terms as a contract is similar to allowing the robber to call the robbery a donation because the victim did not resist enough. It also points out that not all such contracts are created equal, but that too often is simply ignored – the contract is a creation of the law and as such must meet certain requirements. If this is not the case, it is not a contract despite what one party may call it.

considered unfair. An experiment conducted at the University of Connecticut addressed this issue. The authors created a fake social network called Name Drop and wrote a terms and services agreement that users agreed to during the signing up process. The agreement included a provision that users would give up their first-born child in exchange for using the social network, and that anything shared by users would be forwarded to the U.S. National Security Agency. Ninety-eight percent of the participants agreed to the terms (Obar, Oeldorf-Hirsch 2018).

As Internet intermediaries become more and more unavoidable, the inequality of the parties – as a fundamental principle that permeates civil law (and other private law relations) in this contractual relationship – has become increasingly pronounced. Users must agree to the content of rules of conduct that they cannot influence, and the leeway not to do so is increasingly reduced as their business and private lives are tied to the use of digital platforms.[29] In 2024, the number of social media users will exceed five billion (Forbes 2024). For example, according to Phenomena (2023) in the first half of 2022, large tech companies (Google, Netflix, Facebook, Microsoft, Apple, and Amazon) generated almost half of all Internet traffic.

The user can influence the binding law in the physical public place since they have the opportunity to influence the law through the election of their representatives. Furthermore, since the rule-makers of the rules of conduct on the street are not guided solely by commercial interests, the content of the rules that will be binding are more suitable for the protection of the human rights of individuals than the rules established by private Internet platforms, which are primarily aimed at making a profit for their creators. Internet platforms are commercial entities, designed to maximize profit, and not with the aim of defending freedom of expression, preserving collective

[29] In certain industries, the regulator has the authority to consider the terms and conditions of business that companies offer to their customers, with the aim of correcting the fact that companies independently draw up the text of the contract and their counterparty is a party that is generally not equal. In Bosnia and Herzegovina, Internet platforms are not required to submit terms and conditions to any state organization for consultation or approval before offering them to their users. Exceptions exist when they provide services for which they are the regulator, such as banking services. Due to the outdated legislative framework (the Communications Act of 2003, which has been amended several times, most recently in 2012), the Communications Regulatory Agency does not have comprehensive competence over the Internet, so many problems arising from the inequality of the parties remain out of its reach. In addition, another specialized institution for consumer protection is the Ombudsman Institution, but its competences are also limited. First of all, it can act ex-post, after a violation of consumer rights occurs, but even then, it does not have the competence to make binding decisions, but only to initiate judicial and administrative proceedings and give recommendations.

heritage, or positively influencing users' creativity. The people who work in such companies are private employees, not public servants (Taylor 2014, 221). The restriction of the rights and freedoms of individuals, therefore, is not carried out by public authorities, but by private companies with a goal that is particular and focused on market success.

When it comes to public places that can be privately owned, such as banks, museums or shopping centers, they have their own specifics that distinguish them from digital platforms. Such physical places have their rules enforced primarily by staff, allowing owners to directly control the behavior and experience of visitors in a defined, tangible environment. These places are subject to clear rules and restrictions, with users being physically present and interactions taking place in real time. In contrast, digital platforms operate in a virtual environment without borders, in which access is given through online connectivity and digital platform membership, rather than physical presence. While digital platform owners also impose rules and guidelines, enforcement is algorithmic or reactive, often relying on user reports rather than direct oversight. Digital platforms facilitate interactions, which can be asynchronous, anonymous and global, blurring the boundaries between the public and private realms and enabling a more fluid, expansive, and often less predictable user experience. Consequently, the imposition of rules and their enforcement by the state becomes more difficult, while private public places are often subject to clear legal obligations, and owners usually cooperate with law enforcement to maintain order.

6. THE RISKS AND IMPLICATIONS OF DEFINING THE INTERNET AS A PUBLIC PLACE

Even if we do not take into account the previous considerations about the distinct theoretical differences between the Internet and public places, the issue of the risks and consequences of defining the Internet as a public place remains, especially through misdemeanor provisions.

Although the regulation of behavior on the Internet – and thus the definition of a public place – is a current and important issue, the media situation in BiH tells us that there are a number of areas that require more urgent legislative activity. The primary duty of state actors concerning the freedom of expression and the freedom of the media is to refrain from interference and censorship and to ensure a favorable environment for an inclusive and pluralistic public debate (European Commission 2018).

Minister of Internal Affairs of Canton Sarajevo Admir Katica stated that "Canton Sarajevo police officers are trained to punish offenses on the Internet provided for in the draft law, such as the spreading of fake news" (Zatega 2023, translated by author). Examples from Croatia on the implementation of misdemeanor provisions on the Internet tell of the insignificant number of issued misdemeanor fines, resulting in the justified fear that police officers are not adequately trained to punish misdemeanors on the Internet. Supervision over the implementation of this law is carried out by officers of the Police Directorate, who control the implementation of orders. The omission of a court instance from the assessment of what constitutes hate speech, fake news and disinformation is a major problem. This solution practically means that the police, in the part of misdemeanor proceedings, assess elements that are challenging even for court proceedings due to their complexity and possible interference with the freedom of the media. Comparative practice makes it clear that any restriction of the right to expression must be subject to judicial proceedings (Gačanica 2023). According to Gačanica, it is not clear whether the legislator made an omission, forgetting that it added the work of the media to the provisions on misdemeanors and thus left an imprecise solution, or whether the legislator consciously and intentionally introduced the possibility of banning media for committing a misdemeanor. The fact that the amount of online content is increasing exponentially and steadily forces the "big players" to invest heavily in AI systems and human resources to eradicate hate speech (Finck 2019, 5), serving as a counterargument to the state's capabilities and equipment – i.e., as an argument in favor of self-regulation of social networks.

6.1. The "Big Players"

The extent to which the "big players" have invested in hate speech regulation is demonstrated by the fact that, in 2019, it was revealed that Meta and subsequently Facebook engaged more than 20,000 people to identify hate speech on its platform. YouTube reportedly employs more than 10,000 people who check whether content violates its internal rules of conduct online. This type of investment certainly cannot be achieved by the stratified state administration. The difficult legal definition of hate speech is additionally highlighted as a problem. Meta reported in February 2021 that 97% of hate speech removed from Facebook was spotted by automated systems before anyone flagged it, up from 94% in the previous quarter and 80.5% at the end of 2019 (Schroepfer, 2021). Criticism of the inability to adapt to cultural places when flagging unwanted content has also been directed to AI mechanisms (Alkiviadou 2021, 105). The market of South

Slavic languages is not significant for the "big players", and consequently AI mechanisms for removing unwanted content in this language area does not have the level of development and efficiency of the mechanisms for English, Spanish and other languages with a large number of speakers. In addition to EU regulation, the owners of large digital platforms dictate the rules of the game.

Since mid–2023, significant changes in platform governance have emerged, particularly following Meta's announcement of sweeping changes to its content moderation policies. These changes include the removal of fact-checking programs and the introduction of user-driven "community notes" systems, modeled after X (formerly Twitter) (TechPolicy. Press 2025). Meta CEO Mark Zuckerberg emphasized that these shifts aim to prioritize free expression while reducing perceived censorship, yet critics argue that such policies may lead to increased disinformation and harmful content (CNN 2025). Amnesty International has raised concerns that these changes could increase risks to vulnerable communities, potentially fueling violence and human rights abuses, as seen in previous instances of inadequate content moderation (Amnesty International 2025). These developments highlight the complexities of defining the Internet as a public space, as they challenge traditional regulatory frameworks and underscore the evolving dynamics of platform governance showcasing that the owners of large digital platforms tend to avoid any regulation of digital platforms.

Existing AI mechanisms with human supervision show certain shortcomings and require significant amounts of funds that digital platform owners allocate to eliminate hate speech and fake news. Such considerations further show how unjustified it is to expect that insufficiently equipped administrative bodies would be able to monitor the immense number of social interactions on social networks. In conclusion, the application of misdemeanor provisions on the Internet by inadequately trained officials can ultimately achieve a chilling effect (Ó Fathaigh 2019).

6.2. The Path Forward

With the current media picture in Bosnia and Herzegovina, the announcement of the expansion of the public sphere to the Internet has resulted in a justified fear that the trend of legislative activity superficially regulating the media space and resulting in ambitious and unclear solutions will continue. From a legal point of view, "chilling effect" can be defined as the negative effect of any state action on natural and/or legal persons, which results in preventive neutralization and prevention of exercising their

rights or fulfilling their professional obligations, due to the fear of being subjected to formal state procedures that could lead to sanctions or informal consequences such as threats, attack or defamation (Pech 2021, 4).

The shortcoming of the Draft CS, as well as of the existing laws in Croatia and Serbia, is primarily the imprecise definitions of essential terms. The absence of legal definitions of terms such as "incorrect information" and "fake news" results in legal uncertainty and the possibility of arbitrary application of legal solutions.

The challenge of defining these terms does not imply that the legislator should abandon the regulation of social relations on the Internet, but such problems require more innovative legislative solutions that do not involve rewriting provisions that have proven to be ineffective. Although the Law on Public Order and Peace of the Republic of Serbia contains the meaning of the terms, many of them are not clearly defined. The argument that misdemeanor provisions are not frequently applied to the Internet in practice can support the thesis that defining the Internet as a public place will endanger freedom of speech. However, the nature of this right and the chilling effect tells us that in order to create the impression of a controlled and censored media place, it is enough to pass laws that can cause the media and significant number of citizens to refrain from any form of speech that is perceived as criticism of the government in the public place.

As Bosnia and Herzegovina is a candidate country for EU membership, it would be advisable to explore different trajectories to curb harmful speech. The EU Digital Services Act (DSA) represents the Union's constitutional approach to regulating digital platforms' power, as part of a broader set of measures to shape its digital future. Alongside other legislative initiatives, such as the GDPR and proposals for the Digital Markets Act and the Artificial Intelligence Act, the DSA seeks to apply fundamental rights horizontally to private entities. It introduces substantive and procedural safeguards that protect EU constitutional values in the digital realm, illustrating the EU's strategy to limit the influence of private digital platforms and promote accountability in the algorithmic society. As noted by de Gregorio and Pollicino (2021), the constitutional law provides two remedies to mitigate the consolidation of unaccountable powers of the digital platforms "the first concerns the horizontal application of fundamental rights vis-à-vis private parties; the second comes from the new phase of European digital constitutionalism, looking at the constellation of substantive and procedural rights to increase the transparency and accountability of platforms powers." Instead of attempting to tackle a real problem with erred tools, Bosnia and

Herzegovina should rather seek to learn lessons from the organization it strives to join. This is its legal duty, ultimately, based on the Stabilization and Association Agreement that Bosnia and Herzegovina signed in 2008.

The European Court of Human Rights has developed a robust framework for protecting freedom of expression under Article 10 of the European Convention on Human Rights. Landmark cases of the ECHRhave reinforced the principle that restrictions on speech must be necessary and proportionate (ECHR, Nagla v. Latvia, App. No. 73469/10, 2013. and ECHR, Sunday Times v. United Kingdom, App. No. 6538/74, 1979). Additionally, the Council of Europe has emphasized that the Internet provides a unique environment for exercising human rights, necessitating tailored regulatory approaches.

The CoE Internet Governance Strategy highlights the need for a balanced approach that safeguards freedom of expression while addressing challenges, such as disinformation and hate speech. These standards directly influence the debate on whether the Internet should be classified as a public space, as they underscore the importance of ensuring that digital platforms remain open forums for democratic discourse, while respecting fundamental rights.

The ECHR has played a crucial role in shaping the legal understanding of the Internet as a public space, particularly through its interpretation of Article 10 of the European Convention on Human Rights, which protects freedom of expression.

The ECHR has recognized that the Internet is one of the principal means by which individuals exercise their right to receive and impart information. The Court emphasized that the Internet enhances public access to news and facilitates democratic discourse (ECHR, Cengiz and Others v. Turkey, Apps. Nos. 48226/10 and 14027/11, 2015). This ruling suggests that digital spaces function similarly to traditional public forums, reinforcing the notion that online platforms should be subject to public space protections.

Additionally, the ECHR ruled that blocking access to an entire online platform due to a single violation was disproportionate and arbitrary (ECHR, Ahmet Yıldırım v. Turkey, App. No. 3111/10, 2012). This case highlights the Court's stance that restrictions to online speech must be necessary and proportionate, similar to regulations governing speech in physical public places.

The Council of Europe has also issued recommendations that influence this debate. Its Internet Governance Strategy stresses that digital platforms should uphold fundamental rights, ensuring that online spaces remain open for democratic participation. These standards suggest that while

the Internet shares characteristics with public spaces, its regulation must balance freedom of expression with concerns, such as disinformation and hate speech.

7. CONCLUSION

Equating the concepts of the Internet and public place is problematic for several reasons, which we have tried to show in this paper. The doctrine behind such an attempt is based on the juridical effort to explain the unknown through the known and to place the unknown into categories and concepts whose risks can be predicted and whose potentials can be used.

The problem that legislators are trying to solve by expanding the concept of public place to the Internet is real and significant. Many jurisdictions that have more resources, human capital, and experience in regulating digital technologies are struggling with this at the present. As historical experience teaches us, the law can be abused by the holders of power. The freedom of expression – as one of the fundamental freedoms without which a democratic society cannot survive – is very fragile and requires an environment in which individuals must feel free in order to readily express ideas that others, especially those in power, will not like. The solution to treat prohibited speech or the dissemination of disinformation through a well-known institute aimed at preserving public order and peace is too simplistic since it ignores the specificities that the Internet has in relation to physical public places. In this paper, we point out that there are numerous problems that make it impossible to solve this problem through without creating significant social damage. There are several issues, such as how to precisely terminologically define disinformation and what it means to spread panic. Who is adequately equipped, professional and has enough time to deal with this issue in the online space, where billions of posts and comments are written every day? This is especially controversial given online places where users are sometimes unidentifiable and remain anonymous. Concerns about unclear and ambiguous legal provisions, the possibility of abuse by the authorities and the risk of undermining freedom of expression prevail.

The shortcoming of the Draft CS, as well as the existing laws in Croatia and Serbia, is the imprecise definitions of key terms. Imprecise or nonexistent legal definitions of terms, such as disinformation and fake news, lead to legal uncertainty and allow for arbitrary interpretation. By jointly considering the differences between the nature of the Internet and public place, and the theoretical impossibilities of defining the Internet as a public place and the risks that the legislative definition of the Internet as a public place through

misdemeanor provisions results in, we can conclude that with the current media picture and all the negative consequences, defining the Internet as a public place in BiH is not a justified choice.

An overview of the legal frameworks in Croatia and Serbia reveals the challenges of defining the Internet as a public place in the context of misdemeanor laws and reveals the negative effects of broad definitions that result in arbitrariness in their application. In Croatia, the absence of explicit provisions relating to the application of misdemeanor provisions has led to a broad interpretation of the public place, which has enabled misdemeanor punishment of behavior on the Internet, such as insulting and belittling officials. In Serbia, the legal framework similarly allows for a broad interpretation of public places, making it easier to sanction various offenses in the online place under existing misdemeanor laws. The Internet is increasingly dominated by several large digital platforms where a large number of user interactions take place.[30] Unlike the street, these are private places where the rules of conduct are determined almost unilaterally by technology companies. In addition, digital platforms feature algorithmic profiling which adapts the content to users individually, based on what the algorithm considers desirable.

The path that the leading jurisdictions in the field of digital technology regulation are taking is to regulate the obligations of Internet intermediaries, prescribe obligations in the field of content moderation generated by users, and strengthen media literacy, i.e., the ability of individuals to critically analyze the information available to them on the Internet. Although it may be appealing to tackle the new problems with existing solutions, the challenges brought about by undesirable or prohibited speech on the Internet is a new challenge and needs to be approached as such.

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Vukašin STANOJLOVIĆ, PhD*

NAVIGATING THE LEGAL WATERS: THE ROLE AND LIABILITY OF A SHIP'S CAPTAIN IN ROMAN MARITIME LAW

The ship's captain (magister navis) held a pivotal role in overseeing maritime operations and managing the vessel. Rooted in traditional legal concepts, Roman maritime law predominantly relied on the contract of locatio conductio. Since, under this contract, captains were liable for the delivery of goods rather than their safekeeping, this often led to fraudulent activities. To address these issues, the receptum nautarum was introduced to impose liability for the safekeeping of goods, allowing merchants to sue captains if goods were damaged or stolen during transit. Given this intricate commercial venture, the author aims to elucidate the captain's legal relations with the beneficiary of the maritime venture (exercitor navis) on one hand, and with third parties on the other, as well as to prove that the captain was not initially liable for custodia.

Key words: *Lex Rhodia de iactu. – Locatio rerum vehendarum. – Receptum nautarum. – Roman maritime law. – Ship captain (magister navis).*

* Senior Assistant Lecturer, University of Belgrade Faculty of Law, Serbia, *vukasin.stanojlovic@ius.bg.ac.rs*, ORCID iD: 0000–0001–9834–161X.

1. INTRODUCTION

Recent discoveries have revealed that Romans engaged in prosperous and extensive sea trade as far back as the late Bronze Age (Cifani 2022, 11). Despite the prevailing belief among Romanists and historians that the development of maritime commerce, sea ports[1], and ship contingents began after the Second Punic War (Danilović 1969a, 359; Šarac 2008, 115; Anderson 2009, 184), contemporary research suggests that maritime business held significant economic importance since the earliest settlements along the Tiber. Moreover, it is worth noting that mythological ancestors of the Romans[2], including Aeneas and his group, were sailors (Liv. 1.1). As Cifani aptly observes, Rome was strategically situated along the most important river in central Italy, just thirty kilometres from the sea (Cifani 2022, 11). Undoubtedly, references in Aristotle's (*Pol*. 7.6.2) and Cicero's (*De rep*. 2.10) writings indicate that Romans were engaged in maritime activities as early as the 4th century BC (Cifani 2022, 11). Above all, Cicero (*Cons. Prov*. 12.31) writes that after Pompey's victory over the pirates at *Mare Nostrum*, the Romans established sea routes (*cursus maritimi*) that "linked the Mediterranean into one port" (Adams 2012, 225).

The expansion of sea routes and the establishment of large trade enterprises that occurred after the Second Punic War urged comprehensive legislative activity in the field of Roman "maritime law"[3]. The existing contracts within the scope of *ius civile*, which were utilized to govern all maritime trade operations, did not provide a satisfactory level of protection for the contractual parties, particularly the passengers[4] and

[1] Livy writes that Ancus Marcius, fourth legendary Roman king (642–617 BC), built the port and salt pans in the city of Ostia (Liv. 1.33). On the other hand, archaeological discoveries have shown that port was no older than 4th century BC, although the salt pans were much older and standing on the *Via Salaria* (Mirković 2012, 69 n. 106).

[2] However, some scholars, such as Danilović (1969a, 365), suggest that the first sailors were Greeks and that the maritime transport was primarily conducted using Greek ships.

[3] Maritime law did not exist as a distinct branch within Roman law. Therefore, the term Roman "maritime law" was used in this article as a broad, descriptive label to refer to various legal institutions employed by the Romans in the organization of maritime enterprises. According to Candy (2019, 4–5; see 241–247), these institutions do not represent separate entities of maritime law, but rather should be viewed within the broader context of Roman "merchant law".

[4] Passengers usually travelled on cargo ships. However, Ulpian's text (D.14.1.1.12) indicates the existence of passenger-only ship lines, such as those running from *Cassiope* (Corfu) and *Dyrrachium* (Durrës) to *Brundisium* (Brindisi) (Marzec 2019,

merchants. Deeply rooted in traditional legal concepts, Roman maritime law predominantly relied on contract of letting and hiring (*locatio conductio*)[5] (Kunkel 1949, 240; Zimmermann 1990, 518) for: hiring the ship *locatio conductio rei* (*conductio navis*), engaging sailors *locatio conductio operarum* and transporting the goods *locatio rerum* (*mercium*) *vehendarum* or passengers *locatio vectorum vehendarum*, as specific forms of *locatio conductio operis* (D.4.9.3.1; D.14.2.10.pr; D.19.5.1.1[6]);[7] on the other hand, if the transport was carried out gratuitously, jurists have concluded that it was *depositum* or *mandatum* (D.4.9.3.1) (Fiori 2022, 187–188; Danilović 1969a, 360). Danilović (1969a, 360) highlights that during the earliest period legal gaps in civil norms were supplemented by (uniform) customs that held sway across all ports in the Mediterranean.

Considering the numerous risks to cargo and the questionable reputation of sailors (D.4.9.3.1; D.47.5.1.pr), the praetor took measures to enhance the liability of participants in maritime enterprises. This included the introduction of the *actio furti adversus nautas* and *actio damni adversus nautas*, *actio oneris aversi*, *actio de recepto*, along with the *actio exercitoria*[8]. The latter *actio* was particularly crucial because it enabled direct lawsuit

34 n. 3). According to Zimmermann, the captain probably bore liability just for passengers' safety and their personal non-commercial luggage (Zimmermann 1990, 518).

5 In analysing Greco-Egyptian papyri, Fiori has concluded that Romans employed four types of *locatio conductio* for conducting maritime ventures. These correspond to modern categories of bareboat charters, voyage charters, time charters and contracts of carriage (Fiori 2018, 560–561; see Trajković 1997, 51–189).

6 In cases there was doubt which contract was concluded – *locatio conductio rei* or *operis*, Labeo says that the praetor granted *actio in factum* to the owner of the cargo against a captain – D.19.5.1.1. *Papinianus libro octavo quaestionum: Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit. https://droitromain.univ-grenoble-alpes.fr/*, last visited April 17, 2024.

7 The tripartite division into *locatio conductio rei*, *locatio conductio operarum*, and *locatio conductio operis* was not created by Roman jurisprudents but by later jurists (see Fiori 1999, 305–319).

8 It should be mentioned that the *actio exercitoria* was introduced by the *De exercitoria actione* edict, likely promulgated in the years following the enactment of the *Lex Claudianum de nave senatorum* in 218 BC. This law adopted as a plebiscite (*plebiscitum Claudianum*) prohibited senators from owning ships weighing more than 300 amphorae (Liv. 21.63; Cic. *in Verr*. II 5.18.45; Solazzi 1963, 243–264; D'Arms 1981, 31–37; Miškić 2024, 86–90). The text of the edict was reconstructed based on the writings of Gaius (G. *Inst*. 4.71) and Ulpian (D.14.1.1.19–23) and probably consisted of two sentences: *Quod cum magistro navis gestum erit eius rei nomine, cui ibi praepositus fuerit, in eum, qui navem exercuerit, iudicium dabo. Si*

against the beneficiary from the venture – *exercitor navis*[9], who received all the incomes and appointed the captain. In the scope of praetorian law, the agreement formed the basis for his liability which included granting *praepositio* – naming the captain (*nominatio*) and authorizing him to conclude contracts with third parties (D.14.1.1.7. and 12). Depending on the form and scope of *praepositio*, the *exercitor*'s liability could vary, albeit he could have been sued *in solidum* (Zimmermann 1990, 53). In such case the third party could sue him with praetor's *actio exercitoria* or the captain with *actio ex contractu*.

2. CONTRACTUAL LIABILITY OF MAGISTER NAVIS IN THE SCOPE OF *IUS CIVILE*

The maritime transport of goods and passengers in Roman times was a complex, but lucrative[10] venture. It involved compound preparations such as finding a suitable ship, hiring the captain and sailors, and mitigating the constant risks of shipwrecks (*naufragium*), storms, winds, currents and pirates (*vis piratarum*). Consequently, it required an atypical legal structure

is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium datur (Lenel 1883, 204).

[9] Ulpian explains that the *exercitor* was the person who received all the revenues, regardless of whether he was the owner of the ship (*dominus navis*) or a lessee (D.14.1.1.15). Occasionally, the *exercitor* also acted as the *dominus negotii*, while in others cases they were separate individuals. In these situations, the *dominus negotii* appointed the *exercitor* typically through *locatio conductio operis* or *mandatum*. Nonetheless, he could have been *exercitor*'s *pater familias*, patron or master. Watson (1985a, 416 n. 1) translates the term as "ship owner" or "manager", while Aubert (1994, 58) translates it as "shipper" or "principal", although there is no adequate word in English. His personal status or gender was also not important and the position of the *exercitor* could have been held by multiple persons bound in partnership or as joint owners of the ship. Each *exercitor* was personally liable in full and could have been sued separately by third party (Aubert 1994, 63; see also Sirks 2018, 88). After the entire debt derived from the captain's contract had been discharged, the *exercitor* could sue his partner(s) or joint owner(s) with the *actio pro socio* or *communi dividundo* (Aubert 1994, 63).

[10] *Aulus Persius Flaccus*, the Roman poet and satirist from the first century, mentioned the earnings from the maritime industry compared to other businesses. According to his writings (Pers. *Sat.* 5.149), the profits from the maritime venture constituted approximately 11% of the invested capital, whereas in other sectors, it amounted to about 5%.

and contractual relationships involving at least three persons: the *exercitor*, who can also be *dominus negotii*, *magister navis*, and a third party – either a passenger or the owner of the goods to be carried.

In the introduction, we highlighted that since the inception of organized communities, Roman maritime law predominantly relied on the contract of *locatio conductio*. The earliest mention of *locatio conductio* in the context of sea transport is found in the plays of Plautus[11] and Terence. In Plautus' *Rudens*, probably written in the last decade of 3rd century BCE, Leno Labrax decided to seek happiness in Sicily and, for that purpose, hires a ship (*navis clanculum conducitur*) and loads his entire fortune onto it (Plaut. *Rud*. 57–59, 199, 356–358) (Candy 2019, 156). On the other hand, one of the Terence's characters in the *Adelphi*, written around 160 BCE, hires a ship (*navem conductam*) for transporting the goods to Cyprus (Ter. *Ad*. 225–26) (Candy 2019, 156).

Given the economic significance of this contract, in the subsequent sections, we will delve into its various types and implications in the context of maritime trade.

2.1. Liability of *magister navis* towards *exercitor navis*

The legal relations between the *exercitor* and the *magister navis* were established through two legal acts – *locatio conductio operis* and *praepositio*. Within the scope of *ius civile*, the rule *alteri stipulari nemo potest* (D.45.1.38.17) dictated that contracts could not be concluded for the benefit or at the expense of third parties. Consequently, the captain could not bind the *exercitor* from contracts with third parties, nor could the *exercitor* be held liable from such agreements. Therefore, the topic of *praepositio* will not be further discussed in this paper.

From the perspective of *ius civile*, the legal framework of maritime ventures was relatively simple and primarily depended on the captain's *status libertatis* and *familiae*. If the captain was *alieni iuris* or a slave, his *pater familias* or master assumed full liability for his actions. In such circumstances, the captain had no legal capacity to enter into contracts with third parties, making any agreement merely natural obligation. Conversely, if the captain was a free person, the *exercitor* appointed him through *locatio conductio operis*.

[11] See also Plaut. *Asin*. 433. and Plaut. *Mostell*. 823 (Thomas 1974, 122 n. 31; Candy 2019, 156–157 n. 129 and 130).

According to Ulpian, the captain's primary duties were to hire the ship (as well as the crew), transport goods or passengers, and sell commodities for a fixed freight (D.14.1.1.3). The internal relationship in maritime venture depicts the relationship between the *exercitor* (*locator*) and the captain (*conductor*) governs by the rules of liability outlined in *locatio conductio operis*. Since both parties benefited from the contract, they were liable *omnis culpa* (in postclassical law *culpa levis in abstracto*), i.e. for negligence. Moreover, because the captain was responsible for selecting the ship, hiring sailors, and delivering goods (Casson 1971, 317), he was accountable to the *exercitor* if damage occurred due to a lack of knowledge (*imperitia*); for example, the captain needed to possess specialized expertise in maritime geography, celestial navigation, chart reading, and ship navigation (Miškić 2024, 143). Furthermore, the *magister navis* could be held liable for any damage caused by sailors (*culpa in eligendo*). Liability would extend to damages occurring on-board the ship, irrespective of whether the sailors were free citizens or slaves (D.4.9.7.pr).

The external relationship in maritime venture was characterized by the interaction between the captain and third parties. In that regard, captains commonly entered into contracts of *locatio rerum vehendarum* or *locatio vectorum vehendarum*, which we will discuss in the next chapter, as well as *emptio venditio*, *locatio conductio* (*rei* or *operarum*) and *mutuum*. In the event of a breach of contractual obligations, third parties retained the right to sue the captain based on the specific contract.

2.2. Liability of *magister navis* towards the merchants and passengers

2.2.1. Conductio navis et locatio loci in navem

Merchants had several options for transporting goods by sea, one of which was hiring an entire ship (*conductio navis*) (D.19.2.61.1). In this arrangement, the contractual parties were the ship owner or captain (*locator*) and entrepreneur (*conductor*). The *locator* was obligated to handover the ship with all equipment and staff, while the *conductor* was liable for paying the rent (*merces*) and return the vessel without any damage – except for that resulting from age, proper use and *vis maior* (Fiori 2022, 189). The reasonability for the goods lies exclusively with the *conductor*, and if any mishap occurred to the cargo, the captain, i.e., the *locator*, would not be held liable, since he was solely liable for handing over the ship in sailing condition. Scaevola sheds light on this issue (D.19.2.61.1). Namely, a man hired a ship for a fixed fee to sail from the province of Cyrene to Aquileia with

a cargo consisting of three thousand *metretae* of olive oil and eight thousand *modii* of grain. However, the loaded ship was detained in the province for nine months, and the cargo was subsequently unloaded and confiscated. The question arose as to whether the shipper could still collect the *merces*. The jurist answered affirmatively.

> D.19.2.61.1. *Scaevola libro septimo digestorum: Navem conduxit, ut de provincia Cyrenensi Aquileiam navigaret olei metretis tribus milibus impositis et frumenti modiis octo milibus certa mercede: sed evenit, ut onerata navis in ipsa provincia novem mensibus retineretur et onus impositum commisso tolleretur. Quaesitum est, an vecturas quas convenit a conductore secundum locationem exigere navis possit. Respondit secundum ea quae proponerentur posse*.[12]

Alternatively, the merchant could rent only a part of the ship's loading space or deck (*locatio loci in navem*) (D.14.1.1.12; D.14.2.2.pr) (Thomas 1960, 489–505; Zimmermann 1990, 519; Marzec 2019, 35). Under this arrangement, the merchant (*conductor*) would only rent free space for his goods and the captain's (*locator*) obligation was solely to provide the merchant with the agreed-upon space and nothing more (Marzec 2019, 35). The merchant could initially pay the *merces*[13] for this service provided or after the unloading of the cargo. Both contractual parties, as beneficiaries, were liable *omnis culpa*, meaning they would be liable for any harm resulting from their negligence; if the captain was a son-in-power or a slave, in the system of *ius civile*, this obligation would be uncollectible. For instance, if the captain carelessly or intentionally rented out the loading space to another person after concluding *locatio loci in navem*, or if the merchant loaded goods that damaged the ship or other cargo, both parties would be accountable, based on *actio locati* i.e. *conducti*. Importantly, as in the case of renting the whole ship, there was no guarantee for the merchant that the stored goods would safely arrive at their destination, nor was the captain liable for any loss, harm, theft or actions of the crew (Marzec 2019, 35). His

[12] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[13] In contracts of *conductio navis* and *locatio loci in navem*, the jurists raised the question of the amount of freight, resulting in two distinct views. The older view, articulated by Labeo, stipulates that freight should be paid for the entire cargo space, regardless of whether the merchant loaded goods to full capacity. Conversely, Paul introduces a distinction based on whether the ship was hired at a flat rate or if the freight was determined in relation to the number of goods loaded (D.14.2.10.2) (see De Marco 2000, 358–362; Du Plessis 2012, 89).

sole obligation was to facilitate the storage of goods, and if the goods did not reach the port, the merchant could be sued for the *merces* or if he initially paid the rent, could not claim a refund.

2.2.2. Locatio rerum vehendarum

Rather than *locatio loci in navem*, merchants were more secured if they have had conclude with the captain *locatio rerum vehendarum*. In this agreement, the merchant (*locator*) would entrust the goods to the captain (*conductor*) to be transported from port A to port B. Upon delivery and unloading of the cargo, the captain would receive compensation for the services rendered. Scholars such as Thomas (1960, 500–501) argue that the focus of this agreement was not on delivering, storing, or guarding the goods, but rather on their transportation. According to Thomas, this was an *obligation de résultat*, not an *obligation de moyens*. On the other hand, Kordasiewicz (2011, 195) rejects Thomas's ideas and highlights that *nauta*'s obligation was to deliver the cargo.

Nonetheless, the main difference between *locatio loci in navem* and *locatio rerum vehendarum* lay in the liabilities of the contractual parties. The *conductor* was liable *omnis culpa*. Moreover, since the captain's obligation was to ensure the delivery of the goods, he was required to possess adequate knowledge and skills to fulfil this task (*lege artis*). Therefore, if damage occurred due to his lack of abilities and prudence (*imperitia*), the merchant could sue him and seek compensation for damages. In this context, *imperitia* could entail scenarios such as captain recklessly steering the ship during a storm, leading to its sinking, or transferring the goods to a smaller and inadequate vessel resulting in a similar fate (D.14.2.10.1; D.19.2.13.1) (Aubert 1994, 63; Fiori 2022, 192–193). The captain's fault would lie in making poor decisions, whether by disregarding the dangers posed by the waves or winds, or selecting unsuitable watercraft (Ferrándiz 2022, 128). Additionally, the captain would be held liable for the actions of his crew (*culpa in eligendo*), as it was his duty to select competent staff (D.4.9.7.pr); the liability would extend to damages occurring only on-board the ship, regardless the *status libertatis* or *familiae* of the sailors. In practice, this meant that *locator* could compensate the lost only if he gives a proof of captain's *culpa* (Marzec 2019, 36). On the other hand, the merchant was liable for any fault (*omnis culpa*) on his part.

2.2.2.1. Were nautae *liable for* custodia*?*

Concluding *locatio rerum vehendarum*, *nautae*[14] had a greater interest in organizing the safe voyage as failure to deliver the cargo would result in the loss of earnings. However, a significant question remains unanswered: Were they liable for securing the goods entrusted to them, or solely for their delivery? In other words, were they liable for *custodia*[15] (*custodire*) which included cases of *casus minor* such as theft or damage to the cargo by third parties? This question is highly debatable and requires further analysis. However, it is likely that they, in the scope of *ius civile*, were not liable for situations classified as *casus (vis) maior*[16] (D.19.2.15.6).

The root of the problem, that is, the dilemma of whether *nauta* was liable for the *custodia*, lays in the following Gaius's text:

> D.4.9.5.pr. *Gaius libro quinto ad edictum provincial: Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur.*

[14] In a general sense, the term *nauta* encompasses all individuals on board a ship who were liable for its navigation (D.4.9.1.2), including sailors, ship's guards (*nauphylakes*), valets (*diaetarii*), helmsmen (*gubernator / kybernetes*), captains and *exercitor*. However, the word *nauta*, as well as the words *navicularius* and *nauclerus*, were not *termini tehnici*. Noting this problem, Van Oven (1956, 137) correctly indicates that: "*Les textes du Corpus Iuris concernant la responsabilité des nautae et exercitores sont embrouillés, ténébreux, sinon énigmatiques*." Bearing in mind the terminological indeterminacy and fluid use of the term *nauta* in legal texts, in this section of the paper the author uses the term in a twofold manner: both as *exercitor* and as captain, depending of the context in which the word was used.

[15] It is important to note that some Romanists believed that classical jurists regarded the liability for *imperitia* and *culpa in eligendo* as a form of *custodia* (Wieacker 1934, 47; Luzzatto 1938, 189). However, this question remains open, and since it was not the main subject of this paper, the author will not delve into further details (see Danilović 1969b, 341–342). On the other hand, Robaye (1987, 180–181) states that since standard form of liability under *locatio conductio operis* was *culpa*, the captain was liable for *custodia* which was seen as *culpa in custodiendo*.

[16] Some authors argue that the liability of the *exercitor* and *magister navis* was initially considered objective and absolute (see Danilović 1969a, 368). However, historical accounts from Titus Livy and Plutarch (*Cato Mai*. 21.6) suggest otherwise. For instance, Livy (Liv. 23.49) recounts that during the Second Punic War, the Roman state entered into an agreement with publicans for the supply of the Roman army in Spain. This agreement included a clause stipulating that the state would bear the risk of shipwrecks and pirate attacks (also Liv. 25.3). As a result, it was clear that without this clause, the publicans, not the shippers, would have borne the risk of *vis maior* (Danilović 1969a, 368).

> *Nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur.*[17]

From the quoted Gaius's text, we learn that *nauta* does not receive reward (*mercedem*) for safekeeping (*pro custodia*) of the goods and passenger, but rather for transporting them. However, in the subsequent sentence, the jurist asserts that seaman, innkeeper and stable keeper are liable for *custodia*, i.e. safekeeping of the stored goods. The issue arises as to whether Gaius is referring to the rule of *ius civile* – the liability arising from *locatio rerum vehendarum* – or from the *receptum nautarum*, which was more likeable (Kordasiewicz 2011, 206–207). Nevertheless, mere linguistic interpretation cannot resolve the issue, thus we must interpret the Gaius's observation in the context of two Labeo's (D.14.2.10.pr–1) and three Ulpian's (D.19.2.13.1–2. and D.47.5.1.3) texts.

First of all, Labeo addresses whether *nauta* can charge freight when a slave dies on the ship (D.14.2.10.pr). The jurist concluded that if goods are damaged due to a shipwreck, or if a slave dies on board, the *locator* would not have the right to claim freight because the contract has not been fulfilled (*obligation de résultat*), placing the risk (*periculum*) on the *conductor* for his goods. Labeo's text is intriguing because, as Danilović (1969b, 347) astutely observes, it was irrelevant whether the slave died (*mortuum est*) of natural causes (*vis maior*) or was murdered. The irrelevance of the cause of the slave's death suggests that *nauta* was not liable for safekeeping the goods, as Labeo does not delve into his liability for slave's death. On the other hand, Candy (2019, 161–162), referencing to Fiori (1999, 133), concluded that Labeo qualified the death of slave as *vis maior*. Below, Paul supplemented Labeo's assertion, stating that the matter of freight payment in the event of a slave's death hinges on the type of *locatio conductio* agreed upon. The jurist concluded that if determining the specific type is not feasible, *nauta* only had to present the evidences that the slave was aboard the ship.

> D.14.2.10.pr. *Labeo libro primo pithanon a Paulo epitomarum: Si vehenda mancipia conduxisti, pro eo mancipio, quod in nave mortuum est, vectura tibi non debetur. Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi*

[17] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

> *an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium.*[18]

Secondly, Labeo considers the following dilemma: If a shipper has chartered / hired a ship (*condicione navem conduxisti*) for the carriage of cargo and *nauta* needlessly (*necessitate*) tranships the cargo to a less suitable vessel, knowing that the shipper would disapprove (*cum id sciret te fieri nolle*), and the cargo is lost with the ship while being transported, the shipper had an *actio* from *ex conducto locato* against the first *nauta*.

> D.14.2.10.1. *Labeo libro primo pithanon a Paulo epitomarum: Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriorem, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem*.[19]

The quoted text is multi-layered and ambiguous. Firstly, it is unclear which contract the parties concluded – *conductio navis* or *locatio rerum vehendarum*. Labeo uses the phrase *condicione navem conduxisti* to indicate that the ship-owner (*exercitor*?) hired a ship to transport goods (*obligation de moyens*). However, the text also suggests that the obligation of *nauta* (*magister navis*?) was to transport specific goods (*obligations des résultat*), which Accursius in *Magna Glossa* interpreted to mean that the captain had the obligation to deliver the cargo to a precisely specified port (*ad aliquem locum*) (Candy 2019, 166).

According to Fiori (1999, 144–145; 2010, 164–165), this situation represents a mixed contract similar to today's voyage charter, where *nauta* (captain) as a *locator* rents a ship from the ship-owner, while also assuming the role of a *conductor* obligated to deliver the goods to a certain location. Consequently, both parties could use either *actio locati* or *actio conducti* depending on which part of the contract was breached (Fiori 2018, 536–539). On the other hand, Miškić (2024, 148–149 n. 207), referencing Tomas, suggests that elements of the transport of goods by sea prevail in this situation, indicating that it should be viewed within the context of

[18] *Ibid*.

[19] *Ibid*.

locatio rerum vehendarum. Additionally, some scholars argue that the text was interpolated, while others believe that the phrase *condicione navem conduxisti* lacks specific meaning (Candy 2019, 166).

Nonetheless, two points seem indisputable: the captain's liability is undoubtedly based on *culpa*, as he transhipped the goods against the co-contractors' will and chose an unsuitable vessel (Candy 2019, 166). Moreover, the text is significant because it confirms that the term *nauta* was used to denote the captain of a ship (Miškić 2024, 150; opposite Valiño del Río 1967, 381). This fact is crucial for understanding and interpreting the following Ulpian text, which causes significant confusion.

Hereafter, Ulpian poses the following scenario: If a *navicularius* agrees to transport freight to Minturnae but, due to navigational constraints, transfers the goods onto another vessel that ultimately founders at the river's mouth, is the primus *navicularius* liable? Ulpian quotes Labeo, who states that the *navicularius* bears no liability if the incident occurred without his fault (*si culpa caret*). However, if the *navicularius* acted contrary to the owner's instructions, transferred the goods during adverse conditions (such as a storm), or moved the goods to a vessel unsuitable for the task, then the owner of the cargo could pursue legal action against him *ex locato agendum*.

> D.19.2.13.1. *Ulpianus libro 32 ad edictum: Si navicularius onus Minturnas vehendum conduxerit et, cum flumen Minturnense navis ea subire non posset, in aliam navem merces transtulerit eaque navis in Ostio fluminis perierit, tenetur primus navicularius? Labeo, si culpa caret, non teneri ait: ceterum si vel invito domino fecit vel quo non debuit tempore aut si minus idoneae navi, tunc ex locato agendum*.[20]

First of all, the term *navicularius* (gr. *naukleros* / *ναύκληρος*) is highly questionable and amorphous. Watson[21] (1985a, 103) translates it as "*ship owner*", indicating that it was used to denote *exercitor*. On the other hand, Scott[22] translates it as "*master of a ship*" (gr. *pistikos*) i.e., the captain. The question remains open – did Ulpian have in mind the *exercitor* or the *magister navis*? The word *navicularius*, as a noun, is used in most cases by

[20] *Ibid*.

[21] It is noteworthy that in Book L of Justinian's Digesta, the term *navicularii* appears thirteen times. In some instances, Watson (for example 1985b, 425) retains the Latin term, while in others (Watson 1985b, 433), he translates it as "ship owner".

[22] Available at: *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

Roman writers (Cic. II *Ver*. 2.137, 5.153; Cic. *Ad Fam*. 16.9.4; Cic. *Att*. 9.3.2; Tac. *Ann*. 12.55) to designate the ship owner i.e., the person who hires out a vessel for money (see also Casson 1971, 315 n. 67; Salway 2019, 46). However, Lewis & Short (1958, 1192) Salway (2019, 46) and Miškić (2024, 97) write that the word could also be translated as "*ship master*" i.e., the captain. Without delving into a deeper linguistic analysis of the word, the author believes that it is correct to translate the word both as "ship owner" and as "ship master" depending on the context in which the word is used (see *CIL* III 14165). Therefore, if we read Ulpian's text (D.19.2.13.1) carefully, we can assert that all described actions were attributed to the captains, not to the *exercitor*: closing the deal (*vehendum conduxerit*), navigating the vessel, making the decision regarding which ship is suitable for further sailing, and organizing the transfer of the goods from one vessel to another (*merces transtulerit*). Moreover, if we use an analogy with the previously cited Labeo's text (D.14.2.10.1), we can assert that it was common to use the terms twofold, and that the jurists were discussing the captain's liability from *locatio conductio*.

Nonetheless, the author believes that the mentioned text implies that the captain's liability was subjective, indicating that he was held accountable due to negligence. This negligence stemmed from actions such as transhipping the goods against the owner's wishes or transferring them onto an unsuitable vessel, despite being aware of its inadequacy. The absence of liability for *custodia* is obvious, as the captain would otherwise be held liable for the cargo's loss regardless of his conscientiousness. While there is a dispute regarding the text's authenticity (see Thomas 1960, 502–503; Van Oven 1956, 148), Danilović (1969b, 347–348) contends that it is Ulpian's original text which discusses a real event, since the jurist mentions the specific river where the failed transhipment occurred. Furthermore, a systematic interpretation of the text in connection with D.14.2.10.1. *Labeo libro primo pithanon a Paulo epitomarum* suggests that the phrase *"si culpa caret"* is attributed to Labeo. The jurist likely denotes the captain's negligence, rather than clearly defining an abstract degree of guilt. Labeo operates within the principle of *bona fides* and asserts the captain's liability for incompetence and carelessness (*faute contractuelle*) based on the principles of *locatio conductio*.

Afterwards, Ulpian notes that if a captain enters a river from the sea without the assistance of the helmsman, and the ship subsequently sinks, passengers have the right to *actio locati* (D.19.2.13.2). According to one interpretation, by not seeking assistance from the helmsman, the captain clearly violates the principles of *bona fides*, and the consequences of his negligence result in the ship's sinking, even though the act of shipwreck

itself is considered force majeure. On the other hand, this could refer to a breach of a contractual provision. Namely, river navigation was rather risky due to the swift streams or currents, rapids, waterfalls, narrows, and the particular difficulties of night sailing (Adams 2012, 227). Because of all these, the shipping contracts often had a specific clause[23] such as the one (P. *Ross. Georg*. II 18) concerning the navigation on the Nile which stipulated that the captain must anchor at the safest and designated anchorages at the proper hours during the night (Adams 2012, 227; see also 2018, 175–208).

> D.19.2.13.2. *Ulpianus libro 32 ad edictum: Si magister navis sine gubernatore in flumen navem immiserit et tempestate orta temperare non potuerit et navem perdiderit, vectores habebunt adversus eum ex locato actionem*.[24]

Lastly, Ulpian states that if goods are stolen, there were two options: owner could either sue the *exercitor* with the praetorian *actio furti adversus nautas* or sue the actual thief with civile *actio furti* (D.47.5.1.3). According to Gaius's Institutions, in classical law, the *actio furti* could be initiated not only by the owner but also by individuals whose interest was in securing the property (*cuius interest rem salvam esse*) (G. *Inst*. 3.203), first of all one liable for *custodia* (G. *Inst*. 3.205–207; see Rosenthal 1951, 217–265). Since only the owner of the stolen goods could bring an *actio furti* against the actual thief, we can infer that the *exercitor* was not considered liable for *custodia* in the context of *locatio rerum vehendarum* (Danilović 1969b, 348). This is particularly evident from Gaius's text, where he specifies that, based on *locatio conductio operis*, only the clothier and the tailor were held liable for *custodia* (G. *Inst*. 3.205).

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[23] Labeo's text (D.14.2.10.pr) incorporates Paul's commentary, which distinguishes the merchant's liability for paying freight. In cases where it is uncertain which contract has been concluded – whether it is the *locatio rerum vehendarum* discussed by Labeo or any another – the captain could demand freight if he can prove (*probaverit*) that the goods were loaded (*impositum esse*) on board, even if they were not carried (*deportati*) to their destination. In this peculiar situation, it is assumed that none of three *locatio conductio* has been concluded, but special contract, likely originating from maritime customary law, characterized by an *obligation de moyens* (Fiori 2022, 189). This contract included an atypical clause that scholars named *navigationsklausel*, which stipulated that the transportation of goods should only occur during daylight, under calm water conditions, with the obligation for the ship to dock in port every day (Fiori 2022, 189). Fiori (2022, 189) further notes that the captain's liability encompassed both delivering and safeguarding the goods. However, he would not be held liable for *vis maior*, and if the cargo was not delivered, he could still demand freight payment.

[24] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

> D.47.5.1.3. *Ulpianus libro 38 ad edictum: Cum enim in caupona vel in navi res perit, ex edicto praetoris obligatur exercitor navis vel caupo ita, ut in potestate sit eius, cui res subrepta sit, utrum mallet cum exercitore honorario iure an cum fure iure civili experiri*.[25]

Despite the observed controversies in the previously cited texts, primarily caused by the terminological inaccuracy of Roman jurists, the author believes that the captains, as well as *exercitor*, were not liable for *custodia*. Bearing in mind that the linguistic interpretation of the texts does not provide satisfactory and credible answers, a systematic interpretation allows us to conclude that, within the framework of *locatio conductio vehendarum*, the *exercitor* and captain were liable for negligent.

2.2.2.2. *The* receptum nautarum *and introducing liability for safekeeping the goods*

Sailors in ancient times were often regarded unfavourably (D.4.9.3.1; D.47.5.1.pr). *Nautae* frequently engaged in fraudulent activities such as collaborating with pirates or staging shipwrecks to evade their contractual duties (Liv. 25.3) (Zimmerman 1990, 516).[26] These practices were common and lucrative because under *locatio conductio* they were liable only for the delivery – not the safety of the cargo (Schulz 1960, 540; Thomas 1960, 495; Robaye 1987, 86–88; Zimmerman 1990, 519; opposite Földi 1993, 286). In response to these malpractices (*hoc genus hominum*), the praetor[27] introduced a special *in factum actio* (D.4.9.3.1), later named *actio de recepto*.

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[25] *Ibid*.

[26] Livy (Liv. 25.3) reports that, in the event of a shipwreck, the state assumed all costs. This policy led many merchants to deliberately sink their ships to claim compensation. During the Second Punic War, one such case of fraud was reported to the praetor Marcus Aemilius, who brought the matter to the senate. However, the senate refrained from punishing the carriers, fearing that doing so might provoke their anger and jeopardize the supply of the Roman army. On the other hand, the public reacted strongly to this leniency. In response, the tribunes of the plebs, Spurius and Lucius Carvilius, imposed a fine of two hundred thousand sesterces on the merchant Marcus Postumius.

[27] The Praetor's Edict *De Receptum Nautarum* has become a part of the European *ius commune* and is still in force in South Africa (Zimmerman 1990, 520). Additionally, many codifications (for example *Code Civil*) prescribe strict liability for shippers regarding the safekeeping of goods. The main characteristics of their liability for cargo are that it is *ex contractu*, subjective with presumed fault, and legally limited, as outlined in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (Trajković 1997, 121–123).

Based on a previously concluded *receptum*[28], the owner of the goods could sue *nauta* if he failed to transport and deliver the goods without damage (Buckland 1921, 528). This innovative solution, in a form of an additional security, introduced liability for *custodia*[29] in contracts for transportation of goods by sea (D.4.9.5.pr) (Kunkel 1949, 240; Girard 1918, 618; Marzec 2019, 36).

> D.4.9.3.1. *Ulpianus libro 14 ad edictum: Ait praetor: "Nisi restituent, in eos iudicium dabo". Ex hoc edicto in factum actio proficiscitur. Sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: sed si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. Miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui receperit tenetur; ...*[30]

Paul's text clarifies this (D.4.9.4.pr). The jurist states that in cases of theft, the *nautae* could bring *actio furti*, as they bore the risk (*periculo*) for the merchandise, despite not being the owners of the goods. Furthermore, Paul confirms that this applies not only to theft but also to damage to goods (D.4.9.5.1). Comparing D.4.9.4.pr. *Paulus libro 13 ad edictum* with previously analysed D.47.5.1.3. *Ulpianus libro 38 ad edictum*, it confirms

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Similar to Roman law, the shipper is obliged to compensate for damages if he personally causes them or if any of his employees do so (*culpa in eligendo*). Conversely, the shipper's liability for the safekeeping of goods (*ex recepto*) falls under his general liability based on the concluded contract for the carriage of goods by sea. The degree of care required in the contractual relationship in modern law is referred to as "the diligence of a prudent shipper", which includes liability for even the slightest negligence (*culpa levissima*). The norms regarding the liability of the shipper are of a dispositive nature, and the grounds for exemption from liability in Serbian law are provided by the Law on Merchant Shipping, *Službeni glasnik RS* br. 96/2015 i 113/2017 – dr. zakon (see also Trajković 1997, 128–150).

[28] Besides the *receptum nautarum*, Scaevola writes (D.22.2.5.pr–1) that in contracts for transporting goods by sea, there could existed additional pact (*pacta adiecta*) that increased the obligation of the debtors.

[29] Consequently, as Ulpian states, in the case of theft the merchant would not have *actio furti*, but *nauta*, since he incurs the risk of safekeeping (D.47.5.1.4).

[30] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

that under *locatio conductio*, *nautae* were not liable for *custodia*, but they became so after the introduction and conclusion of the *receptum*. Moreover, this interpretation could be supported by Suetonius (St. *Claudius* 18.11–13; 20.3. and 14–21), who writes that Emperor Claudius rebuilt the docks in Ostia and allowed merchants to earn good profits by assuming the risk of damage caused by shipwreck. The same emperor issued an edict which stipulated that shippers of Latin origin (*nave Latinus*) acquired citizenship if they had built a ship with a volume of no less than ten thousand *modii* and supplied Rome with grain for six years (Ulp. *Reg*. 3.6; St. *Claudius* 18.13–15). Both sources indicate the immeasurable importance of seafaring for Roman Empire.

> D.4.9.4.pr. *Paulus libro 13 ad edictum: Sed et ipsi nautae furti actio competit, cuius sit periculo, nisi si ipse subripiat et postea ab eo subripiatur, aut alio subripiente ipse nauta solvendo non sit.*[31]
>
> D.4.9.5.1. *Gaius libro quinto ad edictum provinciale: Quaecumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.*[32]

The introduction of the *actio de recepto* represented a significant shift in maritime law enhancing the protection of merchants against the ignominious practices of the participants in the maritime venture. In that regard, several scholars have debated the emergence and implications of this legal remedy. For example, Kordasiewicz (2011, 197 n. 28) and Candy (2019, 229) vaguely conclude that the edict on the *actio de recepto* was adopted after the introduction of the actions on letting and hiring (opposite Van Oven 1956, 138; Földi 1993, 278–279) and Zimmerman (1990, 517) that it was younger than the *actio furti adversus nautas* and *actio damni adversus nautas*. On the other hand, De Robertis (1952, 42) suggests that the *actio de recepto* was introduced around 200 BC and Danilović (1969a, 366) after the passing of *Lex Aebutia* (around 150 or 130 BC) which legalized the formulary procedure and expanded the praetor's powers. Moreover, Thomas (1960, 504–505) suggests that it was a creation of an unknown Augustan jurist. Discussing its origin, Mitteis (1898, 203), Partsch (1908, 416) and Danilović (1969a, 377) note that the *receptum* drew from Greek customary

[31] *Ibid*.

[32] *Ibid*.

law (similarly Kunkel 1949, 240) and that was later incorporated into Roman law under the framework of *ius gentium*. *A contrario*, Zimmerman (1990, 516) and Földi (1993, 276) do not mention the Greek origin of the *receptum*, but suggest that it was an informal guarantee which *nautae* used to give in order to attract potential customers.

Concerning the *receptum*, several questions arise: what was its legal nature, what degree of liability did *nautae* assume and how did it change over time? However, the most intriguing and puzzling question relates to the influence of the *receptum* on the internal relationship between the *exercitor* and the *magister navis*.

First of all, we must highlight that modern Romanists believe that *nauta* could be liable under the *actio de recepto* only if he had concluded special agreement to bear the risk for the goods taken over (Danilović 1969a, 369–376; Kaser 1974, 236). On the other hand, the question arose as to whether this agreement was an independent pact (Huvelin 1929, 135–159; De Robertis 1952, 74; Schulz 1960, 539; Betti 1962, 373), a unilateral undertaking of an obligation (Van Oven 1956, 139), *accidentale negotium* (Brecht 1962, 99–112; Zimmerman 1990, 520) or *naturale negotium* (Kunkel 1949, 240; Kaser 1974, 236; Földi 1993, 267) of *locatio conductio*.

Most likely, the *receptum* emerged as an independent *pacta*, since after its conclusion the party had two legal remedies: *actio locati* or *conducti* from *locatio conductio* and *actio de recepto* from *receptum*. Moreover, Ulpian's text (D.4.9.1.7) testifies that for transporting the same goods, one person could enter into *locatio rerum vehendarum* and another into *receptum*. Probably, during the late classical period, the liability of *nauta* from *receptum* became an integrative part of contracts for carrying goods by sea (Zimmerman 1990, 520). On the other hand, Danilović (1969a, 376) believes that *receptum* did not become *naturalium negotii* of *locatio conductio*, that it was an independent pact (1969a, 371) and that in practice both legal transactions were concluded simultaneously by the same persons (1969a, 376). She argues that the *receptum* was perceived as a standard form contract (contract of adhesion or leonine contract) because shippers publicly announced the conditions of transportation and the tariffs for the transportation of cargo. The price of the transport depended on whether the goods were transported with the assurance of *salvum fore restituere* or not (Danilović 1969a, 376), since *receptum* was *negotia onerosa* (D.20.4.6.1) (Buckland 1921, 528; Purpura 2022, 115).

Secondly, the texts raise the question of whether *nauta* was liable only for *custodia* or also for force majeure. Interpreting Labeo's opinion (D.4.9.3.1), the *communis opinio doctorum* (for example Kunkel 1949, 240; Schulz 1960, 539; Zimmermann 1990, 515; Földi 1993, 265; Marzec 2019, 36) is that

initially he was liable for all damages, including those caused by *casus* (*vis) maior*. However, from the time of classical law, possibly starting with Labeo's era, this liability was relaxed. Labeo writes that if the cargo was destroyed due to actions beyond human control (pirate attacks or sea disasters) *nauta* would be granted an exception (*exceptionem ei dari*) to the merchant's lawsuit since the *actio de recepto* was *stricti iuris* (Zimmermann 1990, 515). In practice, this meant that the merchant could only claim the value of the destroyed goods (*damnum emergens*), not the *lucrum cessans*, if the cargo was lost for a reason that excludes the actions of force majeure (Mišković 2024, 146–147). Most likely, the *exceptio Labeoniana* was introduced[33] after the affirmation of principles of *aequitas* and *bona fides*, as well as the structuring of contractual liability in classical law based on *dolus*, *culpa* and *custodia* (Molnár 1990, 152; Földi 1993, 280). Initially, it only covered the cases of shipwrecks and pirate attacks, but in Ulpian's time it refers to all cases that were treated as force majeure, since he speaks of *damno fatali* (Salazar Revuelta 2006, 1086 n. 5).

> D.4.9.3.1. *Ulpianus libro 14 ad edictum: ... at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. ...*[34]

[33] Although sailors had a bad reputation in Rome, the sources provide some positive examples and testify to the change of attitude towards them over time. A recently discovered bronze tablet in Rome from 78 BC contains the text of a *Senatus Consultum* granting great privileges to three Greek captains: Asclepiades of Clazomenae, Polystratus of Carystus, and Meniscus of Miletus (Terpstra 2011, 220). The Senate rewarded their distinguished roles in the *Bellum sociale* or Sulla wars (*τοῦ πολέμου τοῦ Ἰταλικοῦ*) and, as *amici populi Romani*, they were given financial benefits (freedom from liturgies, restitution of property sold during their years of service) and were granted such high honours as the right to offer sacrifices on the Capitol and the right to speak in the Senate (Terpstra 2011, 220).

On the other hand, privileges engraved on tablets and placed on the Capitol were not given only to individuals but to whole families or communities, like the Aphrodisians in 39 BC (Terpstra 2011, 221). We know that Vespasian attempted to find copies of three thousand such tablets destroyed by fire, which contained alliances, treaties, and special privileges granted to individuals (Terpstra 2011, 221–222). Although these privileges were not common, they testify that at the end of the Republic and the beginning of the Principate, there was an increase in trust in seafarers and the professionalization of this activity. In all these circumstances, we can seek *raison d'être* for the introduction of *exceptio Labeoniana*.

[34] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024. See Lenel 1929, 1–6.

In the context of *nauta*'s liability based on the *receptum*, the question arises as to which goods he took liability for – whether he bore the risk for all the merchandise brought on board or only specifically designated ones. According to one group of authors (for example Földi 1993, 267), *nauta* was liable for all items brought on board; Földi (1993, 281) concludes that this practically meant his liability transcended the liability for *custodia.* On the other hand, another group of authors (for example Danilović 1969a, 369–376; Kordasiewicz 2011, 204; Purpura 2022, 114) argues that *nauta* was liable exclusively for precisely specified, marked and handed over goods. This includes the goods on-board, as well as the merchandise on the shore (D.4.9.3.pr). Both Ulpian and Pomponius states that the edict acts covered of all passengers (D.4.9.1.8; D.4.9.3.pr), not only the members of the crew as was the case in the context of *actio furti adversus nautas* and *actio damni adversus nautas* (Kordasiewicz 2011, 204).

However, we must differentiate whether the goods were *species* or *genera*. If they were *species*, most likely *nauta* was liable only for marked cargo that could be identified upon the delivery (*χειρέμβολον*[35]). On the other hand, if the goods were *genera* (D.19.2.31), as in the case of shipping in bulk, the *mutatio dominii* occurred and *nauta* became the owner of the cargo. Consequently, he was liable not for the delivery and safekeeping of that exact grain, wine or oil, but rather for delivering the same quantity and quality of the merchandise, even in the case of *vis maior*, since *casum sentit dominus* (Purpura 2022, 114).

Furthermore, Ulpian (D.4.9.1.6) and Paul (D.4.9.4.2) paraphrase Vivianus' opinion that *nautae* were liable for passengers' personal belongings, such as clothing and daily provisions, even though fright was not paid for them. The two texts differ slightly, as Paul's version indicates that Vivianus held this position for property brought onto the ship after the contract (*locatio conductio*) had been concluded and the cargo loaded. Even though no *vectura* was owed for these items, they were still regarded as part of the agreement. This suggests that before the Vivianus' intervention, the liability from *receptum* covered only explicitly listed goods (Candy 2019, 210). The captain could waive liability if he declared that passengers were liable for their belongings (D.4.9.7.pr). This was not a unilateral declaration of will but an exculpatory clause of *locatio conductio*, as Ulpian notes that the passengers had to agree to it.

[35] See Purpura 2014, 127–152.

> D.4.9.1.6. *Ulpianus libro 14 ad edictum: Inde apud Vivianum relatum est, ad eas quoque res hoc edictum pertinere, quae mercibus accederent, veluti vestimenta quibus in navibus uterentur et cetera quae ad cottidianum usum habemus*.[36]
>
> D.4.9.4.2. *Paulus libro 13 ad edictum: Vivianus dixit etiam ad eas res hoc edictum pertinere, quae post impositas merces in navem locatasque inferentur, etsi earum vectura non debetur, ut vestimentorum, penoris cottidiani, quia haec ipsa ceterarum rerum locationi accedunt*.[37]

Lastly, we must examine who concluded the *receptum*, who was the defendant (*nauta*), and how this affected the relationship between the *exercitor* and the *magister navis*. The controversy lies in the fact that the *receptum* was concluded by the captains with the owners of goods or passengers, yet the liability was borne by the *exercitor* (D.4.9.1.2). Pomponius clarifies that the *exercitor* could be held liable only if the *receptum* was concluded by the captain[38], not by an oarsman (*remigem*) or ordinary seaman (*mesonautam*). However, if he orders the oarsman or common sailor to enter into this agreement, Pomponius or Ulpian adds that he will be under an obligation; the same goes for persons in charge of ship's security – the guards and the valets (D.4.9.1.3). Nonetheless, in the texts discussing the matter of *receptum nautarum*, the term "*nauta*" refers to the *exercitor*, who was always the defendant in disputes based on this agreement, albeit concluded between the captain and third parties. According to Cvetković-Đorđević (2020, 134) this was a rare example of direct representation in Roman law.

> D.4.9.1. *Ulpianus libro 14 ad edictum: 2. Qui sunt igitur, qui teneantur, videndum est. Ait praetor "nautae". Nautam accipere debemus eum qui navem exercet: quamvis nautae appellantur omnes, qui navis navigandae causa in nave sint: sed de exercitore solummodo praetor sentit. Nec enim debet, inquit Pomponius, per remigem aut mesonautam obligari, sed per se vel per navis*

[36] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[37] *Ibid*.

[38] Labeo writes that the same applies on those in charge of a boat or boatmen (D.4.9.1.4).

> *magistrum: quamquam si ipse alicui e nautis committi iussit, sine dubio debeat obligari. 3. Et sunt quidam in navibus, qui custodiae gratia navibus praeponuntur, ut naufulakes et diaetarii.* ...[39]

Bearing in mind that the *exercitor* bore the entire liability for the success of the maritime venture, it remains unclear what implications the conclusion of the *receptum* had on the internal relationship between him and the captain. Although the sources do not provide unequivocal confirmation of this position, if the captain is guilty of the resulting damage or if his actions contributed to the occurrence of the damage – which, in addition to liability for negligence (*culpa*), also includes liability for employees (*culpa in eligendo*), incompetence (*imperitia*), and theft[40] committed by the crew or third parties (*casus minor*) – there would be a division of liability between the captain and the *exercitor* (Miškić 2024, 147). Most likely, the *exercitor* would acquire the right to a regressive claim against the captain, commensurate with his share in the total damage, after he, as the sole debtor from the *receptum*, fully compensated the damage to third parties.

2.2.3. Lex Rhodia de iactu

Roman law recognized specific liability for contracting parties based on the *locatio rerum vehendarum* in case of so-called "general average". This principle applied when it was necessary to sacrifice part of the cargo to save the ship and the remaining goods. The resulting damage was proportionally shared by the owners of the salvaged goods (D.14.2.2.pr). This rule, still in effect and known as the "Rhodian Sea-Law on Jettison" (*Lex Rhodia de iactu*), was likely of Phoenician origin (Miškić 2022, 201) and adopted by the Republican jurists from the customary law of the port of Rhodes (Candy 2019, 176).[41] Two slightly different texts by Paul and one by Maecius regarding its content and implications in Roman law are preserved:

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[39] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[40] The jurists debated whether the owner of the goods could bring an *actio furti* or an *actio de recepto* if the goods were stolen. Ulpian writes that Pomponius was doubtful, but concludes that either by application to the judge or the defence of fraud, plaintiff ought to be restricted to one or the other (D.4.9.3.5).

[41] In *De Officiis* (Cic. *de Off*. 3.63. and 89), Cicero references an intriguing philosophical treatise by the Greek Stoic philosopher Hecaton of Rhodes (*Ἑκάτων*). In the sixth book on his work "On Moral Duties" (*De Officiis*), dedicated to Quintus Tubero, Hecaton presents a moral dilemma: in the event of general average, which should be thrown overboard first – a valuable horse or an inexpensive slave? The dilemma

> Paul. *Sent.* 2.7.1: *Levandae navis gratia iactus cum mercium factus est, omnium intributione sarciatur, quod pro omnibus iactum est.*[42]
>
> D.14.2.1. *Paulus libro secundo sententiarum: Lege Rodia [Rhodia] cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*[43]
>
> D.14.2.9. *Maecianus ex lege Rhodia: Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ <Ἰκαρίᾳ> διηρπάγημεν ὑπὸ τῶν δημοσίων <δημοσίωνῶn> τῶν τὰς Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὔγουστος ἔκρινεν.*[44]
>
> *Id est: Petitio Eudaemonis Nicomedensis ad imperatorem Antoninum. Domine imperator Antonine, cum naufragium fecissemus in Italia (immo in Icaria), direpti sumus a publicis (immo a publicanis), qui in Cycladibus insulis habitant. Antoninus dicit Eudaemoni. Ego orbis terrarum dominus sum, lex autem maris, lege Rhodia de re nautica res iudicetur, quatenus nulla lex ex nostris ei contraria est. Idem etiam divus Augustus iudicavit.*[45]

Maecianus' text is the most significant in understanding the legal nature and application of the Rhodian Sea-Law. The text recounts the case of Eudaimon from Nicomedia, who sought legal instruction from Emperor Antoninus (Pius or Aurelius) on how to resolve a dispute with local authorities on the island of Cyclades, near which his ship was wrecked and the goods he was transporting were confiscated. The emperor replied that in such a situation, the provisions of the Rhodian Sea-Law should be applied, as well as the decision of Octavian (Augustus) that regulates this area. From this, we can draw several conclusions. First, the so-called Rhodian Sea-Law

centers on whether to prioritize personal interest or humanity. Hecaton argues in favor of prioritizing the former, a stance that Cicero cites as a negative example, criticizing any action that places self-interest above humanity.

42 *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

43 *Ibid*.

44 Candy 2019, 173.

45 *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

was not a single provision, as reported by Paulus, but most likely, as Candy (2019, 177) notes, an existing customary legal framework adopted by the Romans. Secondly, it appears that it was not a promulgated law, i.e., *lex*, but rather a body of laws which did not conflict with the existing Roman legal structure and it was considered in the context of *locatio conductio*, but also as a part of an autonomous set of rules (*lex*) (Candy 2019, 175 and 177).

If the general average occurred, the process unfolded as follows. Firstly, the owners of the destroyed goods would bring an *actio locati* against the ship's captain. Secondly, after settling the debt, the captain would then acquire the right of recourse against the shippers through an *actio conductio*, demanding a proportional settlement of the debt (D.14.2.2.pr). According to Servius' the shipmaster also acquired the right to retain (*retentio*) the goods until his damages were settled (D.14.2.2.pr). The total loss was apportioned based on the market value of the property, and it was necessary to consider the value of all property except what was placed on the ship for consumption purposes, such as foodstuffs (D.14.2.2.2). The calculation of the share in the damage was carried out only if the cargo was jettisoned and the ship was saved (Paul. *Sent*. 2.7.5).

We do not know much about the application of Rhodian Sea-Law from the period of the Republic and the early Principate. A number of authors advocate the thesis that the legal situation described above took place on the basis of previously concluded pacts (De Martino 1938, 22 and 210–211; see also Candy 2019, 179 n. 200). On the other hand, Wieacker (1953, 517) and Cardilli (1995, 266) claimed that initially, the captain acquired the right to an *exceptio ex iure tretii* against those merchants who sued him for damages, even though they had not previously paid their share. Regarding this statement, Candy (2019, 180) assumes that in Paul's time, the captain had an *actio conducti* directly against the merchant who did not pay his share. Furthermore, the same author states that initially only the *magister navis* could be sued *ex locato*, while giving him an action *ex conducto* was a later innovation (Candy 2019, 180).

Lastly, it is worth noting that Roman jurists, by analogy, applied the provisions of the Rhodian Sea-Law to all *locatio conductio*, not only *locatio rerum vehendarum*, which included maritime venture, as well as in a several related situations: the jettison of the ship's gear, the ransoming of merchandise from pirates, the loss of goods that had been offloaded to lighten a vessel, and damage caused to goods on board while the act of jettison was taking place (Candy 2019, 190).

3. CONCLUSION

The role of a ship's captain in Roman maritime law was crucial for ensuring the safe transport of goods across the seas since, according to Ulpian, his primary duties were to hire the ship and crew, transport goods or passengers, and sell commodities for a fixed freight. The relationship between the captain and the *exercitor*, i.e., *dominus negotii*, depended on whether the captain was a slave, *alieni iuris*, or a free man. If the captain was under *patria potestas* or a slave, his *pater familias* or master assumed full liability for his actions. In such circumstances, the captain had no legal capacity to enter into contracts with third parties, making any agreement merely a natural obligation. Conversely, if the captain was a free person, the *exercitor* appointed him through *locatio conductio operis*, in which case he was liable *omnis culpa*, including liability for *imperitia* and *culpa in eligendo*.

On the other hand, the relationship between the captain and merchants or passengers was more complex and depended on the type of contract they concluded. In the case of *conductio navis* or *locatio loci in navem* – both forms of *locatio conductio re* – the *magister navis* undertook to provide a ship or a place on the ship for the transport of goods, but was not liable for delivering the merchandise to the port. The merchants paid *merces* only for that service. Liability for the goods rested exclusively with the *conductor*, and if any mishap occurred to the cargo, the *locator* would not be held liable, as his liability was limited to handing over the ship in sailing condition.

By contrast, in the case of *locatio rerum vehendarum*, the captain's obligation was not to provide free dock space but to transport the goods. At the beginning, the captain's liability was limited to delivering the cargo, not ensuring its safekeeping. This limitation often led to fraudulent activities, such as collusion with pirates or false claims of shipwrecks. Most likely introduced in the late Republic, the *receptum nautarum* was a special agreement that extended the captain's liability to include the safekeeping of goods. Although it initially functioned as an independent *pactum*, by the end of the classical period it had become an integral part of the contract for the transport of goods by sea.

There are two opposing theories regarding the origin of the *receptum*: some scholars argue it derives from Greek law, while others suggest it originated from customary law. Additionally, Romanists debated whether the captain was liable for all the goods on the ship or exclusively for specially marked items. Most likely, if the goods were *species*, the captain was liable only for marked cargo that could be identified upon delivery. If the goods

were *genera*, he was liable for delivering the same quantity and quality of merchandise. Unless otherwise agreed, the captain was also liable for the passengers' personal belongings.

After the introduction of the *receptum*, the relationship between the *exercitor* and the captain regarding liability became more complex since the *receptum* was concluded by the captains, yet the liable one was the *exercitor*. While Roman sources do not explicitly clarify all aspects of this relationship, it is likely that *nautae* were held liable for damage caused by negligence (*culpa*), the actions of the crew (*culpa in eligendo*), incompetence (*imperitia*), theft by sailors or third parties (*casus minor*), and, until the inception of the *exceptio Labeoniana*, even for force majeure (*vis maior*). If the captain was found guilty of causing the damage or if his actions contributed to it, liability would be shared between the captain and the *exercitor*. Once the *exercitor* compensated third parties for the total damage under the *receptum*, he would likely have a regressive claim against the captain for a proportionate share of the loss.

Finally, in the case of general average, where part of the cargo was deliberately sacrificed to save the ship and the remaining goods, the damage was shared proportionally by the owners of the salvaged goods. The owners of the jettisoned goods would first bring an action against the ship's captain. Once the captain settled the debt, he would then have the right of recourse against the shippers, demanding a proportional contribution for the loss, which ensured a fair allocation of the financial burden resulting from such maritime incidents.

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/ПРИКАЗИ

Boris BEGOVIĆ, PhD*

Seabright, Paul. 2024. *The Divine Economy: How Religions Compete for Wealth, Power, and People***. Princeton & Oxford: Princeton University Press, 485.**

> 'It was pride that changed angels into devils; it is humility that makes men as angels.'
>
> Saint Augustine

To an outlander of the academic economists' tribe, the book's title – *The Divine Economy* – could sound like a *contradictio in adjecto*, prompting a rhetorical question: How on Earth can anything in the economy be divine? Nonetheless, none of the initiated tribesmen are surprised about the title, for two good reasons.

First, the economics of religion is, while perhaps a bit exotic, a well-established discipline within the trade, even codified in the *Journal of Economic Literature* (code Z12), and it features a wide range of contributions by outstanding economists. This was demonstrated almost 30 years ago in an

* Professor (retired), University of Belgrade Faculty of Law, Serbia, *begovic@ius.bg.ac.rs*, ORCID iD: 0000–0001–7343–190X.

introductory overview of the economics of religion (Iannaccone 1998). Such a development is not unexpected, considering that the seminal contribution of Adam Smith, the founding father of economics, dealt with the economics of religion, particularly the issue of inter-confessional competition (Smith 1776). A recent comprehensive review on the relationship between religion and economic growth (Becker, Rubin, Woessmann 2024) substantiated not only that there is a significant impact of religion on all four ingredients of economic growth (capital, labour, human capital, and total factor productivity), but also that there are numerous valuable academic contributions in the field. As the question of the origin of economic growth is still widely debated (with institutions and culture as the main competitors, at least up to a point), the reviewed academic pieces (both theoretical and empirical) are essentially contributions to the growth theory, one of the most important theories in economics.

Second, Paul Seabright, the author of the book, is well known in the economists' community as a researcher who prefers to explore the fringes of mainstream of modern economics. Two of his previous thought-provoking books – *The Company Strangers: A Natural History of Economic Life* (Seabright 2010) and *The War of the Sexes: How Conflict and Cooperation Have Shaped Men and Women from Prehistory to the Present* (Seabright 2012) – with their rather iconoclastic topics, testify to the author's preferences towards unconventional subjects, but also about the profoundness of his research. The author is definitely not a stranger to exotic intellectual territories. From the beginning, the stage is set for the reader's sheer intellectual pleasure.

The insightful introductory story from Ghana, based on a personal encounter, portrays a young woman, who despite her poverty and precarious job 'gives money to the church, by paying tithes – the traditional 10 percent of her tiny income – as well as by giving to the collection during services, which brings the total she gives up to around 12 percent' (p. 3). According to the author, she is quite rational, thoroughly aware of the opportunity costs of her deeds, i.e. this money cannot be used for other purposes, and she contributes recurrently and completely voluntarily, without any coercion – she is not a prisoner of her church. On top of it, the pastor of her church 'drives a large Mercedes, and wears a belt with a big round buckle decorated with a dollar sign' (p. 3). This demonstrates the power of religion, based on the free-will decisions of the individual. The other insightful introduction story is well-known to the public: the 2022 endorsement by Russian Orthodox Church Patriarch Kiril of his country's full-scale war against Ukraine. He urged soldiers to fight 'as their patriotic duty, and promised them that "sacrifice in the course of carrying out your military duty washes away all sins"' (p. 5). These two episodes provide the frame for specifying the

book's topic: 'about how the world's religions have gained such power, what they do with it, and how abuses of this power can be constrained' (p. 6). The book's topic is further developed into the task of answering three crucial and difficult questions that many standard accounts of religion struggle to respond to. The first one is: What are the needs of individual human beings to which religious movements speak? The second is organisational: Why do religious movements take so many distinctive forms, from tiny cults to vast international organisations? The third question is political, in the broadest sense of the word, and it deals with the power of religious organisations and their use and abuse.

The author's answers to these questions are deeply embedded in economics. As he points out, 'Religious movements may preach in poetry, but for their work to be effective they must minister in prose. They must be the fruit of system, not just of serendipity – and the more modern the movement, the more important is the system' (p. 7). Furthermore, '[w]ithout economic resources behind them, the most beautifully crafted messages will struggle to gain a hearing in the cacophony of life' (p. 8).

In short, in the very beginning of the book, in the introductory chapter, it becomes clear that there are two cornerstones of the analysis in the book and consideration of the 'divine economy'. First, '[r]eligions, in short, are businesses. Like most businesses, they are many other things as well – they're communities, objects of inspiration or anxiety to observers from outside, cradles of ambition and frustration to their recruits, theaters of fulfilment or despair to those who invest their lives or their savings within them' (p. 8). According to the author, religions, as legitimate businesses, need to be understood in terms of their organisation as well as in terms of the mission they inherit from their founders. In business economics terms, what needs to be understood is the current structure of these businesses, their logistics, and their corporate culture.[1]

Second, quite novel and, it seems, a much more promising and intriguing cornerstone of the analysis is the author's approach based on the insight that religious organisations are platforms. 'What this book will show is both

[1] In his review of the book, Becker (2024, 1692) claims that the characterisation of religious organisations as businesses is 'a bit overemphasised, considering that even in the richest countries, many churches are small local churches, run by business amateurs'. Be that as it may, there are small business establishments run by business amateurs in all the countries in the world, but still, they are businesses. Furthermore, both divine and secular small businesses have been surviving (though not all of them) for many decades, even centuries. Perhaps divine small businesses have been even more resilient than secular ones.

simple and novel. Religious movements are a special kind of business – they are *platforms*. Platforms are organizations that facilitate relationships that could not form, or could not function as effectively, in the platforms' absence. Platforms reward those who create and manage them by appropriating some of the benefits those relationships make possible' (p. 15, italics in original).[2] The author provides ample evidence about religious organisations as platforms, and the platform approach enables him to offer convincing answers to some difficult questions about these organisations. This is quite a novel and insightful approach.

The platform approach, although novel, is a further development of the path-breaking club approach, i.e. applying the economic theory of clubs to religious organisations (Iannaccone 1992).[3] In the author's view of the club approach, '[t]he club's members would enjoy some collective benefit – such as a certain quality of worship and ritual – and they would pay a price that was the "entry fee"; higher entry fees typically signaled a higher quality of the collective benefit' (p. 98). The point is that the economic club approach deals only with joint consumption and the utility generated out of it. Seabright explains that '[t]he platform model takes the idea a step further. Members of platforms are more than consumers of the benefits that are provided for them – they are assets of the platform, and active in the delivery of such benefits to each other. And what they are paying for is not just a generalized good, available to everyone, but specifically access to other members of the quality that the church can credibly promise to give them' (p. 99).

With all the methodological details sorted out and carefully explained to the reader, the curtains rise, and the book's four parts follow like four acts of well-written drama. Part One of the book ('What Does Religion Look Like in the World Today?') answers two unavoidable questions. Chapter 1: What Is Religion? quite appropriately deals with – definitions. The author

[2] Platforms is a shorthand for two-sided platforms: a theoretical concept rather recently introduced to economics (Rochet, Tirole 2003). In time, the term 'two-sided platform(s)' has been replaced by 'multi-sided platform(s)' (Evans, Schmalensee 2016), though recently, as the reviewed book testifies about this development, the adjective is dropped – it is simply 'platform(s)'.

[3] The aim of the economic theory of clubs (Buchanan 1965) has been to explain interdependence in consumption (the consumption of each club member is an argument of the utility function of each club member) with limited capacity (with marginal costs in consumption becoming infinite if capacity is reached) and reasonable costs of exclusion of every (potential) club member. Although the economic theory of clubs is a rather recent intellectual innovation, as is its application to religious organisations (Iannaccone 1992), it is demonstrated (Carvalho, Sacks 2021) that some of the idea of religious clubs can be traced back to Adam Smith.

considers religion 'as a set of activities that turn around people's interaction with spirits who are not visible to the ordinary senses, but are believed to be capable of influencing human life for good and ill, and of hearing our call' (p. 21).[4]

The most important distinction made by the author, following Strathern (2019), is between immanent and transcendental religion. The distinction is sharp. 'Immanent religion is focused on multiple interactions with invisible spirits, who may, if approached in the right way, offer help to human beings in the here and now, but may also be threatening to them if not suitably placated. Transcendental religion is based around the hope of salvation from the human condition, and typically involves interaction with a more distant spiritual world, which is thought of as leaving human beings, most of the time, to govern their own affairs' (p. 31). Dominant modern global religions, like Christianity and Islam, are typical transcendental religions.

The author makes a very useful distinction between magic and religion. 'Magic is essentially a form of *technology* – it's about trying to manipulate the world through an understanding of its internal workings' (p. 34, italics in original). It is hardly surprising that in the modern world, in the age of flourishing science and technology based on its breakthroughs, magic is losing its ground. 'Religion, by contrast, is a form of *diplomacy* – it's about thinking, speaking, and acting in such a way as to communicate with the spirit or spirits that animate the universe – either by actively directing your thoughts toward them or by allowing them to see into your soul' (p. 34, italics in original). It is reasonable to inquire whether diplomacy is more resilient than technology – this is basically the secularisation question.

The author points out that 'Weber's work has come to be widely associated with the idea that secularization (a set of changes intrinsically tied up with the nature of modern life) would gradually diminish the importance of religion in the modern world' (p. 36). Nonetheless, the author is not convinced that the insight is correct, pointing out Weber's view on the inevitable decline of the role of magic rather than religion (Weber 1920).[5]

[4] The author is fair enough to provide a disclaimer with a gracious twist of self-irony: 'I have no personal religious belief or affiliation, but that's not relevant to any of the arguments here – though only others can tell whether I resemble those "objective observers" writing about Zen Buddhism of whom Alan Watts once wrote that "they invariably miss the point and eat the menu instead of the dinner"' (p. 23).

[5] It is the work of Ghosh (2014) that is crucial for the author's understanding of Weber. Furthermore, it should be noted that the author refers to the final version of Weber's crucial contribution, published in 1920, rather than the earlier 1905 version.

Furthermore, Seabright has no doubts that Weber unambiguously thought that modernity posed a challenge to which religious movements would have to adapt. Following that view, the author points out that nowhere did Weber suggest that religious movements would be unable to adapt to this challenge, adding that the idea that secularisation, in Weber's sense, would lead to the terminal decline of religion is not one that Weber ever held.

Although this debate reminds the reader of the futile Marxist deliberation on what Marx *actually* thought about something and what is the *true* meaning of his words, these considerations proved to be very appropriate prologue to Chapter 2: What Does Religion Look Like in the World Today?, dealing empirically with the issue of secularisation. Based on the available data from worldwide censuses and surveys, the author claims it is difficult to accept the secularisation thesis as the decline of religion and religious organisations. With the caveat that much remains unknown, the author provides eight insightful points.

1. The common belief that Christianity commands the loyalty of a declining share of the world's population, squeezed between a Godless secularism on one side and a resurgent Islam on the other, is a pure statistical illusion.[6] Both Christianity and Islam, according to the author, are alive and well, and both are increasing their share of the population in most regions of the world. With both religions being global, i.e. competing at the global level, the reader infers that this set-up provides the grounds for an epic Huntingtonian 'clash of civilisations' (Huntington 1993; Huntington 1996). In more benevolent and joyful terms, it can be labelled 'El Clásico'.

2. Christianity appears to have declined only because it has been concentrated in parts of the world whose populations are growing relatively slowly, including the decline of the indigenous population. But population growth rates are converging fast across the world; Christianity's demographic deficit will soon be a thing of the past.

3. The share of Christianity in Europe and North America has indeed been declining – but, according to the author, it is a very different story, with different causes, from what is happening in the rest of the world. In short, the reader concludes that it is Eurocentrism bias that created the fallacy of declining Christianity.

[6] The illusion in question is known as Simpson's paradox. This is a phenomenon in probability and statistics in which a trend appears in several groups of data but disappears or reverses when the groups are combined (Simpson 1951).

4. Throughout much of the world, there has been a sharp decline in the share of Christians belonging to the mainstream churches but a rapid increase in the share belonging to the Evangelical and Pentecostal churches. This partly explains why Christians from the mainstream traditions are so convinced that Christianity is in overall decline. Again, this is Eurocentrism in action, especially the one located in the Vatican, the reader concludes.

5. The reported importance of religion in people's lives has been in decline in the United States, Canada and some other countries, such as Spain and Ireland. But in almost all other countries, it is not in decline. It's either rather low but holding steady, or it is high and stable or even increasing in many countries. The average change in the importance of religion, for the 78 countries for which there are comparable data, is −0.39 per cent from the early 1990s to the late 2010s, which is statistically indistinguishable from zero.

6. Other indicators of religiosity show a divergence between measures of belief and measures of religious participation. The average share of people reporting belief in God has increased by 1.1 per cent over the same period, which is also statistically indistinguishable from zero. The average percentage of people reporting that they attend religious services at least once per month has fallen by 3.6 percentage points, which is a large and statistically very significant change.

7. Based on the data, the author concludes that the secularisation hypothesis captures something of the changing nature of religion over the past century – religion is adapting to the challenges of modern life, as are the rest of our behaviours and institutions. Nonetheless, secularisation can mean many things, and none of them imply that religion is declining or likely to decline further in the 21st century.

8. Finally, Seabright claims that where religion has recently declined in importance, it is usually because of events that discredited religious leaders in the eyes of their followers, for example in Ireland, meticulously described in the book, or because turning religion from a politically neutral phenomenon into a polarising one, like in the case of Spain. Although religion in Poland is blossoming, and the reputation of the Roman Catholic Church in the (ethnically homogenous) country is substantial, not least because of the Church's leading role in the national struggle against communism and Soviet occupation, involving the Church in the political agenda of the Polish conservative government could backfire.

After all, the thesis of the decline of religious organisations has proven to be flawed, reminding the reader of the famous quip of Mark Twain's – 'The report of my death was an exaggeration.' With religious organisations being alive and well, it is time for the central pillar of the book – Part II.

Part II of the book, 'How Do Religions Gain Their Power?', comprises seven chapters. Chapter 3: Demand for Religion, the title of which is quite expected for an economic analysis, deals with understanding the 'demand side' of religion. According to the author, '[t]he variety of different potential needs is vast: many people have little or no need for religion, but the demands of those who do range from ordinary material needs such as education, health, or financial services to more directly spiritual needs such as participation in prayers and rituals, to the sharing of narratives about the origin and purpose of our lives' (p. 63). The author provides an important caveat that providing for this variety is at the heart of religious communities because what religious individuals seek is not the private enjoyment of this or that good or service, but rather participation in an activity that makes sense only as part of a community.

Seabright points out that it is only in the past several decades that researchers have started to look in detail at how religious believers choose between the alternatives available to them, using the same research tools used to analyse other choices people make in their lives – in short, very rational choices. 'So when we say that we should consider people's religious decisions to be as lucid as the decisions they take in the rest of their lives, we're not setting an impossibly high bar' (p. 72). A free, rational choice by individuals, not only between religions but between religious and secular organisations, generates competition for members, revenues, and other resources, such as members' time and energy. The author claims that it is a competition not only to attract members but also to induce existing members to increase their investments of time, energy, and money.

Chapter 4: Choosing Communities: The Platform Model of Religion deals with the 'supply side' of services by religious organisations, developing in detail the previously described concept of these organisations as platforms. After providing ample details about the content of the religious supply, the author concludes that 'a religious community is a web of interlocking relationships, united by need, including the need to be needed by others. [...] More precisely, the religious community is a platform, to which members choose to belong in the light of what other members on the platform are doing' (p. 95). Fair enough, but since religious organisations are business organisations, the crucial question is how they manage to be financially sustainable, some of them for several millennia.

The author claims that two things explain the profitability of religious movements, even though they're not naturally as scalable as digital platforms. 'First of all, successful preaching can, indeed, reach an audience of millions through broadcasting and social-media networks, which many religious leaders develop on the back of their physical networks. Secondly, though the costs of building religious communities are important, the services they provide can be priced very highly' (p. 102). For reasons that are well explained in the book, the reservation price of the members of the religious community is higher than the contribution (not only monetary) they are paying. In short, costs are usually much lower than the revenues (monetary and in-kind) of the religious community – a sufficient condition for profitability and financial sustainability. There is even some sort of market power of the religious community because of the social ties the members of the community have created within it, which would be lost with the departure to another community – a typical lock-in effect, well-known in the field of industrial organisation. As the author points out, '[c]ommunity is a blessing, but it can also lock you in' (p. 102), weakening competitive constraints, in the parlance of competition law and economics.

The author refers to two relevant questions about rituals. How do rituals fit into the platform model of religious competition? What part do rituals play in the package of services that religious platforms offer? Chapter 5: Ritual and Social Bonding provides the answers to both. They are based on the insight by cognitive psychologists that we as human beings learn by imitation, and we do it in the process of 'over-imitation'. The author points out that 'We are *extravagant* imitators of the behavior of others. When children are trying to learn from experimental demonstrators how to perform some task (such as opening a box or constructing a complex object), they don't imitate only the aspects of the demonstrators' behavior whose relationship to the ultimate objective they can understand. They also make a point of imitating any gestures or routines that accompany that behavior, even if their purpose is completely irrelevant or obscure' (pp. 112–113, italics in original). That is exactly how rituals of religious organisations work, and they should be both irrelevant and obscure. The reason is that 'human beings have a particular talent for suspending disbelief when asked to do so by someone we trust. We signal to each other all the time: do what I'm showing you, trust me, this works – even if you can't see why' (p. 113). A trained economist would say that rituals and the joint communal experience of the members of the flock eliminate or at least decrease information asymmetry between community members and therefore build and strengthen bonds between religious community members, fostering the individual's belonging to the community. In the language of corporate managers, rituals are team-building experiences resulting in higher *esprit de corps*.

Chapter 6: Religion and Belief deals with a conundrum, as theological doctrines are rather complex, counterintuitive, definitely not straightforward, and ineligible for empirical testing. It is rather difficult for people to believe in them, as the author provides empirical data that only a portion of the members of some religious communities believe in certain segments of their doctrines, claiming that 'on average, most nonmembers of the religion find difficult to believe' (p. 127). The conundrum is why non-believing does not impede membership. According to the author, '[t]he answer is that *accepting* doesn't require believing, and believing is optional in practice for most members, most of the time (even while it passionately preoccupies some other members). It's only after joining that most members start to shift their beliefs in the direction of the religion's doctrines – and they do it because it comes naturally to them, not because their membership requires it' (p. 127, italics in original). In short, the author's key message is that most religions have asked new members to accept and belong rather than necessarily to believe. Seabright emphasises that asking them to believe comes later, after they've agreed to belong. Considering the empirical data provided in the book, the reader infers that believing is not a necessary condition for membership.

This insight resolves the conundrum by emphasising *community* rather than *religious* in the term religious community. The community is disciplined, so all the members behave as if they believe in the theological doctrine. If they comply with that simple rule, the religious community is satisfied, and there is no ambition to engage Orwellian *Thought Police* – paying lip service is enough, if necessary at all. In this way, the conundrum is resolved very convincingly and in a way that is not only thoroughly consistent with the notion of religious organisations as platforms, but also reinforces that notion.

Chapter 7: Religion, Narrative, and Meaning is about telling stories and how religions have been successful in doing this. Since religion is not in decline at all, not even in modern times, clearly these stories have been compelling. The authors explore the reasons for that success. Starting with the notion of the human fascination with stories, Seabright suggests what the elements of a compelling narrative are, starting with the claim that '[w]e can instead note that some recurrent kinds of narrative structure are more systematically represented than would happen by chance' (p. 156), but then the reader wonders why these recurrent structures seem to make the stories more compelling. The author provides the answers based on the research of people far removed from economics – anthropologists. 'The first, which is less obvious than it sounds, is that narrative stories need to conform to some notions of commonsense causality. These are generally

accepted hypotheses about everyday cause and effect' (p. 157). Well, the reader ponders, narratives based only on that can be boring, very boring. Here comes the twist. 'The second element of the answer to our question about why narratives are so compelling is that the most effective stories also have something counterintuitive to them [...] also that they usually mess with our notions of probability' (pp. 157–158). So, this is a pattern for the stories of good and evil, for heroes and villains, and stories with a moral at the end.

Everyone can tell the story, but 'what marks out today's religious platforms from most of their secular rivals, and what marked out the new [...] "transcendent" religions from the transactional businesses that thronged the marketplaces of ancient Athens and Rome as well as many other places around the globe (the "immanent" religions), is a willingness to tell grand and ambitious stories' (p. 169). The author provides ample evidence from the research on the character of human beings, primarily by anthropologists, that there has been a huge demand for that kind of the stories. To support that claim, the reader remarks that transactional business stories (commercials) are usually very boring. 'The narratives of transcendental religion included stories not just about the nature of creation but specifically about our place in it, stories about why bad things keep happening to us, stories about what we can hope for if we are patient, stories about why we have to die' (p. 170) – hardly a boring stuff.

To wrap up the narrative story: 'In short, religious platforms developed by the transcendent religions could deploy the human fascination with narrative with an overall ambition and coherence unknown to immanent religion. They brought consolation to the downtrodden, and thereby increased their value as allies to a privileged elite. It was the inspired conjunction of an organizational innovation – the religious platform, which underscored the way in which all the components of the religious life fit together, and how the individual could make sense of that fit through membership of a community – and an appeal to a much more ancient human need, the need for stories' (p. 172).

It seems that Chapter 8: The Evolutionary Origins of Enchantment is based on research that is the farthest away from economics. It is fascinating in itself, focused on the evolution of religion and religious organisations throughout prehistory. The reader's fascination with all the insights is, nonetheless, overshadowed by second thoughts about what the contribution of this chapter is to the two pillars of the book: religious organisations as business organisations and as platforms. Referring to Sterelny (2003) and his view that 'religion could have developed without imposing large costs on its practitioners, because it involved ritual long before it involved belief' (p. 183) is not very helpful.

Much more relevant for the topic of the book – or perhaps its 'mission', lip service for the sake of staying on religious grounds – is Chapter 9: The Temple Society – and Other Business Models, which provides in-depth considerations of four features of every religious organisation: its mission, its structure, its strategies, and its message. Well, this looks exactly like business organisations. Back to economics!

The mission of a religious organisation (more precisely, movement at the very beginning) is by and large specified by its founder. Hence, a crucial issue is succession. The author gives ample evidence that family succession, i.e. kinship, like in monarchies or family firms, is not appropriate for religious organisations. 'Indeed, one of the innovations of the Christian Church was to transcend kinship as a determinant of succession: Saint Paul, who became the movement's de facto leader at an early stage, had not even known the founder personally' (p. 205).

The author also compares religious movements to secular businesses. The former tend to have lower capital requirements, and the capital needs can often be met by donations from members. Hence, there is no shareholders assembly that elects and dismisses the Managing Board and the CEO of the religious organisation. Seabright points out an important side effect – the resulting independence from outside investors, which gives religious organisations freedom – including the freedom to persist in their mistakes.

The author points out that the strength of religious movements/organisations, compared to secular businesses, includes the ability to credibly promise continuity after the eclipse of a founder. Furthermore, 'the platform model provides an explanation for the stability of a religious movement. The members may have come to the community historically because of the vision of the founder, but once that community has been created it provides a reason of its own for belonging, a social glue that outlasts the physical presence of the founder' (p. 206).

The issue of the structure of religious organisations is tested in the book on the case of the Roman Catholic Church and its 1.3 billion believers subject to the authority of a single Pope. The reason for the success of the organisation – it demonstrated its sustainability for roughly two millennia – is its decentralisation and the hierarchy that is far flatter than one would find in any secular organisation of even a fraction of the size. The author points out that this structure gives substantial autonomy to the local level, including various orders of the Roman Catholic Church, benefiting from cutting the costs of strict monitoring, but it is exactly that structure that provided the grounds for sexual abuse scandals and their cover-up for too long.

As to the strategy, the author does not have second thoughts: 'The two most consequential strategic decisions a religious movement must take are what types of service it will offer to its members, and what types of members it will target. Both decisions will be taken in the light not just of the preferences of potential members but also of the strategies of rival movements that may be competing for their attention, their resources, and their loyalty' (p. 216). It is the literature on (secular) platforms that makes a distinction between 'single-homing' and 'multi-homing' to describe situations where users either stick to a single platform for a particular service or recurrently switch between rival platforms. Nonetheless, the reader is not quite convinced that this platform distinction is relevant for religious organisations, at least those that endorse *The Old Testament*, because 'You shall have no other gods before Me' (Exodus 20:3). In short, it is 'single-homing', but the reader is aware of different strategy choices on the scope of the services provided even among Christian churches – the Roman Catholic Church and the Eastern Orthodox Churches, for example, with the latter having a rather narrow scope, focusing on the spiritual services to the flock.

The section on the message of religious organisations in this chapter is not so much about the content of the message but about the way it is created and how effective it is. The author points out that Martin Luther created 'a new form of theological writing: lucid, accessible and above all short' (p. 227). Perhaps this can explain the momentous impact of Protestantism, especially in its early stage.

Part III of the book ('Religion and the Uses of Power') starts with Chapter 10: Religion and Politics. The author considers horse-trading between political leaders, aiming to borrow the legitimacy of the religious organisations, and religious leaders, asking for monopoly protection for their organisations in exchange, along the lines described more than two centuries ago (Smith 1776). The starting point of exchange is clear. 'Religious power meant the ability to control the performance of religious ritual and the membership of religious communities. Political power meant the ability to command a monopoly of violence, and use it to force the payment of taxes' (p. 245). Along the lines of the Smithian view, the lack of competition removes incentives for religious organisations to be efficient in their operation. Furthermore, the author demonstrates that although competition between confessions can literary be deadly, as the Thirty Years War clearly demonstrated, it can also break the barriers to innovation. 'The Catholic Church in Europe tried but failed to prevent the diffusion of printing, and recent studies suggest the diffusion of printing there was associated with an increase in Protestantism, a greater spread of knowledge, and a faster growth of cities' (p. 250).

Smith (1776) believed that the other outcome of political patronage of religious organisations is that political support for a religious movement would eventually undermine the movement's legitimacy, although this would not necessarily happen immediately. The author hints that this is perhaps what is currently happening in the US, where a substantial decline in religiosity has been recorded in recent decades. He refers to an influential book (Putnam, Campbell 2010) whose authors argue that whereas America was once socially and politically divided between religious denominations (such as Catholic and Protestant), it is becoming increasingly divided between the religious and the irreligious. The religious are increasingly homogeneous in their conservatism, and the political profile of religion has become more associated with the Republican Party. This is a rather convincing explanation, and time will tell what the long-term effects of the active participation of the Evangelical Church in the Republican Party, effectively in Trump's 2024 presidential campaign, will be.[7]

Chapter 11: The Great Religion Gender Gap refers to a paradox. 'There's no getting away from it: across the world, statistically speaking, religious leaders are overwhelmingly male, while women are reported to be, on average, somewhat more religious than men. This is one of those statistical phenomena that have been massively discussed by researchers but never convincingly explained' (p. 271). As to the leadership, the author concludes that there is nothing that sacred texts offer to support the observed discrimination. It is based on religious tradition, and Seabright points out that religious traditions do not have an essence: they are all a vast patchwork of things that have been said and written at various points in the history of a movement. Nothing else. In economics vocabulary, they are endogenous.

More intriguing is the empirical finding that the author refers to, that on average, women score higher than men on most measures of religiosity (from religious affiliation and attendance of religious services, to private actions such as prayer). The difference is not large but is statistically significant and persistent in time. However, it is not present consistently across religions: in fact, it holds strongly for Christianity but not for other religions. So, what is the explanation? The author goes back in time to ancient Roman and its morality – or rather lack of it – everything was allowed if slaves were concerned. 'In this context, a moral code that required men as well as

[7] The reader wonders whether such political engagement by the Evangelical Church can create a rift between protestant churches and the Roman Catholic Church in America as existed during the Prohibition, both during the preparations of the constitutional amendments that introduced the Prohibition and the preparations for its abolishment. Okrent (2011) provides details about this rift.

women to remain chaste until marriage, that forbade adultery for men as well as women, that forbade all infanticide and not just infanticide of boys, was bound to seem like a strong defense of the rights of women and slaves against the sexual arrogance of Roman men' (p. 276). Perhaps old habits die hard. Perhaps we have not moved that far since Roman times. Perhaps, 'The fact that, in principle if not always in practice, the Christian moral codes of chastity and fidelity apply to men and women equally is something that women are more likely than men to find appealing' (p. 276).

The dark side of religious organisations is dealt with in earnest in Chapter 12: The Abuse of Religious Power. The most conspicuous abuse in religious organisations is related to sexual abuse scandals. The author points out that 'there seems so far no reason to think that any religious doctrines are particularly prone to encourage abuse. Nor is there any reason to place intrinsic blame on clerical celibacy, homosexuality, heterosexuality, a generally repressive culture, or a generally permissive culture' (p. 282). Of course, sexual abuse is not monopolised by religious organisations – many secular industries, like sports and entertainment, are infested with it – but sexual abuse contradicts the basic moral norms promulgated by most religions. It was Christian morality, as demonstrated in the previous chapter of the book, that provided moral and not only moral shelter for the vulnerable and exposed to sexual abuse, and nowadays Christian church clerics are sexual offenders, with their own organisations – prominently the Roman Catholic Church – harbouring the abusers.

Seabright provides some explanations. As to the opportunities for sexual and other abuses, they 'exist when a powerful person is placed in unsupervised proximity to another person who is vulnerable by reason of their age, of a relationship of dependence on the powerful person, or of physical or emotional weakness in relation to that person' (p. 289). That is exactly the situation that is frequent in religious organisations, based on the belonging to the community. Furthermore, fertile ground for abuses is provided, the author claims, by two culture patterns: cultures of secrecy and cultures of silence. 'Cultures of secrecy prevent people who know something from talking about it to people who don't. They typically make information more valuable by giving insiders a strategic advantage against outsiders. Cultures of silence are different: they prevent two people who both know something from talking about it to each other' (p. 287). Both culture patterns are inherent to religious organisations, based on belonging to the community and unconditional loyalty to both the organisation and its other members. That is the reason why so many of the molested have been quiet, out of delicacy – they did not want to undermine the reputation of the religious organisation they belong to, e.g. the Roman Catholic Church,

and the molester himself, by and large, senior clergy in the organisation.[8] Seabright provides so many features of religious organisations and their culture that the reader thoroughly understands the contributing factors. Nonetheless, the reader concludes that the ultimate responsibility rests with the individual – the molester.

As to the policy recommendations to reduce the risk of abuses without undermining legitimate religious objectives, Seabright focuses on three: denser networks, external accountability, and ending silence. 'Creating denser networks means giving vulnerable individuals more allies. These may be vertical allies (other people to turn to among the leadership) or horizontal allies (links to other members). There's no reason why any well-run religious organization needs to give its members access to just one spiritual adviser' (p. 294).

As to external accountability, according to the author, 'there's a strong case for imposing tough conditions on what religious organizations may do if they want to claim derogation from some of the duties that apply to other organizations that interact with the general public, such as firms. Among the conditions could be the establishment of an external reporting requirement. In addition to requiring religious organizations to provide information to others (about their revenues, for example), this would authorize external trustees to ask questions of the leadership, and would also authorize members with grievances to contact trustees' (p. 295).

Ending silence is rather self-explanatory: 'Open discussion among members of the organization's strengths and weaknesses should be considered the hallmark of an organization with sound values' (p. 295). The author is somewhat sceptical about the implementation of the third recommendation, recognising that this is easier said than done. The reader expresses reservations regarding the implementation of all three recommendations, not solely the last one.

[8] Silence can backfire. That is exactly what happened in Ireland with the decades of silence about sexual abuses within the Roman Catholic Church in the country. When the information became public, the reputation of the Church dropped significantly, as did the level of religiosity of the nation, as described in detail in Chapter 2 of the book. For decades, Ireland was an exemplary Catholic country and a standard-bearer for the Roman Catholic Church. Not anymore. A common grim joke in Ireland told to the author of this review several years ago by an Irishman over a pint of Guinness in Dublin is: 'It is definitely not true all Catholic priests in Ireland are paedophiles. It's only 80 per cent of them.'

Part IV concludes the book, with Chapter 13: The Past and Future of Religion and Chapter 14: Conclusion. In Chapter 13, the author considers relations between technology and religion and refers to the definition of the digital concept of the Metaverse: 'A massively scaled and interoperable network of real-time rendered 3D virtual worlds that can be experienced synchronously and persistently by an effectively unlimited number of users with an individual sense of presence, and with continuity of data, such as identity, history, entitlements, objects, communications, and payments' (pp. 303–304).[9] Seabright's rather sardonic comment is spot-on. 'Shorn of the references to digital technologies, the experience of the Metaverse is something that religion has been offering its participants in analog form for many thousands of years' (p. 304). In short, religion is here to stay – no technological progress, no economic development, and no political change will make it disappear in the foreseeable future. All these unstoppable processes will pose new challenges to religious organisations and fresh inevitable adjustments will be needed, but religion, it seems, will survive, at least for one reason – it is a virtual reality. As the author points out '[v]irtual reality retains its power because we dive into it and return, refreshed and inspired. It's a complement to normal life, not a substitute for it. It's the more powerful for making us giddy, often unable to remember on which side of the boundary we currently float, like those delicious moments in the early mornings when we are both in our beds and out of them' (p. 306).

Perhaps the most important takeaway from the closing chapters is that 'The twenty-first century will therefore not see religion disappear, because it will continue to minister to real human needs more effectively than most available alternatives. But precisely because its success is legitimately acquired, powerful political interests will continue to manipulate religion to send soldiers to the battlefield and voters to the ballot box, and some of their citizens will continue to be intoxicated by the call. Constraining religion to wear its power more lightly than it has done so often in the past is therefore a project that ought to unite all reasonable people of any faith or of none' (p. 325). In short, those who are not religious are not excused.

Seabright's book is an extraordinary, insightful, thought-provoking and enjoyable read, although reading it is not an easy task – an engaged reader is a prerequisite. The author, an economist, borrows insights from disciplines far removed from economics, especially from anthropology, history and psychology, aiming to provide a rich and honest picture of one of the most complex phenomena of human activities. Such an approach will

[9] The definition of the Metaverse that is quoted is provided by Ball (2022), a writer and venture capitalist, according to the author.

attract non-economists to the book, especially since the economics in the book is disclosed in a very readable, non-technical way. Economists who are not specialists in the economics of religion (JEL code Z12), like the one who has written this review, will learn a great deal about the field and economic approach to the ubiquitous phenomenon. Even scholars in the field of economics of religion, according to one of them (Becker 2024, 1693), will find the book an insightful and enjoyable read.

The author's platform view, i.e. his explanations of the operations of religious organisations within the framework of the economic theory of multi-sided platforms, is a fresh look and convincing explanation. Perhaps this is another example of how the methodology of economics can successfully be applied to areas that are rather far away from the mainstream topics of economics and provide new and relevant insights. Most economists do not have a problem with this peculiar economic (methodological) 'imperialism'. Perhaps some economists will be unconditionally proud of that. A piece of information for them – pride is a mortal sin. Please consult the epigraph. It is the outcome of the change that is relevant.

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/VARIA

УПУТСТВО ЗА АУТОРЕ

Анали Правног факултета у Београду објављују текстове на српском и енглеском језику.

У Аналима се објављују научни чланци, критичке анализе, коментари судских одлука, прилози из међународног научног живота и прикази. Прихватају се искључиво аналитички, а не дескриптивни прикази научних и стручних књига.

Предајом текста, аутор изјављује да текст није ни објављен ни прихваћен за објављивање те да неће бити предат за објављивање било ком другом медију. Аутор такође изјављује да је носилац ауторског права, да је обавештен о правима трећих лица и да је испунио захтеве који произлазе из тих права.

Пријем свих текстова биће потврђен електронском поштом. Редакција ће размотрити подобност свих радова да буду подвргнути поступку рецензирања. Подобни текстови шаљу се на двоструку анонимну рецензију.

Информације о уредничкој политици *Анала Правног факултета у Београду* видети на: *https://anali.rs/eticki-kodeks/*.

Ако желите да предате свој рад *Аналима Правног факултета у Београду*, молимо вас да пратите следећа упутства.

Ако предајете рад на енглеском језику, молимо вас да пратите посебно упутство које је доступно на: *https://anali.rs/uputstvo-za-autore/?lang=en*.

Рукопис треба да буде уређен на следећи начин:

1. насловна страна,
2. апстракт и кључне речи,
3. рукопис и списак литературе,
4. додаци, табеле и слике.

1. НАСЛОВНА СТРАНА

Насловна страна рукописа треба да садржи следеће податке:

- наслов текста,
- име, презиме, годину рођења и афилијацију свих аутора,
- пуну адресу за кореспонденцију и адресу електронске поште.

Ако је текст коауторски, молимо вас да доставите тражене податке за сваког аутора.

2. АПСТРАКТ И КЉУЧНЕ РЕЧИ

Тексту претходи апстракт који је строго ограничен на 150 речи. Апстракт не сме да садржи неодређене скраћенице или референце.

Молимо вас да наведете пет кључних речи које су прикладне за индексирање.

Радови на српском језику треба да садрже апстракт и кључне речи и на српском и на енглеском језику. У том случају, апстракт и кључне речи на енглеском језику треба да се налазе иза списка литературе.

3. РУКОПИС И СПИСАК ЛИТЕРАТУРЕ

Због анонимног рецензирања, имена аутора и њихове институционалне припадности не треба наводити на страницама рукописа.

Текстови морају да буду написани у следећем формату:

- величина странице: A4,
- маргине: 2,5 cm,

- фонт: Times New Roman,
- размак између редова у главном тексту: 1,5,
- размак између редова у фуснотама: Easy,
- величина слова у главном тексту: 12 pt,
- величина слова у фуснотама: 10 pt,
- нумерација страница: арапски број у доњем десном углу странице.

Друге ауторе треба наводити по имену и презимену када се први пут помињу (Петар Петровић), а затим само по презимену (Петровић). Не треба наводити „професор“, „др“, „г.“ нити било какве титуле.

Све слике и табеле морају да буду поменуте у тексту, према редоследу по којем се појављују.

Све акрониме треба објаснити приликом првог коришћења, а затим се наводе великим словима.

Европска унија – ЕУ,

The United Nations Commission on International Trade Law – UNCITRAL

Бројеви од један до девет пишу се словима, већи бројеви пишу се цифрама. Датуми се пишу на следећи начин: 1. јануар 2012; 2011–2012; тридесетих година 20. века.

Фусноте се користе за објашњења, а не за навођење литературе. Просто навођење мора да буде у главном тексту, са изузетком закона и судских одлука.

Поднаслове треба писати на следећи начин:

1. ВЕЛИКА СЛОВА

1.1. Прво слово велико

1.1.1. Прво слово велико курзив

Цитирање

Сви цитати, у тексту и фуснотама, треба да буду написани у следећем формату: (аутор/година/број стране или више страна).

Домаћа имена која се помињу у реченици не треба понављати у заградама:

– Према Милошевићу (2014, 224–234)...

– Римски правници су познавали различите класификације ствари (Милошевић 2014, 224–234)

Страна имена која се помињу у реченици треба да буду транскрибована, а у заградама их треба поновити и оставити у оригиналу. У списку литературе страна имена се не транскрибују:

– Према Коциолу (Koziol 1997, 73–87)...

– О томе је опсежно писао Коциол (Koziol 1997, 73–87).

– Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags– und Universitätsbuchhandlung.

Пожељно је да у цитатима у тексту буде наведен податак о броју стране на којој се налази део дела које се цитира.

Исто тако и / Исто / Као и Константиновић (1969, 125–127);

Према Бартош (1959, 89 фн. 100) – *тамо где је фуснота 100 на 89. страни*;

Као што је предложио Бартош (1959, 88 и фн. 98) – *тамо где фуснота 98 није на 88. страни*.

Пре броја стране не треба стављати ознаку „стр.“, „p.“, „f.“ или слично.

Изузетно, тамо где је то прикладно, аутори могу да користе цитате у тексту без навођења броја стране дела која се цитира. У том случају аутори могу, али не морају да користе неку од назнака као што су: *видети, посебно видети, видети на пример и др.*

(видети, на пример, Бартош 1959; Симовић 1972)

(видети посебно Бакић 1959)

(Станковић, Орлић 2014)

Један аутор

Цитат у тексту (Т): Као и Илај (Ely 1980, број стране), тврдимо да...

Навођење у списку литературе (Л): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

Т: Исто као и Аврамовић (2008, број стране), тврдимо да...

Л: Аврамовић, Сима. 2008. *Rhetorike techne – вештина беседништва и јавни наступ.* Београд: Службени гласник – Правни факултет Универзитета у Београду.

Т: Васиљевић (2007, број стране),

Л: Васиљевић, Мирко. 2007. *Корпоративно управљање: правни аспекти*. Београд: Правни факултет Универзитета у Београду.

Два аутора

Т: Као што је указано (Daniels, Martin 1995, број стране),

Л: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

Т: Као што је показано (Станковић, Орлић 2014, број стране),

Л: Станковић, Обрен, Миодраг Орлић. 2014. *Стварно право.* Београд: Номос.

Три аутора

Т: Као што су предложили Сесил, Линд и Бермант (Cecil, Lind, Bermant 1987, број стране),

Л: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

Више од три аутора

Т: Према истраживању које је спровео Тарнер са сарадницима (Turner *et al*. 2002, број стране),

Л: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

Т: Поједини аутори сматрају (Варади *et al*. 2012, број стране)...

Л: Варади, Тибор, Бернадет Бордаш, Гашо Кнежевић, Владимир Павић. 2012. *Међународно приватно право*. 14. издање. Београд: Правни факултет Универзитета у Београду.

Институција као аутор

Т: (U.S. Department of Justice 1992, број стране)

Л: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

Т: (Завод за интелектуалну својину Републике Србије 2015, број стране)

Л: Завод за интелектуалну својину Републике Србије. 2015. *95 година заштите интелектуалне својине у Србији*. Београд: Colorgraphx.

Дело без аутора

Т: (*Journal of the Assembly* 1822, број стране)

Л: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

Цитирање више дела истог аутора

Клермонт и Ајзенберг сматрају (Clermont, Eisenberg 1992, број стране; 1998, број стране)...

Баста истиче (2001, број стране; 2003, број стране)...

Цитирање више дела истог аутора из исте године

Т: (White 1991a, page)

Л: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

Истовремено цитирање више аутора и дела

(Grogger 1991, број стране; Witte 1980, број стране; Levitt 1997, број стране)

(Поповић 2017, број стране; Лабус 2014, број стране; Васиљевић 2013, број стране)

Поглавље у књизи

Т: Холмс (Holmes 1988, број стране) тврди...

Л: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

Поглавље у делу које је издато у више томова

Т: Шварц и Сајкс (Schwartz, Sykes 1998, број стране) тврде супротно.

Л: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664. *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Књига са више издања

Т: Користећи Гринов метод (Greene 1997), направили смо модел који...

Л: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

Т: (Поповић 2018, број стране), *Р:* Поповић, Дејан. 2018. *Пореско право*. 16. издање. Београд: Правни факултет Универзитета у Београду.

Навођење броја издања није обавезно.

Поновно издање – репринт

Т: (Angell, Ames [1832] 1972, 24)

Л: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Чланак

У списку литературе наводе се: презиме и име аутора, број и година објављивања свеске, назив чланка, назив часописа, година излажења часописа, странице. При навођењу иностраних часописа који не нумеришу свеске тај податак се изоставља.

Т: Тај модел користио је Левин са сарадницима (Levine *et al*. 1999, број стране)

Л: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

Т: На то је указао Васиљевић (2018, број стране)

Л: Васиљевић, Мирко. 2/2018. Арбитражни уговор и интеркомпанијскоправни спорови. *Анали Правног факултета у Београду* 66: 7–46.

Т: Орлић истиче утицај упоредног права на садржину Скице (Орлић 2010, 815–819).

Л: Орлић, Миодраг. 10/2010. Субјективна деликтна одговорност у српском праву. *Правни живот* 59: 809–840.

Цитирање целог броја часописа

Т: Томе је посвећена једна свеска часописа *Texas Law Review* (1994).

Л: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

Т: Осигурање од грађанске одговорности подробно је анализирано у часопису *Анали Правног факултета у Београду* (1982).

Л: Анали Правног факултета у Београду. 6/1982. *Саветовање: Нека актуелна питања осигурања од грађанске одговорности*, 30: 939–1288.

Коментари

Т: Смит (Smith 1983, број стране) тврди...

Л: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

Т: Према Шмаленбаху (Schmalenbach 2018, број стране), јасно је да...

Л: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*Л:* Томић, Јанко, Саша Павловић. 2018. Упоредноправна анализа прописа у области радног права. Радни документ бр. 7676. Институт за упоредно право, Београд.

Т: (Glaeser, Sacerdote 2000)

Л: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Лична кореспонденција/комуникација

Т: Као што тврди Дамњановић (2017),

Л: Дамњановић, Вићентије. 2017. Писмо аутору, 15. јануар.

Т: (Welch 1998)

Л: Welch, Thomas. 1998. Letter to author, 15 January.

Стабилни интернет протокол (URL)

Т: Према Заводу за интелектуалну својину Републике Србије (2018),

Л: Завод за интелектуалну својину Републике Србије. 2018. Годишњи извештај о раду за 2017. годину. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, последњи приступ 28. марта 2018.

Т: According to the Intellectual Property Office (2018)

Л: 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.

У штампи

Т: (Богдановић 2019, број стране)

Л: Богдановић, Лука. 2019. Економске последице уговарања клаузуле најповлашћеније нације у билатералним инвестиционим споразумима. *Номос*, том 11, у штампи.

Т: (Spier 2003, број стране)

Л: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Прихваћено за објављивање

Т: У једном истраживању (Петровић, прихваћено за објављивање) посебно се истиче значај права мањинских акционара за функционисање акционарског друштва.

Л: Петровић, Марко. Прихваћено за објављивање. Права мањинских акционара у контексту функционисања скупштине акционарског друштва. *Правни живот*.

Т: Једна студија (Joyce, прихваћено за објављивање) односи се на Колумбијски дистрикт.

Л: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Судска пракса

***Ф(усноте)**:* Врховни суд Србије, Рев. 1354/06, 6. 9. 2006, Paragraf Lex; Врховни суд Србије, Рев. 2331/96, 3. 7. 1996, *Билтен судске праксе Врховног суда Србије* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16.

Т: За референце у тексту користити скраћенице (ВСС Рев. 1354/06; CJEU C-20/12 или Giersch and Others; Opinion of AG Mengozzi) конзистентно у целом чланку.

Л: Не треба наводити судску праксу у списку коришћене литературе.

Закони и други прописи

Ф: Законик о кривичном поступку, *Службени гласник РС* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 и 55/2014, чл. 2, ст. 1, тач. 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).

Т: За референце у тексту користити скраћенице (ЗКП или ЗКП РС; Regulation No. 1052/2013; Directive 2013/32) конзистентно у целом чланку.

Л: Не треба наводити прописе у списку коришћене литературе.

4. ПРИЛОЗИ, ТАБЕЛЕ И СЛИКЕ

Фусноте у прилозима нумеришу се без прекида као наставак на оне у остатку текста.

Нумерација једначина, табела и слика у прилозима почиње са 1 (једначина А1, табела А1, слика А1 итд., за прилог А; једначина Б1, табела Б1, слика Б1 итд., за прилог Б).

На страни може бити само једна табела. Табела може заузимати више од једне стране.

Табеле имају кратке наслове. Додатна објашњења се наводе у напоменама на дну табеле.

Треба идентификовати све количине, јединице мере и скраћенице за све уносе у табели.

Извори се наводе у целини на дну табеле, без унакрсних референци на фусноте или изворе на другим местима у чланку.

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БУЛЕВАР КРАЉА АЛЕКСАНДРА 67
11000 БЕОГРАД
СРБИЈА
anali@jus.bg.ac.rs
anali.rs