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Petra PERIŠIĆ, PhD*

KILLED BY ROBOT OR HUMAN: CONSIDERATIONS ON AUTONOMOUS WEAPONS SYSTEMS AND HUMAN DIGNITY

The emergence of autonomous weapon systems (AWS) has raised a number of concerns. In addition to issues related to the capability of these weapons to conform to the principles of international humanitarian law, primarily the principles of distinction and proportionality, concerns have also emerged regarding their compliance with human rights law. In this context, respect for human dignity has been cited as one of the major arguments against the use of AWS. The paper examines arguments for and against using the concept of human dignity as a rationale for prohibiting AWS. It demonstrates that those who oppose completely banning AWS do not necessarily believe that AWS conform to human dignity; rather, they offer different reasons why solutions other than total prohibition may be more appropriate. Finally, the paper explores whether implementing "meaningful human control" could bridge the gap between opposing standpoints on AWS and help resolve the human dignity dilemma.

Key words: *Autonomous weapons systems*. – *Human dignity*. – *Human rights*. – *International humanitarian law*. – *Meaningful human control*.

* Associate Professor, University of Rijeka Faculty of Law, Croatia, *petra.perisic@uniri.hr*, ORCID iD: 0000–0002–8529–0152.

1. INTRODUCTION

The rapid evolution of artificial intelligence has influenced practically every aspect of human life, including warfare. The emergence of autonomous weapons systems (AWS) not only broadened the spectrum of available weapons, but made it possible for humans to be completely replaced by machines. A scenario in which machines fight humans, or the one in which machines fight each other, has now become realistic and is – to a certain extent – already materializing (UN Panel of Experts 2021).[1]

The exact meaning of the term AWS is still a matter of discussion. So far, no internationally agreed definition has been accepted (see Sharkey 2019, 75; Schmitt 2013; Taddeo, Blanchard 2022), making it difficult to delineate between various weapons technologies with autonomous functions – a differentiation that may have important implications for a legal regulation of these technologies. Nonetheless, it appears that all the relevant international actors discussing AWS have found a common ground on the essential features of AWS, agreeing that AWS are those "weapons that can independently select and attack targets", i.e., weapons that "have autonomy in the 'critical functions' of acquiring, tracking, selecting and attacking targets" (ICRC 2014).

The emergence of autonomous weapons is a relatively new phenomenon. Although the first weapon systems with autonomous functions date back to the mid-20th century, the more advanced ones have been in use since the 2000s (Work 2021). Their employment introduced diverse challenges: strategic, military, ethical, and legal. Strategic concerns mainly include proliferation of autonomous weapons, arms race, and, most of all, an enhanced risk of conflict escalation (Rosert, Sauer 2019, 370). Surely, states could resort to force much more easily knowing that robots would wage war instead of human soldiers and that there would be no human casualties on their part (Amoroso, Tamburrini 2020, 1–20). From the military point of view, some issues arise, such as the nonexistence of a traditional chain of command, while ethical concerns are focused on the dehumanization of war (Amoroso, Tamburrini 2020). In the legal domain, most discussions so far have revolved around the (in)ability of AWS to adhere to the principles of international humanitarian law (IHL), namely the principles of military necessity, proportionality, precaution, and distinction.[2] Particularly, the inability of AWS to differentiate between combatants and civilians has

[1] For the first time, the UN reported on the use of AWS in Libya in 2020.

[2] For more, see Winter 2022, 1–20; Sassóli 2014, 308–339.

often been voiced as a major argument in support of placing a complete ban on their use (Docherty 2012). There are numerous situations, such as those in which soldiers are *hors de combat* or children are climbing on decommissioned tanks, in which machines are considered to be incapable of determining legitimate targets, at least for the time being (Sparrow 2016, 98; Sparrow 2015, 699–728).

Observing the compatibility of AWS with the tenets of the law of armed conflict is crucial, yet insufficient. Limiting a discussion on these issues reduces the issue to the technical capabilities of AWS. The reasoning is then as follows: since AWS lack technical sophistication to act in a manner compliant with the principles of IHL, their use should be prohibited. The majority of the existing research indeed shows that at the present AWS do not possess capabilities to act in line with the said principles (Winter 2022). It is, however, believed that, since the technology is constantly advancing, in a not-too-distant future they will be able to conform to these principles (Winter 2022; Kahn 2022). However, the debate on AWS does not end there.

Article 36 of the Additional Protocol I to the 1949 Geneva Conventions, which regulates "new weapons", points to extending the debate beyond the compliance of AWS with IHL. It places an obligation on its states parties to determine whether new weapons, means and methods they use are in compliance with the said Protocol or any other rule of international law applicable to that state.[3] This implies that AWS should be reviewed in light of all the relevant international law rules.

The present paper observes AWS in the context of human rights law, more precisely in relation to human dignity, as a cornerstone of all human rights. Firstly, it will be demonstrated that human rights law applies to the use of AWS, both within armed conflict and in situations other than armed conflict. AWS will then be observed in relation to human dignity, stressing the arguments in favor and against placing human dignity at the center of the debate on the permissibility of the use of AWS. The concept of meaningful human control, which entails retaining human supervision over the use of AWS, will then be discussed with the aim of assessing whether its application could resolve the dignity issue. In the conclusion, we will try to answer the question whether human dignity should be taken as a self-

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), UNTS, No. 17512, vol. 1125, 3. For more, see Daoust, Coupland, Ishoey 2002.

sufficient argument for the ban of AWS, i.e., whether it is justified to ban AWS solely based on the argument that they are against human dignity, regardless of the other circumstances underpinning their use.

2. APPLYING HUMAN RIGHTS LAW TO THE USE OF AWS

The use of force by AWS against humans can occur in various contexts. What first comes to mind is the context of an armed attack – and rightly so. As AWS are primarily being used in combat, examining their compliance with the rules of IHL seems justified. Yet, it is necessary to assess the permissibility of AWS from a wider perspective, observing the compatibility of their use with the rules of human rights law, regardless of whether these weapons are used in armed conflict or outside of it.

Human rights law applies to the use of AWS in three different situations: first, in the case of an armed conflict, in the case of conflicts that have not reached the threshold of an armed conflict (such as fighting terrorism), and in law enforcement actions (Heyns 2014).

In case of an armed conflict, both human rights law and IHL apply, protecting similar principles and interests (Saxon 2016, 183) and taking the concern for human dignity as their starting point.[4] Human rights law applies complementary to IHL, i.e., it represents the *lex generalis*, as opposed to IHL, which is the *lex specialis* (Mačák 2022, 1–27).[5] A well-known general principle of law – *lex specialis derogat legi generali* – implies that it is the IHL which has a primacy in application here. This is not to say that the IHL will precisely derogate human rights law – as the above maxim does not necessarily imply that there is a conflict of rules (Koskenniemi 2006) – but rather it serves as a means of its interpretation (Droege 2008, 522). For instance, human rights law guarantees the right to life, according to which no person shall be arbitrarily deprived of their life. This guarantee applies likewise in armed conflict and in peacetime. However, what arbitrariness

[4] ICC, case IT-96–21-A, *Prosecutor v. Delalić et al*. Judgment. 20 February 2001, para. 149.

[5] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 13 July 2004, para. 106; ICJ, Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, 19 December 2005, paras. 215–220.

means in the context of an armed conflict will be judged by the applicable IHL. Specifically, whether the loss of life is arbitrary, due to a use of a particular weapon, is a matter of IHL, rather than human rights law.[6]

Generally speaking, requirements stemming from human rights law are stricter than those of IHL, meaning that the use of AWS outside of the context of an armed attack will be assessed more rigorously than within it. This can again be exemplified by the right to life, which is more rigorously protected by human rights law than by IHL. The latter distinguishes between combatants and civilians, providing that civilians enjoy protection, whereas combatants may lawfully be targeted and killed, regardless of what they do. Human rights law, on the other hand, conditions the deprivation of life with specific behavior on the part of a person killed. General comment 36 on the right to life, to Article 6 of the International Covenant on Civil and Political Rights, therefore states that taking a person's life is permitted if it is an act of self-defense (CCPR/C/GC/36, 2019), while the Article 2 of the European Convention on Human Rights similarly specifies actions, such as "unlawful violence", which justify the application of lethal force.

In cases other than armed conflict, such as anti-terrorism actions or law enforcement actions, IHL is not applicable, and solely human rights law applies. When law enforcement officers (and much less often military officers involved in law enforcement operations) perform their duties, they are allowed to use lethal force only exceptionally. Limitations on their use of force are in principle not related to the weapons they use (OHCHR 1990), as it is generally considered that weapons that are illegal under IHL are also illegal in law enforcement operations, but are related to particular situations, that is, to the existence of specific grounds for their use.

Regardless of the context of their use, the employment of AWS may infringe upon a number of human rights. First and foremost, it may infringe upon the right to life, as the most fundamental, "supreme right", from which no derogation is permitted (HRC GC 6 2019). Other rights, such as the right to liberty and security of a person, the right against inhumane treatment, the right to administrative action and the right to a remedy may be violated

[6] Legality of the Threat or Use of Nuclear Weapons, para. 25. See also: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 106. In *Democratic Republic of the Congo v. Uganda*, the ICJ did not mention *lex specialis / lex generalis* distinction, but it did confirm that both IHL and human rights law were applicable in the conflict (*Democratic Republic of the Congo v. Uganda*, para. 179).

as well (Heyns 2014; A Hazard to Human Rights, 2025). And finally, human dignity, as a cornerstone of all other human rights, may be violated when machines replace humans in life-and-death situations.

3. AWS AND HUMAN DIGNITY

3.1. Human Dignity – an Elusive Concept, a Recognized Right

Most people would say that they intuitively know what human dignity is. In spite of that, the exact meaning of the term is not easy to determine (Sharkey 2019, 83; Chengeta 2016). First of all, human dignity is not a static concept, but a dynamic one (Birnbacher 2016, 105–121). It changes over time and across different jurisdictions, and is often open to interpretations (McCrudden 2008, 655). It is sometimes described as a "conversation stopper", as people have a tendency to read their own preferences into it (Heyns 2016, 367).

Despite all this, there seems to exist a minimum agreed content of dignity. This, so-called, "minimum core" (McCrudden 2008, 675) corresponds to the notion of dignity put forward by the philosopher Immanuel Kant. According to Kant, dignity denotes an "intrinsic value" and "unconditional and incomparable worth" of a human being, not dependent on external factors such as recognition or respect (Ulgen 2016, 4; Kuçuradi 2019, 7–13; Umbrello 2024). Being intrinsic and inherent to a human being, dignity can never be lost, and is not conditioned upon a person's behavior (Ulgen 2016).

Human dignity is a concept often discussed in the context of ethics and philosophy (Asaro in Liao 2020; Pop 2018). However, it is also an important legal category, promoted and protected by many international instruments. To name just a few, the UN Charter in its preamble speaks of dignity and worth of the human person; Universal Declaration of Human Rights recognizes dignity and equal rights of all human beings; both International Covenants of 1966 declare that the rights they guarantee are based on human dignity; the EU Charter of Fundamental Rights provides that human dignity is inviolable. A very well-known Martens clause, first encapsulated in the Second Hague Convention of 1899 and later reiterated in other legal texts, builds on the notion of human dignity and requires that armed conflicts be conducted in accordance with the "laws of humanity". In parallel with introducing human dignity into international legal texts, national legal systems underwent the same trend, which resulted in vast majority of state constitutions referring to dignity (Schulztiner and Carmi 2014, 461–490).

A respect for human dignity is, no doubt, rooted in human rights law. Thus, examining AWS compliance with human rights norms necessarily includes examining its compatibility with respect for human dignity. However, before presenting arguments on whether the use of AWS violates human dignity, it must be clarified whose dignity is at stake here. The first category of potential victims are the civilians in an armed conflict, both those who are targeted, as well as those who are incidental casualties (Sharkey 2019, 80). Some authors are of the opinion that civilians are actually "the only [...] serious candidate[s]" whose dignity might be violated (Birnbacher 2016). These authors point out that soldiers are "part of the game", because they are engaged in acts of war, they know what to expect, and can usually opt out (Birnbacher 2016). On the other hand, civilians are not concerned with the rules of war, and opting out by taking refuge elsewhere is often impossible or very difficult (Sharkey 2019, 80). On the other hand, if dignity is to be understood in the Kantian sense, i.e., as an intrinsic value of every human being, then all persons targeted by AWS – be they civilians or soldiers – are in jeopardy of being deprived of their dignity. It makes sense to also safeguard soldiers' dignity. When confronted with machines, they are the weaker and the more vulnerable party. So, it is fair to say that dignity of all those on the receiving end of the use of force needs to be safeguarded (Heyns 2016, 369). But it is not only they whose dignity is at stake. In a broader sense, we might even talk about dignity of those using force, as their moral agency is lost when the prerogative to decide issues of life and death is transferred to machines (Heyns 2016, 369).

3.2. Does the Human Dignity Objection Justify a Ban on AWS?

A legal framework for the use of AWS has been discussed by legal scholars, the UN, NGOs, states, primarily acting through the Group of Governmental Experts within the Convention on Certain Conventional Weapons and other interested actors. The prospect that future wars will be fought by merciless killer robots who will decide who lives and who dies made some of these actors call for their complete prohibition. This initiative relied, *inter alia*, on the human dignity argument. The first and the loudest advocate of such an approach was Christof Heyns, the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Heyns, 2013). Heyns elevated a discussion beyond the mere capability of AWS to do proper targeting, i.e., to distinguish combatants from civilians. He suggested that instead of asking *can* AWS perform in accordance with certain requirements, the question should be *should* it in fact do so (Heyns 2017, 1). Shifting a debate from *can* to *should* departs from the principle of distinction as the

main standard for assessing the appropriateness of the use of AWS and gives primary consideration to human dignity – not just of civilians, but also of combatants.

Heyns problematized certain aspects of the use of AWS, stressing that they lack "human judgment, common sense, appreciation of the larger picture, understanding of the intentions behind people's actions, and understanding of values and anticipation of the direction in which events are unfolding" (Heyns 2013). He further added that compassion and intuition play a role in deciding issues of life and death. While there is no guarantee that humans possess these qualities, there is at least a possibility that they do, whereas AWS surely do not (Heyns 2013). In spite of the fact that AWS can make certain assessments more accurately and faster than humans, they have limited capacity to understand the context in which they operate and to make value-based considerations (Heyns 2013).

Speaking of the so-called "death by algorithm", Heyns elaborates on the issue of autonomy, comparing the autonomy of human beings with that of machines. Humans possess autonomy, which allows them to act as free moral agents (Heyns 2017, 49). The autonomy of robots, on the other hand, is of a different kind: no free will exists, as robots perform functions for which they have been preprogrammed by humans. At first glance, this may imply that robots will act predictably, but in the hectic and changing circumstances of an armed conflict, blind predictability may, in fact, turn out to be unpredictable, undermining the autonomy of the human that created them (Heyns 2017, 49; Barbosa 2024, 7).

Many legal scholars share Heyns's point of view. Peter Asaro, for example, opined that lethal force may only be a result of a deliberate decision of a human operator (Asaro 2012, 694). He notes that "the very nature of IHL [...] presupposes that combatants will be human agents" (Asaro 2012, 700). And in determining legitimate targets, these agents go through "multiple layers of interpretation and judgment," which is something robots are not capable of doing (Asaro 2012, 694). Stephen Goose and Bonnie Docherty also opine that autonomous weapons could undermine human dignity, for similar reasons as those pointed out by Heyns (Goose 2017; Docherty 2014). Dan Saxon stated that delegating complex, value-based judgments to AWS erodes human dignity and, consequently, international law (Saxon 2016, 3). Certain authors, such as Thomas Chengeta, Aaron Johnson and Sidney Axinn, compare the use of AWS to a mouse-trap – a device that kills targets that have certain characteristics and that behave in a certain manner (Chengeta 2016, 483–484; Johnson, Axinn 2013, 134). Humans, on the other hand, should

be treated with more dignity. They may find themselves in the position of an incidental victim of a robotic weapon, but having preprogrammed robots killing them strips them of their dignity (Johnson, Axinn 2013, 134).

On the international scene, many relevant actors have expressed concern over the compatibility of AWS with human dignity. The ICRC raised concerns over the use of AWS, pointing out that "without [effective human deliberation there is no] morally responsible decision making, nor recognition of the human dignity of those targeted or affected" (ICRC 2021). The report by the Stop Killer Robots campaign points out that "delegating life-and-death decisions to machines that cannot fully appreciate the value of human life would undermine human dignity" (Hunt 2019). Similar concerns have been voiced by Human Rights Watch (Docherty 2022) and Amnesty International (2015). United Nations Secretary-General António Guterres stated that the prospect of machines having discretion and power to take human lives is "morally repugnant" (Guterres 2018). Many states have called for a complete ban on AWS (Stauffer 2020).

On the other side of the spectrum are those opposing a complete ban on AWS.

"It makes no difference whether a machine or a human kills you – when you are dead, you are dead" (Rosert, Sauer 2019, 373). From a consequentialist point of view, it is not the means of killing that counts, but a final outcome. If a person killed is a legitimate target, namely a combatant or a civilian taking a direct part in hostilities, and if IHL requirements are met, an act is legally permitted. This argument mirrors a rather pragmatic view, which fails to take into account that it is not irrelevant how you die. Dignified life, as well as dignified death, need to be, and indeed are, protected by law, for it is not just about living or dying – it is about living and dying in a dignified way.[7] Moreover, not only does dying need to be dignified, but dignity needs to be retained even after death (ICRC, Rule 113; Tidball-Binz 2024). If a machine kills a person based on algorithmic decision making, this reduces persons to data points (Rosert, Sauer 2019, 373) and results in those persons being treated as objects, which devaluates humanity and neglects the intrinsic value of a human being (Ulgen 2016, 5).

[7] Dignity is promoted and protected not only by various international instruments, but also by the human rights bodies, for example: CESCR. 2000. General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN Doc. E/C.12/2000/4 (2000); UN Human Rights Council. 2017. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, A/HRC/34/51.

The second argument against this reasoning concerns not the person dying, but rather the persons, and more broadly, the society, causing the death. In classical circumstances of an armed conflict, in which AWS are not used, those that employ force "exercise moral choices" and are responsible for the outcome of those choices – morally, politically, and legally (Heyns 2016, 11). They are not concerned only with those against whom they use force – they are also concerned with their own human casualties. If, however, AWS are used, the society using them does not preoccupy itself with its own casualties, losses of lives, or the moral burdens that result from fighting (Rosert, Sauer 2019, 373). Such a society, which has no cost other than the economic one, is on a good path of losing touch with certain basic values that underlie it. By removing empathy and compassion, the "moral distance" between the military and their targets is increased, which may result in easier resorting to force and in greater killing (Sharkey 2019, 79; Blanchard, Taddeo 2024, 705–711; Enemark 2011, 218–237).

A circumstance that particularly triggers the issue of dignity is the fact that AWS are usually used in asymmetric warfare, where only one side to the conflict applies them, whereas there are human soldiers on the other side. Such asymmetry causes inequality of persons (Ulgen 2016, 5) and causes dread and mental pain on the part of a weaker side (Birnbacher 2016), infringing upon their dignity in the similar manner as torture does.[8]

The majority of authors who oppose human dignity as an argument against AWS do not actually deny the possibility of violations of dignity, but are not so convinced that an absolute ban on AWS is necessary (Saxon 2016; Birnbacher 2016). They propose a nuanced approach to this issue, which would take into account different aspects of the use of AWS. First, they problematize the mere concept of human dignity. Indeed, the concept is vague and open to interpretations, as we concluded *supra*, but in spite of uncertainties regarding its meaning, there is a common ground in perceiving what human dignity stands for. It must be admitted, though, that the existence of this common denominator does not necessarily resolve the issue. Even if there is a consensus that human dignity stands for an intrinsic value of human beings, determining whether someone's intrinsic value has been infringed upon, is again a matter of controversy.

[8] Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person".

The starting premise of those opposing a complete ban on the use of AWS is that human dignity is generally compromised by warfare, regardless of who takes part in hostilities – human soldiers or AWS (Sharkey 2019, 79). This is to say that even if human dignity is violated by the use of AWS, it is equally violated when human soldiers use force by utilizing another type of weapons. On top of that, the substitution of human soldiers by AWS may even have its advantages, such as a lower number of human casualties, and machines may react faster and be more accurate in selecting and shooting targets. Their lack of emotions, such as fear, anger and desire for revenge, may reduce the number of atrocities that are regularly committed in armed conflicts (Arkin 2010, 332–341). The idea here is that AWS do not violate human dignity *per se*, at least not more than human soldiers using other types of weapons do (Schmitt 2013; Schmitt, Thurnher 2013, 233).[9] AWS may under certain circumstances violate human dignity but not because they are autonomous, but rather in cases in which they operate contravention with the existing legal regulations.

4. MEANINGFUL HUMAN CONTROL

The main controversy underpinning the use of AWS is the lack of human control. Giving preprogramed machines the prerogative to decide issues of life and death is, as demonstrated above, something perceived as violating human dignity. This was one of the reasons why the concept of "meaningful human control" (MHC) (Moyes 2016) has become an essential component of all international discussions on AWS.

When referring to human control, different states utilize different narratives. Some of them prefer using the terms "human supervision", "involvement", "judgment" or "human command and control", rather than MHC (Ferl 2024, 145). In the United States, the idea of retaining human control over the process of the use of AWS is expressed through the term "appropriate human judgment" (U.S. DoD 2023).

Setting terminological differences aside, there seems to be a consensus that retaining some kind of human control over AWS, i.e., over the lethal harm they inflict, is necessary (UNGA 2024; Purves, Jenkins, Strawser 2015, 851–872). Yet, no equivocal understanding exists on what human control

[9] Certain weapons, such as biological weapons, are illegal *per se*, even when they are used against combatants. Other weapons, on the contrary, are not illegal *per se*, but may be used illegally. For instance, a rifle is not prohibited under international law, but may be used to shoot civilians, that is, unlawfully.

actually means, as again, different states attach different meanings to it. Specifically, defining what "meaningful" and "appropriate" is, within the contexts of meaningful human control and appropriate human judgment, was one of the main obstacles in identifying these concepts.

Generally, human control refers to a human–weapon relationship, where the human operator retains certain control over a weapon. To identify different levels of control, the so-called OODA loop model can be used. OODA stands for "observe", "orient", "decide" and "act" (OODA Loop 2025). These four tasks are used to assess how much autonomy a particular AWS has, i.e., what is the degree of human involvement in performing these four functions. In that sense, a differentiation can be made between a "human-in-the-loop", "human-on-the-loop", and "human-out-of-the-loop", the first one denoting the highest degree of human control over the robotic system, the second providing a certain level of human supervision, while the third is entirely autonomous and without human supervision (Crootof 2015, 1861).

Keeping a human in the loop, i.e., including a human in the lethal decision process is a necessary, but not a sufficient requirement. It is not equivalent to retaining meaningful human control. A legitimate lethal decision process must also meet certain requirements: that the human decision maker is involved in verifying legitimate targets and initiating lethal force against them. First, a human operator must be allowed sufficient time to be deliberative. Also, they must be suitably trained and well informed.[10] In addition, "cognitive clarity" and "awareness" is needed, as, for instance, an individual who is mentally ill has no capability to adequately meet this requirement (Moyes 2016). Ultimately, it is important that they bear responsibility for their decisions (Asaro 2012, 695). These, and possibly other requirements, may characterize control as "meaningful", as they ensure that a human agent controlling the use of AWS is actually in a position to reach an informed and responsible decision. Without this, it may happen that some kind of human control exists, but is practically meaningless (Moyes 2016).

Similar concerns have been voiced while discussing the meaning of "appropriate human judgment". This standard requires that reliable and tested weapons are used in accordance with established procedures, and that there is a clear and readily understandable interface between weapon systems and users. Such weapons need to be designed and

[10] Practice has shown that the inability of human operators, who control weapons with autonomous characteristics, to properly manage their use resulted in incidents involving shooting at unintended targets. See, for example, the case of the US Patriot antimissile system, which was involved in a "friendly fire" incident during the 2003 Iraq War (Piller 2003).

used to comply with the requirements of IHL, i.e., with the principles of distinction and proportionality. What the appropriate human judgment, however, presupposes not only the ability of AWS to be used lawfully, but also "appropriately", i.e., in accordance with rules of engagement and the mission objectives. Understood so broadly, and especially being subject to the assessment of military objectives, appropriate human judgment denotes a rather vague concept, which allows for its widely different interpretation in different situations (Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System 2016).

Whatever the exact content of meaningful human control or appropriate human judgment, it certainly means keeping the well-trained human operator behind the actions performed by AWS and not replacing soldiers with the machines altogether. The minimum requirement for MHC is that it exists in the phase of actual employment of force, but securing it in other phases of weaponization process, such as pre-development, testing and evaluation, is likewise an option (Nadaradjane 2023, 60).

Many authors agree that retaining MHC over the use of AWS would resolve many issues, such as issues of safety, precision, responsibility and, finally, dignity (Davidovic 2022a). Whether MHC would indeed resolve these issues is open to discussion, as diverse problems may also arise with the introduction of such control. Automation bias, i.e., a tendency to trust machines when the opinions of machines and humans conflict, or assimilation bias, which occurs when humans see what they want to see or hear what they want to hear, may be an obstacle to securing meaningful control (Davidovic 2022b Chengeta 2016). Further is the speed or complexity of data processing, which prevents a proper decision making in real time, making meaningful human oversight impossible (Davidovic 2022a).

Generally, it can be claimed that the existence of proper human control may overrule the objection that machines, due to lack of moral agency, are uncapable of respecting human dignity. However, there are, obviously, many elements of MHC that are currently ambiguous and need to be agreed upon by states. Consideration here will certainly be given to: the technical characteristics of AWS, as different levels of autonomy imply different levels of human supervision; the phases of weaponization in which human supervision and decision making will be required; the qualities of the decision maker; and responsibility issues, as human control that does not result in responsible agents bearing consequences for their actions in the use of AWS could never be sufficiently meaningful (Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System 2019; UN Human Rights Council 2024).

5. CONCLUSION

In the not-too-distant past, it was unimaginable that soldiers on a battlefield would face killer machines, instead of enemy soldiers. Today, this has become a reality. However, the technological advancements that have led to this development have not been accompanied by appropriate legal regulations. Since no legally binding document regulating AWS has been adopted so far, the existing rules of IHL and human rights law currently provide the legal framework for assessing the permissibility of autonomous weapons. This paper analyzes the compatibility of AWS with human dignity, which is a cornerstone of human rights.

A number of states, legal authorities and civil society members have advocated for a complete ban on AWS, justifying their position, either entirely or partially, on the grounds of human dignity. Their arguments are based on the premise that being killed by a machine, which has no conscience or morality, and to which one cannot surrender or plead for mercy, constitutes the ultimate indignity. However, this argument has been challenged on several grounds. First, it is argued that dignity is inherently compromised in war, with no objective difference between being killed by a robot and being killed by any other weapon. Second, the use of AWS may have certain advantages, such as reducing human casualties, making it unjustified to outlaw AWS altogether. Finally, while there is broad consensus on the minimum core of dignity, its inherently diffuse meaning undermines its viability as the primary justification for a complete ban on AWS.

All of these arguments hold merit and none should be entirely dismissed. In bridging the gap between them, the concept of MHC emerges as an appropriate tool. It has also gained broad recognition among all relevant actors engaged in discussions on AWS. However, the challenge with MHC lies in the lack of consensus on its precise meaning and scope. Technologically advanced states are already advocating for a less stringent understanding of MHC, emphasizing the need for flexibility. They argue that there is no one-size-fits-all solution, and that the application of MHC should be adaptable to particular situations. Conversely, other states favor stricter rules that prioritize respect for human dignity and other fundamental rights.

Given the conflicting interests of states, the technological diversity of AWS, and the contextual differences in their use, it seems unlikely that an all-encompassing definition of MHC will be agreed upon. Instead, a more nuanced approach is likely to prevail, in which MHC would be defined based on the type of weapon and its mode of use. Any solution should inevitably include the element of responsibility, as identifying a responsible agent or agents is a minimum requirement for preserving the dignity of those targeted

by AWS. Also, contrary to assertions that human element may be present solely in the programing phase, i.e., in the production of AWS, a human should always be in a position to approve or reject a targeting decision, regardless of whether they selected a target themselves or a machine did so. This is the only way that moral agency can be preserved.

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Jelena TODIĆ, LL.M.[*]

Hristina TODOROVIĆ, LL.M.[**]

EXTRAORDINARY REMEDIES AND CONSTITUTIONAL COMPLAINT IN SERBIAN CIVIL PROCEDURE AS AN ADMISSIBILITY CONDITION FOR ECtHR APPLICATIONS[***]

This article examines the European Court of Human Rights' (ECtHR) approach to the exhaustion of extraordinary legal remedies and constitutional complaints in civil cases against Serbia. It explores when an applicant, alleging a human rights violation based on facts considered in civil proceedings, must exhaust such remedies to satisfy admissibility requirements. While it is generally accepted that an ordinary appeal must be used, the obligation to pursue extraordinary legal remedies – such as requests for revision or reopening of proceedings – and the constitutional complaint is less clear. The article highlights that the necessity of exhausting these remedies depends on the specific circumstances of each case and whether the remedy is considered effective. Through an analysis of ECtHR case law, the authors seek to clarify the conditions under which the Court expects applicants to exhaust these legal avenues before filing an application, aiming to identify consistent patterns in the Court's admissibility decisions.

Key words: *European Court of Human Rights. – Conditions of admissibility. – Exhaustion of legal remedies. – Extraordinary legal remedies. – Constitutional complaint.*

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[*] Attorney-at-Law, Bredin Prat, France, *jelenatodic@ymail.com*.

[**] Attorney-at-Law, Analyst at Investment Arbitration Reporter, Serbia, *hristina.todorovic1@gmail.com*.

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1. ON OTHE RULE OF EXHAUSTION OF LEGAL REMEDIES

The European Court of Human Rights (ECtHR or Court) considers exclusively the merits of those applications that had previously been examined by all effective domestic instances – a rule known as the exhaustion of legal remedies.[1]

In the system of European protection of human rights, of which the Republic of Serbia is a part, Article 35 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) is relevant,[2] stating that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of four months from the date on which the final decision was taken."[3]

The Court has also pointed out in its jurisprudence that the rule of exhaustion is one of the fundamental principles that constitute an indispensable part of the functioning of the judicial system under the Convention.[4] The rule is closely linked to one of the main features of the modern system of settling disputes in the field of human rights at the supranational level – the principle of subsidiarity (see Spano 2014; Todorović 2017).[5] The nature of the protection of human rights at the

[1] In English, *domestic remedies rule* or *rule of exhaustion of domestic remedies*. The rule of exhaustion of legal remedies exists also a part of international customary law. *See* Romano 2013, 561; ICJ, Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), Judgment (20 July 1989), paras. 46, 50, 59; ICJ, Interhandel (Switzerland v. United States), Judgment (21 March 1959), p. 27. *See also* the position of the International Law Commission in codifying international customary law of diplomatic protection (International Law Commission 2006, Arts. 14 and 15.

[2] The Convention's previous Article 26. The ECtHR case law that refers to this Article, before Protocol No. 11 of November 1998 came into force (which modernized the Convention and the human rights protection system at the European level with a permanent court in Strasbourg) is also relevant for the application of Article 35.

[3] The Convention on the Protection of Human Rights and Fundamental Freedoms, Article 35(1). Emphasis added. The referenced and current four-month period was previously set to six months, which changed with the coming into force of Protocol No. 15 in August 2021. See Council of Europe, Protocol No. 15 to the European Convention on Human Rights, *Council of Europe Treaty Series*, No. 213, Strasbourg, 24 June 2013.

[4] ECtHR, *Demopoulos et al. v. Turkey*, No. 46113/99, 1 March 2010, p. 69, 97.

[5] Judge Cançado Trindade also stresses that the ECtHR was sufficiently careful to emphasize the subsidiary nature of the international apparatus for the protection of human rights, established by the Convention. In the Belgian Linguistics case (merits), judgment of 23 July 1968, p. 34 paras. 9–10, the Court held that it "cannot assume the rôle of the competent national authorities, for it would thereby

international level is secondary to that afforded by the Contracting States. The practical application of the principle of subsidiarity takes shape in the rule that before turning to the supranational apparatus, the individual must first utilize the legal means available to them in their home country (see Romano 2013, 563).[6] The local protection system is primary because there is a presumption that each state is best placed to provide a system of human rights protection for its citizens. On the other hand, the objective of protection at the supranational level is reflected in the promotion of certain universally accepted values, while at the same time guaranteeing the minimum standards that complement the national ones. Such dynamics allow for the protection of national autonomy and diversity among the member states of international human rights protection systems (whether it is the ECtHR or some other regional protection regime) (Feichtner 2007, para 5, 23; Marinković, Krešimir 2016, 336), while at the same time guaranteeing a certain minimum of protection at the supranational level.

Additionally, in the context of the former law of diplomatic protection of aliens (an area that yielded the original practical application of the exhaustion rule), Chittharanjan F. Amerasinghe considers that the rule of exhaustion of legal remedies in this type of law concerns three interests: first, the interest of the respondent state to utilize its domestic means of dispute resolution; second, the interest of the foreign citizen in resolving the dispute in the most effective, equitable and cost-efficient way; and third, the interest of the international community in ensuring the fair and effective resolution of disputes. In the law of diplomatic protection, primacy is given to the interests of the respondent state, leaving the other two interests in second place. On the other hand, the same author deduces that, due to the nature of the individual in the protection of human rights (who is not, as in the case of the law of diplomatic protection, identified through their state, *i.e.*, an impersonal entity) the interest of the individual is more dominant in

lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention" (Trindade 1978, 333–370, 346). See Trindade 1976, 501–02; Duruigbo 2006, 1272. On the effect of the exhaustion requirements to the ECtHR's ability to afford redress to the victims of human rights violations and the protection of the rule of law erosion in "neoliberal democracies", see Hanci 2024.

6 Systems that do not require this step and allow for direct access are rare but existent; see, e.g., appeals procedure of the International Labor Organization Article 26, and the collective appeals procedure of the European Social Charter.

the rule of exhaustion of legal remedies in human rights law. This is reflected primarily through the exceptions to the application of the rule (Amerasinghe 1968, 269–271).

Returning to Article 35(1) of the Convention, it is important to note that the provision that reads "according to the generally recognised rules of international law" is interpreted by the same author (albeit in the context of a similar article of another international instrument) in terms of two principles: local remedies must be used and there are exceptions to this rule in favor of the interests of either the individual or the state. In the context of the European system of protection of human rights, it is noted that the *travaux préparatoires* give little indication on how the old Article 26 of the Convention (now Article 35) should be interpreted (Amerasinghe 1968, 272).

Further, with regard to Article 35(1) of the Convention, it should be noted that the exhaustiveness of "all domestic remedies" is a very general and broad condition.[7] Cesare P. R. Romano points out that it is precisely the generality and vagueness of the exhaustion rule in international human rights regimes that has given the decision-making bodies room for maneuver in elaborating the exact scope of the rule and its exceptions (Romano 2013, 565).

The Contracting Parties apply the condition of exhaustion of "all domestic remedies" to the extent permitted by their domestic judicial systems. In this regard, there is also the issue of understanding the definition of domestic remedies in each specific local legal order and its practical implication for a potential applicant before the Court.

Rodoljub Etinski points out that the official translations into Serbian of the English term "remedy" in international instruments may sometimes also mean "the right to appeal", as in the International Covenant on Civil and Political Rights of 1966. Generally, however, under Serbian law, legal remedies are understood as appeals "and extraordinary legal remedies, such as revision, request for the protection of legality or motion for retrial" (Etinski 2004, 430, translated by author).

In the context of the Court's case law, there is no doubt that an appeal, as the first and ordinary instance, must be used in order to proceed in accordance with Article 35 (1) of the Convention. But, what about the other legal remedies that are available in most cases, once the decision has become final and binding? Within the meaning of Article 35 (1) of the Convention, are extraordinary legal remedies – those that can be filed even after the

[7] On the legal nature of the exhaustion rule, see Tubić 2008.

decision becomes final and binding, including constitutional complaint, as a special type of legal remedy – considered being internal remedies within the meaning of Article 35 (1) of the Convention? If so, does the ECtHR always expect *all* extraordinary legal remedies to be exhausted in each specific case, or only some of them? Is it expected that the constitutional complaint will always be used?

The answers to these questions are shaped by the Court's practice, and its conclusions are constantly evolving, so monitoring the progress in this field is a dynamic and challenging task. The Convention is interpreted as a "living instrument", in the context of changing social circumstances in the European countries. Therefore, it should not be surprising that the answers given by the ECtHR to certain questions are not static, but change over time (Etinski 2004, 436). Taking into account the fact that the case law of the ECtHR is constantly changing, Romano points out that it is often difficult for the applicant to conclude for themselves whether, in a particular case, the exhaustion rule has been observed with the legal remedies they have used or whether there is scope for the application of certain exceptions (Romano 2013, 567).

As a general remark, the rule emerges that there is no single solution. In each specific case in which an application to the ECtHR is being prepared, it is necessary to determine separately whether the applicant has previously exhausted everything that the domestic system offers them in this type of dispute, given the nature of the facts and legal violations in that particular case. In the first place, the differences are reflected in the nature of the dispute, *i.e.*, whether the alleged violation of human rights occurred in criminal, civil or administrative proceedings.

While the number of applications before the ECtHR against Serbia is not negligible,[8] the issue of exhaustion of legal remedies in terms of admissibility of Serbian applications to the ECtHR in various types of disputes has so far not been the subject of more detailed academic considerations. The general observations, with reference to the case law of the Court against various States Parties to the Convention on the condition of exhaustion, provide a general framework, but do not facilitate the task of a potential applicant against Serbia in considering whether the procedural condition will also be considered satisfied in terms of its admissibility. The ECtHR's Practical Guide on Admissibility Criteria (Admissibility Guide) does not provide an unambiguous solution to this issue. In the section dealing with the exhaustion

[8] See European Court of Human Rights 2024, 7. See also, Republic of Serbia ECtHR Representative n.d.

rule, the Admissibility Guide points out that it is not a requirement that discretionary[9] or extraordinary legal remedies have been exhausted, except in situations where it has been established that a particular remedy is effective under local law or that challenging a decision that has already acquired the force of finality is the only way to obtain the protection at the local level (Registry of the European Court of Human Rights 2023, 31).

Additionally, the analysis of the Court's case law regarding the admissibility of applications in cases against Serbia has a practical significance when the scope of consideration is narrowed according to a criterion, such as the type of procedure or the violation of a specific right. In this paper, the authors focus on the study of these issues in relation to civil proceedings, *i.e.*, to claims arising from the violation of personal rights and disputes arising from family, labor, commercial, property and other civil law relations.

In particular, the question under investigation is as follows: when an ECtHR applicant against Serbia argues that its human rights have been violated with reference to the facts that were addressed in civil proceedings, will they be expected to use extraordinary legal remedies, in what situations, and which ones? Although the ECtHR is clear in its position that the assessment of which legal remedies must be met depends on the particularities of each individual case, the authors aim to analyze the current practice of the ECtHR in cases involving Serbia[10] and to determine whether certain regularities can be found in the ECtHR's considerations concerning alleged human rights violations where the applicants had sought their protection through civil proceedings. As such, even if it does not identify clear regularities capable of facilitating future considerations, the analysis aims to at least shed light on the criteria and parameters that guided the Court in its assessment of the effectiveness of an extraordinary legal remedy in the light of the rule of exhaustion.

In that regard, below we provide an overview of the ECtHR's views on the characteristics of the rule of exhaustion in the application of Article 35 (1) of the Convention[11] in practice (Section 2), followed by an overview on how the ECtHR approaches the need for the exhaustion of extraordinary legal remedies in general (Section 3). Finally, the types of extraordinary

[9] It should be noted that not all extraordinary legal remedies are discretionary.

[10] The authors aimed to present the most relevant cases involving Serbia regarding the issue of exhaustion of legal remedies and the application of Article 35(1) of the Convention, available as of July 2024.

[11] This paper analyzes only the exhaustion of legal remedies in the context of admissibility of ECtHR applications. The exhaustion of local remedies may also be relevant on the merits, but this issue is excluded from the analysis.

legal remedies available in Serbian civil proceedings will be presented (Section 4), and the practice of the ECtHR will be discussed in relation to the effectiveness of any extraordinary legal remedy that can be used for violation of rights in litigation in the Republic of Serbia (Sections 5, 6, and 7), as well as constitutional complaints (Section 8), concluding with remarks (Section 9).

2. CHARACTERISTICS OF THE RULE OF EXHAUSTION: APPLICATION OF ARTICLE 35 (1) OF THE CONVENTION IN THE PRACTICE OF THE ECtHR

The judgments of the ECtHR have so far crystallized the understanding that the applicant must exhaust all the remedies that, in the light of the facts and circumstances of the specific violation of the law, are "available", "effective"[12] and "sufficient" in the case at hand.[13] However, these terms also have their own specific meaning created by the case law of the ECtHR. The commentary of Serbian authors on the Convention points out that it is possible to conceptually distinguish between the concepts of sufficiency and effectiveness, despite the overlap between the two that is often observed in practice (Beširević *et al.* 2017, 468). In short, it can be said that sufficiency means that a legal remedy, if successfully used, may provide satisfaction to the victim for the violation of their rights. Effectiveness, in turn, means that the remedy is affordable, can directly remedy the situation to which the complaint relates, and offers a reasonable chance of success.[14]

[12] Regarding the definition of effectiveness, Etinski also examines the relationship between the right to an effective remedy (Article 13 of the Convention) and the exhaustion of domestic remedies as a procedural prerequisite for the admissibility of a request for initiating proceedings. He finds that if the question of the admissibility of a request is closely linked to the question of the merits of the request, the ECtHR may combine its decision on both issues and decide them in its judgment. The ECtHR may do so when the issue of remedies is raised before it as a State's objection to the admissibility of a request, on the one hand, and as the request brought before it by an individual, on the other. The same author also notes that in some cases when it judges the effectiveness of a remedy on the basis of a request under Article 13 of the Convention, the ECtHR refers to the criteria it has established in its decisions on admissibility regarding the exhaustion of domestic remedies (Etinski 2004, 436, 454).

[13] ECtHR, *Krstić v. Serbia*, Application No. 45394/06, Judgment of 10 December 2013, para. 71 *https://hudoc.echr.coe.int/eng*.

[14] ECtHR, *Riđić and Others v. Serbia*, Applications Nos. 53736/08, 53737/08, 14271/11, 17124/11, 24452/11, and 36515/11, Judgment of 1 July 2014, para. 65.

Nevertheless, "[t]he applicant is exempt from the obligation to exhaust domestic remedies if, having regard to previous and established domestic case law, that form of protection is doomed fail, as well as if domestic remedies are ineffective or inadequate having regard to the nature of the violation of rights committed" (Kristić, Marinković 2016, 54).[15] Krstić and Marinković point out that with such a flexible interpretation of Article 35, the Commission and the Court have expanded the possibility of initiating a European system of protection of human rights (Kristić, Marinković 2016, 54; Sudre 2003, 426–427). In this light, Etinski also points to the *Egmez v. Cyprus* case where the ECtHR considered the existence of a violation of Article 13 of the Convention guaranteeing the right to an effective legal remedy before national authorities. In that case, the ECtHR found that recourse to the Ombudsman was not considered to be a legal remedy required by Article 35 (1) of the Convention, but that its use may make sense in the context of Article 13 of the Convention. The Ombudsman sent his report to the Public Prosecutor that Erkan Egmez had been subjected to torture, but the Public Prosecutor did not initiate criminal proceeding. For this reason, the ECtHR found that Egmez, by addressing the Ombudsperson, had fulfilled his obligation under Article 35 (1) of the Convention, even though he had not initiated a civil action for damages because his chances of success would have been slim without evidence that would have been obtained in the criminal proceedings (Etinski 2004, 455).[16]

In addition, the Court has repeatedly held that the remedy must provide additional monetary compensation in order to be considered effective within the meaning of the exhaustion rule.[17] In *Đermanović v. Serbia*, the Court held that "the decisive question in assessing the effectiveness of a remedy concerning a complaint of ill-treatment is whether the applicant can raise this complaint before domestic courts in order to obtain *direct and timely redress*, and *not merely an indirect protection* of the rights guaranteed in Article 3 of the Convention".[18]

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[15] Krstić and Marinković opine that by such a flexible interpretation of Article 35, the Commission and the Court have expanded the possibility of launching a European system of human rights protection.

[16] ECtHR, *Egmez v. Cyprus*, Application No. 30873/96, Judgment of 21 December 2000, para. 66.

[17] ECtHR, *Mirković and Others v. Serbia*, Applications Nos. 27471/15, *et al*, Judgment of 26 June 2018, para. 114. Similarly, in ECtHR, *Đermanović v. Serbia*, Application No. 48497/06, Judgment of 23 February 2010, para. 39.

[18] *Đermanović v. Serbia*, 23 February 2010, para. 39, emphasis by author.

As previously pointed out, the definition of domestic remedies is approached differently, depending on the jurisdiction under consideration. In addition, the ECtHR itself tends to change its position in its judgments depending on the national judicial authority of a State party to the Convention that the applicant should have addressed before submitting the application in Strasbourg. The change in the position of the ECtHR is primarily motivated by a different understanding of the effectiveness of a specific legal remedy in the protection of a human right in a single judicial system of a Member State. The ECtHR is not satisfied with a formal and theoretical observation of the elements of exhaustion, but essentially considers the effect, *i.e.*, the effectiveness that each individual legal remedy has on the satisfaction of the right protected by the Convention before the domestic judiciary. The ECtHR takes into account not only the existence of formal remedies in the legal system of a Contracting State "but also the legal and political context in which they operate, as well as the personal circumstances of the applicants" (Etinski 2004, 455, translated by author). Such an approach results not only in frequent changes in the conclusions as to which remedy must be exhausted but also provides a clear indication to the Member State on whether the work of the courts to protect rights before a particular domestic judicial authority can be considered effective.[19]

On the other hand, the Court stresses that Article 35(1) of the Convention must be applied with "some degree of flexibility and without excessive formalism",[20] and that the rule of exhaustion of legal remedies was "neither absolute nor capable of being applied automatically".[21] In addition to the general availability of remedies, the application of this provision also accounts

[19] In the Serbian public, the new position of the ECtHR expressed in one of its judgments, that the legal remedy is considered effective and necessary to satisfy exhaustion, is sometimes received in an extremely positive manner. See, for example, the statement by Bosa Nenadić, President of the Constitutional Court of Serbia at the time when the decision was made in the *Vinčić and Others v. Serbia* case, in which the ECtHR declared the constitutional complaint an effective legal remedy (see below). M. Petrić. 2009. "U Strazbur samo posle ustavne žalbe". *Politika*. December 2009.

[20] See also *Mirković and Others v. Serbia*, 26 June 2018, para. 114. A good example is also an old case dating back from 1979, where, then the Commission found that an application by a prisoner against the United Kingdom was admissible, as the applicant was justifiably unable to exhaust the local legal remedies because the state had prevented him from doing so for almost two years. ECtHR, *Reed v. UK*, No. 7630/76, paras. 8–11. See Bratza, Padfield 1998, 222.

[21] The rule of exhaustion of domestic legal remedies is neither absolute nor automatic, "primarily because the Court takes into account the fact that its primary function is the protection of human rights and fundamental freedoms." (Krstić, Marinković 2016, 54, citing Leach 2001, 78, translated by author)

for "the particular circumstances of each individual case".[22] This means, *inter alia*, that it is necessary to take into account not only the existence of formal remedies but also the "personal circumstances of the applicants".[23] Also, in one case, the Court held that, in situations where the national legal system offers "more than one potentially effective remedy", the applicant should have recourse to only one remedy of his choice.[24] Further, from the Court's case law,[25] Etinski concludes that the effectiveness of the legal remedy is not conditioned by the certainty of a positive outcome for the applicant, but by the speed of the State's response (Etinski 2004, 437). This means that effectiveness puts an important emphasis on the efficiency of the State in the protection of rights. If a legal remedy is known to be subject to a procedure that is inefficient due to its length, such a legal remedy may be considered ineffective. However, the question arises in which situations the applicant will rightly be able to argue that the slowness of the procedure renders the remedy ineffective, and that this is not the usual slowness of legal systems, which is often the case in certain States Parties to the Convention.[26]

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[22] ECtHR, *Grudić v. Serbia*, Application No. 31925/08, Judgment of 17 April 2012, para. 49.

[23] *Grudić v. Serbia*, 17 April 2012, para. 49.

[24] See ECtHR, *Popović and Others v. Serbia*, Applications Nos. 26944/13, *et al*, Judgment of 30 June 2020, para. 58. This rule, however, applies to situations in which the Court was faced with the respondent State's argument that the applicant allegedly had the opportunity to avail themselves of a remedy not only from one but several different domains of law (civil, administrative, criminal, etc.), and does not sufficiently assist in understanding the Court's case law when it comes to considering the need to use extraordinary legal remedies. See ECtHR, *Karako v. Hungary*, Application No. 39311/05, Judgment of 28 April 2009, paras, 13–14; ECtHR, *Kozacioğlu v. Turkey*, Application No. 2334/03, Judgment of 19 February 2009, paras. 39–46.

[25] Relying on ECtHR, *Smith and Grady v. the United Kingdom*, Applications Nos. 33985/96 and 33986/96, Judgment of 27 September 1999, para. 135.

[26] Similarly, in ECtHR, *Šorgić v. Serbia*, Application No. 34973/06, Judgment of 3 November 2011, para. 55. "[I]t has been repeatedly recognized that the speed of the domestic procedure is relevant to whether a given remedy is to be deemed effective and hence necessary to exhaust in terms of Article 35 § 1 of the Convention (see, for example, *Mitap and Müftüoğlu v. Turkey*, no. 15530/89 and 15531/89, Commission decision of 10 October 1991, DR 72, p. 169; see also the reference to the said decision in the matter of *Selmouni v. France*, no. 25803/94, Commission decision of 25 November 1996, DR 88–3, 55). Indeed, the excessive length of domestic proceedings may constitute a special circumstance which would absolve the applicants from exhausting the domestic remedies at their disposal (see *X. v. the Federal Republic of Germany*, no. 6699/74, Commission decision of 15 December 1977, DR 11, p. 24; and *Okpisz v. Germany* (dec.), no. 59140/00, 17 June 2003)."

When submitting their application, the applicants must also comply with the applicable rules and procedures of domestic law, including time limits, and the submission of appropriate evidence in support of the submissions in the domestic proceedings. Otherwise, there is a risk of noncompliance with the condition laid down in Article 35 (1) of the Convention.[27] On the other hand, in proceedings before a domestic authority, it is not necessary to explicitly invoke an infringement of a right protected by the Convention if such a complaint is raised, at least tacitly.[28] In addition, the existence of these remedies must be sufficiently certain not only in theory but also in practice, because a failure would deprive them of the necessary accessibility and effectiveness.[29]

The respondent State bears the burden of proof that an effective remedy has not been exhausted and that the application is inadmissible (unless a remedy is not considered effective as a matter of principle).[30] The respondent State must satisfy the Court that an effective remedy was available both in theory and in practice at the relevant time – in other words, that the remedy was available, that it could have provided satisfaction in relation to the applicant's complaint, and that it offered a reasonable prospect of success.[31] Once this burden of proof is discharged, the applicant must establish that the legal remedy offered by the respondent State had been essentially exhausted, or that it was inadequate and ineffective in the particular circumstances, or that specific circumstances relieved the applicant of this requirement.[32]

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[27] ECtHR, *Pop-Ilić and Others v. Serbia*, Application Nos. 63398/13, 76869/13, 76879/13, 76886/13, and 76890/13, Judgment of 14 October 2014, para. 37. See also *Mirković and Others v. Serbia*, 26 June 2018, para.113.

[28] *Riđić and Others v. Serbia*, 1 July 2014, para. 64. It is not required that the applicant has expressly alleged in the domestic proceedings that a right guaranteed by the Convention has been violated, but it is sufficient that they have presented the essence of their subsequent complaint to the Court alleging a violation of that right (Beširević *et al.* 2017, 465). However, in order to remove any doubt, it is advisable to refer to the relevant provision of the Convention in the domestic proceedings as well. In addition, it should be borne in mind that domestic legal remedies must be exhausted in relation to each violation of the Convention alleged in the representation (Beširević *et al.* 2017, 465).

[29] *Mirković v. Serbia*, 26 June 2018, para. 97. Also *Đermanović v. Serbia*, 23 February 2010, para. 37.

[30] That said, Romano points out that the admissibility of the application must first be established by the applicant, precisely in their submission (Romano 2013, 568).

[31] *Krstić v. Serbia*, 10 December 2013, para. 71.

[32] *Pop-Ilić and Others v. Serbia*, 14 October 2014, para 38. For more on burden of proof, see Robertson 1990.

3. EXHAUSTION OF EXTRAORDINARY LEGAL REMEDIES IN ECtHR CASE LAW

First, it should be noted that extraordinary legal remedies are understood to be all those remedies that can be filed after the decision has become final and do not have a suspensive effect on the execution of that decision. Ordinary legal remedies, on the other hand, are filed against decisions that have not yet become final and may still be subject to review by higher instances, with a suspensive effect on enforcement. Extraordinary legal remedies are rarer than the ordinary ones, and the requirements for lodging them are narrower and more stringent. They are dedicated to correcting the actions of lower courts that are of such nature or gravity that they could not be corrected in regular proceedings, while also harmonizing law at the system level. Extraordinary legal remedies are often decided by the highest judicial instance.[33]

Despite the fact that the practice of the ECtHR with regard to extraordinary legal remedies is not sufficiently crystalized, at times and depending on the case-specific circumstances, extraordinary legal remedies may be considered domestic remedies within the meaning of Article 35 of the Convention. This is especially the case when in the given legislation a particular extraordinary remedy is clearly considered effective and has a reasonable prospect of success.

There are cases in which the ECtHR has taken the view that Article 35 (1) does not require the mandatory lodging of extraordinary legal remedies or that the period of six months (now four) can be extended, with the argument that these remedies had not been exhausted.[34] In addition, Krstić and Marinković point out that the exhaustion of internal remedies can only apply to those forms of intervention "that do not represent a mere possibility or privilege, such as extraordinary remedies or a request for a pardon" (Krstić,

[33] This is also the case with revisions and request for review of a final and binding judgment in the Serbian legal system, and, exceptionally, with motions for retrial. See Articles 405, 423, 433a of the CPA. In the French legal system, the Court of Cassation (*la Cour de cassation*) decides on the request for cassation (*le pourvoi en cassation*). See Article 604 of the French Code of Civil Procedure. This is not the case with the remaining two extraordinary legal remedies: *la tierce opposition* and *le recours en révision*.

[34] See ECtHR, *Çincar v. Turkey*, Application No. 30281/06, 2003; ECtHR, Prystavska v. Ukraine, Application No. 21287/02, 2002; Registry of the Council of Europe 2023, p. 32.

Marinković 2016, 54, translated by author). Bratza and Padfield reach a similar conclusion, citing the *Deweer v. Belgium* case (Bratza, Padfield 1998, 222).[35]

It is important to note that the value of understanding whether a particular extraordinary legal remedy is a condition for the admissibility of an application to the ECtHR is relevant primarily for the clarity of the deadlines and a better action strategy for the potential applicant who claims to have been a victim of a human rights violation. Whether a particular extraordinary legal remedy constitutes a condition for filing an application also leads to a different running date of the four-month deadline for submitting an ECtHR application.

On the other hand, the adoption of unambiguous conclusions on the effectiveness and thus the necessity of exhaustion of extraordinary legal remedies in a legal system cannot be given without a prior detailed consideration of the Court's case law, with special reference to the facts of the particular case and the specifics of the legal system in question. This is because an exception may be based on the facts of the underlying case, with the Court finding that the domestic authority does not afford sufficient protection by a legal remedy in question, and taking the view that the applicant has the right to have immediate recourse to the supranational authority without further hindrance, even if the ECtHR previously considered the legal remedy to be effective and subject to exhaustion.

4. EXTRAORDINARY LEGAL REMEDIES IN SERBIAN CIVIL PROCEDURE

In the part on extraordinary legal remedies, the Civil Procedure Act[36] of the Republic of Serbia (CPA), prescribes that a final and binding judgment issued at the second instance may be subject to: revision,[37] request for review of a

[35] ECtHR, *Deweer v. Belgium*, Application No. 6903/75, Judgment of 27 February 1980, para 32.

[36] Civil Procedure Act, *Official Gazette of the Republic of Serbia*, Nos. 72/2011, 49/2013, 74/2013, 55/2014,87/2018, 18/2020, and 10/2023.

[37] A request for revision may be submitted within 30 days of the date of receipt of the second instance judgment and it is always allowed if: it is prescribed by a special law; the second-instance court has modified the judgment and decided on the parties' requests; and the second-instance court has accepted the appeal, revoked the judgment and decided on the parties' requests. The monetary threshold for property disputes is the dinar equivalent of EUR 40,000 at the mid-market exchange

final and binding judgment,[38] or motion for retrial.[39] Article 434 of the CPA further addresses when these remedies may be filed jointly, stating that the

rate of the National Bank of Serbia on the day the lawsuit is filed. A special revision is one that is exceptionally permitted due to the incorrect application of substantive law and against a second-instance judgment that could not be challenged by revision, if, in the opinion of the Supreme Court (previously the Supreme Court of Cassation), it is necessary to consider legal issues of general interest or legal issues in the interest of equality of citizens, for the purpose of harmonizing judicial practice, as well as if a new interpretation of the law is necessary. The submitted revision does not stay the execution of the final judgment against which it is filed. The reasons for filing a revision are a significant violation of the provisions of civil procedure, incorrect application of substantive law, and exceeding the claim only if such violation was committed in the proceedings before the second-instance court. The Supreme Court decides revisions. The revision must be filed through a lawyer (except if the party is a lawyer).

[38] The Public Prosecutor of the Republic of Serbia has the legal standing to file a request for review of a final and binding judgment rendered in the second instance, which violated the law to the detriment of the public interest. The request is to be filed with the Supreme Court, within three months from the date of the judgment becoming final and binding. The Supreme Court decides on the request without a hearing. If both revision and request for review of a final and binding judgment are filed against the same decision, the Supreme Court will decide on these legal remedies in a single decision. The former request for protection of the legality by the public prosecutor is today called a request for review of a final and binding judgment (Rakić-Vodinelić 2011, 554).

[39] There are 12 reasons why a procedure that has been terminated by a court decision, in a final and binding manner, may be repeated at the request of a party within 60 days or 5 years. See Article 426 of the CPA. These reasons are: 1) the court was improperly composed or a judge who was required to be excluded by law or was exempted by a court decision was adjudicating, or a judge who did not participate in the main hearing participated in the judgment; 2) the party was not allowed to argue before the court due to unlawful conduct, in particular due to a failure to serve documents; 3) a person who cannot be a party to the proceedings participated in the proceedings as a plaintiff or defendant, or a party that is a legal entity was not represented by an authorized person, or a party that is incompetent to litigate was not represented by a legal representative, or the legal representative, or the party's attorney, did not have the necessary authorization to conduct the proceedings or for individual actions in the proceedings, unless the conduct of the proceedings, or the performance of individual actions in the proceedings was subsequently approved; 4) the court decision is based on a false statement by a witness or expert; 5) the court decision is based on a document that was forged or in which untrue content was certified; 6) the court decision was made as a result of a criminal act of a judge, or a lay judge, the legal representative or attorney of the party, the opposing party or a third party; 7) the party gains the opportunity to use a legally binding court decision that was previously made between the same parties on the same claim; 8) the court decision is based on another court decision or on a decision of another body, and that decision is legally binding, revoked, or annulled; 9) the previous issue (Article 12) on which the court decision was based was subsequently legally binding, or finally resolved before the competent body in a different manner; 10) the party learns of new facts or finds or acquires the opportunity to use new evidence on the basis of which a more favorable decision

court decides how to proceed when a party has filed a revision or a request for a review of a final and binding judgment, as well as a retrial motion.[40] When a party first submits a retrial motion and, subsequently, files a revision or a request for a review of a final and binding judgment, the court as a rule suspends the revision or the review proceedings, pending decision on the retrial motion. In this way, the CPA prioritizes the legal remedy that allows for repeated proceedings and ultimately, for the rendering of a "correct" final and binding judgment.[41]

5. THE EFFECTIVNESS OF REVISION IN THE CONEXT OF EXHAUSTION RULE UNDER ECtHR CASE LAW AGAINST SERBIA

In its case law, the ECtHR has often stated that revision is in principle considered an effective remedy, but this position has suffered exceptions, guided by the interpretation of the (in)effectiveness of this remedy in the specific facts of the cases before the Court.

In 2007, in a case concerning issues of paternity and child support,[42] during the admissibility stage of the application, it was noted, among other things, that the applicants had not complained to court presidents, the Ministry of Justice, or the Supervisory Board of the Supreme Court;

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could have been made for the party if those facts or evidence had been used in the previous proceedings; 11) the party gains the opportunity to use a decision of the European Court of Human Rights that established a violation of a human right, and this could have had an impact on the adoption of a more favorable decision; 12) the Constitutional Court, in the proceedings on a constitutional appeal, has established a violation or denial of a human or minority right and freedom guaranteed by the Constitution in the civil proceedings, and this could have influenced the adoption of a more favorable decision.

40 CPA, Article 434.

41 CPA, Article 434.

42 In the case of *Jevremović v. Serbia*, the Court considered an application submitted by two Serbian nationals who had initiated civil proceedings to establish paternity and secure child support. The proceedings began in 1999 and lasted for over eight years, marked by numerous delays and repeated remittals for retrial. The main reason for the prolonged duration was the respondent's persistent refusal to undergo DNA testing, which significantly slowed down the process. Although the domestic courts issued rulings in favor of the applicants on three occasions, a final judgment establishing paternity and awarding child support was not rendered until 2007. ECtHR, *Jevremović v. Serbia*, Application No. 3150/05, Judgment of 17 July 2007, paras. 1–44.

that they had not initiated a civil lawsuit for damages due to the excessive length of proceedings; and that they had not used the opportunity to appeal to the Court of Serbia and Montenegro. The Court, however, rejected these objections and found that none of the mentioned legal remedies met the effectiveness requirement under Article 35 (1) of the European Convention. It emphasized in particular that so-called "hierarchical complaints" – such as addressing court presidents or the ministry – have no binding legal effect and do not constitute a means of legal protection, but rather administrative measures of a discretionary nature. Likewise, the option of initiating a separate civil proceeding for damages was deemed ineffective, as it would involve a new dispute that could last for years and lacks the capacity to expedite the original proceedings or provide timely redress. Similarly, the Court of Serbia and Montenegro was not functional until July 2005 and was abolished following the dissolution of the state union. The Court therefore concluded that the state had not provided any legal remedy that was effective and accessible to the applicants during the relevant period, and thus declared the application admissible.[43] Specifically, in response to Serbia's argument that the applicant could have lodged a revision against a second-instance judgment rendered by the District Court,[44] the Court found that revision was not a tool that had to be exhausted, as it noted that *the revision could not expedite proceedings* that had already been completed in the lower courts, nor to provide the first applicant with *financial compensation for the delay of the proceedings*.[45] The criteria that the ECtHR used here to consider the effectiveness of the revision as a remedy were primarily the efficiency of the procedure.

In 2010, the Court pointed out that revision must, *in principle* and whenever available in accordance with the relevant civil procedure rules and given its nature, be *considered an effective domestic remedy* within the meaning of Article 35 (1) of the Convention.[46] However, the effectiveness of revision was assessed through the prism of legal certainty under the specific facts of the case. The *Rakić and Others v. Serbia* case concerned 30 applicants, police officers living and working in Kosovo, who complained

[43] *Jevremović v. Serbia*, 17 July 2007, paras. 67–76.

[44] *Jevremović v. Serbia*, 17 July 2007, para. 89.

[45] *Jevremović v. Serbia*, 17 July 2007, para. 91. In this case, revision could have been filed only under very specific circumstances.

[46] ECtHR, *Rakić and Others v. Serbia*, Applications Nos. 47460/07 *et al*. Judgment of 5 October 2010, para. 38. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41; ECtHR, *Ilić v. Serbia*, Application No. 30132/04, Judgment of 9 October 2007, paras. 20–21; and, ECtHR, *Debelić v. Croatia*, Application No. 2448/03, Judgment of 26 May 2005, paras. 20–21.

about the inconsistent practice of the domestic courts regarding the payment of salary increases. Although some of them won their cases in the first-instance proceedings, the second-instance court (the District Court in Belgrade) dismissed their claims. Paradoxically, that same court, during the same period, ruled in favor of plaintiffs in more than 70 other identical cases. This practice led to significant judicial inconsistency, given that the cases were based on the same facts and identical legal grounds. Despite a principled understanding of the effectiveness of revision, the Court found that the inconsistent practice of the domestic courts had created a state of persistent uncertainty. The Court rejected Serbia's objection that the applications should be dismissed as inadmissible, holding that the state of *permanent legal uncertainty* deprived the applicants of a fair trial before the District Court.[47] According to the ECtHR, this state of permanent uncertainty must have in turn undermined public trust in the judiciary – such trust being one of the basic components of a state founded on the rule of law.

The *Rakić and Others v. Serbia* case is specific because the ECtHR considered it important to link the issue of admissibility of the application, compliance with the exhaustion rule, and assessment of effectiveness, with the question of the merits of the complaints by the applicants, who claimed that the inconsistent practice of the Serbian courts had led to a violation of their rights protected by the Convention. The Court held that, even if revision were available and utilized, it could not have ensured the consistency in judicial decision-making, with respect to the claims in question.[48]

The examination of whether it was necessary for the applicants to exhaust revision before submitting the application to the ECtHR in order for the application to be considered, i.e., to exceeded the initial admissibility threshold, was practically reduced to the question whether another legal remedy (an extraordinary legal remedy) would have protected the applicants from a violation of the Convention (the right to a fair trial).[49] In the end, the notion of revision as an effective remedy "in principle", did not deprive the applicants of access to the European Court in this case, in light of the practice of the Serbian courts, which had left citizens in legal uncertainty, and the ECtHR's understanding that the filing of a revision would not have

[47] *Rakić and Others v. Serbia*, 5 October 2010, paras. 43–44. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41, *Ilić v. Serbia*, 9 October 2007, paras. 20–21; and, *Debelić v. Croatia*, 26 May 2005, paras. 20–21.

[48] *Rakić and Others v. Serbia*, 5 October 2010, paras. 43–44. The Court referred to *Jevremović v. Serbia*, 17 July 2007, para. 41, *Ilić v. Serbia*, 9 October 2007, paras. 20–21; and, *Debelić v. Croatia*, 26 May 2005, paras. 20–21.

[49] *Rakić and Others v. Serbia*, 5 October 2010, paras. 30–32.

altered the State's treatment. In this case, the Court reiterated its position that applicants are required to exhaust only those legal remedies that are effective and practically accessible, and not merely those that exist formally but offer no realistic prospect of success or do not provide effective protection of rights. It emphasized in particular that inconsistency in judicial practice – when it is persistent, obvious, and cannot be remedied within the national legal system – constitutes a valid basis for concluding that domestic remedies are insufficient within the meaning of Article 35 of the Convention.

In 2011, the Court noted "in passing" that it had already established that revision in civil proceedings was, in principle, an effective legal remedy within the meaning of Article 35 (1) of the Convention.[50] In this case, the Court ruled on the effectiveness of a request for an extraordinary review of a decision in an *administrative dispute*, relying on its position on the effectiveness of extraordinary legal remedies in civil and criminal proceedings. The Court pointed out the following: "As the request for judicial review in the administrative dispute, even if described as 'extraordinary' in the Administrative Dispute Act (*zahtev za vanredno preispitivanje sudske odluke*) corresponds to the said remedies in civil and criminal proceedings [revision and request for review of the lawfulness of a final judgment], the Court considers that, given its nature, it must also, in principle and whenever available in accordance with the relevant rules on procedure, be considered an effective domestic remedy within the meaning of Article 35 (1) of the Convention."[51]

In the *Mirković and Others v. Serbia* case from 2018, several retired public sector workers initiated civil proceedings against the Republic Pension and Disability Insurance Fund, claiming that their pensions had been calculated contrary to the law and government decisions. Although some of them prevailed at first instance, the Court of Appeal overturned those judgments and dismissed their claims. The applicants lodged revision requests with the Supreme Court of Cassation, but these were rejected. In the proceedings before the European Court, the Government of Serbia argued that it was necessary for the applicants to make use of a revision, given that this remedy was effective in the cases of fellow applicants and it was "highly probable

[50] ECtHR, *Lakićević and Others v. Montenegro and Serbia*, Application Nos. 27458/06, 37205/06, 37207/06 *et al*., Judgment of 13 December 2011, para. 50. The Court relied on *Rakić and Others v. Serbia*, 5 October 2021, paras. 37 and 27; *Debelić v. Croatia*, 26 May 2005, paras. 20–21; and ECtHR, *Mamudovski v. the Former Yugoslav Republic of Macedonia*, Application No. 49619/06, Judgment of 10 March 2009.

[51] *Lakićević and Others v. Montenegro and Serbia*, 13 December 2011, para. 50 (emphasis added).

that had the applicants used it, they would have succeeded."[52] The Court observed that revision was an extraordinary legal remedy that is granted only exceptionally in the Serbian legal system, referring to an interpretation of the CPA provision that prescribes the conditions for a "special revision", stating that a competent court of appeal may "exceptionally" decide that a revision is admissible if it would be expedient to resolve "a legal issue of general interest", to harmonize inconsistent case law, or to adopt a "new interpretation of the law".[53] A "special revision" is an exceptional legal remedy under Serbian law that may be used even when the value of the dispute does not exceed the statutory threshold, provided that the case involves matters of significance to the legal system or deviations from constitutional or Convention standards. However, the Court rejected this objection. It found that the Government had failed to provide concrete evidence that the "special revision" was available and effective in practice under the circumstances of the case, nor had it identified any instance in which it had actually led to the correction of inconsistent judicial practice. The Court emphasized that the burden of proving the effectiveness of a legal remedy lies with the State, not with the applicants.

In that regard, the European Court reaffirmed its position that, under Article 35 (1) of the Convention, applicants are only required to exhaust those remedies that are not only formally available but also effective in practice. Although revision is recognized in principle as an effective remedy, in this case it failed to prevent the existence of clear and lasting inconsistencies in judicial decision-making. The State did not provide an internal mechanism to harmonize judicial practice in cases that were factually and legally identical. The Court therefore declared the applications admissible and once again reiterated that the exhaustion of domestic remedies is not a formality, but requires a real and effective possibility of redress within the national legal system.

Referring to the Guidelines of the Constitutional Court related to the procedure for a preliminary examination of constitutional complaint of 2 April 2009, the Court pointed out that it would be overly formalistic to require of the applicants to exercise a remedy that even the highest court of their country would not oblige them to exhaust.[54] Relatedly, it is necessary

52 *Mirković and Others v. Serbia*, 26 June 2018, para. 91.

53 *Mirković and Others v. Serbia*, 26 June 2018, para. 102.

54 *Mirković and Others v. Serbia*, 26 June 2018, paras. 103–104: "In its guidelines (*Stavovi Ustavnog suda koji se odnose na postupak prethodnog ispitivanja ustavne žalbe*) of 2 April 2009 the Constitutional Court noted that an appeal on points of law must be exhausted before a constitutional appeal may be lodged only if the former

to bear in mind the position of the Constitutional Court from 2019 that according to the currently applicable regulations, the "special revision" does not constitute an effective legal remedy,[55] and the proposal by the Supreme Cassation Court (currently the Supreme Court) to amend the provisions of the CPA regarding this remedy, which, if adopted, would significantly tighten the conditions for its filing.[56]

It follows from the above case law of the Court that, while the ECtHR often emphasizes that revision is in principle considered to be an effective legal remedy, the above examples point to situations in which the Court, for various reasons, has accepted applications where the applicants had not utilized

Civil Procedure Act itself provided for the direct admissibility of the former, thus implicitly excluding Article 395 of the former Civil Procedure Act, whose application has always been contingent upon a favourable, discretionary, assessment of the court of appeal concerned. In view of the above, it would be unduly formalistic of the Court to require the applicants to exercise a remedy which even the highest court of their country would not oblige them to exhaust [...]. In any event, the Constitutional Court did not reject the applicants' constitutional appeals for their failure to lodge appeals on points of law."

[55] The authors note that on 25 December 2019, the General Session of the Supreme Court adopted the Initiative and Proposal for Amendments to the Provisions of the CPA, which include amendments to the provisions on the admissibility of revision. The position of the General Session of the Supreme Court was that the conditions for declaring both regular and special revisions must be tightened, in order to enable the "effective and timely decision-making" of the Supreme Court on this legal remedy. The initiative and proposal of the Supreme Court are based on an analysis of the effectiveness of existing legal remedies. It is interesting that since the introduction of the institute of special revision by the Law on Civil Procedure in 2012, until 31 October 2019, the Supreme Court had dismissed 95% of special revisions for the lack of admissibility, while only in 5% of cases a decision was made on the merits. In support of the proposed amendments, the General Session of the Supreme Court of Justice cited the overloading of the resources of the highest court in the Republic of Serbia due to the large number of cases under special revision, as well as the fact that the Constitutional Court had assessed special revision an "ineffective legal remedy". The proposed amendments to the provisions of the CPA on special revision issued by the General Session of the Supreme Court of Justice were included in the Draft Amendments to the Law on Civil Procedure of 19 May 2021. Nacrt zakona o izmenama i dopunama Zakona o parničnom postupku. *https://www.mpravde.gov.rs/obavestenje/33408/nacrt-zakona-o-izmenama-i-dopunama-zakona-o-parnicnom-postupku-1952021-godine.php*, last visited June 1, 2024.

[56] At writing time, the status of the procedure for adopting the current Draft Amendments to the LPP (which includes the aforementioned proposal to amend the provisions on special revision) is still unknown, and it remains unclear whether and how the position of the Supreme Court on this extraordinary legal remedy will affect the right to seek protection before the ECtHR. However, it should also be noted that given that special revision is already considered an ineffective legal remedy, stricter conditions would likely result in this remedy being regarded as even less effective.

revision or where the revision procedure had not been completed by the time the application was submitted to the ECtHR. Revision's admissibility-relevant status is contingent on its practical ability to resolve the alleged violation and to offer redress within the domestic legal system. Inconsistent application by domestic courts, particularly where identical legal and factual situations are treated divergently, combined with a lack of evidence that revision (including "special revision") can rectify such discrepancies, leads the ECtHR to conclude that exhaustion is not required in such contexts.

In situations where there is an established practice of the Supreme Court to rule on a revision in a way that favors a potential ECtHR applicant, the revision should be filed because the ECtHR is very likely to consider this remedy effective. On the other hand, if there are clear indications that filing a revision would only prolong the proceedings, with no realistic prospect that the party would receive adequate compensation through this remedy or for the national judicial system to allow for consistency in the decision-making, it appears that the ECtHR would have reasons to consider that the revision does not constitute a remedy that must have been exhausted. Revision appears to be a safe step, as it is often difficult to have clear insight into the Supreme Court's revision-related rulings, both in terms of potential chances for success and the speed of the decision-making, especially if the potential ECtHR applicant is not represented by a lawyer.

On the other hand, it is clear from the aforementioned judgment in *Mirković and Others v. Serbia* that, before filing their application, the applicant should also consult the practice of the Constitutional Court on the necessity of revision, as a precondition for filing a constitutional complaint in the specific type of dispute. In particular, if the Constitutional Court ruled on the merits of a constitutional complaint, regardless of the fact that the party had not first resorted to the Supreme Court with a revision, it is likely that the ECtHR will not consider such an application inadmissible. It should be borne in mind, however, that such situations will, as a rule, be less frequent than those where filing a revision was expected, with the exception of cases concerning the abovementioned "special revision".

The above-mentioned decisions collectively establish that while revision is generally accepted as an effective legal remedy in Serbian civil law, it cannot be presumed effective *in abstracto*. Its acceptance for admissibility purposes under Article 35(1) ECHR depends on a case-specific, pragmatic evaluation of its practical accessibility, legal certainty, and remedial potential. The Court's approach confirms a consistent preference for substance over form in the application of admissibility criteria and highlights that the mere formal availability of a remedy is not sufficient to meet the exhaustion requirement under the Convention.

6. THE EFFECTIVENESS OF THE REQUEST FOR REVIEW OF FINAL AND BINDING JUDGMENTS IN THE CONTEXT OF THE EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

The ECtHR case law in the domain of the exhaustion rule interprets legal remedies that the applicant may lodge in person as accessible and effective (Registry of the European Court of Human Rights 2023, 118). Since a request for review of a final and binding judgment may be brought only by the Public Prosecutor of the Republic of Serbia,[57] it appears that this legal remedy does not *a priori* fall within the group of remedies that must be exhausted in order for an ECtHR application to be regarded as admissible.

In particular, in the case of Serbia, the ECtHR took the view that the request for the protection of legality was not considered effective precisely because it was discretionary.[58] In *Lepojić v. Serbia* (albeit in the context of criminal proceedings) the Court held in 2007 that only the competent public prosecutor could file a request for review of the legality of a final and binding judgment, on behalf of the applicant, and, moreover, that the authority had complete discretion as to whether to do so. While the applicant was entitled to request it, they certainly had no right to personally lodge this legal remedy. The request for review of the legality of a final and binding judgment was therefore considered ineffective under Article 35 (1) of the Convention.[59]

Still, in a later judgment, the Court made an exception in favor of the applicant, when this extraordinary remedy was successful.[60] During the proceedings before the Court in *Petrović v. Serbia*, the Government of Serbia argued that the applicant had waited for the decision of the Supreme Court

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57 CPA, Article 421(1).

58 ECtHR, *Petrović v. Serbia*, Application No. 40485/08, Judgment of 15 July 2014, para. 59, relying on ECtHR, *Lepojić v. Serbia*, Application No. 13909/05, Judgment of 6 November 2007, para 54.

59 *Lepojić v. Serbia*, 6 November 2007, paras. 54 and 57.

60 "[T]he Court notes that the request for the protection of legality was admittedly of a discretionary character, and normally such a remedy is not considered to be effective [...] and could not restart the running of the six-month limit [...]. Nevertheless, situations in which a request to reopen the proceedings actually results in a reopening, or in which a request for extraordinary review is successful, may be an exception to this rule [...], though only in relation to those Convention issues which served as a ground for such a review or reopening and were the object of examination before the extraordinary appeal body [...]. The Court considers that the situation in the present case falls into the category of exceptional cases." *Petrović v. Serbia*, 15 July 2014, 59, 60.

of Cassation on the request for the protection of legality, instead of applying to the Court in Strasbourg immediately. The Court, however, considered that the applicant's conduct was reasonable because: (1) she had submitted a request to the public prosecutor to initiate the protection of legality procedure, which directly addressed the same allegations she later raised before the Court; and (2) the request for the protection of legality was successful – the Republic Public Prosecutor sharply criticized the previous decisions of the domestic courts as incorrect and arbitrary. For these reasons, the Court found it reasonable that the applicant had awaited the Supreme Court's ruling on the prosecutor's request, and thus concluded that she had not deliberately attempted to delay the time-limit under Article 35(1) of the Convention by using potentially inappropriate remedies that could not have provided her with effective redress, as the Government had claimed.[61]

The ECtHR additionally declared the decision of Supreme Court on the request for review of the legality of a final and binding judgment in this case as a final decision within the meaning of Article 35(1) of the Convention, finding that the deadline for submitting the ECtHR application (then six months) starts running only from the moment of receipt of this decision.[62]

It follows from the foregoing that, in the ordinary course of events, it is not necessary to exhaust the request for review of a final and binding judgment in order for an application to the ECtHR to be considered admissible. However, if the use of that remedy were to relate directly to the issues of the Convention to be brought before the ECtHR, and the Public Prosecutor of the Republic of Serbia decides to submit a request to the Supreme Court, the future applicant before the ECtHR may wait for the decision on that extraordinary legal remedy, arguing that only the decision of the Supreme Court will be considered final in the proceedings in question, and that the four-month period begins to run after the receipt of that decision.

Although a request for the review of a final judgment (request for the protection of legality) does not constitute an effective legal remedy in most cases, the case of *Petrović v. Serbia* serves as an important confirmation that the Court assesses the effectiveness of legal remedies in a functional and context-specific manner. When concrete results are demonstrated and when the conduct of the parties is deemed reasonable in the given circumstances, the Court is willing to make an exception and recognize the effort as relevant for the admissibility assessment.

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61 *Petrović v. Serbia*, 15 July 2014, para. 60.

62 *Petrović v. Serbia*, 15 July 2014, para. 61.

Such interpretation, however, should be approached cautiously and exceptionally. In the first place, the question arises whether the potential ECtHR applicant will have time to inform the Public Prosecutor of the Republic of Serbia of the relevant violation of rights, within the period of four months from the adoption of the final decision required by the Convention, and learn whether the authority will decide to file a request for review with the Supreme Court. The deadline for filing a request by the Public Prosecutor is three months from the date the judgment becomes final and binding.[63] The rather short deadline suggests that the applicant must be prepared to promptly adjust its strategy concerning the ECtHR application. Irrespective of the Public Prosecutor's actions, it would be advisable for the applicant to be prepared to ground the application's admissibility with the argument that the final and binding judgment rendered at the second instance represents a final decision within the meaning of Article 35(1) of the Convention, as well as to submit the ECtHR application swiftly, without waiting for to the Public Prosecutor to act.

7. THE EFFECTIVENESS OF THE MOTION FOR RETRIAL IN THE CONTEXT OF EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

While referring to judgments rendered against other states, in a 2011 case, Court pointed out that a retrial of a case that had ended with a final and binding court decision cannot *usually be regarded as an effective means* within the meaning of Article 35 (1) of the Convention, but that the situation may be different if it is established (in view of the previous practice of courts in similar proceedings) that such a motion may be considered effective.[64]

In the given case, *Šorgić v. Serbia*, the applicant had initiated compensation proceedings which lasted excessively long – more than eight years. After exhausting ordinary legal remedies and having his constitutional complaint rejected, the applicant submitted an application to the Court. The Government of Serbia, among other things, argued that the applicant had failed to await the outcome of a request for the retrial, which he himself had submitted and which remained unresolved at the time he applied to the Court. The Court noted that, while the case was *not without all chances of*

[63] CPA, Article 421(3).

[64] *Šorgić v. Serbia*, 3 November 2011, para. 54.

success (referring to similar practice of the Serbian courts), *the proceedings had been pending for more than five years, with two referrals to the lower court*. The Court observed that the case was again before the court of first instance at that moment, with little chance that a final and binding decision would be issued soon. The ECtHR therefore deemed that Serbia's objections must be rejected.[65]

The foregoing prompts the question whether the decision of the ECtHR would have been different had the procedure for deciding on this extraordinary legal remedy before the Serbian courts been shorter. If the retrial procedure had been shorter and had led to some compensation or a positive outcome for the ECtHR applicant, the Court would have potentially focused on assessing the effectiveness and proposing retrial directly, without addressing the speed of justice. In any case, it is evident that the relevant criteria for the Court's assessment were precisely the efficiency of the procedure and the prospects of success before the court that had been hearing the case at the moment of the ECtHR's consideration (bearing in mind the previous similar practice of said court).

In a case from 2018, Serbia argued that a motion for a retrial was an effective remedy, pointing to the relevant decision of the Constitutional Court that had established a violation of the right to a fair trial in circumstances that mirrored those of the ECtHR applicants.[66] In this case, the Court rejected Serbia's objection, emphasizing that applicants are not required to exhaust extraordinary and uncertain remedies, such as the reopening of proceedings, unless the State convincingly demonstrates that such a remedy is effective in practice. In this case, the Government failed to provide evidence that a request for reopening could have led to the correction of inconsistencies in judicial practice. Referring to *Šorgić v. Serbia*, the Court stressed that, in any event, a motion for the retrial of a case concluded on the basis of a final and binding judgment cannot as a rule be regarded as an effective remedy within the meaning of Article 35 (1) of the Convention.[67]

The presented case law suggests that, in principle, a motion for retrial will not be regarded as an effective legal remedy that must be exhausted before resorting to the ECtHR. Exceptionally, if the proceedings on the motion have already been submitted while the ECtHR is deciding on the application, the

65 *Šorgić v. Serbia*, 3 November 2011, para. 56.

66 *Mirković and Others v. Serbia*, 26 June 2018, para. 91.

67 *Mirković and Others v. Serbia*, 26 June 2018, para. 100.

Court will rule on admissibility taking into account the previous practice of the Court in similar proceedings, the length of the retrial proceedings and the realistic possibility of the applicant to exercise their rights within a reasonable time.

8. THE EFFECTIVENESS OF CONSTITUTIONAL COMPLAINTS IN THE CONTEXT OF THE EXHAUSTION RULE UNDER ECtHR CASE LAW INVOLVING SERBIA

8.1. Conditions for Submitting Constitutional Complaints in the Republic of Serbia

In the Serbian legal system, a constitutional complaint may be lodged against individual acts or actions of state bodies or organizations vested with public authority that violate or deny human and minority rights and freedoms guaranteed by the Constitution, within 30 days from the moment of receipt of the act by the last exhausted legal remedy, or from the date of the applicant's knowledge of the undertaking or termination of the action. A constitutional appeal is a special and subsidiary remedy that can be brought only if other legal remedies for their protection have been exhausted or are not provided for, or if the right to judicial protection is excluded by law.[68] Both in the case of constitutional complaint and in the case of Article 35 (1) of the Convention, it is not specified exactly what legal remedies must be exhausted in order to comply with the admissibility requirements, i.e., in the case of a constitutional complaint, not to be dismissed by a decision without entering into the merits of the request, due to the lack of procedural prerequisites.

These conditions or prerequisites for the admissibility of constitutional complaints are determined by the Constitution of the Republic of Serbia and the Law on the Constitutional Court. However, these acts do not contain a detailed explanation on the extraordinary legal remedies that must be exercised before the protection of the infringed right can be sought in proceedings before the Constitutional Court. Recognizing this

[68] Arts. 82–92, Law on the Constitutional Court, *Official Gazette of the Republic of Serbia*, Nos. 109/2007, 99/2011, 18/2013 – Constitutional Court Decision, 103/2015, 40/2015 – other law, 10/2023 and 92/2023).

gap, the Constitutional Court adopted the abovementioned guidelines on 2 April 2009,[69] listing the legal remedies that must be exhausted for certain proceedings.

For civil proceedings, the Constitutional Court took the position that "by issuing a revision judgment, it will be considered that the last legal remedy before the filing of a constitutional complaint has been exhausted". When revision is not permitted by law, "by issuing a decision on an appeal against a judgment or an appeal against a decision, it will be considered that the last legal remedy has been exhausted".[70] The Constitutional Court also states in its Guidelines that "[i]n the event that the applicant of a constitutional complaint in civil proceedings has filed a request for the protection of legality, the time limit for filing a constitutional complaint shall be calculated in relation to

[69] Constitutional Court of the Republic of Serbia, Guidelines of the Constitutional Court in the Procedure of Examining and Deciding on a Constitutional Complaint, Su No. I–8/11/09, 2 April 2009, *http://www.ustavni.sud.rs/page/view/163–100890/stavovi-suda*, last visited May 22, 2025.

[70] Constitutional Court, Guidelines of the Constitutional Court in the procedure of examining and deciding on a constitutional complaint, Full text of 30 October 2008 and 2 April 2009, translated by author. "3.5. Position: In civil and non-contentious proceedings, the issuance of a judgment on revision shall be deemed to have exhausted the last legal remedy before filing a constitutional complaint. In cases where revision is not permitted by law, the issuance of a decision on an appeal against a judgment or an appeal against a decision shall be deemed to have exhausted the last legal remedy before filing a constitutional appeal. Position: In the event that the applicant for a constitutional complaint in civil proceedings has filed a request for protection of legality, the deadline for filing a constitutional complaint shall be calculated in relation to the date of delivery of the court's decision on said legal remedy. Exceptionally: a) if the applicant for a constitutional complaint filed a constitutional complaint before the court's decision on his request for protection of legality, the Constitutional Court shall decide on the constitutional complaint only after the issuance of a decision on the request for protection of legality; b) if the party has filed a constitutional complaint after receiving notification that the public prosecutor will not file a request for protection of legality, and does not file this extraordinary legal remedy itself, the timeliness of the constitutional appeal will be assessed in relation to the date of delivery of the court's decision on the last legal remedy, within the meaning of the previous Paragraph. Position: If a constitutional complaint is filed against a decision of the Supreme Court of Serbia rejecting the revision or the decision on the request for protection of legality or against decisions that preceded the filing of these extraordinary legal remedies, the Constitutional Court may decide on the merits only on the decision made on the declared extraordinary legal remedy, while the constitutional complaint, in the part in which the decisions of lower-instance courts are challenged, will be dismissed as untimely (if filed after the expiry of the deadline set by the Law), or inadmissible (if the challenged acts were adopted before the Constitution)."

the date of delivery of the court's decision on that remedy".[71] Still, the above guidelines do not provide a clarity as to whether a prospective constitutional complainant is obliged to exhaust all extraordinary legal remedies, or only revision. Such a situation is reminiscent of the considerations concerning the exhaustion of extraordinary legal remedies as an admissibility condition of an ECtHR application.

On the other hand, the question whether constitutional complaints are considered an effective remedy that must be exhausted before resorting to the ECtHR has been the subject of detailed consideration by the Court.

8.2. Constitutional Complaint as Admissibility Condition Before the ECtHR

A constitutional complaint is, in principle, considered to be an effective legal remedy that constitutes a condition for the admissibility of an application to the ECtHR. That said, the assessment of effectiveness is subject to change in cases that show that the practice of the Constitutional Court is inconsistent or that this legal remedy cannot provide sufficient protection of the applicant's rights.

Since a judgment in *Vinčić and Others v. Serbia*, the ECtHR has taken the position that a constitutional complaint should, in principle, be considered an effective legal remedy within the meaning of Article 35 of the Convention, in respect of all applications submitted after 7 August 2008 – a date on which the first merits decisions of the Constitutional Court were published in the *Official Gazette of the Republic of Serbia*.[72] The ECtHR regularly refers to this case in its case law as the general rule on the effectiveness of constitutional complaints.

On the other hand, the effectiveness of constitutional complaint was particularly criticized in cases concerning two groups of issues: the inconsistency in domestic jurisprudence regarding the payment of daily

[71] Constitutional Court of the Republic of Serbia, Guidelines of the Constitutional Court in the Procedure of Examining and Deciding on a Constitutional Complaint.

[72] ECtHR, *Vinčić and Others v. Serbia*, Application Nos. 44698/06, *et al*., Judgment dated 1 December 2009, para. 51. See also ECtHR, *Golubović and Others v. Serbia*, Application no. 10044/11, Decision of 17 September 2013, para. 43.

allowances granted to reservists who served in the Yugoslav Army between March and June 1999,[73] and debts from employment relations involving public enterprises.[74]

8.2.1. First Group: Daily Allowance of Reservists

The *Vučković and Others v. Serbia* case involved thirty separate applications. The applicants, reservists in the Yugoslav Army, complained of discrimination and inconsistency in domestic jurisprudence regarding the payment of daily allowances. After the demobilization, the Government refused to fulfill its obligation to the reservists. Following a series of public protests, an agreement was reached with certain reservists, and the payment was arranged for those who resided in municipalities that were considered "underdeveloped", considering these reservists to be vulnerable, *i.e.*, in worse financial condition.[75]

The ECtHR applicants did not live in the municipalities designated by the Government as relevant and did not receive payment of daily allowances. They decided to sue the State. Both the courts of first and second instances considered the claim for payment of daily allowances to be time-barred, applying a three-year time limit, unlike other courts in the country, which used to apply five-year and sometimes 10-years statute of limitation. Due to this inconsistency, the applicants resorted to the Constitutional Court, filing a constitutional complaint.

The ECtHR analyzed the submissions at a time when the constitutional appeals were still pending. For this reason, Serbia argued that the petitions before the ECtHR should be dismissed as premature.[76] For their part, the applicants argued that a constitutional complaint may not be considered an effective remedy, given the specific circumstances of their case.[77]

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[73] See ECtHR, *Vučković and Others v. Serbia*, Applications Nos. 17153/11 *et al*., Judgment dated 28 August 2012, paras. 70–74.

[74] ECtHR, *Milunović and Čekrlić v. Serbia*, Applications Nos. 3716/09 and 38051/09, Decision of 17 May 2011; ECtHR, *Krndija and Others v. Serbia*, Applications Nos. 30723/09 *et al*., Judgement of 27 June 2017, para. 56. Similarly, see *Riđić and Others v. Serbia*, para. 68 et seq. See also Beširević *et al.* 2017, 473–474.

[75] *Vučković and Others v. Serbia*, 28 August 2012, para. 66.

[76] *Vučković and Others v. Serbia*, 28 August 2012, para. 66.

[77] *Vučković and Others v. Serbia*, 28 August 2012, para. 67.

In examining the admissibility of the applications, the ECtHR analyzed the available jurisprudence on constitutional complaints submitted by the reservists. In the cases that were situationally similar to those of the ECtHR applicants, the Court found that the Constitutional Court had "ignored" the complaints "offering no substantive assessment of the issue whatsoever".[78] For this reason, the ECtHR rejected State's objections and found that, although constitutional complaint should, in principle, be regarded as an effective domestic legal remedy, which was not the case with the applicants' applications. In the same case, the Grand Chamber rendered its own decision, where Serbia again raised the exhaustion objection. The Grand Chamber rendered an identical decision, holding that constitutional complaints were ineffective in these cases.[79]

8.2.2. Second Group: Debts to Employees of Public Enterprises

The second group of cases concerns nonenforcement of judgments rendered against companies with a majority public capital[80] arising from debts stemming from employment relations. The ECtHR initially considered the constitutional complaint to be ineffective in this context, because the Constitutional Court did not provide comprehensive compensation, which, in addition to establishing the violation, should have included compensation for material and nonmaterial damages, and not only for nonmaterial damages.[81]

8.2.2.1. Milunović and Čekrlić v. Serbia

The applications in the *Milunović and Čekrlić v. Serbia* case relate to the nonenforcement of final and binding judgments rendered by the Municipal Court in Novi Pazar against the debtor Raška Holding AD (public enterprise) in favor of the applicants, based on a claim for remuneration they were entitled to during forced leave (Serbian State Attorney's Office 2011).

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78 *Vučković and Others v. Serbia*, 28 August 2012, para. 72.

79 *Vučković and Others v. Serbia*, 28 August 2012, paras. 67–68.

80 Including those companies where a later change in their capital structure had taken place, resulting in state and public capital becoming the majority.

81 This exception was established in *Milunović and Čekrlić v. Serbia*, 17 May 2011; *Krndija and Others v. Serbia*, 27 June 2017, para 56. Similarly, see *Riđić and Others v. Serbia*, para. 68 et seq. See also Beširević *et al*. 2017, 473–474.

The State's argument in favor of the inadmissibility of the applications was that one of the applicants had not filed a constitutional complaint at all, and that the other had not filed a claim for compensation in the manner prescribed by domestic law.[82] The Court found that comprehensive constitutional protection should cover compensation for material and nonmaterial damages, in addition to the determination of a violation.[83]

The ECtHR noted that the Constitutional Court had found a violation of the constitutional rights of the first applicant, as well as that she was entitled to claim compensation for nonmonetary damage. With this decision, however, the Constitutional Court did not require the state to pay the material damages from its own funds, i.e., the amounts awarded in final and binding judgments, as it had been previously done in the judgments in *Kačapor and Others*, *Crnišanin and Others*, and *Grišević and Others*.[84]

Despite the fact that the applicant had never submitted a claim to the Damages Commission, the ECtHR held that the applicant had no real chance of obtaining compensation for material damage in the subsequent proceedings before the civil court since the Constitutional Court had not ordered the payment of the sum of money, but only requested the acceleration of the enforcement proceedings.[85]

In view of this factual context, the ECtHR held that, notwithstanding that constitutional complaints should in principle be regarded as an effective legal remedy for applications against Serbia in line with the *Vinčić v. Serbia* judgment, this avenue of compensation could not be considered effective in cases related to the violations alleged by the applicants.[86]

Interestingly, following these considerations, the ECtHR reserved the right to reconsider its position on constitutional complaint in the future, "if there is clear evidence that the Constitutional Court has subsequently harmonized its approach with the Court's relevant case-law".[87] On the same occasion, the ECtHR noted the efforts to develop domestic case law in relation to enforcement proceedings in which the debtor is a company under restructuring. However, notwithstanding such attempts to comply with the case law of the Court, the ECtHR considered that, at that time, no effect had

82 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 56.

83 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 62.

84 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 62.

85 *Milunović and Čekrlić v. Serbia*, 17 May 2011, paras. 63–64.

86 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 66.

87 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 67.

been achieved in relation to the Court's request that the State pay from its own resources the amounts awarded by the final and biding judgments in question.[88]

8.2.2.2. Marinković v. Serbia; Krndija v. Serbia

A shift was made in the cases of *Marinković v. Serbia* and *Krndija v. Serbia*. Namely, the effectiveness of constitutional complaint as an extraordinary legal remedy was "restored" in cases where the liability of the respondent state for the nonenforcement of judgments rendered against public/state-owned enterprises in bankruptcy proceedings and/or those that had ceased to exist, related to all applications filed after 22 June 2012 – the publication date of Constitutional Court Decision No. UŽ 775/2009 in the *Official Gazette of the Republic of Serbia*. However, this position did not apply to cases related to public/state-owned enterprises undergoing restructuring, because in this context the Constitutional Court was still prepared to award the appellants only compensation for the suffered nonmaterial damage.[89]

In those cases where the company was bankrupt or had ceased to exist, the Constitutional Court upheld the constitutional complaints and awarded the applicants not only amounts of nonmaterial damage, but also amounts of material damage, i.e., it ordered for the salaries to be paid from the budget.[90]

In the second type of cases, involving companies with predominant public capital that were undergoing restructuring, on 19 April 2012 the Constitutional Court adopted the position that there were no grounds for awarding material damages on account of amounts determined by the final and binding judgments of domestic courts, because enforcement proceedings in relation to such debtors could be initiated or continued. In line with the foregoing, several constitutional complaints were upheld (e.g., decisions Nos. UŽ 2544/2009 of 10 May 2012 and UŽ 2701/2010 of 30 May 2012), with the Constitutional Court awarding compensation for nonmaterial damage, while rejecting claims for payment of material damages.

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88 *Milunović and Čekrlić v. Serbia*, 17 May 2011, para. 67.

89 *Krndija and Others v. Serbia*, 27 June 2017, para. 57. See *Marinković v. Serbia*, 22 October 2013.

90 Constitutional Court of Serbia, Decision No. Už-775/2009, *Official Gazette of the Republic of Serbia* No. 61/2012, 22 June 2012; Constitutional Court of Serbia, Decision No. Už-1392/2012, 13 June 2012.

For these reasons, the ECtHR held that constitutional complaints *may be considered effective in the first class of cases, related to bankruptcy*. Conversely, *for companies with predominantly public capital undergoing restructuring, the constitutional complaint remained an ineffective tool*, so the applicants had no obligation to exercise it before resorting to the Court. As in the *Milunović and Čekrlić* case, the Court left the possibility to reconsider this position in the event that the Constitutional Court changes its practice and starts awarding material damages in cases involving companies that are under restructuring, in the same way as those involving companies that are bankrupt or have ceased to exist.

8.2.2.3. Ferizović v. Serbia

In the *Ferizović v. Serbia case* it was established that the Constitutional Court had elaborated and "fully harmonized" its approach to the nonenforcement of judgments rendered against public/state-owned enterprises under restructuring with the relevant case law of the Court, and that, as of 4 October 2013, the constitutional complaint was again considered effective.[91]

In the present case, the applicant was an employee of a state-owned company that was in the process of restructuring at the time that the domestic court proceedings were lodged. A final and binding judgment was issued against the company, based on the applicant's claim, ordering that the plaintiff be paid the amount of material damage (overdue wages, compensation for annual leave) as well as the costs of the proceedings. However, the final and binding judgment was never enforced, and the ECtHR's application concerned the failure of the State to enforce the judgment and the absence of an effective domestic remedy in connection with the disputed nonenforcement. The application was filed without the prior exercise of a constitutional complaint.[92]

The ECtHR observed that the Constitutional Court, in its Decision No. UŽ 1712/2010, in the case of compensation for nonenforcement of a final and binding judgment rendered against a public/state-owned enterprise in the restructuring procedure, ordered the payment of both nonmaterial and material damage at the expense of the state budget, thus fully harmonizing

[91] ECtHR, *Ferizović v. Serbia*, Application No. 65713/13, Decision of 26 November 2013, para. 24; *Krndija and Others v. Serbia*, 27 June 2017, para. 58.

[92] *Ferizović v. Serbia*, 26 November 2013, paras. 2–11, 27.

its conduct with the position of the Court. The Constitutional Court issued decisions with the same effect in cases Nos. UŽ 1645/2010 and UŽ 1705/2010.[93]

As the Decision of the Constitutional Court No. UŽ 1712/2010 was published in the *Official Gazette of the Republic of Serbia* on 4 October 2013, the Court's position was that as of that date, the constitutional complaint was considered an effective legal remedy within the meaning of Article 35, paragraph 1 of the Convention in this type of cases.[94] Considering that on the same day, 4 October 2013, the application was submitted to the ECtHR, without first referring it to the Constitutional Court, the ECtHR considered that the domestic remedies had not been exhausted and dismissed the application as inadmissible.[95]

9. CONCLUDING REMARKS

The authors examined whether, and in which situations, the ECtHR expects applicants from Serbia to exhaust extraordinary legal remedies and the constitutional appeal when claiming that their human rights were violated based on facts considered in civil proceedings. The analysis showed that the ECtHR's stance on the effectiveness of these remedies has evolved over time and that their necessity in proceedings before the Court has always been closely tied to the facts of each specific case.

With regard to revision, although it is generally recognized as an effective means of legal protection, the Court has repeatedly determined that, in certain circumstances–particularly where domestic court practice was inconsistent or the prospects of success were low–revision did not represent a legal remedy that must necessarily be exhausted. The criteria guiding the Court were primarily procedural efficiency and legal certainty.

As for the motion for retrial and the request to review the finality of a judgment, the ECtHR generally does not consider these extraordinary legal remedies to be effective under Article 35(1) of the Convention, except in cases where the state clearly and convincingly demonstrates that these

93 *Ferizović v. Serbia*, 26 November 2013, paras. 12–17, 24.

94 *Ferizović v. Serbia*, 26 November 2013, para. 25.

95 *Ferizović v. Serbia*, 26 November 2013, paras. 26–27.

remedies have produced real effects in protecting an individual's rights. Even in such rare cases, the applicant's actions must be reasonable and aimed at achieving effective protection.

The constitutional appeal is considered an effective and necessary legal remedy that must be exhausted before submitting an application to the ECtHR, starting from 2008, when the first substantive decisions of the Constitutional Court of Serbia were published. However, it too has not always been deemed effective – particularly in cases of inconsistent practice or where it failed to provide concrete and timely protection of rights.

The analysis indicates that there is no single, absolute answer to the question of whether all extraordinary legal remedies and the constitutional appeal must be exhausted in civil proceedings. The effectiveness of a legal remedy is assessed through the lens of specific facts, the domestic legal framework, and judicial practice. This approach by the ECtHR, though requiring careful assessment in each individual case, simultaneously underscores the responsibility of national judiciaries to maintain consistency and ensure timely access to justice.

In light of the analyzed case law of the ECtHR, it can be concluded that the application of the rule on exhaustion of domestic remedies in the context of applications against Serbia is dynamic and highly dependent on the circumstances of each case. Although revision and constitutional appeal are generally considered effective legal remedies, their practical applicability is evaluated based on criteria such as efficiency, legal certainty, and real availability. On the other hand, the request to review finality and the motion for retrial are less often considered necessary steps, except in specific situations where the state can convincingly demonstrate their effectiveness. The practical message emerging from this research is the need for each application before the Strasbourg Court to be prepared with a careful analysis of the domestic procedural context, taking into account not only the formal existence of legal remedies but also their actual ability to provide protection for the violated right. Such an approach reflects the essential nature of the principle of subsidiarity and highlights the importance of transparent and consistent judicial practice in Serbia's judiciary as a prerequisite for effective legal protection.

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Srđan M. CVETKOVIĆ, PhD*

*FALSE DAWN: THE FAILED REFORM OF THE YUGOSLAV SECRET POLITICAL POLICE 1966–1980***

The paper examines the 1966 reform of the Yugoslav secret political police from the legal and operational perspectives, and assesses its outcome. The analysis spans from 1966 to 1980, concluding with the death of Josip Broz, as the country's political landscape underwent substantial changes following his passing. The research hypothesis is that the reform of the Yugoslav secret political police was a failure. The examination includes political incentives for reform, the 1966 legislative reform and its legacy, the beginning of the reversal of the reform in 1971, and the full reversal starting in 1973. The hypothesis is confirmed. The crucial reason for the failure was the disappointment of the political elite with the reform results and their concerns, amid the political and economic liberalisation of the country, about preserving their monopoly on power. These concerns led to the re-bolshevisation of the country, killing the reform of the secret political police.

Key words: *Yugoslavia. – Secret political police. – Legislative reform. – Reform reversal. – Political and economic liberalisation.*

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* Principal Research Fellow, Institute for Contemporary History, Serbia, *srdjan.cvetković@isi.ac.rs*, ORCID iD: 0000–0002–6598–1263.

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1. INTRODUCTION

There is no doubt that the 4th Plenum of the Central Committee of the League of Communists of Yugoslavia (*IV Plenum Centralnog komiteta Saveza komunista Jugoslavije*, the Brioni Plenum), held on the Brioni islands on 1 July 1966, was one of the momentous events in the history of socialist Yugoslavia. For the Yugoslav secret political police,[1] i.e. the state security apparatus, this marked a pivotal moment. After more than 20 years (as the secret political police was established on 13 May 1944, during the Second World War) of stability, a tectonic change emerged regarding the organisation's legal framework, operational pattern and social status.[2] The Brioni Plenum provided the political grounds and strong incentives for the Yugoslav political elite to reform the secret political police – a crucial pillar of the communist regime in Yugoslavia. As in every authoritarian regime, the secret political police have been an inevitable ingredient of its existence and survival (Tanneberg 2020). As empirically demonstrated, especially in Eastern Europe in the late 1980s, such an establishment has been a necessary, although not a sufficient, condition for the survival of authoritarian regimes.

This paper aims to explore the 1966 reform of the Yugoslav secret political police from both the legal and operational perspectives, and to evaluate its outcome. The analysis spans from 1966 to 1980, concluding with the death of Josip Broz, the undisputed patriarch of socialist Yugoslavia, as the country's political landscape underwent substantial changes following his passing. The research hypothesis of this paper is that the 1966 reform of

[1] The secret political police was not the official name of the organisation(s), but it is the most precise description of its character and spirit. It is used following the title of the contribution by Leggett (1981) – *The Cheka: Lenin's Political Police*. Nonetheless, the adjective 'secret' has also been included to emphasise the clandestine operations of the Yugoslav political police, following the doctrine and practice of the Cheka, based on the network of informers whose task was not known to the public. A more technical term – state security service – is used in this paper as a synonym for the secret political police.

[2] The Yugoslav secret political police was established as a section of the OZN (*Odeljene zaštite naroda* – Department for the Protection of the People, usually referred to as *Ozna* in Yugoslav languages) during the war, and following the fragmentation of the OZN in March 1946, it was organised as the UDB (*Uprava državne bezbednosti,* Department for State Security), a department of the Ministry of Internal Affairs, both on the federal level and the levels of federal units, usually referred to as *Udba* in Yugoslav languages. *Udba* became and still is a colloquial name, a moniker for any secret political police in socialist Yugoslavia, although it was renamed the SDB (*Služba državne bezbednosti*, State Security Service) in 1966. Renaming the secret political police was the first, swift, although only symbolic step of the 1966 reform. In the paper, this moniker is thoroughly accepted.

the Yugoslav secret political police was a failure. To examine this hypothesis, the following is an exploration of both the historical and political context of the reform, its aftermath, legislative changes, and, finally, changes in the operation's pattern of the secret political police.

As to the methodology, the exploration is based primarily on the analysis of legislative documents, both statutory and sub-statutory texts, the review of selected primary historical sources (mainly documents deposited in the Archives of Yugoslavia), and considerations and critical examination of the insight about the topic in the literature, i.e. secondary historical sources.

The structure of the paper is organised according to its aim, with sections arranged in chronological order. The paper's first section focuses on the 1966 political decision to reform the secret political police, its motives, and its details. What follows in the second section is the analysis of the substantial legislative changes that stemmed from the 1966 political decision and its legacy. The third section examines the onset of the reform reversal, beginning in the early 1970s, its underlying political motives, and its subsequent outcome. The complete reversal of the reform of the secret political police, which started in late 1973, is analysed in the fourth section of the paper. The fifth section of the paper deals with the state of affairs regarding the Yugoslav secret political police at the end of the era marked by the death of Josip Broz. The conclusion follows.

2. THE BRIONI PLENUM AND ITS OUTCOME

As for the historical context, the road to the Brioni Plenum effectively started with the 1953 death of Joseph Vissarionovich Stalin and the steadfast consolidation of Josip Broz's power as the undisputed communist leader of Yugoslavia. With all other political options in Yugoslavia being defeated and effectively eliminated, the Yugoslav political elite and its leader felt secure and confident, as their monopoly on power was protected and strengthened. The secret political police's operations were unconstrained by any legislation. They were very effective in crushing any political opposition and establishing the groundwork for a 'fear' dictatorship, so the *Udba* earned a considerable reputation within the political elite.[3]

[3] The notion of 'fear' dictatorship, as opposed to 'spin' dictatorship, was introduced recently (Guriev, Treisman 2022). During the period prior to the Brioni Plenum, Yugoslavia was indisputably a 'fear' dictatorship.

The political context and background of the Brioni Plenum were rather complicated, as the leading political player, Josip Broz, clearly sought to accomplish several political aims with this well-prepared session. The other political aims were not directly related to the secret political police. Accordingly, the paper focuses solely on the political background regarding the secret political police.[4]

It is very likely that Josip Broz's confidence in the Yugoslav secret political police significantly declined during the 1960s, when he realised that he was no longer in full control of the organisation (Kovač, Dimitrijević, Popović-Grigorov 2020). Perhaps he became anxious about the possible political challenges from the key people in the service (predominantly Aleksandar Ranković) to whom the incumbent officials and secret political police operatives expressed unconditional loyalty.[5] Josip Broz's introductory remarks at the Brioni Plenum provide some evidence that supports this concern, which was shared by a significant portion of the top echelon of the League of Communists of Yugoslavia (LCY), i.e. the incumbent political elite of the country. Josip Broz's main remark was that it was a mistake that the secret political police had been autonomous from its inception, more than 20 years ago. Nonetheless, it is hardly convincing that the secret political police was autonomous in the 1940s and 1950s, because it was in Josip Broz's iron grip. It seems that his concern was the advent of autonomy of the secret political police (from him) in the early 1960s, setting the stage for a possible challenge to his political primacy in the country.

Another important insight from Josip Broz's introductory remarks relates to the aim of the secret political police: according to him, it was an instrument of class struggle, organised based on revolutionary demand for combating 'the activities of the class enemy'. As pointed out (Begović 2024, 817), it is striking, even puzzling, that the head of the state and the leader of the political party, 21 years after he and his comrades accomplished a

[4] The other political aims have been considered in modern Serbian historiography (Piljak 2010; Kovač, Dimitrijević, Popović-Grigorov 2020) and a section of the general contributions to the history of Yugoslavia (Petranović 1988; Bilandžić 1999; Radelić 2006). There is no historiographical consensus regarding the political aims of the Brioni Plenum, with the exception of the one related to the secret political police. This lack of consensus is of no concern for this paper.

[5] When exactly the confidence of Josip Broz in the secret political police started to decline and when it dropped below the critical point is subject to speculation. One way or the other, his action against the *Udba* came as a surprise to many senior officials of the secret political police. As pointed out by Vojin Lukić, one of these officials, Josip Broz offered warm congratulations on *Udba*'s 20th anniversary in 1964 and gave its contribution to the country the highest marks (Lukić 1989, 56). The tables turned just two years later.

revolution that wiped out all class enemies and established a political monopoly, pleaded for a struggle against the class enemy. This vividly demonstrates how anxious Josip Broz was about his unchallenged supreme political position at the time.[6]

The crucial document of the Brioni Plenum was the Conclusion (*Zaključak*), which provided the political groundwork for reforming the secret political police. It was 'recommended' by the Plenum that the Federal Government should 'immediately and without delay' start reorganising the 'organs of state security', i.e. the secret political police. Regarding the reform guidelines, the Plenum specified that external control of the secret political police should be established by the legislative and executive branches of power, and that such control should be based on constitutional provisions and law.[7]

The problem with this guideline was that state security issues were completely neglected in the Constitution.[8] Furthermore, no legislative legal basis existed for the operation of the state security apparatus at the time. In short, there was no law, so the secret political police was effectively above the law.[9] Perhaps the idea of the author(s) of the Conclusion and these guidelines was to signal that appropriate legislation should be adopted, as the legal grounds for the operations of the secret political police. Furthermore, the statement emphasised that state security should be based predominantly 'on public institutions', relegating secret political police to a secondary role and signalling the turning of the tables. Nonetheless, the statement also includes the notion that state security apparatus should be

6 Alternatively, this puzzling wording can be explained as a product of the casual selection of the standard Bolshevik rhetoric about the war against the 'class enemy', as an indispensable ingredient of the 'dictatorship of the proletariat'. Considering the seriousness of the Brioni Plenum preparations, such sloppiness of Josip Broz's wording is unlikely.

7 There was no formal separation of powers between the legislative, executive, and judicial branches in socialist Yugoslavia. Instead, there was a constitutional concept of 'unity of power' (Marković 2022, 134–144). Accordingly, notions of 'legislative power' and 'executive power' in this paper are both used as *terminus technicus*, according to their contemporary meaning.

8 Article 115 of the 1963 Constitution only stipulated that the 'Federation shall be directly responsible for the sovereignty, independence, territorial integrity, security and defence of Yugoslavia and its international relations'. The term 'security' remained vague – whether it means national security, state security, public security or any other form of security is dubious.

9 The Ministry of Internal Affairs adopted some sub-statutory legal acts (instructions, guidelines, etc.), and all those texts were classified, i.e., known only to selected officials of the Ministry of Internal Affairs officials. Begović (2024) provides a review of the available sub-statutory legal acts of the time.

authorised to act against 'the activity of the class enemy'. Accordingly, the Central Committee of the LCY, following the political willpower of its leader, Josip Broz, provided a political platform for transforming the secret political police precisely into a secret political police (Begović 2024, 819).

The first step in the reform of the secret political police was the establishment of the Commission of the Federal Government for the Reform of the State Security Service (*Komisija Saveznog izvršnog veća za reformu službe državne bezbednosti*). The Commission's first session was held only ten days after the Brioni Plenum.[10] The Commission reviewed the draft theses for reorganising the state security service, prepared by the Federal Ministry of Internal Affairs.[11] The final version of the document was adopted by the Commission on 20 September 1966 (Leljak 2016, 61– 70) and endorsed at the session of the Federal Government on 28 September 1966.[12]

There are three main sections of the theses: (1) scope of operations and authorities vested in the service, specifying that the authorities must be vested only by a statute, i.e. by legislation; (2) methods of operation of the service, prohibiting 'indiscriminate' monitoring of the citizens; (3) desirable 'decentralisation' of the service, i.e. strengthening state security services (the secret political police) of the Yugoslav federal units, and assigning them substantial authority and workload. These three main points were the basis for the legislative reform introduced in late 1966.

3. THE 1966 LEGISLATIVE REFORM AND ITS LEGACY

The main breakthrough in the 1966 legislative reform came at the end of the year when the Federal Parliament adopted a crucial piece of legislation: the Basic Law on Internal Affairs.[13] A substantial part of this legislation (20 out of 62 sections) was dedicated to state security issues. This was the

[10] The Commission's inaugural and other meeting minutes are publicly available at the Yugoslav Archives (*Arhiv Jugoslavije*): AJ-837, KPR, II-5-d/45.

[11] Since the document is rather voluminous (15 pages, single-spaced) and well-developed, it is reasonable to assume that work on the document started well ahead of the Brioni Plenum. In short, the outcome of the Brioni Plenum was known well before it took place. The document is publicly available: AJ-837, KPR, II-5-d/45.

[12] Minutes from the session of the Federal Government (*Savezno izvršno veće*), including the full text of the final version of the Theses for the Reform of the State Security Service, are publicly available: AJ-130, SIV, folder 388, unit 591.

[13] Osnovni zakon o unutrašnjim poslovima, *Official Gazette of the SFRY*, 49/66. The legislation was adopted on 9 December 1966.

first time that a statute in socialist Yugoslavia provided legislative grounds for the operations of the secret political police, now labelled as the state security service. The piece of legislation was rather well-written, compact, and coherent.[14]

According to the Basic Law, the secret political police, i.e. the state security service, was specified as 'an autonomous technical service' within the Ministry of Internal Affairs. The service was authorised only to 'collect intelligence' to detect 'organised and secret activities focused on undermining and overthrowing the constitutionally specified order'.[15] Accordingly, the authority of the secret political police was limited only to gathering intelligence and discovering (no other action whatsoever) activities that were both organised and clandestine, and related to compromising the constitutional order. Although the authority of the secret political police was strictly limited to gathering intelligence, the scope of its work was not unambiguously specified, since 'undermining and overthrowing the constitutional order' is rather a vague notion, especially considering that the constitutional order was nothing but a LCY monopoly on power.[16]

[14] The evaluation of the 1966 Basic Law that follows is based on the analysis of Begović (2024, 824–828). This was a basic law enacted at the level of the Federation, enabling the federal units to adopt their legislation on internal affairs, including provisions on state security, provided that they were in compliance with the provisions of the federal basic law.

[15] It is rather intriguing that the action of the secret political police 'against the class enemy' was specified in the official document of the Central Committee of the LCY but not used in the legislative vocabulary of the statute's text, instead using the notion of the 'constitutional order'. Nonetheless, the crucial substance of the constitutional order in Yugoslavia at the time was a communist monopoly on power, which could have been challenged by the 'class enemy'. Thus, these two notions ultimately do not contradict each other.

[16] The scope of work of the secret political police was specified in the sub-statutory text of the Rules of Engagement of the State Security Service (*Pravila službe državne bezbednosti*), a classified document adopted by the Minister of Internal Affairs in January 1967 (Leljak 2016, 371– 415). Although some of the 'organised and secret activities focused on undermining and overthrowing the constitutionally specified order' that was were under the scope of work of the state security service were precisely defined and linked to specific sections of the incumbent Penal Code of Yugoslavia, other activities were not criminal acts at all, even with the very lose specification at the end of the paragraph as 'miscellaneous organised and secret actions focused to undermining and overthrowing the constitutionally specified order', effectively meaning that secret political police could be engaged in the case of any activity that presumably could have been associated with the constitutional order. Since the constitutional order was a communist political monopoly, the character of the state security service as a political police was even reinforced by this sub-statutory text, a product of the 1966 legislative reform.

The Basic Law rather clearly delimitated the turf, i.e. the terrain of activities, between the federal secret political police and those of the Yugoslav federal units, with substantial turf allocated to the federal unit's police. Notwithstanding the rather clear legal demarcation between the activities of the secret political police operations at two levels – the federal and those of the federal units – it was rather painstaking and cumbersome to follow it in day-to-day operations.

Finally, the Basic Law stipulated that the secret political police was accountable to both the executive and legislative branches of government and that it was required to provide on-demand reports on the service's operations and capacity. Although there were no provisions regarding the content of the reports and the procedures for their endorsement, the Law on the Commission for Control of State Security Services, adopted in October 1968, closed this legal gap.[17]

The main accomplishment of the 1966 legal reform was that the secret political police became 'civilised'. Its operations were based on a piece of legislation, and the legal obligation for external control (by the legislative and executive branches of the government) of the secret political police was introduced. The 1966 legal reform undoubtedly further decentralised the secret political police. Nonetheless, that was hardly its main accomplishment, especially considering that the service was not thoroughly centralised prior to1966.

Apart from the legislative changes, the Commission's work resulted in two significant developments. The first was the 'revision of the documentation', an official euphemism for the destruction (by incineration) of selected secret police documentation – archived files on individuals. The revision was ordered by the Commission for Control of State Security Services, which provided a simple benchmark: all personal files not documenting that an individual was involved in 'enemy activity' were to be destroyed. The benchmark was straightforward, but the problem was that the rather vague notion of 'enemy activity' was not precisely specified, giving substantial latitude for deciding which personal files should be destroyed. The task of selecting personal files was assigned to technical commissions appointed by the heads of the secret political police departments (at the federal level, federal units level, etc.). These commissions both made decisions and implemented them.

[17] Zakon o osnivanju Komisije za kontrolu službi državne bezbednosti, *Official Gazette of the SFRY*, 40/68. The legislation was adopted on 25 September 1968.

As this was the very first 'revision of the documentation' in the history of the Yugoslav secret political police – save some revisions in the Socialist Republic of Croatia (Dimitrijević 2001) – the starting point for revision was quite high: the number of personal files was staggering. According to the report by the Control Commission, as of 1 July 1966, there were 2,754,923 personal files in the secret political police archives, equating to 14 per cent of the country's total population at the time. It is estimated (data for Croatia is missing) that these files took up around 12,000 liner meters of documents. The process took three years to complete. The result was that 2,141,155 files (around 78%) were destroyed (incinerated), 153,598 files (around 5%) were transferred to the military security service and academic institutions, and the remaining 460,170 files (around 17%) were retained in the archives of the secret political police.[18]

Although the technical commissions, appointed by the heads of the secret political police sections, were sovereign in selecting which files to destroy or retain, the Control Commission oversaw the process. The monitoring was somewhat inadequate, only relying on random checks of the retained personal files. Hence, the secret police staff was effectively free to destroy all the files they considered could compromise the image of their establishment's track record.

The other significant development was a substantial decrease in the size of secret political police personnel, accompanied by employee reshuffling, with major shedding of the staff in the top echelons of the service. This development should be considered in light of some background information. At the inception of the secret political police, during the war or immediately after it, the recruitment criteria were stringent in terms of ability for the service and loyalty to the communist idea, manifestly demonstrated during the war. The recruitment policy was not as strict in the two decades that followed the Second World War, up to 1966. Even patronage surfaced, with excessive recruitment of loyal individuals – those who were 'one of us', irrespective of their abilities. New jobs and organisational units were not created in line with the operational needs of the secret political police, but with the idea of a dwelling for loyal individuals.[19] That was one source of the gross overemployment in the secret political police; the other was the character of the service, based on the concept of 'total coverage', i.e.

[18] All the data according to the report publicly available: AJ-130, SIV, folder 558, 1969. SSUP SDB, str. Pov. 01 br. 42, 5 February 1969, *Revizija dokumentacije Službe državne bezbednosti*.

[19] According to the report publicly available: AJ-212, Savezni sud, folder 18, 1966, *Izveštaj o deformacijama u radu Službe državne bezbednosti.*

monitoring all citizens of the country, as anyone could be involved in 'enemy activity'. Implementing this concept was low-tech and labour-intensive, requiring substantial operational networks of those who run the informers. Hence, for targeted monitoring, which was needed at least as lip service according to the new guidelines, the secret political police staff was too big.

Precise data on the dynamics of staffing the secret political police and the number of personnel employed is not available. The total number of employees of the Federal Ministry of Internal Affairs in 1961 was 3,864, and it is estimated that roughly half of them were allocated to the (federal) secret political police. In 1966, after the reorganisation of the secret political police, the number was somewhat lower, at 2,809; in April 1967, it was 1,160, and at the end of 1967, the total number of employees was 934 (342 in the secret political police). Accordingly, the decrease in the federal secret police staff over six years was approximately 83 per cent. It is reasonable to assume that some employees of the federal secret political police were transferred to the secret political police of the federal units. Since there is no data on that number, this hypothesis cannot be tested. Nonetheless, when the process of decentralisation of the secret political police was completed at the end of September 1967, the total number of staff of both the federal service and the services of the federal units was 2,245. The cumulative number of staff in the services of all federal units was 1,954 (87% of total employees).[20]

The reshuffling and labour shedding in the top echelons of the secret political police was considered a hallmark of the reform. Two prominent heads of the service, both with impeccable wartime credentials and political heavyweights, Aleksandar Ranković[21] and Svetislav Stefanović,[22] were sacked. Borče Samonikov, the mayor of the remote Municipality of Štip in the Socialist Republic of Macedonia, was appointed the new head of the federal secret political police. This was the Yugoslav political elite's choice: a person who commands no authority on their own and must occasionally but

[20] Data on the number of employees are provided according to Dimitrijević (2001, 80) and the publicly available document: AJ-130, SIV, folder 558, 5/68. The number does not include informants, military security service staff, or the Ministry of Foreign Affairs security service.

[21] Aleksandar Ranković was the only head of *Ozna*, predecessor of *Udba*, from 1941 to 1946, then a Federal Minister of Internal Affairs, Deputy Prime Minister, and ultimately the Vice-President of Yugoslavia.

[22] Svetislav Stevanović was the head of the *Udba*, then a Federal Minister of Internal Affairs, and ultimately a Deputy Prime Minister of the Federal Government.

repeatedly ask for assistance.[23] Furthermore, 16 persons, all senior officials of the secret political police (incumbent or retired), were placed under criminal investigation, a clear signal that they could be indicted.

Two of the most senior former officials of the secret political police, Aleksandar Ranković and Svetislav Stefanović, who held immunity as Members of Parliament, were not placed under criminal investigation. The Federal Attorney General informed the Federal Government (*Savezno izvršno veće*) about the investigation, implicitly requesting the lifting of the MPs' immunity.[24] It was decided at the top level of the political elite, i.e. by Josip Broz, that the two would not be criminally investigated or indicted. Some of the senior secret political police officials were later indicted, and some of the indicted were found guilty and sentenced.

All these developments changed the general perception of the secret political police. It was no longer ubiquitous, relentless, and unconstrained by law. Although it still commanded substantial respect, the omnipresent fear of *Udba* slowly began to subside. The notable failures of the secret political police in the late 1960s and the early 1970s further undermined its reputation, both in the eyes of the incumbent political elite and the general population, although perhaps with different sentiments.

For the political elite, the most critical failure of the secret political police at the time was the failure to anticipate and the inability to contain the 1968 student protests, which centred around the University of Belgrade. The rebellion was quite ideological – it was leftist and more to the left than the current LCY ideology, and the demands were entirely political. The rebellion was not directed against the incumbent LCY government but rather against some of its policies, with the fervent demand for an ideological shift to the left. The students were supported to a great extent by professors and other academic staff, which gave them credibility in the eyes of the general public. Considering all that, it was a significant blow to the political elite, especially since the rebellion came out of the blue, as the secret political police had not given any warning whatsoever about what was about to arise and could not contain or stop it. It was Josip Broz himself who ultimately had to deal with the student revolt. For the political elite, all that was a grave security failure.

[23] The reason for choosing a person from the Socialist Republic of Macedonia was not to disrupt the fragile Serbian–Croatian political balance in communist Yugoslavia. In that context, Macedonia was a 'neutral' party that neither the Serbian nor Croatian political elite would question.

[24] The document is publicly available: AJ-212, Savezni sud, folder 18, 1966, *Savezno javno tužilaštvo, dopis Saveznom izvršnom veću*.

In hindsight, the protest by ethnical Albanians in Kosovo and Metohija proved to be far more sinister. This was a one-day event on 27 November 1968, emphasising the right of local Albanians to self-determination, with the demand that the province of Kosovo and Metohija, referred to as 'Kosovo', become a full-fledged federal unit (*republika*). Again, not only did the secret political police not anticipate the event, but it was also unable to do anything about it, as the event was extinguished the day after by the Yugoslav armed forces.

The other failures of the secret political police were not political but deadly. This time it was a classic state security concern – terrorism. The secret political police, nominally a state security service, failed to provide intelligence and prevent the bombing of a cinema in Belgrade (during the screening) in 1968 by a Croatian political emigrant terrorist organisation. It failed to thwart another bomb being planted by the same organisation at the Belgrade railway station luggage storage that same year (the bomb did not go off, not due to any countermeasures taken, but due to its malfunction). The secret political police failed to prevent the assassination of the Yugoslav ambassador to Sweden in 1971, again by the Croatian political emigrant terrorist organisation, followers of Ustaše ideology dating back to the Independent State of Croatia (1941–1945). There is no doubt that all of these terrorist events were substantial failures, which undermined the reputation of the secret political police.

Hence, the relevant question is: were these failures a consequence of the reform of the secret political police? After all, there were no such failures *before* 1966. Nonetheless, the timing alone is insufficient grounds for a conclusion about causality, constituting a *post hoc ergo propter hoc* fallacy.[25]

[25] Aleksandar Ranković used these developments to justify his approach to state security and his methods of running the secret political police. According to him, the 1966 reform, which began with his sacking, was a disaster and these failures were the 'smoking gun' evidence. In short, he believed such failures would not have happened on his watch (Kovač, Dimitrijević, Popović-Grigorov 2020, II-128). One of the problems with Ranković's view is that it completely disregards the 'supply side', i.e., that the new generation of Croatian political emigrant organisations stepped onto the scene and proved to be more active in terrorist acts against Yugoslavia than the previous one. Nonetheless, the considerations regarding the transformation of the Croatian political emigrant organisations in the 1960s are well beyond the scope of this paper, as is the worldwide surge of terrorism in the late 1960s and the early 1970s – nonetheless, the 'supply side' matters.

There is hardly any evidence to support the hypothesis that the 1966 reform of the secret political police caused the security failures of the late 1960s and early 1970s.[26]

One way or another, the political elite at the time was anxious about the security breaches. It blamed the reforms of the secret political police in the late 1960s for the occurrences, and decided to reverse the reforms, with a redirection of institutional development and secret police operations. Exploring the historical and political context is essential for gaining insight into the specific direction.

4. THE BEGINNING OF THE REVERSAL: CONSTITUTIONAL AMENDMENTS, LEGISLATIVE CHANGES AND TURNING BACK POLITICAL CLOCKS

As for the historical context, the late 1960s and early 1970s were a time of economic and political liberalisation in Yugoslavia. The economic liberalisation introduced several market elements into the Yugoslav economy. It enabled the creation of socialist, self-managed enterprises, which undermined the power of the incumbent political elite.[27] Political liberalisation turned out to be an even bigger problem, as a series of developments proved very challenging for the political elite.

Apart from the already mentioned 1968 student revolt, it was the advent of the 'Croatian Spring', also labelled as the 'Mass Movement', whose substantial acceleration occurred in the spring of 1971,[28] even though its beginnings can be traced back to 1967.[29] That movement was focused on

[26] Perhaps the only exception to this insight could be the 1968 Kosovo and Metohija rebellion and demonstrations, as the reorganisation of the secret political police in this province was done hastily and without a clear plan, mainly to alter the ethnic composition of its staff.

[27] Economic liberalisation was significant but should not be confused with the country's democratisation (Vujić 2007). It was merely the introduction of some, but not all, market elements into the economy, rather than the advent of political pluralism.

[28] It is the political liberalisation of the 1960s in the country that is considered to pave the way for the Croatian Spring (Mihaljević 2017).

[29] The inception is considered to be the Declaration on the Name and Status of the Croatian Literary Language, published on 17 March 1967 and signed by representatives of prominent Croatian institutions, and it has been considered a bellwether of the Croatian Spring. The Declaration is available at: *https://upload.wikimedia.org/wikipedia/commons/f/f2/Deklaracija.jpg*, last visited July 14, 2025.

further decentralisation and devolution of Croatia within Yugoslavia, and was led by the Croatian political elite.[30] Hence, it was perhaps one of the biggest challenges for Josip Broz, whose aim was the preservation of Yugoslavia and the Yugoslav federation, if possible.[31] Another challenge, somewhat less significant, came from the Serbian political elite – from the LCY officials labelled 'liberals'. These developments, particularly the 'Croatian Spring', were the crucial ingredient to the mother of all questions in the Second Yugoslavia: the issue of decentralisation or the balance of power between the Federation and the federal units.

Furthermore, political liberalisation in the country has also led to cultural liberalisation, resulting in the 'Black Wave' in culture, particularly in film, literature, and theatre. Movies, books, and plays belonging to this movement offered an alternative view of history and everyday life, distinct from the official narrative of the political elite.[32] The 'Black Wave' authors questioned some of the communist movement's 'sacred truths', effectively undermining the LCY's political monopoly.

One of the frequently overlooked aspects of political liberalisation was the liberalisation of passport issuance, removing administrative barriers for Yugoslav citizens to travel abroad, particularly to Western Europe. With the increased frequency of travel to countries of liberal democracy, some elements of their culture of public life, quite distinct from the grim Yugoslav

[30] The 'Mass Movement' in Croatia was rather heterogeneous. Although it was led by the Croatian (communist) political elite, there were various actors in it, some with no links to the elite, and in hindsight, some of them with an eye on independence in due course (Irvine 2011).

[31] There is additional evidence that this crisis was perhaps the most serious for Josip Broz since his split with Stalin in 1948, mainly because it originated from his own LCY. According to the KGB files transferred to Great Britain in 1991 by former chief archivist of the Soviet secret political police Vasili Mitrokhin, operation code-named Progress was underway in various Eastern European countries, consisting of nine KGB agents (all of them illegals, i.e. without diplomatic coverage) deployed in Yugoslavia in 1971. They were given a long list of institutions, universities, institutes, academies of science, and media outlets – none of which were governmental – and were instructed to 'strike up acquaintances' (Andrew, Mitrokhin 1999, 304– 305). The aim was to gather intelligence and perhaps identify relevant and influential persons with a pro-Soviet stance. Some reports were sent back to the KGB Moscow Centre and 'were judged sufficiently important to be forwarded to [Leonid] Brezhnev' (Andrew, Mitrokhin 1999, 305).

[32] Perhaps the most prominent art contribution to the Black Wave, a symbol of it, was the movie *Zaseda* (The Ambush) by Živojin Pavlović (both screenwriter and director), which dealt with the historical events of 1945 and was released in July 1969.

authoritarian reality, were transferred back to the country, changing the cultural pattern of the local population – not necessarily in favour of the incumbent political elite and their desire to preserve their political monopoly.

On the international scene, the 1968 Soviet intervention in Czechoslovakia produced a credible threat to the national security of socialist Yugoslavia. In the 1960s, within the nominal framework of the non-alignment movement, Yugoslavia began shifting its international alignment towards the Soviet Union, and the political pendulum swung from the West to the East. Accordingly, the 1968 Soviet intervention was both a surprise and a bitter disappointment.[33] The Yugoslav political elite took this event very seriously – and for good reason.[34]

In the political context, the incumbent political elite viewed these developments as grave challenges to their political monopoly. It is rather apparent that they felt anxious about their political monopoly being threatened, and Josip Broz was concerned for his position as the undisputed autocrat in the country. In hindsight, this concern was quite rational.

The answer to these challenges was consisted of two parts. The first one was a reversal of the liberalisation, both the political and the economic. The process of re-bolshevisation started.[35] The second was the devolution of the Yugoslav Federation, transforming it into an effective confederation – a loose community of (con)federal units. Both these reforms substantially impacted the constitutional and legislative grounds for the operations of the secret political police.

The adoption of the 1971 Constitutional Amendments (Amendments XX–XLII) triggered legislative and organisational changes in state security and the operation of the secret political police.

Amendment XXXVI created the country's top collective federal executive body – the Presidency (*Predsedništvo*), which was chaired and whose work was decisively directed by Josip Broz. According to Amendment XXX, the

[33] Tripković (2008) considers Yugoslavia's international relations position before and after the 1968 Soviet intervention in Czechoslovakia in detail. Jakovina (2005) offers a perspective on Soviet–Yugoslav relations, considering the impact of the 'Mass Movement'.

[34] Memories of the 1956 Soviet intervention in Hungary – much more violent and with significantly heavier casualties than the 1968 intervention in Czechoslovakia – were at the time still very fresh in the minds of the Yugoslav political elite.

[35] The term 're-bolshevisation' was introduced by Mirko Čanadanović, a former high-ranking communist official dismissed in the early 1970s (Popov 1990, 226).

Federation was empowered and responsible only for providing the grounds for the operations of the state security service, not for conducting the operations themselves.

Furthermore, Amendment XXIX introduced a notion of 'social self-protection' (*društvena samozaštita*) – an extraordinarily vague and thoroughly incomprehensible concept. It was the pinnacle of the socialist self-management ideological narrative in creating a neologism with no clear meaning, or, in this case, no meaning at all.[36]

A new piece of legislation was introduced in late 1971, significantly increasing the authorities of the secret political police.[37] According to this legislation, the service was authorised not only to 'collect intelligence' aimed at detecting the 'activities of individuals, groups and organisations focused on undermining and overthrowing the constitutionally specified order' but also to take actions for both 'detection and prevention' of these activities. In addition, according to the 1971 legislative change, the activities targeted by the service did not need to be 'organised and clandestine'.

In short, the legislation provided the legal basis for targeting any activity presumed to be against the constitutional order. It even established the legal obligation for the service to address them. There is no more necessary cumulative legal condition that the activity against the constitutional order must be both clandestine and organised. The legal constraints on the secret political police imposed by the 1966 legislation were abolished. Effectively, this was the beginning of the end of the 1966 reform.

Additionally, the Presidency, as vested with the power by Amendment XXX, decided to inaugurate the Council for State Security Affairs (*Savet za poslove državne bezbednosti*), which commenced its operations in 1972. Its heavyweight political composition (the President of the Republic, the Prime Minister, and the three ministers: for defence, foreign affairs, and internal affairs) testifies to the Josip Broz's strong political determination to hold on to state security and to control the secret political police directly. In other

[36] Even a pianistically inclined reading of two apologetic papers on 'social self-protection', which have academic ambition, at least those published in academic journals of the time (Simović 1978; Simić 1981), did not provide any clue about the meaning of the notion or the essentials of the concept. The motivation of the political elite of socialist Yugoslavia at the time, to create such unintelligible notions, remains elusive, but this issue is definitely beyond the scope of this paper.

[37] It was The Law on Conducting Internal Affairs in the Competence of the Federal Authorities (*Zakon o vršenju unutrašnjih poslova iz nadležnosti saveznih organa uprave*), *Official Gazette of the SFRY* 60/71. The legislation was adopted on 28 December 1971.

words, his intention was to not repeat the mistake of losing personal control of the secret political police, which he had made before 1966, and obviously hasty, from his point of view, reform of the secret political police in 1966.

One of the most significant conclusions of the April 1972 meeting of the Council for State Security Affairs was that the new legislation on state security should be based on the vague concept of social self-protection. The other insight, effectively a guideline, referred to 'enemy theoretical constructions and platforms' that 'have appeared on our political scene recently' and that the 'LCY should address'. So, it was not about state security but politics, after all. In short, the Council became the primary mechanism for the executive branch of government to direct the secret political police in line with the political priorities of the incumbent communist elite and its leader, Josip Broz.

A national security disaster struck immediately after these institutional changes were implemented. Perhaps the most significant breach of national security in socialist Yugoslavia occurred in June and July 1972, when a group of 19 terrorists of the Croatian Revolutionary Brotherhood, a Croatian political emigrant organisation, crossed into Yugoslavia from Austria and travelled unnoticed for a week to the central geographical location in the country, aiming at triggering an armed rebellion (Operation *Feniks*). Although their mission failed and only one member of the 19 of the terrorist group survived (as a minor, he was not sentenced to death like five other captured terrorists), 13 member of the Yugoslav Army and other security/armed forces were killed during the counterterrorist action (Operation *Raduša 72*). The intelligence failure was immense, as was the operational disaster once the terrorist group was finally detected.[38] The sinister episode proved that essential state security issues were neglected due to a service being overwhelmed with secret political police tasks.[39]

[38] In hindsight, Operation *Feniks* was not a substantial, perhaps not even a significant threat to national security or the constitutional order, especially compared to the effective and recurring terrorist activities around Europe at the time with the RAF (*Rote Armee Fraktion*, i.e. the Baader-Meinhof Group) in Germany, the Red Brigades (*Briggate Rose*) in Italy, the IRA (Irish Republican Army) in the UK, with ubiquitous terrorist groups around the PLO (Palestine Liberation Organization) operating all over Europe. Nonetheless, for the purpose of examining the context of the secret political police reform, it is not hindsight that is relevant, but rather the perception, however biased, of the incumbent decision-makers. For them, this was a disaster.

[39] According to Begović (2024, 912), the secret political police's effectiveness, or rather the lack of it, should be corroborated by the report it sent to the President of Yugoslavia on 10 January 1972. According to this 42-page report, titled 'Evaluation of activities of internal enemy and foreign intelligence services in the Socialist

Nonetheless, the Yugoslav political elite decided that re-bolshevisation was the right strategy – including enhancing the role of the secret political police – and it should only be enforced with greater vigour and speed. This was the political context for the full reversal of the 1966 secret political police reform and the beginning of the last phase of Josip Broz's reign in socialist Yugoslavia.

5. A FULL REVERSAL: THE BEGINNING OF THE NEW BOLSHEVIK AGE

The hallmark of the country's full reversal to the new Bolshevik age, not limited solely to the domain of secret political police, was the 1974 Constitution. Regarding the constitutional grounds for the operations of the secret political police, the 1974 Constitution only confirmed the changes introduced by the 1971 Amendments. Even Preamble IV further developed the concept of social self-protection, although it only increased the confusion without clarifying this vague notion.

New legislation on state security was enacted in late 1973, shortly before the 1974 Constitution was adopted. This was the first law in socialist Yugoslavia on state security that encompasses the term 'state security' in its name – the Law on the Bases of the System of State Security.[40] This legislation was poorly written, riddled with self-management ideology neologisms, and extremely difficult to read (Begović 2024, 907). Furthermore, there were three significant developments, all representing a change for the worse compared to the 1966 and even the 1971 legislation.

Firstly, the scope of work of the secret political police was legally broadened, as the service was responsible for all 'activities focused on undermining and overthrowing the constitutionally specified order'. In the case of activities, there was no qualification whatsoever, such as 'organised'

Republic of Serbia', the main threat to the constitutional order came from within, from the 'internal enemy'. What follows, save one page on foreign intelligence services, is essentially a list of people who should be considered 'internal enemies'. The list comprises many highly educated individuals, including prominent intellectuals, writers, painters, actors, and university professors, primarily from the social sciences and humanities. It was the intellectual *crème de la crème* of Serbia. This was a clear signal that the political elite did not count on the intellectual elite for support at that time. It was also a clear signal of the priorities of the secret political police. The report is publicly available: AJ-837, KPR, folder II-5-d/80.

[40] *Zakon o osnovama sistema državne bezbednosti*, *Official Gazette of the SFRY*, 01/1974. The legislation was adopted on 27 December 1973.

or 'clandestine'. Accordingly, the thoroughly public activity of a single individual was now legally within the scope of the secret police's work. Furthermore, in addition to 'the constitutional order', the secret political police was responsible for 'activities that compromise the security of the country' – a somewhat ambiguous specification, as many activities can be considered as 'compromising the security of the country'.[41] Clearly, the scope of work of the secret political police was substantially broadened legally, perhaps to the pre-1966 level.

The second important feature of the 1973 legislation was that the secret political police was now legally authorised not only to collect intelligence and prevent activities within its scope of work but also to 'initiate actions and proceedings'. Hence, there was a surge in the authorities of the secret political police. In the 1966 legislation, the service was only authorised to collect intelligence on the activities. In 1971, the legislation authorised the service to collect intelligence on activities and take action to prevent them. According to the 1973 legislation, the service was authorised to collect intelligence on the activities and to initiate actions and proceedings to prevent or undermine them.[42]

The third important feature and substantial novelty was that the executive branch took full operational control of the secret political police, as the legislation stipulated that the President (Josip Broz), the Presidency, and the Federal Executive Council 'shall direct the operations of the state security services and specifies the aims, taking into account the interest of the entire country'. Accordingly, the secret political police was no longer an 'autonomous technical service', as it had been under the 1966 legislation, but rather a service under strict, hands-on control of the country's executive government. The task of monitoring the secret political police was assigned to the legislative branch of power. Both the executive and legislative branches of government were firmly under the control of the LCY and the ailing autocrat, leaving virtually no room for discrepancy.

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[41] Hypothetically, a journalist who had written an article for the daily press discussing government irregularities (the incompetence of an official, for example) fell within the scope of the work of secret political police – although their activity was their own, as opposed to be organised with others; it was public, as opposed to clandestine; and it revealed to the public the incompetence of government officials – and could have been considered 'compromising the security of the country'.

[42] The addition of 'proceedings' to the 'actions' was sinister, as it provided grounds for legal actions (within administrative law) of the secret political police against those considered 'compromising the security of the country'.

The adoption of the legislation on the federal councils further strengthened the executive's grip on the secret political police.[43] This was followed by the creation of the Federal Council for the Protection of the Constitutional Order (*Savezni savet za zaštitu ustavnog poretka*), whose mandate was to serve as a specialised authority for the executive power's hands-on management of the secret political police. The Council was presided over by Josip Broz, a clear signal of who the ultimate and undisputed decision-maker was, even in the secret political police's day-to-day operational matters.[44]

Finally, the 1973 legislation provided a legal basis for the thorough decentralisation/devolution of the secret political police, with almost full devolution to the secret political police of each federal unit and with the federal service actions only being taken in exceptional cases, as specified by the executive branch of government. Furthermore, the federal secret political police was also split up between the security services within the auspices of the Ministry of Defence, as well as the Ministry of Foreign Affairs and Internal Affairs, with the executive branch of government ruling in the event of any turf war at the federal level. This was a strong incentive for officials of those services to be fully cooperative with the executive branch of the government. The concept of the secret political police as an 'autonomous technical service' became ancient past only eight years after it had been introduced.

The 1973 legislation was a hallmark of a new political equilibrium established after the failed 1966 secret political police reform experiment. From the viewpoint of the political elite, the experiment produced only trouble, so turning back the clock was an obvious, although not necessarily the best choice. Nonetheless, in the 1970s the country differed significantly from the early 1960s. However moderate, the freedom experienced in the late 1960s did not vanish. Although there was no organised political resistance to the increased repression in the 1970s, many people were not happy about it and had strong opinions against it.

The political elite understood this rather well, so the focus of the secret political police – now under the thorough control of the executive branch – was redirected towards 'internal enemies'. This insight is corroborated by

[43] *Zakon o saveznim savetima* [The Law on Federal Councils], *Official Gazette of the SFRY* 66/74. The legislation was adopted on 26 December 1974.

[44] Perhaps this was the reason for the condescending stance of Franjo Herljević, the Federal Minister of Internal Affairs and *ex officio* the head of secret political police, to Josip Broz in his address on 18 March 1975. Cvetković (2008, 134–5) provides details about the context of this event. The address is publicly available: AJ-803, Predsedništvo SFRJ, folder 24–1976, *26. mart 1975.*

the secret political police reports to the political elite, in which the taxonomy of the 'internal enemies' is highly developed.[45] There were two basic groups of 'internal enemies': (1) the 'old school', bourgeois opposition, and (2) the new, socialist opposition. The bourgeois opposition was then further divided, for analytical purposes, into: (1) the descendants of wartime anti-communist forces (*ustaše, četnici, ljotićevi*, etc.), (2) the 'remnants' of the bourgeoisie as a social segment, (3) the clerical opposition, and (4) the bourgeois liberals, i.e. liberal democrats. In short, they all aimed to restore capitalism, possibly including political pluralism.

The new socialist opposition aimed to preserve socialism, albeit with ideologies and policy models that were quite different from the incumbent one. For analytical purposes, it was divided into: (1) Stalinists and Neo-Stalinists (*dogmatsko-birokratske snage*), (2) anarcho-liberals (New Left), (3) communist liberals (followers of dismissed Serbian communist officials), and (4) technocrats (who believed in meritocracy, entrepreneurship and market solutions under socialism). It is curious that the specific group of 'nationalists' was divided into two main groups, consisting of, for analytical purposes, right-wing nationalists and left-wing nationalists – apparently both threats to the 'constitutional order'. Effectively, anyone who did not fully subscribe to the ideas and policy of the LCY, i.e. of the incumbent political elite, its values, and its fuzzy self-management socialism ideological narrative, was an internal enemy, one way or another. The level of repression went up.

A private, clandestine meeting of Stalinists and neo-Stalinists in the city of Bar (Socialist Republic of Montenegro) on 6 April 1974, ambitiously named 'Congress of the New Communist Party of Yugoslavia', was interrupted by the secret political police operatives, and its participants were detained. Already in 1974, 54 participants of the 'Congress' were sentenced to prison terms ranging from 5 to 15 years in prison (Cvetković 2012, 152). That operation by the secret political police demonstrated the rising level of repression in socialist Yugoslavia with the re-bolshevisation process in the 1970s. It also testifies to the increasing anxiousness of the incumbent political elite, since the 'Congress' gathered complete political outsiders, believers in Stalinism, without any political clout whatsoever. In hindsight, this group did not pose a threat to the incumbent political elite, yet the elite decided to take decisive

[45] Detailed taxonomy of the 'internal enemies' is provided in the secret political police reports publicly available to the executive branch of government: AJ-803, Predsedništvo SFRJ, folder 45, 74. sednica, *Specijalni rat protiv SFRJ*, 23. april 1977. Also, AJ-837, KPR, II-5-d, *Ocena delovanja unutrašnjeg neproijatelja i stranih obaveštajnih služni u Srbiji*, 10. januar 1972.

repressive action against ineffective adversaries – if they were adversaries at all. This demonstrates how nervous the incumbent political elite were about preserving its political monopoly in the 1970s.

Perhaps the most telling episode about the anxiousness of the incumbent political elite, the iron grip of executive branch over the secret political police, and the level of repression at that time was an international incident that took place on 9 August 1975. Federal secret political police operatives abducted Yugoslav political emigrant Vlado Dapčević from neighbouring Romania, inadvertently killing two of his companions. The operation, which was a grave violation of both international and national law, was ordered by the ailing Yugoslav dictator (Josip Broz), arranged in direct contact with his Romanian counterpart (Nicolae Ceaușescu), and executed in cooperation of the secret political police of the two countries.[46] For his ostensible political activities against Yugoslavia, Dapčević was sentenced to death on 5 June 1976, and later on appeal the sentence was commuted to 20 years in prison (Cvetković 2012, 161–162).[47]

The crucial question is whether Vlado Dapčević, a political emigrant who lived in Belgium and was a quiet citizen, a family man, although with somewhat exotic political views (at the time he rejected Soviet communist doctrine and subscribed to Enver Hoxha's Albanian variant), was *any* threat to the Yugoslav political elite and Josip Broz himself. In hindsight, the answer is negative. Nonetheless, the episode demonstrates the substantial level of anxiety, perhaps even paranoia of Josip Broz who was the undisputed leader, with the ambition of becoming a non-hereditary monarch. Even with the substantial risk of damaging international relations with the West (especially with Belgium, whose citizen was lured to Romania by the Yugoslav secret political police and then abducted), in the immediate aftermath of the Helsinki Conference, the advent of the Helsinki Accord and the founding of the Conference on Security and Co-operation in Europe (CSCE), Josip Broz undertook the action of highly dubious value against at best a negligible, in reality imaginary opponent, just for the preservation of his undisputed and

[46] General Ion Mihai Pacepa, the incumbent head of the Romanian secret political police at the time, who defected to the West in the mid-1980s, provided first-hand testimony on the joint Yugoslav-Romanian top-level preparations for this abduction (Pacepa 1987, 344–362).

[47] According to the incumbent Penal Code of Yugoslavia at the time, 20 years of imprisonment was the harshest prison sentence.

unconstrained power. This episode of political whim, which led to quite a politically unreasonable action,[48] testifies to the state of mind of Josip Broz in his final decade and its impact for the role of the secret political police.

6. THE END OF THE EPOCH AND ITS LEGACY

The death of Josip Broz and, consequently, the end of his reign, occurred on 4 May 1980. His funeral was considered a demonstration of both domestic and international support for the man and his achievements. His followers were enthusiastic about such a reception.[49]

Nonetheless, the grim reality of Josip Broz's legacy emerged shortly after the funeral. He left the country with the secret political police under the full operational control of the executive government, issuing operative orders to the service, with a fuzzy legislative basis for the operation of the secret political police, effectively without legal constraint on its operation, and with a substantial level of repression.

At the time of Josip Broz's death, no trace remained of the 1966 reform of the secret political police, and the situation in that area looked much like it had before 1966 – as if no reform of the service had occurred at all, as if no political liberalisation had taken place. The problem for the incumbent political elite after Josip Broz's death was the lack of political legitimacy, comparable to the one that he had gained at the very start of his political career – as the winner in the war against Nazi Germany and domestic political opponents, and the one who stood to Stalin at the peak of his power. His successors lacked comparable political credentials and did not possess his political clout – let alone his charisma. Nonetheless, he left them with bespoke institutions for himself, i.e. adjusted for his personal charisma, authority and political might. One almost feels pity for the successors who found themselves in shoes too large for them. They were simply incapable

[48] Although there is no consensus among historians regarding the motivation and character of Josip Broz's political action against the leaders of the Croatian Spring in 1971 and the repression of the movement, there is no doubt that the defeated Croatian political leaders and their movement were a palpable threat to Josip Broz's unconstrained power. Hence, his actions were reasonable from the perspective of his interests and ambitions. Contrary to that, there was nothing reasonable in the case of Vlado Dapčević.

[49] Broz's funeral could, up to a point, be compared with Winston Churchill's. Churchill's widow, in the evening, said to her daughter: 'It wasn't a funeral, Mary – it was a triumph' (Fielding, Schwarz, Toye 2020, 115). Is not known what Broz's widow commented in the evening, as she was an unperson at the time.

of walking in that outfit. Roughly ten years after the death of Josip Broz, the communist party's monopoly was abolished and even the country itself collapsed.

There is a difference in the role of the secret political police between the collapse of socialist Yugoslavia and the dissolution of the USSR. It was the 1991 failed KGB putsch that was the final blow to the USSR (Zubok 2021). The Yugoslav secret police proved incapable of mounting a similar operation. The collapse of Yugoslavia was violent. Segments of the secret political police probably contributed to this violence, but the service did not contribute to the breakup of Yugoslavia. Nor was it able to prevent it. The clock could not be turned back after the fall of the Berlin Wall.

7. CONCLUSION

The research hypothesis of the paper – that the 1966 reform of the Yugoslav secret political police was a failure – has been confirmed. It failed utterly and miserably. The dawn of a civilised state security apparatus, which many contemporaries made out, was false, because the reform was not sustainable.

The apparent reason for the failure was political determination and a decision to stop the reform. Nonetheless, it is crucial to explain the sources of that political decision. The move by the political elite to embark on a substantial, deep reform of the secret political police was hasty, without a clear plan, and it lacked a comprehensive, consistent picture of the reform's political effects. In short, a radical reform was not well thought out – particularly its political effects and their mitigation. Furthermore, the reform of the secret political police coincided with the country's political and economic liberalisation. All these reforms led to developments that the political elite was unprepared for; the elite perceived them as challenges to its political monopoly, especially when the Yugoslav communist patriarch felt that his absolute power was threatened. Consequently, the reform of the secret political police was stopped and reversed. For survival, an autocracy needs a secret political police as a crucial pillar (Tanneberg 2020). Because the liberalisations at the time were perceived as a threat to the political elite and the communist political monopoly – they were stopped. Accordingly, the political liberalisation in the socialist Yugoslavia did not result in political pluralism and democracy. The economic liberalisation in the country did not result in a market economy. Both liberalisations just faded away.

The failed reform of the secret political police in Yugoslavia is the only case of a substantial reform attempt of the state security service in Eastern European autocratic countries, including the USSR. Some reforms took place, such as the reorganising of the state security apparatus in the USSR, in the aftermath of Stalin's death. The KGB (*Комитет государственной безопасности*) was created as an agency independent of the USSR's Ministry of Internal Affairs and accountable directly to the Council of Ministers.[50] Nonetheless, the scope of work and the authorities of the Soviet secret political police did not change at all. The socialist countries in Eastern Europe followed the Soviet example and reorganised – rather than reformed – their secret political police from time to time. The secret political police in Eastern Europe underwent substantial reform after the demise of socialism. Accordingly, as the Yugoslav secret political police reform case was clearly an outlier, there is no methodologically correct way to generalise the findings of this case study. Perhaps one specific finding could be of some merit: the perfect storm of unexpected adverse outcomes for the political elite (security failures, disturbances brought about by the political liberalisation, and political challenges of economic liberalisation) killed the secret political police reform in Yugoslavia.

This outcome does not preclude the possibility of reforming the secret political police in autocracies. The existence of non-socialist autocracies, especially those classified as 'spin dictatorships', provides for the role of secret political police that is quite distinctive from the traditional 'fear dictatorships'. Accordingly, it seems that if an autocracy is transformed from fear to spin dictatorship, the country's secret political police would have to be reformed. These reforms could be successful and sustainable. It is, after all, an autocracy, albeit transformed, and it is the secret political police, after all – nothing like the state security services that operate in democracies. Nonetheless, a reformed secret political police should be expected. Perhaps, such research should focus on the post-Soviet independent states that abolished socialism and fear dictatorship, but have not yet fully embraced democracy. This could be a relevant academic contribution to the field of reform of the secret political police in autocracies.

Returning to Yugoslavia, the counterfactual narrative could be: Had the Yugoslav political institutions shifted from fear to spin dictatorship, would the reform of the secret political police have been successful? The answer is that the probability of success of such a reform in conditions of a spin dictatorship would be much higher. Nonetheless, the problem with this counterfactual narrative is that no socialist spin dictatorship has been

[50] Albats (1994) provides ample evidence about this reorganisation.

recorded. With the political monopoly of the communist party and a strong ideological commitment to socialism, it seems implausible that socialist Yugoslavia could have become a spin dictatorship. Given all these historical constraints, it appears that the failure of the Yugoslav secret police reform was inevitable.

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Miloš STANKOVIĆ, PhD[*]

THE ENACTMENT OF THE LIVRE AU ROI*: A CHRONOLOGICAL INQUIRY*[**]

The Livre au roi *is the oldest of all the treatises that make up the Assizes of Jerusalem. The enactment of this codification was associated with the reign of King Amalric of Lusignan. The subject of research in this paper is an attempt to determine the moment of its adoption more precisely. Firstly, the legal features of the* Livre au roi *are pointed out. Then, it is indicated to the conflict between King Amalric and Ralph of Tiberias, which had a decisive influence on the enactment and on the content of this codification. Finally, the moment of the* Livre au roi*'s enactment is sharpened by pointing the peace treaties which King Amalric concluded with Sultan Al-Malik Al-Adil and the provisions of the codification which regulated the regency. The* Livre au roi *could have been enacted in 1200, 1204, or it was created in both of the mentioned years.*

Key words: *King Amalric of Lusignan. – Livre au roi. – Queen Isabella I. – Ralph of Tiberias. – Sultan Al-Malik Al-Adil.*

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[*] Associate Professor, University of Belgrade Faculty of Law, Serbia, *milos.stankovic@ius.bg.ac.rs*, ORCID iD: 0009–0001–6482–5285.

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1. INTRODUCTION

The *Livre au roi* is one of the oldest compilations of feudal customary law in general, especially among those composed in the Old French language, and the oldest of all the treatises that make up the Assizes of Jerusalem.

Specifically, the Livre au roi most likely and mainly represents a compilation of the feudal law of the Latin Kingdom of Jerusalem, which existed until 1187 and, according to legend, was irretrievably lost with the fall of Jerusalem to Saladin. Therefore, it cannot be reliably determined whether and to what extent the legal rules that existed in the First Kingdom of Jerusalem were then authentically formulated and codified in this compilation of laws, or if it underwent some modification.[1]

According to current scientific results, what also seems certain, regarding the content of the *Livre au roi*, is that this collection 'reproduces assizes, judgments and certain customs of the Latin Kingdom, though it has no official character' (Greilsammer 1982, 219).[2] In any case, the arguments stating that the internal structure of this compilation of laws was not systematic have been rejected, and it has been shown that this code of feudal law possesses a certain internal logic and structure (Greilsammer 1995, 70).

What is almost undoubtable is that it was created in Acre, by an author or commission whose identity cannot be reliably established nowadays, but who was well acquainted with the customs and assizes of the First Kingdom of Jerusalem. The legal technique with which the *Livre au roi* was written also implies that its author was more skilled in legal practice than in legal theory, with a pronounced sense and the ability to respond precisely and clearly to even the most complex legal issues (Beugnot 1841, LXVI; Riley-Smith 1973, 155; Grandclaude 1923, 118, 121). This may be due to the fact

[1] All three manuscripts in which the *Livre au roi* is preserved (French manuscript 19026 of Paris, Codex Gallus 51 of Munich and Codex Gallus 771 of Munich) were created more than 100 years after this codification. According to Grandclaude (1926b, 422–424), all these manuscripts are similar to each other, which does not mean that they are close to the original. He points out that it is also possible that they all originate from an earlier, common manuscript that may be different from the original text of the *Livre au roi*. It is also possible that the preserved manuscripts contain certain interpolations (See also Greilsammer 1995, 30–66).

[2] It can be said that this conclusion, presented by Greilsammer, relies on the previous considerations of Grandclaude (1926a, 309, 312, 314), according to which all the provisions that make up the *Livre au roi*, in the form this code is preserved, can be divided into two large categories. In his opinion, one consists of those that represent previously issued judgments or extracts from previously issued judgments (*extraits de jugements*), and the other represents legal provisions (*anciens bans*).

that the possible author of this codification, as the king's vassal, participated in the work of the High Court before 1187. However, the spirit of the *Livre au roi* and the conflict between King Amalric and Ralph of Tiberias indicate that these may not have been the biggest feudal lords, or at least not all of them, but in all likelihood, the nobility loyal to King Amalric and his notions about consolidating royal power. For this reason, one can also conclude that the *Livre au roi* was an act of one or more laymen, which was a rarity compared to other similar collections of feudal law created at the time (Greilsammer 1995, 107–110, 118 n. 201; Grandclaude 1926a, 314).

However, to this day, there is no scholarly consensus on when exactly the *Livre au roi* was issued. Its origin is defined by different authors as being at different times. For example, Hans Eberhard Mayer (1990, 161) states that it was composed between 1196 and 1205, Greilsammer (1995, 83–86), Maurice Grandclaude (1923, 50; 1926b, 419) and Gaston Dodu (1894, 49) consider it was enacted between 1197 and 1205, Jonathan Riley-Smith (1973, 10, 36, 142) places it between 1198 and 1205, Joshua Prawer (1980, 5) 'in the last years of the twelfth century', Peter Edbury (1997, 105) and Michel Balard (2018, 21) in about 1200, Florian Besson (2015, 772; 2018, 95) between 1201 and 1205, while John La Monte (1970, 26) states that it is was written by 1210.

Until recently, it seemed that Auguste-Arthur Beugnot's opinion (1841, LXVI) that the *Livre au roi* was composed between 1271 and 1291 had been abandoned.[3] However, relying on Beugnot's argumentation, Louis-Marie Audrerie (2023, 209, 215) has offered arguments that the *Livre au roi*, as a compilation of decisions previously issued by the High Court, was actually written on Cyprus between 1285 and 1306, during the reign of King Henry II of Cyprus. Audrerie (2023, 220–222) also put forward the hypothesis that the compiler of the rules that make up the *Livre au roi* was Gerard of Montreal, who, according to Audrerie, was also the possible compiler of the Munich manuscript of this codification.

The aim of this paper is to try to determine the time of creation of the *Livre au roi* more precisely, starting from the historical and social circumstances and considering the evolution of the legal order and legislation of the Latin Kingdom of Jerusalem, primarily from the second half of the 12th century. Although there is almost no doubt that this happened during the reign of King Amalric (Amaury) of Lusignan and Queen Isabella I, and that the *Livre*

[3] For a critique of this Beugnot's attitude, see, especially, Grandclaude 1923, 46–50.

au roi is even considered as 'constitutionally the most important event of the reign of Amaury' (La Monte 1970, 45), it seems that the moment of its enactment can be determined even more precisely.

Many authors (Grandclaude 1923, 119; Greilsammer 1982, 220–223; Greilsammer 1995, 73–82, 99–100; Besson 2018, 95–96) agree that the *Livre au roi*, with its content and the spirit with which it is imbued, represents a legal basis for the manifestation of royal authority towards high nobility, which was still strong at the time of its enactment. Following Greilsammer (1982, 226) this was done by emphasising and re-establishing the royal powers, that is, by fixing the powers of the high nobility with the intention to preserve them, thus preventing the strengthening of great vassals.[4] Bearing in mind the historical and political circumstances following the fall of Jerusalem in 1187, this does not exclude the possibility that this treatise was already somewhat anachronistic at the time of its creation. This is especially true considering that some of the prominent Christian families of the Latin East, such as Ibelin, Gibelet and Garnier, took advantage of the illness of King Baldwin IV, the fall of Jerusalem, and the weakness of Guy of Lusignan to seize the powers and authority that would otherwise belong to the king (Besson 2015, 771–772).

However, the epoch when the *Livre au roi* was created did not feature a strong influence of the baronial movement, as had been the case just a few decades later. With this in mind, the explanation for the remark by Audrerie (2023, 215) – that the sources not only lack information about the *Livre au roi*, but also about any collection of court decisions or collection of laws issued by the High Court before 1250 – is obvious. One can easily understand that later jurists deliberately tried to erase any evidence of new codification of the assizes after the fall of Hattin, bearing in mind that it was not in line with their point of view, as defenders of pure feudalism. This is all the more so if one accepts the view that the *Livre au roi* was not official in nature. However, some evidence about the legislative activity resulting in the creation of the *Livre au roi* does appear to exist. According to Greilsammer (1982, 224–225) the additional prologue of manuscript CG 771 testifies to Amalric's efforts to reconstitute codification of laws resulted in the assizes contained in the *Livre au roi*. A similar response could be made to Audrerie's (2023, 216–217) argument that the treatises by the great jurists of the

[4] Indeed, as suggested by Besson (2010, 110) even in the *Livre au roi*, the monarch's powers were not defined as unlimited and absolute, but rather limits were set for them so that they would not exceed them. Besson (2015, 771–792) points to a particular perspective that reveals how King Amalric, by prescribing various offenses and sanctions in the *Livre au roi*, aimed to consolidate his power.

13th century did not discuss the king's authority to deprive a woman of her inherited fief if she married a baron without the king's consent, which is provided for in Chapter 31 of the *Livre au roi*.

Audrerie's (2023, 219) claim that the enactment of the *Livre au roi* should be viewed through the prism of a time when an attempt was made to reassert central, royal authority was acceptable. However, his conclusions that this codification is a product of the legal and political circumstances of the late 13th and early 14th century, or that the *Livre au roi* is a product of the High Court's activities in that period, under the patronage of King Henry II, cannot be accepted.

Firstly, it is almost certain that the content of the *Livre au roi* refers to the legislation of the Latin Kingdom of Jerusalem, since its provisions do not mention Cyprus. It is indisputable that the *Livre au roi* was already partially anachronistic at the time of its adoption. This is in part due to the choice of assizes in it, as well as the possible combination of previous and newly emerging customs – but which as a whole testify to a strong royal authority, to which the vassals had to submit (Greilsammer 1982, 226). However, if such a conception of the *Livre au roi* did not quite correspond to the social and political circumstances of the late 12th and early 13th century, or match the interests of the high nobility – which is confirmed by the treatises John of Ibelin and Philip of Novara, who do not even refer to the *Livre au roi* (Balard 2018, 21, 29) – how anachronistic *Livre au roi*'s rules must have been in the second half of the 13th century, after the emergence of these two aforementioned treatises? Namely, the Crusader states arose at a time when feudalism in Western Europe was at its peak. Even if the pilgrims intended to fully replicate its achievements in the Holy Land, this proved to be impossible in practice. In fact, the range of legal institutions, the powers granted to local officials, and the organization of state administration represented a combination of Western and Eastern historical and legal heritage (Cahen 1983, 155–166; Ketsamanian 2014, 42–54). This practice gradually shaped the Crusader states for almost two centuries, and its evolution would not have been unknown to the Cypriot king, had he had any doubts about the possibility of implementing an idealised feudal-legal order in 13th or 14th century Cyprus. Moreover, in several places in the *Livre au roi* text, when citing relevant norms and referring to previous decisions and assizes, the authority of what was cited is supported by statements that such a solution was envisaged by '*le droit et la raison du royaume de Jérusalem*'. Is there any reason that the King of Cyprus would have referred to the law and customs of the Kingdom of Jerusalem, especially after the fall of Acre?

Indeed, during the Third Crusade, King Richard the Lionheart conquered Cyprus, in 1191, only to sell it the following year to Guy of Lusignan, whose brother and successor Amalric founded the Lusignan dynasty that ruled Cyprus for the next three centuries. But the state institutions of the Latin Kingdom of Jerusalem and the Kingdom of Cyprus were separate from the very beginning, and when Amalric of Lusignan died in 1205, Jerusalem and Cyprus continued to be ruled by two different dynasties. King Amalric and Queen Isabella I had no children who would, like them, unite the two kingdoms under one dynasty (Phillips 2001, 127). However, although the state institutions were separate and the feudal structure was different in the Latin Kingdom of Jerusalem and the Kingdom of Cyprus, the legal systems were intertwined to a certain degree. Thus, in the 13th century, the same unified law was in force both in the Latin Kingdom of Jerusalem and the Kingdom of Cyprus, and the feudal customs of the Latin Kingdom of Jerusalem were applied in Cyprus and vice versa (Edbury [1977] 1999, 329). However, over time, separate customs began to develop in Cyprus, but similar to those in the Latin Kingdom of Jerusalem. Namely, although the Assizes of Jerusalem continued to apply only in Cyprus after the fall of Acre, they were nevertheless imported to the island from a different social and legal system. In the second period of its history, the Latin Kingdom of Jerusalem represented the ideal feudal state, while Cyprus was practically the private domain of the Lusignans, where there were no large feudal domains and where all fief holders were directly dependent on the king (Grandclaude 1923, 114, 150–151).

As suggested by Audrerie (2023, 217), Chapter 47 of the *Livre au roi* states that knights suffering from leprosy are invited to join the Order of Saint Lazarus, while also pointing out that the Order of Saint Lazarus is first mentioned as an order during the reign of Pope Gregory IX (1227–1241). However, the truth is that the earliest reference to the Order's military activity is dated to 1234. It is believed that this monastic order was created in the during the 1130s, as a hospitaller order, but the first unambiguous reference to this order was made by King Fulk in 1142 when he gave land in Jerusalem to 'the Church of St Lazarus and the convent of the sick who are called *miselli*' (Marcombe 2003, 7). Therefore, leaving aside terminological differences, there is no doubt that the Order, consisting of knights suffering from leprosy, existed in the Kingdom of Jerusalem as early as the mid-12th century.

Elsewhere, Audrerie (2023, 210) relies on Schlumberger's argumentation and points out, citing Chapter 16 of the *Livre au roi*, that the king could confiscate the fief of a baron who minted money independently – even without the decision of the High Court. Based on this, Audrerie highlights that such a provision could only have originated in Cyprus, because the

licence to mint money in Cyprus was reserved solely for the king, while it is known that in the Latin Kingdom of Jerusalem there was a number of crown vassals who minted money. Grandclaude and Greilsammer respond to this argumentation by pointing out that the minting of money without the king's authorization first began in Sidon, between 1165 and 1204, and that the relevant (but also other) provisions of the *Livre au roi* at the time they were adopted had long since ceased to correspond to reality. Furthermore, the rule on the sanctioning of vassals who minted money found its way into the *Livre au roi* thanks to the Assize on confiscation (*établissement*) of King Baldwin III. According to Grandclaude, it cannot be determined whether and to what extent this Assize applied at the time of the adoption of the *Livre au roi*, which will be discussed further in this text. Finally, the term 'coin', which is contained in the *Livre au roi*, and which is generally interpreted as the right to mint money, can also be interpreted differently, etymologically and historically, as the right to affix a seal by a local feudal lord (Grandclaude 1923, 44–45; Greilsammer 1995, 104–106).[5]

Having all of this in mind, the conclusion of this article is that the initiator of enacting the *Livre au roi*, in the specific historical, social and legal framework of the late 12th and early 13th century in the Latin Kingdom of Jerusalem (or what remained of it), could only be a ruler who, according to their internal and external political achievements, could emerge as the first strong ruler and politician after the defeat at Hattin – or at least with good reason to act so.[6] In this sense, the *Livre au roi* was supposed to represent a legal round-up of the political and social consolidation of the circumstances by King Amalric of Lusignan, one of the kings of Jerusalem most skilled in legal matters.[7]

According to Greilsammer (1982, 226) and Besson (2018, 96), he primarily intended to restore 'a strong monarchy rather than to set down in writing the old assizes lost in 1187'.[8] Yet, even if only as a means of achieving King

5 According to Riley-Smith (1971, 188), the clause forbidding the minting of coins was consistently broken without any legal consequences.

6 The historical period from 1193 to 1229 in the Latin Kingdom of Jerusalem is also referred to as the 'period of recovery and reconstruction' (Jotischky 2015, 590).

7 John of Ibelin (Livre de Jean d'Ibelin, chap. CCLXXIII, 430) describes the legal knowledge of King Amalric of Lusignan as 'Il sot miaus les uz et les assises que nul autre, se tesmoingnent ciaus qui le virent, et moult les avoit en memoire'.

8 According to Besson (2015, 792) 'it reflected Amalric's will to re-impose the monarchy above the barons: by deliberately using anachronistic assizes and vocabulary, by claiming the right to judge, the king wanted to show himself as the direct successor of the powerful kings of the past'.

Amalric's political goals, the *Livre au roi* could not have been created without the prior fulfilment of certain social and political conditions. These internal and external political conditions can serve for the more accurate dating of the creation of the *Livre au roi*.

2. DOMESTIC POLICY

Having married Queen Isabella I and after their coronation in January 1198, Amalric of Lusignan became the king of the Latin Kingdom of Jerusalem (Eracles, chaps. IV–V, 221–223; Ernoul, chap. XXVIII, 308–312). Amalric was a wise and determined politician, capable of imposing his will on the barons of Jerusalem, even at the risk of his own unpopularity (Riley-Smith 1971, 184).[9] Having witnessed the instability and frequent changes on the throne after the fall of Jerusalem to Saladin, and likely aware of the considerable public odium towards his brother, Guy of Lusignan, Amalric must have had both state-related and personal reason for strengthening his own power. The opportunity to begin implementing such a policy presented itself very soon.

The most significant success that Amalric achieved domestically during his reign was the confirmation of his dominance in relation to the high nobility. This was manifested by his triumph over Ralph of Tiberias, known as 'the Socrates of the Barons'. Although there is no evidence that he left behind any written legislative work, his legal knowledge, competence in judicial procedure, court speeches and legal argumentation overshadowed all his contemporaries and served as an inspiration to subsequent generations (Riley-Smith 1971, 184; 1973, 122).[10] This comes as no surprise. Having

[9] Dodu (1894, 150) bases his argument for a similar view of King Amalric's personal and ruling qualities on one of his assizes, in which he requiring the knights to sell their fiefs if it was necessary to raise money to ransom a king who became a Saracen captive. Praising the qualities of King Amalric of Lusignan and his advancement through the state institutions of the Latin Kingdom of Jerusalem, John of Ibelin (Livre de Jean d'Ibelin, chap. CCLXXIII, 429–430) left the following testimony about him: 'Le rei Heymeri [...] qui estoit un povre valet et gentishom, puis ot il toz les offices dou reiaume, dès la chamberlainie jusque à la conestablie, et puis fu il roi des deus reiaumes, premierement de Chipre et puis de Surie, et ambedeus les gouverna bien et sagement jusque à la mort'.

[10] 'Et s'il avenist que aucunes d'elles se mariast sans le congié dou seignor, et il en vausist aver dreit par sa court, après ce qu'ele vendreit en la presence de la court, de ce ai je oï et veu grant debat: car les treis plus sages que je onques veisse de sà meir, c'est assaver, monseignor Raou de Tabarie, monseignor de Baruth le veil et monseignor de Saieste, en estoient end escort, si que nus d'eaus disoit ce que l'autre en semblet.' (Livre de Philippe de Navarre, chaps. XLVII, LXXIII, XCIV, 543–545, 559,

held the function of seneschal, i.e. 'representing an absent king, regent or lieutenant in the High Court and presiding over the *secrete*', Ralph had gained a great deal of insight into the functioning of the state administration, as well as becoming thoroughly familiar with court procedures (Riley-Smith 1973, 157; La Monte 1970, 44, n. 1).

The falling-out most likely took place in the autumn of 1198, because the last occasion when Ralph witnessed one of Amalric's charters was in October 1198 (Riley-Smith 1971, 189 n. 52).[11] Ralph of Tiberias, who turned down the king's invitation to participate in the reconstruction and codification of the legislation from the era of the First Kingdom of Jerusalem (Livre de Jean d'Ibelin, chap. CCLXXIII, 430; Livre de Philippe de Navarre, chap. XLVII, 523)[12]

570). Philipe of Novara himself can be considered a student of Ralph of Tiberias. Ralph, bedridden during the first siege of Damietta, spoke to him extensively about the law and customs of the Latin Kingdom of Jerusalem, and Philip, in his own words, memorized it all (Livre de Philippe de Navarre, chap XLIX, 525).

[11] According to Loud (1985, 206), Ralph of Tiberias witnessed two royal charters in August 1198, but not later.

[12] Prawer (1980, 287–288) relied on a Philip of Novara's argumentation that Ralph of Tiberias rejected King Amalric's invitation to reconstitute the assizes of the Kingdom stating that 'he would not cooperate with Antiaume, a man of low extraction'. However, was this just an excuse for Ralph of Tiberias, given that his refusal of such an invitation, which in a broader sense could also be subsumed under his feudal obligation of *auxilium et consilium*, would have been a gross violation of his feudal obligations. It seems that by including Ralph of Tiberias in this legislative undertaking, Amalric really wanted to gain the support of the high nobility for the adoption of the *Livre au roi* and thus provide it with additional legitimacy. However, Beugnot (1841, XXXI) points out that there was undeniable resistance to legislative reform among representatives of the aristocracy in the Holy Land, among other reasons, due to the understanding that power and knowledge should remain limited to the nobility. Other authors (see especially Riley-Smith 1973, 155) have similar views to Beugnot on Ralph of Tiberias's refusal to respond to King Amalric's invitation to participate in the legislative preparation: 'The king certainly shared the anxiety of the feudatories lest the lost laws be completely forgotten and he may also have sensed a possible danger to the crown if its past record of legislation was obliterated. He thought of establishing a commission of two men under his presidency to codify what was remembered of the law and he wanted Ralph of Tiberias to participate as well. It is unlikely that Ralph flatly refused to serve on the commission – it would have been a service required of him as a vassal – but it is very possible that his quarrel with the king intervened before the commission met. At any rate he played no part in the compiling of a treatise on the laws'. Mayer's (1990, 161) observation should also be interpreted along these lines: 'Ralph excused him from a task which was so incompatible with his own class interests'. Likewise, as suggested by Grandclaude (1923, 101 n. 4) and Greilsammer (1995, 91–93, 106–107), Ralph's refusal reflected the negative attitude of the high nobility towards this undertaking, which was clearly aimed at strengthening royal power. Taking all this into account, they point out that Ralph declined the invitation to participate in Amlaric's commission before the king sanctioned it without a court

and who had been his rival to marry Queen Isabella,[13] was identified as the initiator of the failed assassination of King Amalric by four German knights, although his complicity was never proven (Eracles, chaps. VI, X–XI, 224, 228–231; Ernoul, chap. XXVIII, 310–311).[14] Amalric recovered quickly and sanctioned his reluctant vassal without the formal judgement (*esgart*) of the High Court, ordering him to leave the Kingdom within eight days, although it seems he did not confiscate his fief. Amalric probably found a legal basis for acting in this way – alluding to Ralph's apparent treason without proof – in the *établissement* of King Baldwin III.[15] The *établissement* was most likely enacted between 1118 and 1131 and enumerated 12 reasons for the

decision, i.e. '*avant de se fâcher avec lui*'. Finally, a somewhat different and original explanation, offered by Greilsammer (1995, 61, 98–99), seems plausible. In her opinion, Ralph of Tiberias 'participated at least in the first phase' of the redaction of the *Livre au roi* – although it cannot be determined to what extent – before he left the Kingdom of Jerusalem, i.e. before the conflict with King Amalric.

13 After the death of Henry of Champagne, the issue of Queen Isabella's new husband arose. Hugh of Tiberias, garnered the support of some barons for his brother, Ralph of Tiberias, a member of the second generation of Westerners living in the Holy Land, to be the queen's new husband, but the proposal was rejected. The reason for this seem to be that the Templars and Hospitallers believed that Ralph was not wealthy enough, or rather, not influential enough outside the Crusader states, to provide aid to the threatened kingdom. German pressure in favour of the King of Cyprus likely carried some weight too. Therefore, the following proposal, by Conrad of Querfurt, was that Queen Isabella marry the King of Cyprus, Amalric of Lusignan. Patriarch Aymar initially opposed this, arguing that such a marriage would be impossible under canon law, since his brother was already married to her sister. However, he relented, most likely due to the privileges that were promised to the church (Eracles, chap. V, 222–223; Ernoul, chap. XXVIII, 308–311; Riley-Smith 1971, 184; 1973, 152; La Monte 1970, 42, 44; Mayer 1990, 164; Edbury 1997, 25–26; Runciman 1954, 94). It is plausible that part of the explanation for Ralph of Tiberias's refusal to participate in the reconstruction and codification of the legislation of the First Kingdom of Jerusalem was the personal animosity that must have arisen from the rivalry for becoming Queen Isabella's husband (Riley-Smith 1971, 183–184).

14 In fact, one could argue the opposite: Ralph of Tiberias was not on good terms with the German crusaders, quite on the contrary. Upon the arrival of the Germans in the Holy Land, Ralph's brother, Hugh of Tiberias, who was unable to protect his peers, advised them to place their wives and children under the protection of the Military Orders (Eracles, chap. XXVIII, 216; Riley-Smith 1973, 152).

15 According to Riley-Smith (1971, 189–190, translated by author) 'Aimery's promulgation of Ralph's banishment looks like a trial of strength with reference to the assise of Baldwin III, an attempt to reestablish a right to act without *esgart* in certain circumstances'. At first, Prawer (1961, 524) considered King Baldwin II as a legislator during whose reign *Assise sur les confiscations* (*établissement*) was put into force. The same opinion is shared by Riley-Smith (1985, 178–179). Prawer (1962, 42), however, later corrected his opinion and argued convincingly that King Baldwin III was more likely to be considered the author of the *établissement*.

deprivation of a vassal of his fief (i.e. confiscating it) without a formal court decision (*esgart*) (*Livre au roi*, chap. 16, 177–184; Prawer 1961, 523; Dodu 1894, 248).[16] However, with the adoption of the *Assise sur la ligèce* by King Amalric I (Amaury I), between 1162 and 1170, the said *établissement* was practically nullified, because the mentioned Assize stipulated that a vassal could not be deprived of his freedom or of his fief without a court decision in any case (Riley-Smith 1973, 150; Prawer 1959, 65–66). Hence, Prawer (1961, 522) and Riley-Smith (1973, 155) note that not only is it strange that the *établissement* found a place in the *Livre au roi*, but also that this legal text itself contradicts the underlying tendencies and principles of the 12th – century feudal society in the Latin East.

Although the sources (Livre de Jean d'Ibelin, Livre de Philippe de Navarre, Eracles, Ernoul) are not entirely unanimous in describing the course of the legal battle between King Amalric of Lusignan and Ralph of Tiberias,[17] it seems that it can be assumed – if one accept Ibelin's and Novara's reports – that Ralph based his legal defence precisely on the application of the *Assise sur la ligèce*. He pointed out the incompatibility of the *établissement* with this Assize, i.e. argued that a High Court decision was necessary in a dispute between a lord and his vassal (Riley-Smith 1971, 190–191; 1973, 157; Mayer 1990, 249.).[18] This means that, contrary to the intention of its editor, King Aimery I, the Assize was applied for the first time against the king in this case. This was not entirely successful, as the conflict ended with Ralph's leaving of the Kingdom of Jerusalem within said eight days, and he did not return until after Amalric's death. On the other hand, the *établissement* became an integral part of the *Livre au roi*, owing to which it has been preserved.[19]

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[16] According to Riley-Smith (1973, 146) the 'theory of regalia [...] was best expressed in [this] *assise'*, but he believes that Baldwin III is the most likely king to have passed it.

[17] For more about these differences, see especially Loud 1985, 204–212.

[18] Relying primarily on Eracles (1859) as a source that describes the conflict between King Amalric and Ralph of Tiberias, Loud (1985, 210) concludes that 'nearest contemporary account of the events in question, that of the *L'Estoire d'Eracles*, makes no mention of the *Assise sur la ligece* being used against the king, and is perfectly consistent with the *Livre au roi*'. Even if this approach was accepted, this would not resolve the dilemma about the reasons why the *établissement* found its place in the *Livre au roi*, because the *Assise sur la ligèce*, whose existence could not have been unknown to the nobles, was enacted after the *établissement* and practically nullifiedit.

[19] According to Grandclaude (1926a, 309) the *établissement* is classified among those provisions of the *Livre au roi* that he equates with the *anciens bans*. Having this particular case in mind, Riley-Smith (1973, 151, 158–159) concludes: 'The

As suggested by Greilsammer (1995, 71, n. 105), the *Livre au roi* is imbued to a significant extent with the spirit of the *Assise sur la ligèce* which, as she says, the *Livre au roi* 'interiorised', despite not quoting it. The way in which the Assize sets out the relations between the king and the nobility tacitly reflected the relationship between them defined in the *Livre au roi*.[20] The fact that this codification of law is imbued with the spirit of the *Assise sur la ligèce* should not necessarily be considered a contradiction for one more reason: the *Livre au roi* states that a vassal cannot be arrested by his lord unless he had been judged by his peers in court.[21]

Therefore, the conclusion that the *Livre au roi* was created between 1187 and 1198, before the conflict between King Amalric of Lusignan and Ralph of Tiberias, would seem unfounded, regardless of the fact it contained the *établissement*, which was nullified by the *Assise sur la ligèce* (Riley-Smith 1973, 146), and which, according to the testimonies of Philip of Novara and John of Ibelin, was the basis for Ralph of Tiberias's legal defence in this dispute. It is much more likely that King Amalric of Lusignan, as the de facto winner of this conflict, wanted to confirm the strength of his own authority immediately after this success and give legitimacy to his own action against Ralph of Tiberias by incorporating the *établissement* into the *Livre au roi*. At the same time, it can be concluded that he wanted to create the opportunity for himself so that he could punish other unruly vassals in the future, in the same manner and without restrictions (Greilsammer 1982, 221 n. 14; 1995, 101). Moreover, according to Prawer (1962, 30), the range of cases in which confiscation could occur was expanded in the *Livre au roi*, compared to the *établissement*. Specifically, referring to Chapters 7 and 8 of the *Livre au roi*, this author indicated that refusal of the vassal to submit as a hostage for his lord or serve as an assurer for his debts, was sanctioned with confiscation.

Bearing all this in mind, the opinion of some authors that the *Livre au roi* actually was 'the new edition of the Laws', whose enactment was initiated by King Amalric of Lusignan, can be accepted (Runciman 1954, 95). In this sense, La Monte (1970, 44) appears to be correct that Ralph's refusal to participate in the work of the legislative commission does not mean that

weaknesses in the baronial interpretation of the *Assise sur la ligece* will become apparent as we consider its development from the moment when it was first proposed by Ralph of Tiberias'.

[20] Besson (2015, 785) argues similarly. Grandclaude (1923, 119) is more moderate in his assessment, pointing out that the *Livre au roi* treats the *Assise sur la ligèce* 'only summarily', giving priority to the Assize on confiscation of King Baldwin.

[21] This will be one of the arguments for Riley-Smith (1973, 10, 36, 143) to conclude that 'it is an exaggeration to call it a treatise on behalf of the monarchy' (See also: *Livre au roi*, chap. 25, 208–210).

this commission was not established at all and that it did not work to 'revive' and codify the legislation of the Latin Kingdom of Jerusalem from the period before the fall of Jerusalem in 1187. Moreover, it is possible that the *Livre au roi* was created precisely by this commission. The additional prologue to manuscript CG 771 testifies that Amalric's effort to reconstitute this codification resulted in the assizes contained in the *Livre au roi* (Riley-Smith 1971, 185; Greilsammer 1982, 224–225).[22] Did King Amalric's reference to the *établissement* in his conflict with Ralph, among other things, also represent a kind of retribution for Ralph's refusal to participate in the work of this commission?

In this regard, it seems indisputable that the author of the *Livre au roi* was someone very familiar with the legislation of the First Kingdom of Jerusalem, of which they probably knew some assizes by heart, word by word. However, it is also clear that their redaction was done selectively, sometimes even partially, in fragments, which makes it difficult to fully identify the content of this codification with the content and meaning of the law of the First Kingdom of Jerusalem (Grandclaude 1923, 122).

Given all this, was the content of the *Livre au roi* directly influenced, at least to a small extent, by King Amalric of Lusignan himself, just as Napoleon influenced certain provisions of his *Code civil*?[23] Since he was not a legal theorist, but undeniably had respectable legal knowledge,[24] it seems that this hypothesis should not be rejected either, especially since the *Livre au roi* was written in a pragmatic manner. King Amalric had an apparent interest in this, especially in this systematization of the law in global. In this sense, although not overemphasised, the reference to the *Assise sur la ligèce* in the *Livre au roi* could actually represent a balance between the King Amalric's idea to strengthen central power and emphasise the king's authority over the nobility in the *Livre au roi* on the one hand, and the practical circumstances

[22] In this regard, the opinion of the great mid-13th century jurists of the Kingdom of Jerusalem, that the refusal of Ralph of Tiberias to take a part in this commission led to defeat of King Amalric's entire effort to restore the legislation of the first Kingdom of Jerusalem, cannot be accepted.

[23] For example, as suggested by Loud (1985, 208), 'the section protecting the vassal from physical punishment without judgement may also reflect the personal experience of King Aimery, when as royal constable he was arrested by Henry of Champagne *c.* 1193'. See also *Livre au roi*, chap. 25, 208–210.

[24] Following Riley-Smith (1971, 185): 'He was remembered above all as a great lawyer who knew the laws and usages better than his contemporaries, having memorized many of them. Only Ralph of Tiberias was more learned than he was'. See also Livre de Philippe de Navarre, chaps. XLVII, LXXIII, XCIV, 521–523, 543–545, 570; Livre de Jean d'Ibelin, chap. CCLXXIII, 429–430.

that indicated this could not be implemented consistently and completely, on the other hand. This is especially true since during the reign of King Amalric the *Assise sur la ligèce* continued to reflect the strength of the royal authority and the limitations of the great barons. Namely, the Assize only fully became a lever of power for the high nobility during the struggle against Emperor Frederick II of Hohenstaufen, primarily in Cyprus (Riley-Smith 1971, 179–204). However, it is clear now that the beginnings of that struggle and the possibility of a completely opposite interpretation of the Assize did become visible during the conflict between King Amalric and Ralph of Tiberias, who invoked it for the first time against a ruler. In this regard, two hypotheses can be put forward.

According to the first, it is possible that King Amalric, based on his own experience in the dispute with Ralph of Tiberias, had already become aware of the implications that the *Assise sur la ligèce* could have in the future. In fact, Amalric emerged victorious from this conflict, although not with an indisputable legal basis, because Ralph of Tiberias left the Kingdom of Jerusalem. So, spurred on by the success against Ralph of Tiberias, the king tried to strengthen his own position (Mayer 1990, 161–162), apparently realising that this Assize could be used against him or any other future king, and eventually wanted to keep it applicable only against lower vassals. Thus, one might conclude that by reaffirming the *établissement* in the *Livre au roi*, the king wanted to prevent new tendencies in the application of this Assize and strengthen royal authority.[25] This is supported by the fact that the successful application of the Assize against the ruler would only take place in the mid-13th century, as a legal remedy in the conflict between the barons and Emperor Friedrich II Hohenstaufen. The place of the *établissement* in the *Livre au roi*, understood in this way, can also be interpreted as a compromise. Namely, even if in the 1230s the *établissement* was considered as a limitation of regal power,[26] in new circumstances – following the adoption of the *Assise*

[25] As suggested by Riley-Smith (1971, 188), the similar explanation for inclusion of *établissement* in the *Livre au roi* is possible: 'It was an archaic, half-forgotten piece of legislation introduced, like so much in the book, to answer a contemporary need'.

[26] Riley-Smith (1985, 176, 178) at first claimed the opposite: 'All historians including myself, have been of the opinion that the *établissement* is evidence of the strength of the kings in the first half of the twelfth century'. Later, he was closer to the opposite conclusion: 'Thirdly, the *établissement* surely demonstrates not so much the strength as the limitations of royal power. [...] But if a virtue of the *établissement* is that it provides us with early evidence for prerogatives, a vice is that a king had taken the step of putting down on paper those cases in which he could impose a fixed sentence without *esgart* and this could only have the effect of limiting his freedom of action: it is an age-old principle of law-making that

sur la ligèce, the defeat at Hattin, and the king's conflict with Ralph of Tiberias – the *établissement* could be treated as a step towards the re-strengthening of royal power (Greilsammer 1995, 81, 101 n. 165), as well as a meaning of the king's attempt to convalidate his behaviour towards Ralph of Tiberias.

According to the second hypothesis, one could argue that King Amalric did not anticipate the far-reaching implications of the interpretation of the Assize invoked by Ralph of Tiberias, which led to the application of the *Assise sur la ligèce* against the central authority in the 13th century. This is especially the case since he emerged as the de facto winner in the conflict with Ralph of Tiberias. It may be that Philip of Novara and John of Ibelin, under the influence of their circumstances and needs, i.e. their belonging to the nobility and the goals with which they wrote their treatises, exaggerated the significance of the Assize in the conflict between King Amalric and Ralph of Tiberias – especially knowing that the *Assise sur la ligèce* was originally created to strengthen the power of the crown. If so, perhaps this is precisely why the king had no objection to the Assize becoming a part of the *Livre au roi*, albeit indirectly. Since this Assize only gained significance in the Kingdom of Cyprus, which it did not have in the Latin Kingdom of Jerusalem, i.e. a means of challenging the central government, then Audrery's conclusion that the *Livre au roi* was composed in Cyprus seems even less convincing. If his interpretation were to be accepted, the contradiction in content and meaning between the *Assise sur la ligèce* and the *Livre au roi* would be irreconcilable.

Regardless of which hypothesis is accepted, it seems indisputable that in the time of King Amalric the central authority in the Latin Kingdom of Jerusalem was not as strong as it had been during the early 12th century, nor as weakened as the circumstances of the 13th century would dictate. Consciously or not, its content embodies a period of balancing, a shift in the pendulum of power towards the centre, a compromise between the differing aspirations of the king and the nobility. Like any legislative undertaking, however future-oriented it may be, it was greatly shaped by the experiences of the past. In this sense, it is justified to consider the *Livre au roi* as a swan song of the strengthening of royal power, but also as the establishment of the outlines of a new order that this codification deeply manifests.

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definitions of rights should be avoided, since they create a framework beyond which it becomes difficult to operate'. Following Prawer (1980, 432), a somewhat more balanced view: 'Our *assise*, which determined the relations between the king and his vassals, strengthened the king's position, although to some extent it also safeguarded vassals from too arbitrary decisions from their lord'.

3. FOREIGN POLICY AND PERSONAL MOTIVATION

On the foreign policy front, on 1 July 1198, King Amalric of Lusignan signed a peace treaty with Sultan Al-Malik Al-Adil for duration of 5 years and 8 months, which secured Frankish control of the Mediterranean coast from Acre to Antioch. Specifically, the Franks kept possession of Jebail and Beirut, Al-Adil kept Jaffa, while Sidon was divided between them. Amalric would pivot his foreign politics around the intent to keep peace with Al-Adil while waiting for a huge crusade to the Holy Land that being prepared in Europe (Eracles, chap. X, 228–230; Ernoul, chap. XXVIII, 316–317; Runciman 1954, 98, 101–102, 129; Greilsammer 1995, 89). Having consolidated his internal power after the conflict with Ralph of Tiberias and having ensured a respite and consolidation in the fight with the Saracens through a truce with Al-Adil, the earliest time when Amalric could have passed the *Livre au roi* and rounded off his authority on the legislative level is the autumn or winter of 1198.

However, the exclusive reliance on this dating of the enactment of the *Livre au roi* is not without its drawbacks. John of Ibelin and Philip of Novara state that the major barons who supported Ralph of Tiberias in his dispute with the king collectively ceased to fulfil their feudal obligations to the king, withdrawing from his service – all in reference to the *Assise sur la ligèce*. According to these sources, despite Ralph's departure from the Latin Kingdom of Jerusalem to the County of Tripoli, the vassals did not resume their feudal obligations to the king until at least 1200 (Livre de Jean d'Ibelin, chap. CCIV, 327–328; Livre de Philippe de Navarre, chap. XLII, LII-LIII, 518, 527–529). On the other hand, according to Loud (1985, 207), this interpretation of John of Ibelin's account of the baron's actions, which is common in literature, is incorrect. He claims that John's report 'means exactly the opposite – that the threat was withdrawn'.

However, in this regard, it seems more acceptable to set the year 1200 as the earliest moment when the *Livre au roi* could have been created. Firstly, if one starts from the reasonable assumption that the work on the *Livre au roi* began after the accession of King Amalric of Lusignan to the throne and before his conflict with Ralph of Tiberias, it is unlikely that this work could have been completed in only 8 or 9 months. Therefore, it is plausible that the vassals returned to the king's service in 1200, or withdrew their threat – perhaps as a result of the compromise reached with the king. Such a compromise is also manifested in the content of the *Livre au roi*, which, as previously noted, although imbued with the spirit of the *Assise sur la ligèce*,

still retained the *établissement*. Thus, the *Livre au roi* could have been created in 1200 precisely as a symbolic result of the consolidation of the internal and external political circumstances in the Latin Kingdom of Jerusalem.

On the other hand, Riley-Smith (1971, 185) and Greilsammer (1995, 84–86) demonstrated that the provisions of Articles 5 and 6 of the *Livre au roi* were written precisely considering the specific family and ruling status of King Amalric and Queen Isabella I.[27] Amalric was Queen Isabella's fourth husband,[28] with whom she had two daughters and one son, while Isabella had a daughter, Mary, from her second husband, Conrad of Montferrat. The previously mentioned provisions of the *Livre au roi* regulated the order of succession to the throne of the queen's children born from two marriages. If the queen were to become widowed and remarry, in the event of her death, the heir to the throne would be her eldest son from her first marriage. However, if she had no children from her first marriage, the throne would go to the eldest child from her second marriage (Dodu 1894, 106–107). In other words, it was decided that the queen's heirs from her first marriage would have priority, with sons taking precedence over daughters; if there were no male heirs from the previous marriage, then the daughters from the first marriage took precedence over the sons from the later marriage. Finally, if there were no children from the first marriage, then the son from the second marriage took precedence over the daughter, even if she was the older sibling. Regency belonged to the eldest male or female relative, but on the side through which the throne escheated. If the queen had no offspring from her first, but only from her second marriage, and the father of the children outlived the queen, the regency over the minor heir would belong to the father, until his son or daughter came of age (La Monte 1970, 49–50).

In the specific circumstances, the possibility of Amalric's regency in the event of Isabella's and even Mary's death was obviously foreseen. As suggested by Greilsammer (1995, 85–86; 1982, 224), Amalric advocated for these provisions in order to secure his own bailage and consequently revert

[27] This is one of the key arguments in favour of Grandclaude's (1923, 50, 119–120) claim that the *Livre au roi* was written between 1197 and 1205.

[28] Queen Isabella's first husband was Humphrey of Toron. Dissatisfied with his weak and indecisive character, the barons had influenced the annulment of his marriage to Isabella. She was then married to Conrad, Marquess of Montferrat, who was murdered. Then, also under the influence of the nobility, Henry, Count of Champagne, was chosen as the heir to the throne, to whom Queen Isabella was married for this purpose. After his death in 1197, Isabella, at the age of only 26, married her fourth husband, Amalric of Lusignan, King of Cyprus, who was invited by the Syrian barons to take power over Syria through this marriage (Ernoul, chaps. XXIV–XXVIII, 264–317).

to the throne of his heirs, should Isabella and her heiress die first. From these provisions, it is clear that at the time of the writing of the *Livre au roi*, all three children from the Amalric and Isabella's marriage had been born, so this treatise could only have been created after the birth of their youngest child. Their elder daughter Sybilla was born in 1198, the younger, Melisende in 1200, while it is not known when their son Amalric was born, but he is known to have died as an infant on 2 February 1205 (Greilsammer 1995, 86; Runciman 1954, 103 n. 3).

According to Audrerie (2023, 211–219), this argumentation should not be rejected, but he points out that it could be applied to a whole series of similar events related to the succession to the throne of the Latin Kingdom of Jerusalem that took place between 1185 and 1268. However, starting from the hypothesis that the *Livre au roi* is a collection of extracts from decisions and counsels passed by the High Court, he concluds that all these cases must have preceded the creation of the *Livre au roi*, i.e. that this codification could not have been created before the late 13th or early 14th century. In this regard, he highlights the text of the preamble to Chapter 1 of the *Livre au roi*, which stresses the need to preserve the judgments of the High Court, and concludes that this decision was made only between 1285 and 1291. Audrerie's argument does not seem convincing enough, especially in the context of all the other arguments about the time of the creation of the *Livre au roi* that are presented in this paper. He bases his conclusion on the hypothesis that the *Livre au roi* is a kind of legal manual compiled from previous legal precedents. Although this hypothesis is not without its shortcomings, even if taken as indisputable, it does not mean that it refers exclusively to previous events, quite the opposite. It could also be concluded differently – that issues regarding the succession to the throne and the regency were frequent in the Latin Kingdom of Jerusalem, therefore their regulation in the *Livre au roi* served as a model for the resolution of similar future cases. In this sense, the preamble to Chapter 1 of the *Livre au roi* may also be a later interpolation. Finally, according to Grandclaude (1923, 44, 49), a whole series of provisions in the *Livre au roi* indicate that the *chief seignor* was the queen, not the king, and this was not the case between 1244 and 1291, but it was repeated without interruption between 1192 and 1227. With the latter in mind, why would the King of Cyprus prescribe provisions formulated in this manner? Above all other cases, they could in fact be related to the situation in which Queen Isabella I found herself alongside her four husbands.

A similar argument can be used to respond to Audrerie's (2023, 216) claim that Chapter 1 of the *Livre au roi*, which prohibits the king, queen, and their vassals from voluntarily surrendering their fortresses and castles to

the Saracens, is actually a precedent derived from the conflict between King Hugh III and the lord of Beirut. This occurred in 1273, after the lord of Beirut, Haymo Léstrange, surrendered his fief and his widow, Isabelle of Ibelin, to the protection of Sultan Baibars. There is no doubt that the prohibition prescribed in Chapter 1 of the *Livre au roi* was of essential importance from the very beginning in the Latin Kingdom of Jerusalem, because it not only indicated a violation of feudal obligations, but also represented a condition for the survival of the Crusader states. It is impossible that the Crusaders did not consider it worthy of regulation during the full two centuries of their statehood in the Holy Land, and that they only noticed its value in the late 13th or early 14th century. The event mentioned by Audrerie is a consequence rather than a cause of such an understanding. In this regard, the prohibition that the *Livre au roi* foresees, in connection with the surrender of fortresses to the Saracens by the king's vassals, is emphasised in Chapter 39 of the *Livre au roi*, which explicitly mentions Crac, Jaffa, Ascalon, Arsur, Cesarea, Cayphas, Tiberias, Belinas, Toron, Scandelion, Sidon, Sais, and Beirut (Grandclaude 1923, 45–46). If Audrerie's claim about the time of enactment of the *Livre au roi* is accepted, the question must be asked whether there are any arguments for the claim that in 1291, on the eve of the collapse of the Crusader states, when some of these cities were still under Crusader control, there were social and political opportunities for a legislative undertaking whose content ignores not only the significant influence of the nobility, but also the overall difficult situation in the remnants of the Kingdom of Jerusalem.[29] It seems even less logical that the Cypriot king, in composing the *Livre au roi*, would mention the cities that the Crusaders had lost after the fall of Acre.

Another foreign policy success of King Amalric of Lusignan should be added to the pinpointing of the possible time of creation of the *Livre au roi*. In September 1204, he renewed the truce with Sultan Al-Malik Al-Adil to last for six years. It seems that Al-Adil was prepared to finally abandon Beirut

[29] The opposite interpretation is offered by Audrerie (2023, 218–219). In his opinion, the work on the *Livre au roi* began between 1285 and 1291 in Cyprus, during the reign of King Henry II. According to Audrerie, through this legislative undertaking, Henry wanted to strengthen royal power by introducing new legal rules (some maybe even as a part of his own judgements) and reaffirming some of the old ones, such as the *établissement*. Another argument can be added to the objection that the general framework of political and social circumstances in the Latin East leaves no room for such a conclusion. If the reference to the *établissement* in the last 12th century, in the conflict between King Amalric and Ralph of Tiberias, was already anachronistic, how much more so must it have been almost a full century later?

and Sidon to Amalric, to cede Jaffa and Ramleh to him, and to simplify the terms for pilgrims going to Jerusalem and to Nazareth (Eracles, chap. XII, 263; Ernoul, chap. XXXII, 347–367).

One should not forget that Constantinople also fell during the Fourth Crusade, in 1204, which led to the creation of new crusader states on the territory of the Byzantine Empire, potentially rivalling the Latin Kingdom of Jerusalem. For all these reasons – and above all based on the relevant text of the *Livre au roi* on the succession to the throne and regency over the throne, and the new truce with Al-Adel, which further strengthened King Amalric's power and expanded the borders of the Kingdom of Jerusalem – another hypothesis can be put forward. The *Livre au roi*, as the pinnacle of the previously implemented internal stabilization and another of Amalric's foreign political successes, was created between September 1204 and February 1205 and most likely in the late autumn or winter of 1204. Since Amalric was born in 1145 and died suddenly on 1 April 1205 of a surfeit of fish (Eracles, chap. XI, 304–305; La Monte 1970, 45, n. 3; Runciman 1954, 103),[30] was that the moment when King Amalric had already prepared the legal framework, through the *Livre au roi*, for the possible enthronement of his children from his marriage with Queen Isabella, primarily his son Amalric, who was still alive at the time? In this case, it is possible that Amalaric's death prevented the *Livre au roi* from becoming an official part of the Latin Kingdom of Jerusalem's legislation (Greilsammer 1995, 88).

Finally, taking into account all of the above, a third hypothesis about the date of enactment of the *Livre au roi* could also be nominated. As King Amalric resolved the internal political situation by triumphing over Ralph of Tiberias in 1198, although this result was not immediately accepted by the other barons, Ralph did not return to his full service until 1200. In the same year Amalric foreign political successes began through the first concluded truce with the Sultan Al-Adil (which was renewed in 1204), and seeing that the provisions of the *Livre au roi* as we know it today indicate that at the time of its creation all three of his children from his marriage to Queen Isabella I were alive, could the *Livre au roi* have been created in two successive and complementary acts, the first of which appeared between late 1198 and 1200 (more likely in 1200), and the other in 1204? Comparatively,

[30] Anyway, Isabella I ruled after Amalric's death alone only shortwards due to her death. Their two sons have passed away before Amalric's death, so Isabella was succeeded by her daughter from her second marriage, Mary la Marquise (Ernoul, chap. XXXV, 407 n. 2; Mayer 1990, 249–250).

a historical example from Serbian history shows that this kind of hypothesis is plausible: Emperor Dušan (the Mighty) Nemanjić passed his famous Code in 1349, at the council in Skopje, and supplemented it in 1354 in Serres.

4. CONCLUSION

The *Livre au roi* is the oldest of the treatises that make up the Assizes of Jerusalem. Its content represents a compromise between the interests of the growing influence of the great barons and the interests of the royal authority, which was neither as strong as it had been for much of the 12th century nor as weak as it had been after the fall of Jerusalem in 1187. Thus, as an attempt to strengthen the central authority, the *Livre au roi* could only have been the product of a strong ruler, skilled in law, such as King Amalric of Lusignan was.

Historical circumstances, i.e. Amalric's successes in domestic and foreign policy, indicate that the *Livre au roi* was the crowning glory of his reign. First, he emerged victorious from the conflict with Ralph of Tiberias, one of the leaders of the barons in the Holy Land, and this was confirmed by the rest of the nobility in 1200, in returning to the king's authority. On the other hand, by concluding peace treaties with Sultan Al-Malik Al-Adil in July 1198 and September 1204, he not only secured peace for the Kingdom of Jerusalem, but also regained some of the lost territories. King Amalric concluded all this with the provisions of the *Livre au roi* by which he reserved the right to inherit the throne for his son Amalric, from his marriage to Queen Isabella I, and the right of regency over him for himself. However, his son died in early February 1205, and King Amalric died in April.

King Amalric of Lusignan, with his successes in domestic and foreign policy, undoubtedly contributed to the consolidation of the Latin Kingdom of Jerusalem. The crowning achievement of this policy was his great legislative undertaking, embodied in the enactment of the *Livre au roi*. The rewriting of the laws was intended to restore the state's authority and the confidence of the Franks, since the previous legislation had most likely been lost forever with Saladin's conquest of Jerusalem in 1187.

In the context of all the above events, one can conclude that the *Livre au roi* was enacted in 1200 or 1204, or that it was created in 1200 and its text was supplemented in 1204.

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Nenad S. TEŠIĆ, PhD*

SURGE OF 'FEMINISATION' IN THE SERBIAN JUDICIARY

In this paper, the author examines the extent to which the actual gender ratio in the Serbian judiciary is a consequence of deep-rooted stereotypes about the roles that women and men should play in the family and society. This dilemma is considered through multiple perspectives, including by analysing statistical data on gender distribution and the parity of men and women in leadership positions. Finally, the author compares gender structure in the Serbian judiciary with corresponding data from a representative sample of European judicial systems. Taking into account that in a number of countries the proportion of women in the Supreme Court is significantly higher (feminisation of the judiciary), while in others this percentage is lower ('masculinisation' of the judiciary), the author aims to determine the position of the Serbia in this context, highlighting that the Serbian judiciary is well ahead in terms of 'feminisation' compared to EU member states.

Key words: *Feminisation of the judiciary. – Gender-neutral nomination procedure. – Gender ratio. – Judicial professions.*

* Associate Professor, University of Belgrade Faculty of Law, Serbia, *nenad.tesic@ius.bg.ac.rs*, ORCID iD: 0000–0002–9101–7371.

1. INTRODUCTION

1.1. Framing the Inquiry: Objectives and Hypothesis

When focusing on gender distribution in the Serbian judiciary, it is important to first examine the data on the proportion of the men to women and determine whether there is a fair or imbalanced gender composition. An analysis could provide insight into the level of interest among contemporary legal professionals in pursuing a particular judicial career and whether success in the judiciary is in any way related to gender. If it turns out that there is a disparity between men and women in the Serbian judiciary, several important questions arise: What are the underlying causes of this gap? Do men or women dominate the field? If women prevail, is this dominance reflected solely in their numerical representation, or does it also extend to their professional status? More specifically, are women able to reach the highest positions within the judicial system, or do structural barriers hinder their advancement?

Our research began with the hypothesis that implicit gender bias is still very much present in the judicial professions. We tested this hypothesis on several levels: first, by analysing statistical data on the gender ratio in various judicial professions, and then by examining the representation of women and men in senior positions in the Serbian judiciary. To fully understand these dynamics, it is essential to compare gender structure in the Serbian judiciary with equivalent data from other European countries. These findings will help to determine whether Serbia deviates significantly from general European trends, or whether the observed patterns are part of a wider phenomenon overwhelming legal systems across the continent.

1.2. Clarification of Key Terms and Concepts

Given the complexity of gender dynamics in this type of analysis, it is important to clarify the meaning and use of key terms and concepts from the very beginning. Although the phrase ‘feminisation’ of the judiciary’ frequently appears in scholarly and policy-oriented discourse, it can sometimes carry negative implications, such as suggesting a devaluation of the profession. On the contrary, in this paper, the term ‘feminisation’ is employed strictly in a structural and quantitative sense, without any normative judgment or ideological connotation. It is applied exclusively in reference to objectively measurable patterns, capturing statistically verifiable developments in the gender structure of the judiciary, without endorsing either a supportive or

a critical stance. More precisely, 'feminisation' refers to a persistent gender asymmetry in favour of women within judicial professions, accompanied by a continuous increase in this imbalance over time – most clearly manifested in the composition of the highest-level courts. Consequently, the phrase 'feminisation peak' was coined to denote the point at which women's representation reaches its highest level within a given jurisdiction or legal profession. It relates not only to numerical dominance, but also to the fact that women hold a greater proportion of senior roles and leadership positions within the judicial system.

1.3. Quantitative Methods and Cross-National Comparison

The present study relies on quantitative analysis of secondary data, focusing primarily on official statistics regarding gender representation in the Serbian judiciary over an extended period of time. The core data sources include the Statistical Office of the Republic of Serbia (SORS) yearbooks and official reports, which were combined with data from the archives of the Ministry of Justice, as well as publicly available statistics from the High Court Council and the High Prosecutorial Council. To identify whether gender dynamics in Serbia are consistent with, or divergent from, broader European patterns, we conducted a comparative analysis based on publications and data from relevant international organizations, including the European Institute for Gender Equality (EIGE) and its Gender Statistics Database, as well as reports and studies published by the Council of Europe European Commission for the Efficiency of Justice (CEPEJ). The chosen methodology enables a clear, data-driven overview of gender ratios and trends in the Serbian and selected comparative judiciaries, contributing to a deeper understanding of the cultural and systemic factors underlying this phenomenon.

1.4. Limitations and Pathways for Deeper Insight

Although the quantitative method provides a reliable framework for evaluating numerical disparities and trends, it is unable to capture the subjective experiences, professional trajectories, or institutional logics that may underlie gender-related patterns. Accordingly, a key methodological limitation of this study is the absence of qualitative analysis. The qualitative

insights would have enabled a more in-depth exploration of informal barriers, cultural expectations, and internal perceptions of gender roles within the judiciary.

In particular, this study could have included interviews with sitting judges and public prosecutors to illuminate whether women in the judiciary face any form of silent segregation, such as being directed towards specific courts or case categories perceived as more 'appropriate' for women.

A qualitative approach would also have been essential for exploring how women experience the impact of work-life balance pressures on their careers, and whether they feel constrained from taking on more demanding roles or leadership positions. Similarly, it remains unexplored whether there are a prevailing perception among women judges and women public prosecutors that their male counterparts progress more rapidly through the judicial ranks, often with less effort or fewer obstacles.

However, this limitation stems largely from ethical constraints related to confidentiality and institutional permissions, as well as the general sensitivity of researching internal dynamics within the judiciary. Subsequent research could overcome these obstacles by conducting semi-structured interviews with retired judicial professionals, in order to obtain an in-depth understanding of internal perspectives on gender disparity, investigate whether gendered patterns exist in judicial assignments, and identify perceived barriers related to motherhood and career progression.

Socially significant issues, such as the gender ratio in the Serbian judiciary, as well as the causes and consequences of the current disparity, require comprehensive qualitative research.

However, due to the current lack of resources necessary to conduct such an extensive inquiry, our study was based primarily on relevant data published by official institutions.

2. GENDER RATIO IN JUDICIAL PROFESSIONS

2.1. Judges

The gender composition of the judiciary in Serbia underwent substantial changes during the 1990s. As a result of the war and hyperinflation, judicial salaries were dramatically decreased, leaving many unable to support their families. Consequently, a large number of judges, mainly men, left the judiciary to join the private sector. Their departure created vacancies in the judiciary, which were largely filled by newly nominated judges, many

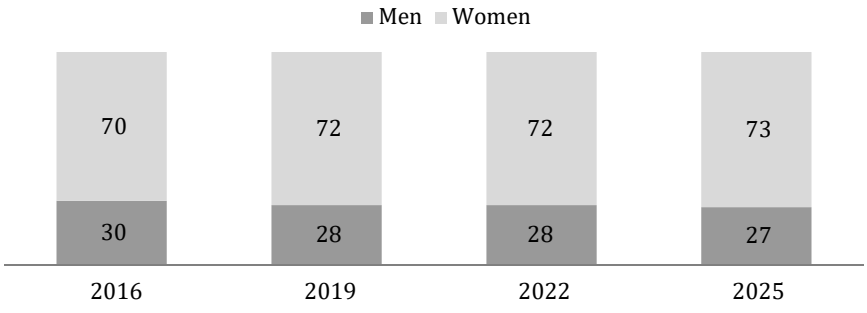
of whom were women. In order to understand the long-term trends in the gender structure of the Serbian judiciary, we reviewed the aggregated data for the period from 2016 to 2025, with the reference years chosen mainly according to the frequency of reporting by the Statistical Office of the Republic of Serbia.

Table 1:
Gender ratio in Serbian courts – Total (2016 – 2025)

Entities	Year	Total		Men		Women	
		Number of persons (headcount)	Total in percent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Courts of general and special jurisdiction	2016	2748	100	817	30	1931	70
	2019	2703	100	762	28	1941	72
	2022	2657	100	737	28	1920	72
	2025	2655	100	712	27	1943	73

Sources: Judges by sex in 2016 (SORS 2017, 231); Judges by sex in 2019 (SORS 2020, 253); Judges by sex in 2022 (SORS 2024, 270). Data for 2025 were obtained from the Ministry of Justice archives, courtesy of Assistant Minister Vladimir Vinš.

Figure 1:
Gender ratio in Serbian courts – Total (2016 – 2025)



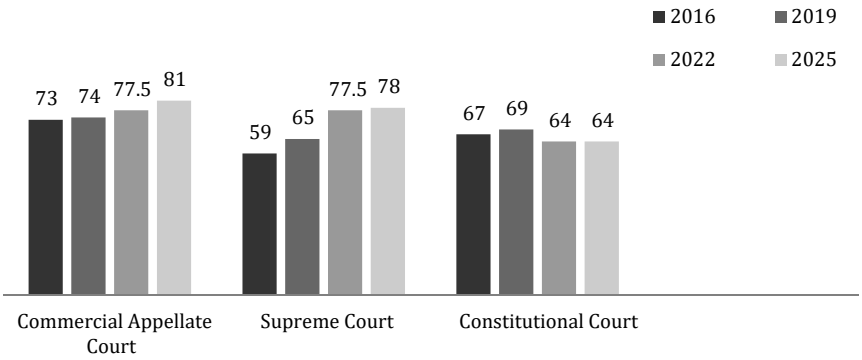
Source: Author.

Table 2:
Gender ratio in the selected Serbian courts (2016 – 2025)

Entities	Year	Leading position	Total		Men (M)		Women (W)	
		Court president (gender)	Number of persons (headcount	Total in percent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Commercial Appellate Court	2016	M	37	100	10	27	27	73
	2019	W	39	100	10	26	29	74
	2022	W	39	100	9	22.5	30	77.5
	2025	W	31	100	6	19	25	**81**
Supreme Court	2016	M	37	100	15	41	22	59
	2019	M	46	100	16	35	30	65
	2022	W	42	100	9	22.5	31	77.5
	2025	W	41	100	9	22	32	**78**
Constitutional Court	2016	W	15	100	10	33	5	67
	2019	W	13	100	4	31	9	**69**
	2022	W	11	100	4	36	7	64
	2025	W	11	100	4	36	7	64

Sources: Judges by sex in 2016 (SORS 2017, 231); Judges by sex in 2019 (SORS 2020, 253); Judges by sex in 2022 (SORS 2024, 270). The data for 2025 are collected from the websites of the related institutions.

Figure 2:
Changes in the share of women justices in Serbia on the example of selected courts (2016 – 2025)



Source: Author.

When examining the gender structure trends in a particular legal profession, we assume that the ideal gender ratio is 50:50 men to women. Considering the gender distribution in the judiciary, it may be concluded that a gender gap exists whenever the number of men or women exceeds 50% for the entire group. If we look at the aggregated data on general and special courts in the Republic of Serbia (Table 1), we can observe that the gender ratio is skewed in favour of women, and that the number of female judges increased from 70% to 73% between 2016 and 2025. It would appear useful to verify this conclusion with regard to individual courts of higher instance. Assuming that it is possible to select certain courts as sufficiently representative for reaching meaningful conclusions about the gender structure of the Serbian justice system as a whole,[1] we chose the following: the Commercial Appellate Court, the Supreme Court, and the Constitutional

[1] We have chosen the aforementioned courts as a relevant sample for drawing conclusions on the gender pattern in the judiciary (in the strict sense) for several reasons. First, there are officially disclosed data on the number of judges of the courts of higher instance between 2016 and 2022, published by the Statistical Office of the Republic of Serbia, and it is possible to collect data on the number and gender ratio of judges in 2025 by accessing the courts' websites. In addition, the rulings of these courts are of particular importance for the citizens and economy of Serbia due to: i) the value of the disputes they decide for the legal remedies (appeals and revisions); ii) the unification of judicial practice which is entrusted to the Supreme Court; as well as iii) the indirect influence of the Constitutional Court on judicial practice, by deciding on the protection of fundamental rights on the basis of constitutional appeals.

Court.[2] The collected data (Table 2) show a steady feminisation trend in selected Serbian courts between 2016 and 2025.[3] The most striking example of feminisation is the Commercial Appellate Court.[4] In 2016, 73% of the judges of this Court were women, but this figure was 81% in 2025, which means that the percentage of women had increased by eight points. Furthermore, this Court has been chaired by a female justice since 2017.

A gender distribution in favour of women (78% of the total number of justices in 2025) is only slightly less pronounced at the Supreme Court of Serbia, which has been headed by women since 2021.

The gender imbalance in the Constitutional Court of Serbia also appeared to be very significant during the examined period, with women representing 64% of the Court members in 2025. In addition, the position of President of this Court has been held by a woman since 2014.

2.2. Public Prosecutors

Exploring the gender composition of public prosecutors in Serbia is essential for understanding potential disparities in career opportunities within the judicial system.

In order to compare the gender ratio in public prosecution with the situation in the courts and identify potential trends, we collected data for the same period, from 2016 to 2025, both in terms of the total number of prosecutors and the gender structure in selected prosecutor's offices.

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[2] Although, from a theoretical point of view, the Constitutional Court is not part of the judiciary, the data on the number of female and male members of this court is significant for the study of gender equality in the judiciary in a broader sense. A similar methodology is accepted by the SORS and EIGE. Consequently, academic studies on gender equality in the judiciary have considered constitutional courts as courts of last resort (Valdini, Shortell 2016, 865).

[3] There is also a higher proportion of women in the High Court Council – an independent body with an important function in the selection of judges and their career advancement – where seven members are women (63.64%) compared to four men (36.36%). *https://vss.sud.rs/sr*, last visited April 4, 2025.

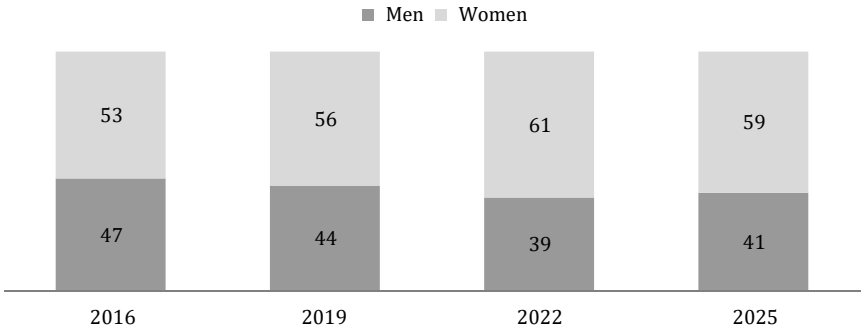
[4] According to the latest data, in 2022 women judges represented 77% of judges of the appellate courts, 75.0% of the Commercial Court, 86.5% of the Administrative Court, 86.5% of the Misdemeanour Appellate Court, and 74.7% of the Misdemeanour Court (SORS 2024, 270).

Table 3:
Gender ratio in the Serbian Public Prosecutor's Offices – Total (2016 – 2025)

	Year	Total		Men		Women	
		Number of persons (headcount)	Total in percent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Public prosecutors and public prosecutor deputies	2016	722	100	341	47	381	53
	2019	785	100	343	44	442	56
	2022	728	100	282	39	446	**61**
Main public prosecutors and public prosecutors	2025	753	100	307	41	446	59

Sources: Public prosecutors and public prosecutor deputies, by sex, in 2016 (SORS 2017, 231); Public prosecutors and public prosecutor deputies, by sex, in 2019 (SORS 2020, 253). Public prosecutors and public prosecutor deputies, by sex, in 2022 (SORS 2024, 269); The Ministry of Justice archive.

Figure 3:
Gender Ratio in the Serbian Public Prosecutor's Offices – Total (2016 – 2025)



Source: Author.

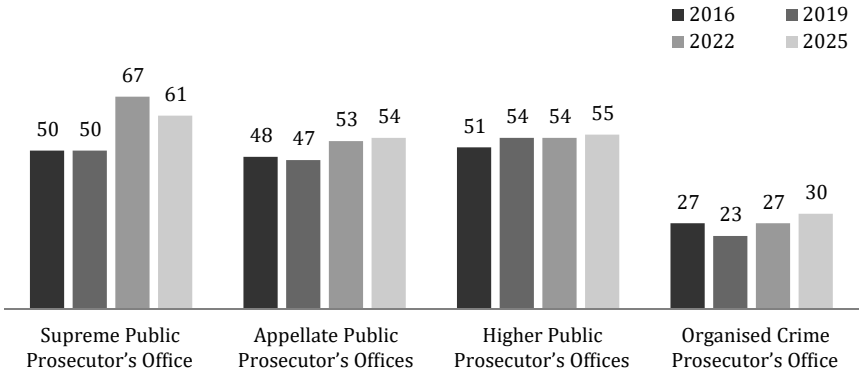
Table 4:
Gender ratio in the selected Serbian Public Prosecutor's Offices (2016 – 2025)

Entity	Year	Leading position	Total		Men (M)		Women (W)	
		Supreme public prosecutor and main public prosecutor	Number of persons (headcount) including Supreme public prosecutor and main public prosecutor	Total in percent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Republic Public Prosecutor's Office	2016	W	14	100	7	50	7	50
	2019	W	12	100	6	50	6	50
	2022	W	12	100	4	33	8	**67**
Supreme Public Prosecutor's Office	2025	W	13	100	5	38	8	61
appellate public prosecutor's offices	2016	M 2 W 2	52	100	27	52	25	48
	2019	M 2 W 1	51	100	27	53	24	47
	2022	M 1 W 1	45	100	21	47	24	53
	2025	M 2 W 2	50	100	23	46	27	**54**
Higher Public Prosecutor's Office	2016	M	195	100	96	49	99	51
	2019	M	234	100	108	46	126	54
	2022	M	208	100	95	46	113	54
	2025	M	242	100	109	45	133	**55**
Organised Crime Prosecutor's Office	2016	M	11	100	8	73	3	27
	2019	M	13	100	10	77	3	23
	2022	M	11	100	8	73	3	27
	2025	M	10	100	7	70	3	**30**

Sources: Public prosecutors and public prosecutor deputies, by sex, in 2016 (SORS 2017, 231); Public prosecutors and public prosecutor deputies, by sex, in 2019 (SORS 2020, 253). Public prosecutors and public prosecutor deputies, by sex, in 2022 (SORS 2024, 269); High Prosecutorial Council.[5]

[5] The Ministry of Justice archive (2025) and *https://dvt.jt.rs/spisak-nosilaca-javnih-tuzilackih-funkcija/*, last visited July 14, 2025.

Figure 4:
Changes in the share of women public prosecutors in Serbia, example of the selected public prosecutors' offices (2016 – 2025)



Source: Author.

Looking at the overall picture (Table 3), we can note that between 2016 and 2025, the portion of women in prosecutors' offices increased from 53% to 59%, or by 6 percentage points. In addition, there are significantly more women than men in the Public Prosecutor's Office in the Republic of Serbia (called the Supreme Public Prosecutor's Office after 2023). Between 2016 and 2025, the percentage of women in this Office increased by 11 percentage points, from 50% to 61% (Table 4). Furthermore, the highest position has been held by a woman since 2010. The above can be summarised as very strong feminisation.

In appellate prosecutors' offices, the proportion of women increased from 48% to 54% over the given period, and in higher prosecutors' offices from 51% to 55%, which can be considered a moderate feminisation.

It appears that men still 'enviously guard' the Office of the Public Prosecutor for Organised Crime as an exclusively male domain: the proportion of women in this office is only 30% and it is headed by a man.

2.3. Public Notaries and Public Bailiffs

Latin notaries have traditionally contributed to legal certainty by notarising and certifying legal documents (Tešić 2014, 482).[6] In modern times, especially in the field of non-judicial procedures (Dika 2009, 1153–1777), there is a clear tendency to delegate judicial powers to notaries, who enjoy *fides publica*. Although it is not feasible to equate notaries with courts or administrative judges, it remains true that the nature of the notarial function can give rise to the 'right to (complete) the notarial procedure within a reasonable time' under Article 6 of the European Convention on Human Rights (ECHR), as well as a 'right of access to a notary' (Marguénaud, Dauchez, Dauchez 2018, 7).

Although it is controversial to claim that notaries belong to the judiciary in the strict (normative) sense, it cannot be denied that this legal profession is part of the judicial system,[7] and can be classified as the *judiciary in the substantive (functional) sense* (Tešić, Kovačević, forthcoming).

In its leading judgment, the European Court of Human Rights (ECtHR) has linked the enforcement of judicial decisions to the requirements of the right to a fair trial.[8] The ECtHR asserted that the right of access to a court 'would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 §1 should describe in detail procedural guarantees afforded to litigants [...] without protecting the implementation of judicial decisions. [...] Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6' of the ECHR.[9]

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6 In 2015, Serbia became one of the states with Latin notaries. For more on the functions of notaries, see CEPEJ 2021, 6–7.

7 According to contemporary legal literature, public notaries improve access to justice (Zendeli, Selmani Bakiu 2017, 145).

8 ECtHR, *Hornsby v. Greece*, App. No. 18357/91, 19.3.1997.

9 For more on entrusting the conduct of enforcement processes to enforcement agents, see CEPEJ 2015.

Table 5: Gender ratio of the Serbian judiciary in the functional sense, in 2025

Members of the judiciary in the functional sense	Total		Men		Women	
	Number of persons (headcount)	Total in per cent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Public notaries	225	100	94	42	131	58
Public bailiffs (enforcement agents)	248	100	137	55	111	45

Source: The Ministry of Justice archive.

2.4. Attorneys

Attorneys are recognized in the Constitution of the Republic of Serbia as an independent and autonomous profession providing legal assistance.[10] Their role is crucial in ensuring the right to a fair trial and access to justice. Examining the gender structure of attorneys is vital to address potential disparities within this judicial profession. Understanding these dynamics helps to identify potential structural barriers that may prevent women from achieving equality in career advancement. Limited access to financial resources and networking opportunities, due to the desire to maintain a work-life balance,[11] make it more difficult for women to start their own practices, and in most cases they seek a secure salary at another law firm or as in-house counsel.

[10] Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, 98/2006 and 115/2021, Art 67 (2).

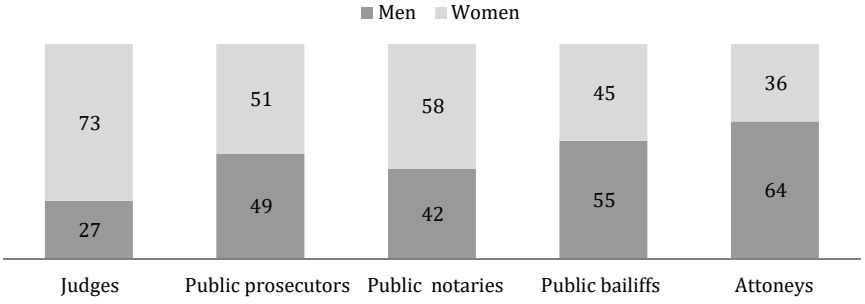
[11] For more on work–life balance in terms of informal care of children, see Barbieri *et al.* 2019.

Table 6: Gender ratio of the Serbian judiciary in the broadest sense (2023)

Members of the judiciary in the broadest sense	Total		Men		Women	
	Number of persons (headcount)	Total in percent	Number of persons (headcount)	Per cent of total	Number of persons (headcount)	Per cent of total
Attorneys	9,661	100	6,183	64	3,478	36

Source: Petrović 2018.

Figure 5: Gender ratio in judicial professions in Serbia, in 2025[12]



Source: Author.

2.5. Leading Positions in Judiciary

A higher number of women among judges and public prosecutors does not necessarily mean that they have equal opportunities for career advancement or that they can at some point reach the highest positions in the judicial hierarchy.[13] Structural barriers, unconscious biases and a lack

[12] The last data available on the gender ratio among attorneys are from 2023.

[13] The issue of women's access to the highest levels of the judiciary has been highlighted in France, resulting in an over-representation of men at the top of the judicial hierarchy (Bessière, Gollac, Mille 2016, 175–180). German authors make a similar argument that women move up the career ladder more slowly than their male colleagues with noted glass ceiling effects (Schultz 2015, 145), as do their

of gender-sensitive policies may still hinder their progression to leadership roles. Ensuring true gender equality in the judiciary requires not only numerical representation but also the creation of an environment where females have the same access to promotions and leading positions as their male counterparts.

Table 7:
Men and women in leading position in the Serbian judiciary, in 2025[14]

Judiciary in the normative sense			Judiciary in the functional sense		Judiciary in the broadest sense	
	Women in leading positions	Men in leading positions	Women in leading positions	Men in leading positions		
Courts	Commercial Appellate Court, Administrative Court, Misdemeanour Court in Belgrade, Misdemeanour Appellate Court, Supreme Court, Constitutional Court	Higher Court in Belgrade, Higher Court in Novi Sad, Appellate Court in Belgrade, Appellate Court in Novi Sad, Appellate Court in Kragujevac				
Public prosecutors	Supreme Prosecutor's Office, War Crimes Prosecutor's Office, Appellate Public Prosecutor's Office in Novi Sad, Appellate Public Prosecutor's Office in Kragujevac	Organised Crime Prosecutor's Office, Appellate Public Prosecutor's Office in Belgrade, Appellate Public Prosecutor's Office in Niš				

Italian counterparts: 'a closer look at the gender distribution of top-level offices and to the composition of judicial self-governing bodies [...] shows that the so-called "glass ceiling" is far from being broken' (Cocchi, Guglielmi 2020, 385).

[14] For the sake of simplicity, we have focused on the higher courts and the higher public prosecutor's offices. Data regarding men/women in leadership positions was collected from the official websites of the selected institutions.

			Chamber of Public Notaries	Chamber of Public Bailiffs	Serbian Bar Association, Belgrade Bar Association, Novi Sad Bar Association, Niš Bar Association, Kragujevac Bar Association	
Other judicial bodies	High Court Council	High Prosecutorial Council				

Source: Author.

2.6. Intermediate Conclusion

The aggregated data undoubtedly confirms the assumption that there are gender stereotypes in the judicial professions in Serbia that are particularly manifested through an imbalance in representation in favour of women compared to men, leading to the continuous increase in the percentage of women on courts and public prosecutor's offices, i.e. feminisation of the judiciary (in the normative sense). On the other hand, there are almost equal representation of women and men in judicial professions that are generally perceived as more desirable, such as public notaries and public bailiffs (judiciary in the functional sense). A slight imbalance in favour of women in relation to men in the case of notaries (women 52%, men 48%) and men in relation to women in the case of public bailiffs (men 55%, women 45%) is an indication of the existence of gender stereotypes that the function of notary is more suitable for women, while procedural actions within the scope of bailiffs are more appropriate for men.[15] This bias is also reflected in the fact that the Chamber of Public Notaries is headed by a woman, while the Chamber of Public Bailiffs is chaired by a man.

[15] For the survey confirming the existence of unconscious social bias towards legal professions that are more suited to men, see Tešić, Kovačević, Forthcoming.

Women are underrepresented among attorneys (judiciary in the broadest sense), which, according to prevailing opinion, is the most desirable judicial profession.[16] Consequently, we cannot confirm that the feminisation trend present in the Serbian judiciary (in the normative sense) exists to the same extent in other judicial professions.[17]

If we ask ourselves who the decision maker is in the Serbian judiciary, we can conclude that women have definitely broken the glass ceiling. In addition to already mentioned Constitutional Court since 2014, Supreme Court since 2021, Commercial Court of Appeal since 2017, Administrative Court since 2022, Supreme Public Prosecutor's Office since 2017, and Chamber of Public Notaries since 2024), women are the heads of the High Court Council[18] since 2021, the State Attorney's Office since 2015,[19] as well as the Ministry of Justice in the Government of the Republic of Serbia since 2016.[20] On the other hand, the leading position in attorney ship is still firmly

[16] Some survey showed that the most desirable legal profession for students of both sexes in their final year of study in Serbia was that of an attorney, while only one in ten students wanted to become a judge. However, these findings should be interpreted with caution, as respondents were at a stage in life where factors such as work-life balance typically do not play a significant role in career decisions. Instead, priorities tend to focus on career progression, job autonomy, and earning potential (Đorđević 2022, 685).

[17] We did not offer any conclusions about gender structure trends in terms of public notaries and public bailiffs since they are relatively new professions in Serbia: public bailiffs have existed since 2011. Law on Execution and Security, *Official Gazette of the Republic of Serbia*, 106/2015, 106/2016 – authentic interpretation, 113/2017 – authentic interpretation, 54/2019, 9/2020 – authentic interpretation and 10/2023 – other law. and public notaries since 2015 Law on Public Notaries, *Official Gazette of the Republic of Serbia*, 31/2011, 85/2012, 19/2013, 55/2014 – other laws, 93/2014 – other laws, 121/2014, 6/2015, 106/2015 and 94/2024). As there has been little change in the individuals first entrusted with public authority, it is not possible to observe trends in the gender structure with sufficient certainty. The modern attorney ship was introduced in Serbia in 1862, but unfortunately we could not find any relevant data on the changes in the share of women attorneys in the study period from 2016 to 2024.

[18] 'Judicial Councils are sui generis bodies. Their function is multi-dimensional, i.e. judicial when they perform disciplinary competences, administrative when they organize the operation of courts, and legislative when they propose laws related to the judiciary and the judicial budget' (Stanić 2022, 6).

[19] State Attorney's Office of the Republic of Serbia, *http://www.rjt.gov.rs*, last visited July 14, 2025; and *https://dpb.gov.rs/en/state-attorney-and-deputies*, last visited July 14, 2025.

[20] Ministry of Justice of the Republic of Serbia, *https://www.mpravde.gov.rs*, last visited July 14, 2025.

held by a male. There are only men in the highest positions, as presidents of the Serbian Bar Association and the regional bar associations in Belgrade, Novi Sad, Niš, Kragujevac, and Šabac.

3. WHERE DOES SERBIA STAND COMPARED TO SIMILAR JUDICIARY SYSTEMS?

3.1. Judiciary in the Normative Sense

In order to complete the picture of the gender structure in the Serbian judiciary, it is important to determine the similarities and differences of the gender distribution in the judicial professions in Serbia and in other judicial systems. To achieve this, we have created a representative sample of European judiciaries consisting of the following states: Germany, France, Austria, and Italy, as the legal systems that have influenced the development of the judiciary in Serbia the most; Slovenia and Croatia, as states that, like Serbia, have emerged from the dissolution of former Yugoslavia and which have since become EU members; Montenegro, Bosnia and Herzegovina, and North Macedonia, as states that emerged from ex-Yugoslavia and, like Serbia, are in the process of accession to the EU; Hungary, Romania, and Bulgaria, which are EU members that are Serbia's neighbours and share a similar socialist heritage; Sweden and the UK, states commonly cited as examples of good practice in the protection of human rights and gender equality; the IPA beneficiaries[21] with which Serbia is currently affiliated; and the EU-28, a group of states that Serbia would like to join. We have taken 2016 as the reference year from which we started to follow the trend in Serbia, with the same being applied with regard to European countries, in order to make the comparability consistent.

[21] Western Balkans countries and Turkey, participants in the EU's Instrument for Pre-accession Assistance (IPA). See EIGE 2019.

Table 8:
Women justices in Supreme Courts. Comparison of Serbia and the representative sample of European judiciaries in terms of percentages and feminisation peak (2016 – 2024)

Regions and states	2016	2024	Year of feminisation peak
EU-28	39.5	44.9	(2023) 44.9
IPA	22.2	(2023) 24.6	(2017) 26.8
Austria	21.7	41	(2023) 41.7
Bulgaria	74.5	76.6	(2017) 76.8
Germany	31.1	41.2	(2023) 37.5
France	47.2	51.2	(2019) 53.8
Sweden	33.3	31.3	(2016) 33.3
UK	8.3	16.7	(2019) 25
Italy	28.1	37.4	(2017) 43.1
Hungary	48.1	58.4	(2022) 61.8
Romania	84.1	74	(2016) 84.1
Slovenia	38.7	48.3	(2023) 48.3
Croatia	39.0	31.3	(2017) 40.0
North Macedonia	47.4	(2023) 38.5	(2016) 47.4
Montenegro	63.2	(2023) 80.0	(2022) 82.4
Bosnia and Herzegovina	39.1	(2023) 55.6	(2023) 55.6
Serbia	59.5	78	(2024) 78

Source: EIGE 2024a.

Table 9:
Women in decision-making positions in the judiciary. Comparison of Serbian judiciary and the representative sample of European judiciaries (2024)

Regions and states	President of the Supreme Court		President of the Constitutional Court		(Supreme) Public Prosecutor	
	Number of persons	Per cent of total	Number of persons	Per cent of total	Number of persons	Per cent of total
EU-28	11	39.3	2	10	12	30.8
IPA	3 (2023)	42.9	5	71.4	2	28.6
Austria	0	0	0	0	1	100
Bulgaria	1	100	1	100	0	0
Germany	1	100	0	0	0	0
France	0	0	0	0	0	0
Sweden	0	0	N/A	N/A	1	100
UK	0	0	N/A	N/A	1	100
Italy	1	100	0	0	0	0
Hungary	0	0	0	0	0	0
Romania	1	100	0	0	0	0
Croatia	0	0	0	0	0	0
Slovenia	0	0	0	0	1	100
North Macedonia	1 (2023)	100	1	100	1	100
Montenegro	1 (2023)	100	0	0	0	0
Bosnia and Herzegovina	0	0	1	100	0	0
Serbia	1	100	1	100	1	100

N/A – not applicable.
Sources: EIGE 2024a; EIGE 2024b; EIGE 2024c.

If we assume that the best way to understand trends in the gender structure of the judiciary is to look at the number of women serving on the Supreme Court, it is not difficult to see, on the basis of the consolidated data (Table 8), that gender dynamics vary considerably from country to country.

In the majority of countries, we are witnessing a feminisation trend in the judiciary (in the normative sense).[22] This phenomenon has several particular aspects for the judicial profession: the dominance of women in relation to men, the growth in the proportion of women over time, and the leadership role of women – especially if it is long-term.

If we compare the data on women justices on the Supreme Court of Serbia to other states from the representative sample, we can conclude that feminisation of the judiciary in Serbia, according to all important parameters, reached its highest level in 2024 (feminisation peak).

The proportion of female judges on the Supreme Court is 78%, with the share of women increasing from 59% to 78%, or by 19 pp, between 2016 and 2024.[23] Since 2021, a woman has been the head of the Supreme Court. If we add to this the previously mentioned fact that women hold leading positions in the Constitutional Court and the Supreme Prosecutor's Office, we can conclude that the judicial system in Serbia is 'super-feminised'.

In terms of increasing the number of women on the Supreme Court, Serbia is following a broader regional trend, as reflected in Austria (where the percentage of women rose from 21.7% to 41%, a gain of 19 percentage points), Montenegro (which saw a rise from 63.2% to 80%, or 17 pp), Germany (where the figure grew from 31.1% to 41.2%, or by 10 pp), Slovenia (with an increase from 38.7% to 48.3%, or 10 pp), and Hungary (where the share climbed from 48.1% to 58.4%, or 10 pp).

The same tendency, but to a lesser extent, is notable in UK (from 8.3% to 16.7%, or by 8 pp), in the EU-28 (from 39.5% to 44.9%, or by 5 pp), and in France (from 47.2% to 51.2%, or by 4 pp).

An important difference is that the increase in the number of women justices in Serbia is by far the greatest of all the countries included in the analysis, except for Austria, with which it is on a par (19 percentage points).

[22] This phenomenon has also been observed in some countries not included in our analysis, and is what some authors call the 'new reality in the judicial structure' (Duarte *et al.* 2014, 30).

[23] The trend of feminisation of the judiciary is also evident in other statistical data. According to the Statistical Office of the Republic of Serbia, the share of women is highest at the Misdemeanour Appellate Court and the Administrative Court, at 86.5% (SORS 2024, 268).

Another significant distinction is that the peak of feminisation in the Serbian judiciary (78%) is significantly higher than in the other countries with a long-term increase in the number of women on the Supreme Court.[24] For instance, the peak of feminisation in Sweden, which is often cited as an example of good practice in human rights protection, was reached in 2014, when 37.5% of the Supreme Court judges were women.

During the same period, between 2016 and 2024, some countries showed opposite patterns ('masculinisation' of the judiciary). For example, in Romania, the number of female judges on the Supreme Court decreased from 84.1% to 74%, or by 10 pp. It is similar in North Macedonia (9 pp)[25] and Croatia (8 pp).[26]

There are interesting examples of countries with fluctuating gender dynamics, such as Hungary, where the peak of feminisation 61.8% occurred in 2022, after which the percentage of female members of the Supreme Court fell to 58.4%. Similarly, in the UK, the proportion of female judges on the Supreme Court rose from 8.3% (2016) to 25% (2019) at the peak of feminisation, before falling significantly to 16.7% (2024).

To sum up, although every classification is conditional, in this specific case the following division of the judiciaries seems possible, based on an examination of the gender structure of the Supreme Courts:

1) Montenegro, Serbia, Bulgaria, and Romania can be classified as countries with an extremely pronounced gender gap in favour of women (*highly feminised judiciary*);

2) France, Hungary, and Bosnia and Herzegovina as countries with a medium gender imbalance in favour of women (*moderately feminised judiciary*).

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[24] With the exception of Montenegro, where women hold 80% of the seats on the Supreme Court (EIGE, 2024a).

[25] Going a step further back, in 2014 the share of women on the Macedonian Supreme Court was 56%, so the decline in the proportion of women by 2023 is much more pronounced – 17 pp.

[26] The gender ratio in the Supreme Courts does not seem to be directly linked to EU accession. For example, in Croatia, the percentage of female judges on the Supreme Court was 47.6% in 2012. Between EU accession, in 2013, and 2023, this percentage decreased to 32.3%. On the other hand, in Slovenia, the percentage of women on the Supreme Court was 36.1% in 2003, prior to EU accession, and increased to 46.4% over the 2004 – 2023 period (EIGE 2024a).

3) Germany, Austria and Slovenia, on the other hand, are countries with a medium gender imbalance in favour of men (*moderately 'masculinised' judiciary*).

4) UK, Sweden, Italy, Croatia, North Macedonia, and the IPA beneficiaries (Barbieri *et al.* 2019) can be described as countries with an obvious gender imbalance in favour of men *(highly 'masculinised' judiciary*).[27]

Looking at the leading positions in judiciaries other than Serbia, the function of president of the supreme court is held by women in Bulgaria, Germany, Italy, Romania, Montenegro, North Macedonia, as well as in 35.7% of the EU-28 countries and 42.9% of the IPA beneficiaries.[28]

In Serbia, Bulgaria, North Macedonia and Bosnia and Herzegovina, the presidents of the constitutional courts are women, as is the case 10% of the EU-28 countries and 30.8% of the IPA beneficiaries (EIGE 2024b).

The function of supreme public prosecutor is performed by women in Austria, Sweden, UK, Slovenia, North Macedonia and Serbia as well as in 30.8% of the EU-28 and 28.6% of the IPA beneficiaries (EIGE 2024c).

Despite all the socioeconomic and cultural differences that limit the possibility of a qualitative comparison between Serbia and countries in a representative sample, the general conclusion that can be drawn is that the degree of feminisation in Serbia is greater than in any of the other analysed states and regions – which could be considered alarming. While the EU-28 average is very close to gender balance (44.9%), the actual percentage of female justices on the Serbian Supreme Court (78%) is even higher than in Bulgaria (76.6%) and Romania (74%), and very close to the highest share of women judges – in Montenegro (80.0%). In terms of the number of women in decision-making positions, the feminisation of the Serbian judiciary is mirrored only by that of North Macedonia, as in both countries all three of the most important judicial functions are held by women (Table 9).[29]

[27] For comparison, in the USA, 4 of the 9 Supreme Court Justices are women, as are 32% of sitting federal judges (excluding the Supreme Court), and 34% of state court judges (Represent Women 2025).

[28] This is a considerable increase since 2019, when only 21.4% of EU-28 and 14.3% of the IPA beneficiaries had a woman in a leading position in the supreme court (EIGE 2024a).

[29] It is difficult to find a rational explanation that in terms of the extent of feminisation, Serbia is at the very top, alongside North Macedonia and Montenegro. It differs from these countries according to many other parameters, even though they are from the same region. For example, Serbia: population – 6.6 million, current GDP USD 75.6 bln, current GDP per capita – USD 11,447.00; North Macedonia:

These data are not extreme in themselves, simply because they testify to the dominance of women. However, we cannot turn a blind eye to an obvious imbalance. On the other hand, it is necessary to investigate the causes of the gender gap, which is not typical of developed European countries. In other words, we need to ask ourselves why the Serbian judiciary (in the normative sense) does not seem to attract the best legal professionals, regardless of gender.

3.2. Judiciary in the Functional and Broadest Sense

A representative sample of the European judiciary, similar to that used for judges, was selected in order to determine the position of other judicial professions in Serbia – public notaries, enforcement agents (public bailiffs), and attorneys – the difference being that we used data on Council of Europe (CoE) member states collected in 2016 by CEPEJ. Therefore, no comparison with the EU-28 countries and the IPA beneficiaries has been made in this context.

Table 10:
Women's participation in the judiciary in the functional and the broadest senses (in per cent). Comparison of Serbia and other CoE member states[30]

Regions and states	Notaries	Enforcement agents	Attorneys
CoE member states	54	43	41
Austria	N/A	N/A	29
Bulgaria	No data	No data	No data
Germany	16	N/A	40
France	39	34	55
Croatia	62	37	46
Sweden	33	63	30

population 1.8 million, current GDP – USD 14.8 bln, current GDP per capita – USD 8m146.50; Montenegro: population 0.6 million, current GDP USD 7.6 bln, current GDP per capita, USD 12,252.60 (World Bank Group 2024).

[30] See CEPEJ 2018, 181. Aiming to achieve a consistency in comparison, we used CEPEJ data from 2016, even though the actual data for the Serbian judiciary is slightly different. For fine adjustment, see Tables 5 and 6 in this paper.

Regions and states	Notaries	Enforcement agents	Attorneys
UK – England and Wales	28	N/A	48
Italy	34	52	47
Hungary	N/A	N/A	N/A
Romania	No data	No data	No data
Russian federation	84	79	41
Slovenia	59	11	45
North Macedonia	56	43	42
Montenegro	60	30	27
Bosnia and Herzegovina	51	N/A	29
Serbia	57	40	36

N/A – not applicable.

Source: CEPEJ. Studies 26, 2018, 8–9.

It appears that feminisation is less pronounced in the judiciary in the functional and the broadest sense. The gender distribution in other judicial professions in Serbia and in the sample of CoE countries under consideration is quite similar. Females are a slight majority among notaries, but form a minority among public bailiffs and attorneys. A general characteristic of the countries created by the dissolution of the former Yugoslavia is the gender imbalance in the notary profession in favour of women, with feminisation being most prominent in Croatia (62% of women). Such participation of women notaries can be explained by the common socialist heritage[31] and the absence of the long-standing tradition that exists in other European countries where the representation of women notaries is significantly lower (e.g. Germany 16%, France 39%). On the other hand, there is a substantial gender gap in the public bailiff profession, but in favour of men. Women are underrepresented the most in Slovenia (with only 11% of public bailiffs being female).

[31] According to the 2018 CEPEJ report on the legal professions, in certain Eastern European countries, the proportion of women in the notarial profession is higher than 70%. For instance, the feminisation of notary service is especially evident in Armenia, Estonia, Georgia, Lithuania, Moldova, Russia, and Slovakia, possibly for reasons related to the stability of the profession compared to that of attorneys (CEPEJ 2018, 183).

The imbalance in favour of men is particularly notable in attorney ship. The share of women attorneys is lowest in Montenegro (27%) and Bosnia and Herzegovina (29%). It appears that, in addition to the reasons presented in the Table 11, the causes for the gender gap in terms of judicial professions can be found in the strong religious and cultural stereotypes that exist in these patriarchal states.[32]

Summarising the data collected in Serbia and the states in representative sample on the proportion of women in other judicial professions, it appears that the vast majority of the analysed judicial systems exhibit the same pattern of gender stereotypes in relation to public notaries and public bailiffs, according to which women are more predisposed to be notaries, while men are more suited for the role of public bailiff (enforcement agent).

4. WHY IS THERE A GENDER IMBALANCE IN THE SERBIAN JUDICIARY?

When identifying the main socioeconomic and cultural causes of gender disparity, as well as the principal differences between judges and public prosecutors (the judicial profession in the strict sense), notaries and bailiffs (the judicial profession in the functional sense), and attorneys (the judicial profession in the broadest sense) that might influence a lawyers' career, the following key indicators of choice can be highlighted: earning potential, employment security, autonomy at work, and work-life balance.

In comparison to other judicial professions, judges and public prosecutors have the lowest salaries and the least professional freedom. Given the permanent nature of these functions, their employment security is very high, as is the possibility of combining parenthood with work.[33] The overall effect of these factors is that there are significantly more women than men in the judiciary in the strict sense.

[32] In a 2020 questionnaire, the majority of the interviewees consider Bosnia and Herzegovina a patriarchal society. Some even claimed that it is 'a deeply patriarchal and deeply religious society' (Kusyová 2020, 42). Similar qualifications are expressed with regard to Montenegro: 'Montenegrin society, despite rapid developments in the process of EU accession, remains highly patriarchal' (GIZ and FAO 2021, 1).

[33] The judicial profession offers much greater security and stability, making it significantly easier to perform this role in later years compared to legal practice. Judges have more free time than attorneys, for example, as they are not as dependent on clients and often very short deadlines. Unlike attorneys, who operate in a highly competitive environment, judges do not need to actively seek clients

In the case of notaries and bailiffs, there is less job security compared to judges and public prosecutors, but the earning potential is significantly higher,[34] and there is greater freedom in everyday practice. Independent legal professions, vested with prerogatives of public power, can be reconciled with parenthood, but this is much more difficult than with a career in the public sector. The above characteristics of notaries and bailiffs allow us to label as minor the differences in the representation of women and men in these two professions.

In the case of attorney ship, the earning potential is the highest, although there are great income differences within the profession.[35] Moreover, we should not lose sight of the reality that the attorney profession often ensures workplace autonomy. Employment, on the other hand, is uncertain, and it is difficult to balance professional commitments with family life.[36] As a result, men dominate the profession.

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to maintain their workload (Posner 2010, 163, 166–167). Unlike attorneys, whose earnings have no upper limit, judges do not receive bonuses or financial incentives for extra work or effort. Generally, all judges of the same rank receive equal salaries, and there are rarely consequences for those who fail to fulfil their duties on time or neglect their responsibilities (Posner 2010, 140).

[34] For instance, in Serbia public notaries have exclusive jurisdiction over the solemnisation of real estate sale contracts. There was a total of 31,138 sale contracts in the real estate market in Serbia in Q3 2024 (Republic Geodetic Authority 2024, 3).

[35] Income depends on specialisation, professional experience, and length of service (women are more likely to have career breaks due to family responsibilities), but also the size and location of law firms, especially if one takes into account the trend of 'informal corporatisation of the attorney profession' (women are more likely than men to work in smaller law firms or in lower positions in medium-sized or large firms). According to the results of a recent survey, the average annual income of attorneys in Serbia is EUR 27,500, which is almost twice the average annual income of judges and four times more than the average annual salary in the country (Vuković 2017, 105–106).

[36] 'Women continue to confront the profession's lack of accommodation for family responsibilities, as well as negative career repercussions associated with motherhood (Kay, Gorman 2008, 323). According to some studies, in Serbia, 67.9% of women and only 11.5% of men engage in daily household chores. When it comes to caring for the elderly, children, and family members with disabilities, the gender disparity is slightly smaller but still significant – 41.2% of women aged 18 and older take on these responsibilities every day, compared to just 29.5% of men (Babović, Petrović 2021, 37).

Table 11: Potential causes of gender imbalance in the Serbian judicial system

Judicial professions	Earning potential	Employment security	Autonomy at work	Work-life balance	Gender ratio	Leadership positions
Judges and public prosecutors (judiciary in the normative sense)	low	high	low	high	women prevail	women dominate
Public notaries and public bailiffs (judiciary in the functional sense)	high	medium	medium	medium	relatively equal	women dominate among notaries, men dominate among bailiffs
Attorneys (judiciary in the broadest sense)	high	Low	high	low	men prevail	men dominate

Source: Author.

5. RETHINKING THE FEMINISATION OF THE SERBIAN JUDICIARY

5.1. Feminisation Factors

Although statistics on the Serbian judiciary show that women dominate both as members and leaders in the courts and prosecutor's offices of the highest instance, the picture is not black and white. It is a fact that during the period of transition in Serbian society, most men left the judiciary in search of higher-paying jobs.[37] Women, on the other hand, opted for the judiciary in the strict sense, which meant lower earnings, but also advantages in terms of reconciling work and parenthood. It should be noted that such a scenario is in line with social patterns and customs linked to certain stereotypes about gender roles, in which men are allocated 'the role of breadwinner', while women are assigned the 'maternity role'[38] or, more generally, the 'role

[37] Highly paid jobs appear to be more attractive and potentially more accessible to men. For example, in 2022, 91% of tax payers with the highest income were male, compared to 9% for women (Tax Administration of the Republic of Serbia 2023).

[38] Although Serbian society is not an exception in this regard. 'The classical career stop is to be a mother. Maternity and educational leave makes women "disappear".' (Schultz 2015, 146).

of caregiver'.[39] However, this is an important, but not the only reason for greater representation of women in the judiciary (in the strict sense). The causes of such a gender ratio can be grouped into three categories: internal, external, and mixed.

1) The internal reasons for feminisation stem from the inherent failures of the Serbian judicial system: non-transparency of selection criteria, slow and uncertain career prospects, etc. In such circumstances, women appear to show greater patience and commitment.
2) On the other hand, external factors such as digital transformation also must be taken into account.[40] A significant number of males are opting for careers in the IT sector, which are at the heart of the Fourth Industrial Revolution and thus bring greater economic[41] and social power.[42]
3) The mixed causes of feminisation are the result of internal weaknesses of the judicial system as well as external influences. For example, a large number of court associates are abandoning the judiciary due to dissatisfaction over the low number of new judges appointed (internal reason). In addition, the private sector (banks and companies) is very interested in hiring employees who have successfully completed judicial training, particularly in commercial courts, and are therefore likely to offer higher salaries to attract them (external reason).

[39] For more on expectations related to family and reproduction of women in Western Balkan as 'a region dominated by patriarchal gender norms', see Duhaček, Branković, Miražić 2019, 88.

[40] In addition to the difficulties faced by women in professions dominated by masculine values, research on the feminisation of professions is mainly concerned with the link between feminisation and the devaluation of the profession (Mouhanna 2023).

[41] Analyses of similar issues point out that a growing number of women have opted for more stable positions, whereas men have selected positions with higher economic remuneration and benefits in the private industry (Gómez-Bahillo, Elboj-Saso, Marcén-Muñío 2016).

[42] In the past several years, the most popular field of education in Serbia has been information and communication technologies, with 24,107 students enrolled in state and private universities in 2021/22, of which 16,616 (68.3%) were males and 7,491 (31.7%) were females (SORS 2022, 127).

5.2. How Can We Get Closer to Gender Equality?

According the law, a judge can be elected from among the citizens of the Republic of Serbia who meet the general requirements for employment in a state body, have graduated law school, passed the bar exam, and possess the necessary expertise, competence, and integrity to perform judicial duties.[43] Discrimination on any grounds is prohibited in the nomination and selection of judges.[44]

In practice, in order to ensure that the judicial system is truly meritocratic and free from gender bias, it is essential to establish gender-neutral procedures in three key areas: recruitment, compensation, and career advancement.

1) A fair and transparent selection process is the foundation of an inclusive judiciary and this can be achieved in the following ways:[45]

   i. Anonymous application procedures that minimise the impact of gender on the selection process. By removing personally identifiable information – such as names and gender – from applications, selection committees can focus solely on the candidate's work history and competencies. This helps to prevent unconscious bias from influencing initial assessments and ensures that candidates are assessed on their credentials rather than perceived gender roles.[46]

   ii. Diverse selection committees that include both men and women, to ensure balanced decision-making. A gender-inclusive approach to selection committees is vital for bringing different perspectives and experiences to proceedings. This also strengthens public confidence in the impartiality of the judiciary.

[43] Law on Judges, *Official Gazette of the Republic of Serbia*, 10/2023, Art 48 (1).

[44] Law on Judges, Art 52 (1).

[45] 'Member States should ensure that the procedures of recruitment are conducted transparently, the criteria are clear, detailed and implemented in an impartial manner, and women are equally involved in the decision-making process of recruitment' (CEPEJ 2022).

[46] Legal literature indicates that one of the key factors in female dominance in the Russian judiciary is the influence of recruiting practices. 'The work in the court administration consists of office-type work that is considered to be a 'female' job. Because of this, the overwhelming majority of those working in the court administration are women. Thus, when recruitment is carried out by the court administration the majority of recruits turn out to be women' (Ivanova 2015, 579).

iii. Structured interviews and standardized assessment methods, to evaluate candidates based on their legal expertise and integrity. Rather than subjective impressions, interviewers should use predefined criteria that focus on the candidate's professional achievements and legal problem-solving abilities. Uniform scoring systems and objective evaluation metrics ensure that all candidates are evaluated on a level playing field.

2) Transparent salary structures are essential for ensuring that judicial professionals receive equal pay for equal work,[47] eliminating disparities based on gender or other non-objective criteria.[48] The introduction of a competency-based system reinforces this approach by linking pay to non-arbitrable achievements rather than subjective or discretionary decisions.[49]

3) A truly gender-neutral judiciary must ensure equal opportunities for career growth and leadership positions by implementing policies that eliminate structural biases. To achieve this, several strategic measures should be adopted:

   i. Merit-based promotion standards within the judiciary, based on objective and transparent criteria that rank candidates according to their legal expertise and professional contributions. This approach ensures that career advancement is determined by an individual's achievements rather than personal biases, subjective impressions, or gender-based assumptions.[50]

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[47] 'Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions' (Council of Europe 1998, 6.2).

[48] 'The statute provides a guarantee for judges acting in a professional capacity against social risks linked with illness, maternity, invalidity, old age and death' (Council of Europe 1998, 6.3).

[49] The Bangalore Principles of Judicial Conduct identify financial independence as one of the minimum requirements for ensuring judicial independence, alongside the security of tenure and institutional independence. Financial independence is defined as the judge's right to a salary and pension prescribed by law, which must not be subject to arbitrary interference by the executive authority (United Nations Office on Drugs and Crime 2007, 29).

[50] 'Decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity' (Council of Europe 2011, Art 44).

ii. Secondly, the elimination of barriers to equal footing in the pursuit of leading positions is key to promoting gender equality. Outdated perceptions of leadership, unequal access to networking and political connections often hinder gender equality. Judicial institutions must actively identify and dismantle these barriers to ensure fair leaders selection. Furthermore, the judiciary should encourage work-life balance policies that allow both men and women to pursue leadership roles, without facing disproportionate challenges.[51]

iii. Thirdly, structured mentorship initiatives play a crucial role in supporting career progression. By connecting aspiring judicial professionals with experienced mentors, these programs provide career advice and networking opportunities. The implementation of mechanisms in which senior leaders actively advocate for talented individuals, can further promote equitable career advancement by ensuring that both men and women are given the visibility and support needed to attain leadership positions.

In addition to general measures for achieving gender balance in the judiciary, it seems that, given the degree of feminisation, some specific measures should be taken in Serbia to attract the best law students, regardless of their gender. For example:

1) Organising student internships in courts and public prosecutor's offices, coordinated by the Judicial Academy which, in addition to practical training, would also have the important purpose of creating a special 'emotional bond' with the judiciary;

2) Providing a large number of scholarships for the best students, established by the High Judicial Councils;

3) Development of programmes to meet the housing needs of young judges and prosecutors, both through leasing and through the possibility of purchasing an apartment under favourable conditions. On the other hand, the holders of a judicial function would be required to devote a certain number of years to the administration of justice.

[51] 'Members States should adopt and implement measures to promote work and family life balance for all judges' (CEPEJ 2022, 6).

5.3. All Powers Are Equal, But Some Are More Equal Than Others

The existing gender imbalance in judiciary leadership positions indicates that the real power of the judicial branch in the Republic of Serbia is highly debatable. When there is widespread belief in society that almost everything is dependent on policy-makers,[52] and that, despite the proclaimed separation of powers, the judiciary is second in line and subordinate to the executive branch,[53] the primary interest of men may be directed towards establishing leadership in political parties.[54]

This phenomenon confirms gender stereotypes on the roles of men and women in society,[55] where leading a political party requires strong ambition[56] and a 'firm hand' (attributes believed necessary to succeed

[52] Some studies show that the formal separation of powers is insufficient to assure the independence of the judiciary. Although judges are not directly dependent on politicians, denying politicians formal power in the appointment and promotion of judges still does not fully protect judges from political influence. Politicians attempt to manipulate the court through various kinds of favours and threats; for example, they can offer the family of 'friendly judges' easier access to public sector jobs, but they can also make the careers of 'stubborn judges' more difficult, limit the budget for courts, etc. Cf. Lambais, Sigstad 2023.

[53] For more on similar dilemmas, see Chemin 2021.

[54] Political parties in Serbia remain highly segregated organisations in which women are underrepresented in leadership positions. This data provides a slightly different perspective on the EIGS's findings that Western Balkan countries have made noticeable progress in the political power sub-domain, due to the increased representation of women in the legislative and executive branches at different levels of government, which could be attributed to the introduction of legal electoral quotas (EIGE 2023, 27).

[55] Sexism is still widespread in politics and women are often unwelcome. A number of social, political, and institutional barriers limit women's participation in national and local decision-making. Women have less confidence to run for high office, and when they do their election campaigns often receive less funding than those of their male counterparts (Margaras 2019, 2).

[56] According to some authors, gendered socialization leads to different levels of political ambition among men and women (Fox, Lawless 2014, 499). In Serbia, the traditional patriarchal model prepares women to be second-tier, more like collaborators than allies of the men. This means that women are sometimes unprepared for the challenges of taking on more important positions in a party or government bodies. Because of the private/public duality, women in politics do not feel that they are on their own territory and are, in a way, constantly tested (Vuković 2008, 361–362).

in male gender-typed positions),[57] whereas heading a court requires a high level of responsibility,[58] as well as extensive theoretical and practical knowledge[59] – which are currently more often attributed to women.[60]

In this context, it is important to underline the difference between the apparent "supremacy" of women over men in the judiciary and how things might work in reality.[61] Although the feminisation of the judiciary (in the strict sense) is at its highest level in the Republic of Serbia (feminisation peak), numerical superiority still does not imply real dominance.

For instance, if the most important judicial decisions are potentially being made "in the political shadows", the statistical feminisation might be a distorted picture (feminisation of the judiciary paradox).

This further means that although vital, the role of legislation – as an instrument for achieving gender equality – is nevertheless limited. Ultimately, achieving genuine gender equality requires the active involvement of society as a whole. Specific measures aimed at ensuring gender balance in the judicial professions should be integrated into a broader strategy that promotes equality between women and men in all areas of social life.

By implementing gender-neutral policies in recruitment, compensation, and promotions, the judiciary can create a truly inclusive environment that allows judicial professionals to advance based on merit rather than gender.[62] Systematic reforms that incorporate the recommended measures would not only enhance gender equity but also significantly impact the

[57] In accordance with same gender bias pattern, women are likely to hold ministerial positions on environment (32%), public administration (30%), and education (30%), and are in leadership positions on gender equality, human rights, and social rights. In contrast, globally, men continue to dominate ministries such as economy, defence, justice, and the interior (UN Women 2023).

[58] Some authors suggest that a feminine gender identity is related to power construed as a responsibility and a masculine gender identity is related to power construed as an opportunity (Weltevreden 2022, 1 *et seq.*).

[59] Women are more likely than men to engage in adult (lifelong) learning in the majority of EU Member States (Barbieri *et al.* 2019).

[60] Perceptions about gender stereotypes evolve over time. Furthermore, women are no longer regarded as less competent than men (Eagly *et al*. 2020, 301 *et seq)*.

[61] 'The explanation [of male and female leadership stereotypes] is usually psychological: both women and men unconsciously view men as leaders and women as followers, so that when a woman is promoted to senior management, she disrupts unconscious collective norms' (Baxter 2013).

[62] "Professional associations should consider creating mentoring opportunities for women judges." CEPEJ 2022, 9.

judiciary's impartiality[63] and integrity.[64] Moreover, ensuring that the most capable individuals are chosen to uphold justice is essential to restoring and strengthening public confidence in the judiciary,[65] which serves as a fundamental pillar of the rule of law in democratic society.

5.4. A Starting Point for Future Qualitative Research

The presented analysis is primarily based on a descriptive statistical method, which is particularly well-suited to this type of research as it allows for the identification of structural patterns, gender-based asymmetries, and longitudinal trends. This approach provides sound empirical grounds for determining where disparities exist, how they have evolved over time, and which judicial sectors are most affected. Furthermore, the included data could serve as a valuable platform for subsequent research integrating qualitative analysis. It would be important to examine whether female judges and public prosecutors have merely adapted to traditional structures and unwritten rules, or whether their numerical dominance has genuinely resulted in changes to the legal culture and judicial practice. A key question is whether differences in decision-making and legal reasoning, depending on the gender of the judge, can be observed for instance, in family law proceedings – such as child custody, maintenance, or protection against domestic violence, how the 'best interests of the child' standard is interpreted, and whether any implicit bias emerges when joint custody is not a feasible option in cases of parental divorce.

In addition to a comprehensive analysis of a significant number of concrete cases, these issues could be further explored through semi-structured interviews with judges and legal practitioners, aimed at identifying subjective attitudes to gender roles. For instance, how do respondents perceive women in decision-making roles in the courtroom? Are women seen as more inclined to compromise and be empathic, or are they regarded as having a different level of authority in the eyes of counsel and colleagues?

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63 "Judge should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts." Council of Europe 2011, Art 5.

64 For more on the relationship between personal and professional morality of judges, see Dabetić 2023, 90.

65 For more on public confidence in the judiciary, see Vuković 2007, 491–507.

In parallel, focus groups with justice system users (e.g., parents who have gone through divorce proceedings) could be conducted to examine their experiences and perceptions of judicial behaviour, and whether they noticed any difference depending on the gender of the judge.

For instance, respondents could be asked whether they believe the outcome would have been different with a male or a female judge. The aforementioned qualitative lines of inquiry constitute a logical extension of the present research, however, they substantially exceed its defined analytical scope and core objectives. Accordingly, the particular social relevance of gender dynamics in the judiciary constitutes an open invitation for continued scholarly engagement.

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Др Виолета БЕШИРЕВИЋ*

Ана ВЛАДИСАВЉЕВИЋ, мастер**

УСТАВНИ ОТПОР ЕВРОПСКИМ ИНТЕГРАЦИЈАМА: УПОТРЕБА И ЗЛОУПОТРЕБА УСТАВНОГ ИДЕНТИТЕТА

Примена начела супрематије права Европске Уније односу на националне уставе држава чланица одувек је била спорна. Ступањем на снагу Уговора из Лисабона и нормативним оснаживањем клаузуле националног идентитета, концепт суверенитета, коришћен као механизам за ограничење продора права ЕУ у национални правни поредак, замењен је концептом уставног идентитета. У раду показујемо: (1) да је употреба уставног идентитета са циљем контролисања продора права ЕУ у националне правне системе заснована на потреби да се сачува важност националног устава и/или учврсти односно прошири надлежност националног уставног судства; (2) да ослањање на уставни идентитет у те сврхе није угрозило уставни плурализам на којем почива однос између правних поредака ЕУ и држава чланица; (3) да је злоупотреба уставног идентитета од уставних судова у Пољској и Мађарској, са циљем јачања отпора популистичких режима европским интеграцијама, заснована на раскидању везе између конституционализма и уставног идентитета и да је, као таква, угрозила уставни плурализам на којем почивају европске интеграције.

Кључне речи: *Уставни идентитет. – Национални идентитет. – Популизам. – Супрематија права ЕУ. – Европска Унија.*

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* Редовна професорка, Правни факултет Универзитета Унион у Београду, Србија, *violeta.besirevic@pravnifakultet.edu.rs*, ORCID iD: 0000–0001–9452–5630.

** Асистенткиња, Правни факултет Универзитета Унион у Београду, Србија, *ana.vladisavljevic@pravnifakultet.edu.rs*, ORCId iD: 0000–0003–1956–9355.

1. УВОД

Иако је концепт уставног идентитета конструкција савремене уставне теорије и доктрина уставних тела која врше контролу уставности настала у новије време, корени расправе о уставном идентитету потичу из Аристотеловог учења о држави у којем он инсистира да идентитет једне државе не зависи толико од њених фактичких и географских карактеристика колико од устава:

> [...] Јер ако је држава нека заједница, и то заједница грађана везаних једним уставом, и ако државни устав постане друкчији и различит од претходног и држава нужно постаје друга, [...] јасно је да се тек посматрањем устава једне државе може рећи да ли је држава иста или се променила (Аристотел прев. 1975, 1276б, 13–14).

Упркос томе што се појам уставног идентитета релативно скоро нашао у фокусу уставне теорије, о уставном идентитету као аналитичкој категорији, односно на њему изграђеној правној доктрини, постоји богата научна литература, укључујући и истраживања која се тим појмом баве у контексту европских интеграција, као и овај рад. Као аналитички концепт, уставни идентитет објашњава како једна политичка заједница схвата свој идентитет кроз уставни поредак и сам уставни текст, док устави идентитет, у форми правне доктрине коју примењује уставно судство, говори о фундаменталним вредностима и начелима која обавезују све уставне актере на начин који их чини непромењивим (Maes 2024, 6). У европском контексту, уставни идентитет се посебно разматра у функцији бедема, односно штита или мача против права Европске Уније (ЕУ) (Faraguna 2017). Такав приступ, важан за овај рад, заступљен је и у нашој правој литератури (Јовановић 2015; Ђурић 2017; Станић 2021; Новичић 2023). Наша дискусија иде корак даље: осим што разматрамо новија схватања и релевантну судску јуриспруденцију, дискусијом обухватамо и доктрину о уставном идентитету ЕУ, коју је, под ударом популистичких режима у Мађарској и Пољској, био приморан да развије Суд правде ЕУ (Суд правде), као и злоупотребу уставног идентитета у тим државама из перспективе идеја конституционализма.

Конкретније речено, расправа у овом раду тиче се правне доктрине о уставном идентитету коју су развили Суд правде и уставно судство држава чланица, тумачећи клаузулу о заштити националног идентитета из члана 4 став 2 Уговора о Европској Унији (УЕУ) и члан 2 УЕУ који говори о вредностима на којима почива ЕУ. И док је у контексту европских интеграција развој такве доктрине логичан с обзиром на то

да се у судару два правна система увек поставља питање њиховог односа, њена садржина и ефекти су, међутим, спорни, зависно од тога да ли је тумаче органи држава чланица или Суд правде.

Већина надлежних уставних тела држава чланица која су се тим питањем бавила у доктрини уставног идентитета пронашла је механизам за одређивање границе до које је право ЕУ примењиво у државама чланицама. Та граница се одређује у дијалогу између националних судова и Суда правде, узимајући у обзир да поменута два правна система постоје паралелно и да су једнаке правне снаге, односно имајући у виду, како то теорија дефинише, да ЕУ почива на уставном плурализму (MacCormick 1999), односно уставној толеранцији (Weiler 2003). У контексту решавања односа између два правна система, уставни идентитет је тако добио улогу коју је пре њега имао концепт суверенитета, с тим што, ради опстанка и напретка европских интеграција, на његово тумачење и даље утиче уставни плурализам који се темељи на негирању хијерархијског односа између правних система који паралелно постоје. Равнотежу између уставног плурализма и уставног идентитета пореметили су уставни судови Мађарске и Пољске тиме што су својим одлукама о уставном идентитету пружили подршку отпору владајућих режима европским интеграцијама и праву ЕУ. Приморан да делује, Суд правде је развио доктрину о уставном идентитету ЕУ, заснивајући је на вредностима заједничким уставним традицијама држава чланица. Истовремено, клаузулу националног идентитета тај суд рестриктивно тумачи, повезујући национални идентитет држава чланица првенствено са њиховим културним идентитетом.

То је укратко садржина овог рада којом се критички бавимо у неколико поглавља. После увода, у другом делу указујемо на разлике у дефинисању уставног идентитета, као и на разлику између појмова уставног идентитета и националног идентитета, који се у контексту европских интеграција, уз доста конфузије, често преплићу. У трећем делу разматрамо на које идентитете експлицитно или имплицитно упућује УЕУ из перспективе Суда правде и националног уставног судства држава чланица и пре и после конституционализације клаузуле националног идентитета на нивоу ЕУ. У фокусу четвртог дела је пракса националног уставног судства о уставном идентитету у тзв. постлисабонском периоду. У петом делу наша пажња усмерена је на злоупотребу тог концепта од Уставног суда Мађарске са циљем подршке антимигрантској политици владајућег режима и на ставове Уставног суда Пољске који је злоупотребио концепт уставног идентитета да би легитимисао противуставну реформу правосуђа коју је спровео режим

смењен на изборима из 2023. године. У закључним разматрањима се осврћемо на уочене тенденције у тумачењу уставног идентитета у претходним деловима овог рада.

2. УСТАВНИ ИДЕНТИТЕТ: СХВАТАЊА И РАЗЛИКОВАЊА

Дефинисању уставног идентитета претходи логичко питање – шта је идентитет? Одговор је тежи него што изгледа не само зато што постоје многобројне дефиниције и објашњења већ и због тога што оне зависе од тога о чијем идентитету говоримо – појединца, друштва, народа, нације, државе или друге политичке заједнице. Имајући у виду тежину задатка, Чарлс Тејлор (*Charles Taylor*) истакао је да је концепт идентитета дубљи и сложенији од било које његове артикулације која се нуди (Taylor 1989, 29). Његово запажање показало се тачним. У својој студији *Шта је идентитет (како сада користимо ту реч)?* Џејмс Фирон (*James D. Fearon*) цитирао је четрнаест различитих појмова идентитета (Fearon 1999, 4), од оног сходно којем је идентитет схватање „људи о томе ко су, какви су људи и како се односе према другима“ (Hogg, Abrams 1988, 2) до оног да се идентитет „односи на начине на које се појединци и колективитети разликују у друштвеним односима од других појединаца и колективитета“ (Jenkins 1996, 4). Заједнички именитељ свих дефиниција, ипак, постоји: то је идеја „сопства“, било појединца, групе или заједнице, с тим што се то сопство протеже кроз време и зависи од промена (Booth 1999, 249).

Консензус не постоји ни у односу на питања сврхе и појма уставног идентитета којим се бавимо у овом раду. Неслагања у погледу сврхе у начелу се тичу његовог опстанка: да ли је реч само о тренутно актуелном концепту који је заменио концепт суверенитета у контексту решавања сукоба између права ЕУ и правног система држава чланица, који већ сутра може бити замењен неком новом теоријском конструкцијом у решавању истог сукоба? Или је, ипак, реч о аналитичком и/или нормативном концепту чија је употреба знатно шира? С једне стране, Федерико Фабрини (*Federico Fabbrini*) и Андраш Шајо (*András* Sajó) сматрају да је реч о „помодарском“ концепту који су развили, пре свега, уставни и врховни судови држава чланица ЕУ са циљем спречавања утицаја права ЕУ на националне правне систем (Fabbrini, Sajó 2019). С друге стране, у најновијој и до сада најсвеобухватнијој компаративној студији о уставном идентитету, Рен Хиршл (*Ran Hirschl*) и Јанив Рознаи (*Yaniv Roznai*) указују не само на тренд у праву ЕУ већ и на глобални тренд употребе уставног идентитета, било у форми аналитичког

концепта или правне доктрине у дебатама о уставним амандманима (Бразил, Турска, Чешка, Тајван), месту религије у уставним порецима (Индија, Индонезија, Израел), наметнутом уставу (Јапан), као и у теоријским студијама о уставним револуцијама, популизму и назадовању демократије (Hirschl, Roznai 2024, 3–11).

Неслагања у погледу појма уставног идентитета су сложенија. У теоријском смислу, уставни идентитет није концепт решења већ концепт достигнућа (Waldron 2021, 121–136). Наиме, концепти решења нуде одговор на неки проблем, на пример концепт владавине права тежи да одговори на питање како спречити самовољу власти. Концепти достигнућа не нуде решење проблема већ указују на вредности и циљеве који су подложни променама и који се не могу унапред предвидети. У том смислу, уставни идентитет јесте концепт достигнућа зато што идентификује и реафирмише одређене вредности и принципе на начин који омогућава јединство у оквиру одређеног уставног поретка (Бешировић 2025). Међутим, дефинисање уставног идентитета, као и дефинисање многих других уставних појмова (нпр. суверенитета, демократије, слободе и достојанства), није довело до јединственог схватања. За потребе овог рада навешћемо неколико најутицајнијих дефиниција.

Прва је дефиниција Герија Џејкобсона (*Gary Jacobsohn*), у којој се наводи да „устав стиче идентитет кроз искуство. [...] Идентитет настаје дијалошки и представља мешавину политичких тежњи и опредељења које изражавају прошлост једне нације, као и одлучност оних унутар друштва који траже да на одређене начине надиђу ту прошлост“ (Jacobsohn 2010, 7). Уставни идентитет, према томе, настаје у дијалогу устава и друштвене заједнице у којој делује. Другу нуди Мишел Розенфелд (*Michel Rosenfeld*) наводећи да је уставни идентитет „појмовна конструкција која има циљ да уједини све оне који су обухваћени једним уставним поретком“ (Rosenfeld 2024, 287). Розенфелд истиче да је уставни идентитет инхерентан постојању самог устава (заједнице које имају устав разликују се од оних које их немају), а настаје у односу између садржаја устава (нпр. федерална држава се разликује од унитарне државе) и контекста у којем тај устав делује (Rosenfeld 2012, 757).

За разлику од Џејкобсонове и Розенфелдове дефиниције уставног идентитета које су аналитичког карактера зато што одговарају на питање шта чини један устав *уставом* и сходно којима је устав не само правни документ него и документ који нам даје увид у културу једне

политичке заједнице, сведочећи о томе како та заједница разуме себе и свој однос према прошлошћу (Scholtes 2023, 2), у неколико наредних дефиниција конструише се уставни идентитет као правна доктрина.

Мишел Тропер (*Michel Troper*), тако, сматра да концепт уставног идентитета има ограничену улогу која се своди на процес тумачења устава, с обзиром на то да уставни идентитет говори о уставним нормама без којих би устав изгубио свој карактер и престао да представља заједницу којој је намењен (Troper 2010, 202). Другим речима, Тропер тај концепт схвата као правну доктрину која помаже судовима у процесу тумачења устава. Концептуализација коју нуди Војчек Садурски (*Wojciech Sadurski*) најближа је идеји сопства о којој смо претходно говориле, имајући у виду да тај аутор уставни идентитет дефинише као„скуп вредности, принципа и смерница који дефинишу [...] ефективно прихваћена и примењивана ограничења унутар којих мора да се одвија свакодневна политика“ (Sadurski 2006, 1). Бошко Трипковић указује на то да је уставни идентитет основни мотив судијама у тумачењу устава и наглашава његову двоструку димензију: прва је општа и обухвата уставне гаранције које временом еволуирају и које су карактеристичне за уставне демократије, док је друга партикуларне природе и ослања се на специфичне вредности „које се могу уочити из различитих слојева моралних судова који су донети у националној уставној пракси“ (Трипковић 2017, 14). Другим речима, специфичности неког уставног идентитета настају из конкретне уставне традиције и односе се на специфична уставна искуства политичке заједнице у питању (Трипковић 2017, 31). Додаћемо још и слично мишљење Џорџа Флечера (*George Fletcher*) који сматра да уставни идентитет потиче из процеса тумачења устава у којем судије решавају спор тако што се „загледају у правну традицију“ из које тај спор потиче (Fletcher 1992, 737).

У основи уставног идентитета артикулисаног у смислу правне доктрине налази се његов однос према промени устава, то јест према доктрини о неуставној промени устава, која нас води до Карла Шмита (*Carl Schmitt*) и његове претпоставке да је промена устава могућа само уколико се њоме очувају идентитет и континуитет устава у целини (Schmitt прев. 2008, 150). Према Шмитовом схватању, уставотворац не сме да узурпира улогу коју има да би променио фундаменталне уставне поставке. Уставни идентитет тако схваћен представља средство којим се не само ограничава промена устава већ и оцењује његово кршење (Scholtes 2023, 4).

Иако полазе са различитих позиција, сви поменути аутори, осим Шмита, сугеришу, међутим, да доктрина о неуставној промени устава не значи да је уставни идентитет статичан зато што произилази

из перманентне реинтерпретације уставних докумената од стране судова током времена. Упркос томе што је у непрекидној интеракцији између универзалних вредности и партикуларистичке историје, вредности и обичаја, уставни идентитет је променљив. Они се такође слажу да уставни идентитет никада није искључујући: уставни идентитет уједињује: када се елаборира у контексту либералног конституционализма, појављује се као концепт који интегрише целу заједницу (Rosenfeld 2024, 287). На томе се заснива чак и модел етноцентричног уставног идентитета у чијем је средишту нација, а који не мора да буде херметичан, монолитан и затворен за друге, како је то тумачио Шмит (Schmitt, прев. Schwab, 2007), него комплементаран са унутрашњим плурализмом, односно конституционализмом и демократијом, како је то на немачком моделу показао Розенфелд (Rosenfeld 2010, 154).

Зашто је баш битно споменути везу између уставног идентитета и конституционализма? Иако је конституционализам апстрактан појам, реч је о концепту који обухвата механизме ограничавања вршења политичке власти у политичкој заједници. Зато конституционализам, који захтева да они који врше власт буду везани ограничењима која подразумевају, између осталог, поделу власти, владавину права, независно судство, заштиту људских права и слободу медија, у најбољем случају опстаје не зато што су дата ограничења рационалног карактера него зато што њихово поштовање добија смисао повезивањем са специфичностима било које политичке заједнице (Scholtes 2023, 12).

За потребе ове дискусије посебно је важно истаћи једно разликовање. Уставни идентитет није исто што и национални идентитет, иако оба концепта вуку корене из XVIII века и доба просветитељства (Rosenfeld 2012, 758). Розенфелд ту разлику пластично објашњава тако што истиче да француска и немачка нација постоје и без устава (Rosenfeld 2012, 758). Враћајући се на дефиниције, национални идентитет говори о општим друштвеним достигнућима којима инклинира једна заједница људи (Hirschl, Roznai 2024, 5) или, како то наводи Вилијем Блум (*William Bloom*), национални идентитет је „стање у које је група људи дошла поистовећивајући се са националним симболима“ (Bloom 1990, 52). За разлику од тога, уставни идентитет говори о правним достигнућима једне политичке заједнице, најчешће државе. Узимајући у обзир културолошке разлике између политичких заједница, уставни идентитет сваке од њих ће се разликовати зависно од тога како та заједница схвата себе у односу на друге (Rosenfeld 2010, 149–150). Специфичност клаузуле националног идентитета у праву ЕУ, међутим, огледа се у томе што неки судови држава чланица схватају ту клаузулу као клаузулу

уставног идентитета, која, у нормативном смислу, представља механизам за ограничење продора права ЕУ у националне правне поретке држава чланица, о чему ће доцније бити више речи.

3. ИДЕНТИТЕТ ИДЕНТИТЕТА У УГОВОРУ ИЗ ЛИСАБОНА

Уговор из Лисабона, тачније УЕУ који је његов саставни део, експлицитно се осврће на националне идентитете држава чланица, а имплицитно пружа упориште уставном идентитету ЕУ. Иако је уставни идентитет, као што смо показале, глобално прихваћен теоријски концепт, у контексту европских интеграција стекао је неке посебне карактеристике с обзиром на то да се, с једне стране, приписује Унији која, подсетићемо, није држава, а с друге стране, користи као оружје за супротстављање супрематији права ЕУ и ограничавању њених надлежности. С обзиром на то да је у односима између ЕУ и држава чланица ослонац обеју страна, прво ћемо размотрити уставни идентитет ЕУ, а потом значење које му придају државе чланице у примени права ЕУ.

3.1. Од Уставне повеље до уставног идентитета ЕУ

Уставни идентитет ЕУ је судска конструкција новијег датума, чије је увођење у право ЕУ практично изнуђено отпором популистичких режима европским интеграцијама и растом идеологије идентитетске политике у неколико држава чланица.

Да поновимо, као аналитички концепт уставни идентитет се користи да се њиме објасни како једна политичка заједница разуме себе, док се као нормативни концепт уставни идентитет своди на основне норме и начела уставног система који обавезују све уставне актере, чинећи та правила и вредности непроменљивим (Maes 2024, 6). Дуго оклевање Суда правде да у поступак тумачења и примене права ЕУ уведе нормативни концепт уставног идентитета може се приписати познатој скепси према уставној природи ЕУ с обзиром на то да она нема *demos* (Бешировић 2013). Како је Суд правде скоро од почетка европских интеграција био главни заговорник конституционализације правног поретка бивших заједница а потом и ЕУ (Бешировић 2023, 23–25) и како још од 1986. године инсистира да су уговори на основу којих функционише ЕУ, односно претходне Заједнице, уставна повеља

Заједница/Уније[1], било је само питање времена кад ће тај суд развити нормативни концепт уставног идентитета ЕУ, зато што се уставни идентитет везује за постојање устава, а не само *demos-a*. Уздржаност Суда правде поклопила се и са теоријским лутањима и различитим схватањима појма уставног идентитета. Данас је, међутим, међу теоретичарима неспорно да вредности и начела на којима почива ЕУ, а који су заједнички и уставним порецима држава чланица, представљају њен уставни идентитет (Besselink 2017; Kadelbach 2020; Drinóczi, Faraguna 2023).

Прихватање оваквог става у пракси Суда правде наговештено је 2008. године у предмету *Kadi I*, у којем је Суд нашао да уставна ограничења садржана у праву ЕУ, која штите индивидуална права, представљају део њеног уставног идентитета, због чега право ЕУ не може бити подређено обавезама које намеће међународно право.[2] У недавно донетим пресудама идентичног садржаја против Мађарске и Пољске (тзв. *Conditionality Judgements*) Суд правде је изричито нагласио постојање уставног идентитета ЕУ. Пресуде су реакције на назадовање режима владавине права у Мађарској и Пољској.

Наиме, 16. децембра 2020. законодавни органи ЕУ усвојили су уредбу којом се успоставља режим условљавања у спровођењу буџета ЕУ уколико се у држави чланици догоди систематско кршење владавине права.[3] Уредба дозвољава Савету ЕУ да, на предлог Европске комисије, усвоји мере као што су обустава плаћања из буџета ЕУ или суспензија одобравања једног или више програма који се плаћају из буџета ЕУ. Мађарска и Пољска су тражиле поништај те уредбе тврдећи, између осталог, да у постојећим Уговорима не постоји правни основ за њено доношење, да је ЕУ њеним усвајањем повредила начело правне сигурности и да се њоме заобилази процедура утврђења у члану 7 УЕУ која

[1] CJEU, Case 294/83, *Partiécologiste* „Les Verts“ *v*. *European Parliament*, ECLI: EU:C:1986:166 [1986] ECR 1339.

[2] CJEU, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461 [2008] ECR I-6351, пара. 282, 285.

[3] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I of 22/12/2020, p. 1–10.

се примењује када постоји јасан ризик да ће држава чланица озбиљно нарушити вредности наведене у члану 2 УЕУ, укључујући и владавину права.[4]

Одбијајући тужбе у целини, Суд правде посебно је нагласио да су

> Државе чланице препознале [...] и деле вредности које члан 2 УЕУ садржи. Оне одређују сам идентитет Уније као заједничког правног поретка. Због тога Унија мора бити у могућности да у границама својих овлашћења предвиђених Уговорима, брани наведене вредности.[5]

Другим речима, вредности заједничке уставним порецима држава чланица представљају уставни идентитет ЕУ. Подсетимо, реч је о универзалним вредностима, укључујући људско достојанство, слободу, демократију, владавину права, основна права и једнакост. Суд правде је посебно истакао нормативни карактер члана 2:

> [...] мора се имати на уму да члан 2. УЕУ није само пуко навођење политичких смерница или намера, већ садржи вредности које су саставни део самог идентитета Европске Уније као заједничког правног поретка, вредности које су конкретно изражене у начелима која садрже правно обавезујуће обавезе за државе чланице.[6]

Према томе, постојање уставног идентитета ЕУ, који чине вредности и начела садржана у члану 2 УЕУ, требало би да спречи државе чланице да манипулишу својим националним (уставним) идентитетом са циљем нарушавања уставног идентитета ЕУ.

3.2. Решавање ребуса: национални и/или уставни идентитет држава чланица?

За разлику од уставног идентитета ЕУ, клаузула националног идентитета држава чланица у праву ЕУ није судска конструкција нити је новина коју је установио тренутно важећи реформски уговор. Инсистирање

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[4] Вид. CJEU, C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97; CJEU, Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

[5] *Hungary v. Parliament and Council*, пара. 127.

[6] *Hungary v. Parliament and Council*, пара. 232.

на националном идентитету држава чланица у вагању односа између два правна система, националног и супранационалног, почело је знатно раније и било је проузроковано увођењем начела супрематије у комунитарно право и изостанком заштите људских права у оснивачком Уговору из Рима, којим је била основана најважнија од три раније постојеће европске заједнице, Европска економска заједница. Да би разумели значај који клаузула националног идентитета данас има у праву ЕУ, треба се осврнути на период у којем није имала нормативну снагу већ је у контексту европских интеграција фигурирала као политичка декларација.

3.2.1. Пут до „лисабонске" клаузуле националног идентитета

Примена начела супрематије у праву ЕУ започела је 1964. године и од тада не престају отпори његовој апсолутној примени у државама чланицама. Уследио је покушај кодификације у тексту Устава за Европу, чије је усвајање пропало, да би потом то начело било укључено у Изјаву бр. 17 уз Уговора из Лисабона, али не и у сам његов текст.[7]

Шта је спорно у примени начела супрематије права ЕУ? Подсећамо, још од одлуке Суда правде у предмету *Costa*, донетој 1964. године, целокупно право ЕУ апсолутно је и безусловно надређено националном праву у свим случајевима и свакој ситуацији.[8] Такав став је оправдаван потребом остваривања кохерентности и јединствености у примени комунитарног, а потом и права ЕУ (Беширевић 2023, 107–109). Став Суда правде да је право ЕУ надређено свим правним актима држава чланица, укључујући и њихове уставе, изазвало је велики отпор уставних, односно врховних судова држава чланица. Национални судови су користили различите начине да очувају не само неприкосновеност највишег акта својих држава већ и да у уставу поставе границе за преношење надлежности са држава чланица на ЕУ. Таква пракса је знатно старија од популаризације концепта уставног идентитета

[7] У тој изјави се истиче да у складу са„устаљеном судском праксом Суда правде, Уговори и право које је Унија усвојила на основу Уговора имају супрематију над правом држава чланица, под условима утврђеним у поменутој судској пракси". Уводну изјаву прати и Мишљење Правне службе Савета од 22. јуна 2007. године, бр. 11197–07 (ЈУР 260), у којем се истиче да је судска пракса Суда правде потврдила да је супрематија права Европске заједнице основно начело, својствено посебној природи (сада) ЕУ, а чињеница да начело није унето у Уговор из Лисабона ни на који начин не мења постојање начела и постојећу судску праксу Суда правде.

[8] ECJ, Case 6–64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

која је у току. Историјске корене вуче још од напора држава чланица да пруже заштиту уставним правима њихових грађана у време кад заштита људских права није постајала на нивоу бивших заједница. У том смислу, чувени су наводи немачког Савезног уставног суда у предмету познатом под називом *Solange I* из 1974. године да прихватање европских интеграција Основним законом „не отвара пут промени основне структуре устава, на којој почива његов идентитет“.[9] Сличним образложењем користио се и италијански Уставни суд у предмету *Frontini*, решаваним 1973. године, наводећи да делимичан пренос суверенитета на Европску економску заједницу њеним институцијама не даје „неприхватљиву моћ да крше основне принципе нашег уставног поретка или неотуђива људска права“.[10]

Клаузула идентитета, која говори о потреби заштите правног поретка држава чланица у контексту европских интеграција, први пут се експлицитно појавила у Уговору из Мастрихта. Њено увођење је било резултат потребе да се уравнотеже различите тежње: жеље одређених политичких снага за јачањем и продубљивањем политичких интеграција, с једне стране, и оклевање држава чланица да, у том процесу, пренесу на ЕУ већи број надлежности него што је то до тада био случај, с друге стране (Faraguna 2024, 301; Maes 2024, 22). Због тога не чуди широка и непрецизна формулација тадашње клаузуле националног идентитета: „Унија ће поштовати националне идентитете својих држава чланица, чији је систем власти заснован на начелима демократије.“[11]

Та клаузула је промењена у Уговору из Амстердама сводећи обавезу ЕУ на поштовање националних идентитета држава чланица, док упућивање на демократски систем пребацује у посебну одредбу у којој се говори о основним вредностима на којима почива ЕУ, а које су заједничке државама чланицама.[12]

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[9] Савезни уставни суд, 2 BvL 52/71 (*Solange I*), 29. мај 1974, BVerfGE 37, 271 ff.

[10] Уставни суд, n. 183, *Frontini v. Ministero delle Finanze*, 18. децембар 1973, [1974] 2 CMLR 372, пара. 9.

[11] Уговор из Мастрихта, члан Ф УЕУ.

[12] Члан 8 Уговора из Амстердама којим се мења Уговор из Мастрихта, члан Ф УЕУ гласи:

„Члан Ф мења се и гласи: (а) став 1. замењује се следећим: 1. Унија је заснована на начелима слободе, демократије, поштовања људских права и основних слобода и владавине права, начелима која су заједничка за државе чланице; (б) постојећи став 3. постаје став 4. и додаје се нови став 3. који гласи: 3. Унија ће поштовати националне идентитете својих држава чланица.“

Било у првој, било у другој верзији, очигледно је да је клаузула идентитета била сведена на политичку изјаву а не утуживу правну норму, а главни циљ њеног увођења био је да, уз начело супсидијарности, ограничи надлежности ЕУ и онемогући пренос највиталнијих државних функција на ЕУ. О политичкој природи тадашње клаузуле идентитета сведочи изостанак надлежности Суда правде да по њој поступа и само повремено имплицитно упућивање на ту клаузулу у његовој пракси (Faraguna 2024, 302). Штавише, клаузулу националног идентитета у то време није користило ни национално уставно судство. На пример, Савезни уставни суд Немачке је 1993. године у тзв. *Маастрихт* одлуци, истакао да држава, на основу свог суверенитета, има право да одлучи о томе које ће надлежности пренети на ЕУ и у ту сврху је увео контролу засновану на доктрини *ultra vires* у односу на примену права ЕУ у Немачкој.[13]

Позивање на уставни идентитет у контексту односа правног система држава чланица и правног система ЕУ ушло је у моду тек знатно касније, фактички са покушајем усвајања Устава за Европу, у којем се први пут појавила клаузула националног идентитета држава чланица и наметнула обавезу ЕУ да поштује „националне идентитете, неодвојиве од њихових темељних политичких и уставних система“ (члан I-5). Француски и шпански уставни судови су сматрали да та клаузула недвосмислено указује на примат националних устава над правом ЕУ кад год то право утиче на националне уставе (Scholtes 2023, 28). Према ставу француског Уставног савета, члан I-5 Устава за Европу јасно показује да Устав за Европу не утиче на највише место француског устава у домаћем правном систему.[14] Развијајући први пут доктрину уставног идентитета, Уставни савет је у то време закључио да „уношење директиве [у француски правни систем, *прим. наша*], не може бити противно правилу или принципу неодвојивом од уставног идентитета Француске, осим кад се уставотворац са тиме сложи“.[15]

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[13] Савезни уставни суд, 2 BvR 2134/92, 2159/92 (*Маастрихт* одлука), 12. октобар 1993, BVerfGE 89, 155, доступно на енглеском језику на *https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf*, последњи приступ 4. јануара 2025.

[14] Уставни савет, 2004–505 DC, 19. новембар 2004, пара. 10, доступно на енглеском језику на *https://www.conseil-constitutionnel.fr/en/decision/2004/2004505DC.htm*, последњи приступ 8. јануара 2025.

[15] Уставни савет, 2006–540 DC, 27. јул 2006, пара. 19, доступно на енглеском језику на *https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm*, последњи приступ 8. јануара 2025.

3.2.2. Домет и садржај „лисабонске" клаузуле националног идентитета

Уговор из Лисабона, тачније члан 4 став 2 УЕУ, разрађује Уставом за Европу дефинисану клаузулу националног идентитета и даје јој нормативну снагу предвиђајући обавезу ЕУ да „поштује једнакост држава чланица пред Уговорима, као и њихов национални идентитет, неодвојив од њихових темељних политичких и уставних система, укључујући и регионалну и локалну самоуправу". Осим тога, Повељом ЕУ о основним правима, која је постала правно обавезујућа ступањем на снагу Уговора из Лисабона, предвиђена је обавеза поштовања „националних идентитета држава чланица и организације њихових јавних овлашћења на националном, регионалном и локалном нивоу".[16]

У примени те клаузуле проблем ствара конфузија у њеној интерпретацији: проблем се своди на питање да ли се том клаузулом штити национални или уставни идентитет државе чланице или и један и други? Конфузију додатно ствара чињеница да ту клаузулу различито схватају и интерпретирају Суд правде и одређени уставни судови држава чланица који нису без утицаја у ЕУ, пре свих немачки Савезни уставни суд. Мишљење Савезног уставног суда Немачке о домету и суштини клаузуле националног идентитета садржано у његовој „лисабонској" одлуци, инспирисало је, на пример, неке уставне судове држава чланица да пруже отпор европским интеграцијама по основу уставног идентитета, о чему ће доцније бити више речи.

С тим у вези, уочљив је уздржан приступ Суда правде: досадашња пракса показује да је тај суд склон да рестриктивно тумачи клаузулу националног идентитета примењујући је у предметима који су се тицали, на пример, заштите националног језика[17], статуса државе као Републике[18] и институције брака[19] (Бешировић 2023, 131). Очигледно је да Суд правде национални идентитет држава чланица пре свега повезује са њиховим културним идентитетом (Albanesi 2021, 119). Интересантно

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[16] Преамбула Повеље о основним правима Европске уније (Charter of Fundamental Rights of the European Union, 2012/C 326/02).

[17] Вид. CJEU, C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, ECLI:EU:C:2011:291.

[18] Вид. CJEU, C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, ECLI:EU:C:2010:806.

[19] Вид. CJEU, C-673/16, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul. Afacerilor Interne*, ECLI:EU:C:2018:385.

је да се Суд правде, иако је био у позицији, није изјаснио о томе да ли се заштита суверенитета држава чланица може сматрати делом националног идентитета.[20]

Насупрот томе, Савезни уставни суд Немачке искористио је клаузулу националног идентитета да развије доктрину о уставном идентитету као механизму за ограничавање начела супрематије права ЕУ, истичући да то начело нема ефекта на националне уставе увек када дође у сукоб са уставним идентитетом државе чланице. То се најбоље види у већ помињаној „лисабонској" одлуци у којој је тај суд тзв. клаузулу вечности, садржаној у немачком Основном закону, повезао са уставним идентитетом Немачке, претворивши је тако у апсолутну препреку европским интеграцијама (Scholtes 2023, 31). „Клаузулом вечности" из члана 79 став 3 Основног закона предвиђено је да је „недопустива [...] промена Устава којом би се дирало у поделу државе на савезне покрајине, начелно учешћа покрајина у законодавству или у начела која су регулисана у члановима 1 до 20" (гаранције заштите основних права, *прим наша*). Према мишљењу Суда, то практично значи:

> Уставотворац није дао представницима и органима народа мандат који би им омогућио да мењају уставни идентитет Немачке како им одговара. Ниједан уставни орган нема овлашћење да мења основна уставна начела садржана у члану 79. став 3. Основног закона. Поштовање ових начела обезбеђује Савезни уставни суд. Путем такозване клаузуле вечности, Основни закон реагује на историјска искуства пузеће ерозије или изненадног слома либералне супстанце демократског поретка.
>
> Истовремено, такође јасно истиче да немачки устав, [...] има универзално језгро које не подлеже изменама позитивним законом.[21]

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[20] Вид. CJEU, Case C-364/10, *Hungary v. Slovak Republic*, ECLI:EU:C:2012:630; *Czech Republic v. European Parliament and Council of the European Union*, ECLI:EU:C:2019:1035.

[21] Савезни уставни суд, 2 BvE 2/08 (*Лисабонска* одлука), 30. јун 2009, BVerfGE 123, 267–437, пара. 218, доступно на енглеском језику на *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html*, последњи приступ 8. јануара 2025.

У истој одлуци, у односу на надлежности које врши ЕУ, Суд је увео и могућност њиховог преиспитивања путем тзв. контроле (уставног) идентитета (*Identitätskontrolle*), уз већ постојећу контролу по основу доктрине *ultra vires* коју је установио у тзв. *Мастрихт* одлуци:

> Уставни идентитет Основног закона (члан 79 ст. 3.) у вези са којим се овлашћења не могу преносити и који је самим тим ван домашаја европских интеграција, одговара обавези ЕУ да поштује уставотворца држава чланица као господара Уговора. У оквиру своје надлежности, Савезни уставни суд може бити позван да испита, ако је потребно, да ли се ови принципи поштују [...] и да обезбеди да се неповредива срж уставног идентитета Основног закона одржава путем контроле по основу контроле идентитета (*Identitätskontrolle*), у случају да вршење надлежности Европске уније резултира очигледним прекорачењем граница [...]. И *ultra vires* контрола и контрола по основу идентитета могу довести до тога да акт Заједнице – или, у будућности, акт ЕУ – буде проглашен непримењивим у Немачкој [...].[22]

Намеће се питање да ли се и у чему се поменуте контроле којима се испитују домети надлежности ЕУ разликују. Као што то истиче Матијас Вендел (*Mattias Wendel*), обе контроле произлазе из немачког устава, преплићу се али и разликују по основу права које примењују. Контрола по основу (уставног) идентитета заснива се на „клаузули вечности“ из члана 79 став 3 Основног закона. Реч је о националном правном основу чије тумачење зависи само од немачког Савезног уставног суда. Циљ те контроле је да утврди компатибилност права ЕУ са основним уставним начелима, независно од тога да ли је ЕУ прекорачила своје надлежности или није (Maes 2024, 61). Контрола по основу доктрине *ultra vires* заснива се на хибридном правном основу јер се односи на питање да ли је ЕУ очигледно и значајно прекорачила своје надлежности, што нужно подразумева не само тумачење националног устава него и тумачење права ЕУ. Наиме, уколико Савезни уставни суд утврди да је ЕУ поступила *ultra vires*, неће само установити да постоји кршење немачког устава већ и кршење права ЕУ. Наведене контроле се могу и преклопити, што ћемо видети у тзв. *PSPP* одлуци, у којој су подносиоци захтева за контролу уставности тврдили да је њихово право гласа угрозила

[22] *Лисабонска* одлука, пара. 235–241.

надлежна европска институција која, наводно делујући *ultra vires*, није била легитимисана на демократски начин потврђеним пристанком Немачке да пренесе надлежности на ЕУ (Wendel 2021, 482–483).

Насупрот приступу Суда правде, чије тумачење клаузуле националног идентитета није релативизирало начело супрематије права ЕУ, све више је одлука националних судова, нарочито у последњих десетак година, у којима они тумаче право ЕУ и начело супрематије права ЕУ из перспективе националног идентитета, често га поистовећујући са уставним идентитетом. Наиме, иако је Суд правде надлежан да одлучи о томе да ли национални идентитет држава чланица, заштићен чланом 4 став 2 УЕУ, може бити од значаја у примени права ЕУ, тај суд не може да тумачи шта чини уставни идентитет држава чланица. То је задатак националних судова. И ту игра почиње.

4. ДОКТРИНА УСТАВНОГ ИДЕНТИТЕТА У ФУНКЦИЈИ ОСПОРАВАЊА „СВЕ ТЕШЊЕ УНИЈЕ МЕЂУ НАРОДИМА ЕВРОПЕ“

Да поновимо, уставно судство држава чланица користи концепт уставног идентитета у контексту европских интеграција као брану праву ЕУ због тога што се тврди да фундаменталне вредности које чине срж националних устава имају предност у односу на уставом држава чланица прихваћене европске интеграције, укључујући и право ЕУ (Scholtes 2023, 21–22). Према нашем мишљењу, постоје два разлога због којих је уставно судство у државама чланицама искористило „лисабонску“ клаузулу заштите националног идентитета да уставном идентититету подари улогу кочница европских интеграција у постлисабонској ери. Први се односи на још увек релевантну улогу уставног документа у државама чланицама, под условом, како је то приметио Јирген Хабермас (*Jürgen Habermas*), да његов садржај и ефекти потичу из демократског процеса који га легитимизује (Habermas 2002, 59). Други је, значајна пролиферација одлука Суда правде које обавезују уставне актере у државама чланицама, а чија је примена изван контроле националних уставних тела којима је поверена контрола уставности.

Међутим, реторика националног уставног судства о уставном идентититету различитог је интензитета: у неким одлукама је офанзивна, а у другим апстрактна или чак само имплицитна. У одређеном броју држава чланица, као што су Италија, Француска и Ирска, игра на карту уставног идентитета остала је на симболичном нивоу, коју је уставно судство користило више ради потврде, па и проширивања сопствене

надлежности у дијалогу са Судом правде или са националним судовима него ради значајнијег утицаја на примену права ЕУ. За разлику од тога, та реторика је јачег интензитета у Немачкој и Чешкој, али ће дискусија пред нама показати да, осим заоштреног тона у дијалогу између Суда правде и уставних судова тих држава, већих последица по даљи ток европских интеграција за сада није било.

Имајући у виду разлике у реторици, за потребе ове дискусије примере из судске праксе који илуструју употребу уставног идентитета у сврхе разграничавања односа између националних правних система и права ЕУ поделили смо у две групе. У првој групи су одлуке у којима су видљиви помирљиви ставови националног уставног тела задуженог за контролу уставности са начелом супрематије права ЕУ или у којима концепт уставног идентитета није разрађен него је остао на нивоу апстрактне категорије. У другој групи су одлуке у којима је реторика уставних судова видно офанзивна у односу на начело супрематије права ЕУ и питање преношења надлежности са државе чланице на ЕУ.

4.1. Симболично крцкање права ЕУ

4.1.1. Пракса у Француској

Релевантна пракса Уставног савета Француске најбоље илуструје важност националних устава у контексту европских интеграција. Разматрајући Уговор из Лисабона још 2007. године, Уставни савет јасно је ставио до знања да примарно право ЕУ не сме да садржи „клаузулу супротну Уставу", да доведе у питање загарантована права и слободе нити да „штетно утиче на суштинске услове који омогућавају вршење националног суверенитета", осим ако се устав унапред не измени.[23]

Такав став Уставни савет је задржао и у постлисабонској ери, настављајући да развија доктрину уставног идентитета из своје раније праксе у мери у којој су му то дозвољавале ограничене надлежности у вези са контролом усклађености међународног права, односно права ЕУ, са уставом (Millet 2019, 136–140). С тим у вези, Уставни савет је наставио да инсистира на његовој ограниченој надлежности у случајевима контроле уставности законских одредаба које су последица

[23] Уставни савет, 2007–560 DC, 20. децембар 2007, пара. 9, доступно на енглеском језику на *https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/a2007560dc.pdf*, последњи приступ 8. јануара 2025.

преузимања садржаја директива ЕУ али и прилагођавања француског правног система уредбама ЕУ, понављајући да се његова надлежност своди само на случај у којем би због таквог преузимања односно прилагођавања правила или принципи, неодвојиви од уставног идентитета Француске, били доведени у питање, под условом да на трансфер надлежности Унији конститутивна власт није пристала.[24]

Широко постављену конструкцију уставног идентитета, која захтева тумачење у сваком конкретном случају (Baudoin 2022, 22), Уставни савет је ипак недавно донекле разјаснио, одлучујући о уставности закона којим је преузет садржај директиве ЕУ о обавезама авио-компанија да врате назад држављане трећих држава којима је одбијен улазак у државу чланицу ЕУ (у овом случају у Француску).[25] У том контексту, забрану делегирања вршења јавних овлашћења на приватна лица Уставни савет је прогласио принципом који је својствен уставном идентитету Француске, додавши да такво својство немају право на сигурност, начело личне одговорности и начело једнакост у сношењу јавних оптерећења, која су, како је истакнуто, заштићена правом ЕУ.[26] С обзиром на то да Уставни савет није образложио те ставове, остало је нејасно које критеријуме Уставни савет примењује када одлучује шта припада а шта не припада уставном идентитету Француске.

Ако се из праксе Уставног савета не може установити шта је тачна садржина уставног идентитета, оно што се може утврдити јесте његов уздржан став у примени доктрине уставног идентитета у контексту европских интеграција (Millet 2019, 146). Одлука из 2017. године у којој је Уставни савет разматрао Свеобухватни економски и трговинског споразум између Канаде, с једне стране, и Европске Уније и њених држава чланица, с друге стране (CETA споразум),[27] сведочи у прилог о томе.[28]

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[24] Уставни савет, 2018–765 DC, 12. јун 2018, пара. 3, доступно на енглеском језику на *https://www.conseil-constitutionnel.fr/en/decision/2018/2018765DC.htm*, последњи приступ 8. јануара 2025.

[25] Directive 2001/51/EC of the Council of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187 of 10/7/2001, p. 45–46.

[26] Уставни савет, 2021–940 QPC, 15. октобар 2021, пара. 14–15, доступно на енглеском језику на *https://www.conseil-constitutionnel.fr/en/decision/2021/2021940QPC.htm*, последњи приступ 8. јануара 2025.

[27] Реч је о мешовитом споразуму који ступа на снагу кад га ратификују не само ЕУ него и све државе чланице.

[28] Уставни савет, 2017–749 DC, 31. јул 2017, пара. 13, доступно на енглеском *https://www.conseil-constitutionnel.fr/en/decision/2017/2017749DC.htm*, последњи приступ 8. јануара 2025.

Наиме, разматрајући уставност тог споразума у поступку претходне контроле уставности, Уставни савет је заузео став да доктрину уставног идентитета може да примењује да би утврдио да ли је Споразум усклађен са Уставом Француске само у односу на одредбе Споразума којима се утврђује искључива надлежност ЕУ. У том случају, његова улога се своди на испитивање усклађености тих одредаба са оним одредбама француског устава које су инхерентне њеном уставним идентитету, да би се установило да ли је измена устава потребна или није. Ако уставни идентитет није доведен у питање, „на судији Европске Уније је да надгледа усклађеност споразума са правом Европске Уније".[29] Према томе, непостојање јасног садржаја и могућност измене устава увек кад неки пропис ЕУ потенцијално угрожава вредности инхерентне уставном идентитету упућују на то да је постојање доктрине уставног идентитета у пракси Уставног савета више одраз његове намере да потврди своју, ионако ограничену надлежност, него жеље да се угрозе и успоре европске интеграције.

4.1.2. Пракса у Ирској

Ратификација CETA споразума била је и повод да Врховни суд Ирске у својој пракси, у пресуди *Costello v. Government of Ireland* из 2022. године, први пут развије појам уставног идентитета повезујући га, сасвим неуобичајено, са обавезом Ирске према праву ЕУ.[30] Све је почело када се Патрик Костело (*Patrick Costello*), припадник Зелене партије и члан Представничког дома ирског парламента, обратио Високом суду тражећи да се пресудом спречи ратификација CETA споразума. Високи суд је тужбу одбио наводећи да о ратификацији треба да одлучи Представнички дом Ирске.[31] Предмет је завршио пред Врховним судом Ирске, који је тесном већином (4:3) нашао да је жалба основана јер би се ратификацијом повредило начело суверености судске гране власти, имајући у виду да би механизам за спровођење одлука CETA трибунала (успостављен тим споразумом) ту суверености угрозио.[32] У већинском мишљењу такође се наводи да би ратификација могла бити у сагласности са уставом ако би се ирски Закон о арбитражи изменио тако

[29] Одлука 2017–749 DC, пара. 14.

[30] Врховни суд, *Costello v. Government of Ireland*, 11. новембар 2022, [2022] IESC 44.

[31] Високи суд, *Patrick Costello v. The Government of Ireland, Ireland and the Attorney General*, 16. септембар 2021, [2021 No. 1282 P.], пара. 179–180.

[32] *Costello v. Government of Ireland*, пара. 280.

што би се Високом суду омогућило да одбије да спроведе одлуке CETA трибунала које не би биле у складу са уставним идентитетом Ирске и са њеним обавезама према праву ЕУ.[33] Концепт уставног идентитета, који, према мишљењу Врховног суда, обухвата готово све вредности заштићене уставом – од демократије и суверенитета, до поделе власти, основних права и неприкосновеност устава у односу на уговорно право, заједно са обавезама Ирске према ЕУ, биле би тако основи за одбијање спровођења одлука CETA трибунала (Doyle 2023, 725–726).

И поред компилованог језика и штурог објашњења уставног идентитета, јасно је да се, бар у овом случају, Врховни суд Ирске није том доктрином послужио у сврху пружања отпора праву ЕУ (Barrett 2023, 3). То не значи да доктрина о уставном идентитету неће ипак некад послужити у ту сврху, и поред тога што је из поменуте одлуке тако нешто тешко закључити (Doyle 2023, 716). Могуће је, међутим, и то да је, као и француски Уставни савет, и Врховни суд Ирске у тој одлуци само желео да нагласи своју улогу у систему поделе власти јер се укључио у решавање проблема до тада, како је Високи суд закључио, у надлежности само владе и парламента. Имајући у виду да Ирска још није ратификовала тај споразум, изгледа да је у томе и успео.

4.1.3. Пракса у Италији

Најупечатљивији пример судског дијалога у којем је фигурирао концепт уставног идентитета јесте онај вођен између Суда правде и Уставног суда Италије у тзв. саги *Taricco*. Дијалог је иницирао Суд правде својим тумачењем садржаја одредбе члана 325 Уговора о функционисању Европске уније (УФЕУ). Тумачећи тај члан којим се државе чланице обавезују да се боре против превара и свих других незаконитих активности које утичу на финансијске интересе ЕУ, Суд правде је формулисао тзв. правило *Taricco* сходно којем је на националном суду да омогући пуну примену члана 325 УФЕУ не примењујући, по потреби, одредбе националног права које би имале учинак спречавања државе чланице да извршава обавезе према том члану УФЕУ (тзв. пресуда *Taricco I*).[34]

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[33] *Costello v. Government of Ireland*, пара. 236.

[34] CJEU, Case C-105/14, *Criminal proceedings against Ivo Taricco and Others*, ECLI:EU:C:2015:555, пара. 66. ст. 1. и 2. Пресуда о којој је реч донета је по захтеву италијанског редовног суда у претходном поступку, у вези са одредбама италијанског кривичног законодавства о застарелости, које су могле довести

Због тог става Суда правде, који јасно имплицира апсолутну примену начела супрематије права ЕУ, италијански судови су започели дебату о примени правила *Taricco* и покренули поступак пред Уставним судом Италије, захтевајући оцену његове уставности. То је Уставном суду дало иницијалну капислу да, у захтеву упућеном Суду правде, којим се од тог суда тражи да поново размотри домете и садржај правила *Taricco*, обнови стару идеју о уставном идентитету из предмета *Frontini*.[35] Том приликом је опрезним тоном истакао да је примена правила *Taricco* у супротности са начелом законитости који је основно начело својствено уставном идентитету Италије и уставним традицијама држава чланица.[36]

Поступајући по захтеву, у очигледно колегијалном духу, Суд правде је, у одлуци *M.A.S. and M.B.*, познатијој по називу *Taricco II*, преиначио правило *Taricco*, истичући да при доношењу одлуке *Taricco I* није био потпуно информисан о свим елементима италијанског уставног система. С тим у вези, Суд правде је закључио да се члан 325 УФЕУ треба тумачити тако да се правило *Taricco* неће применити у држави чланици ако таквом применом долази до повреде начела законитости, због непрецизности закона, као и ретроактивне примене законодавства којим се прописују строжи услови кривичног гоњења од оних који су били на снази у тренутку учињеног казненог дела.[37] Смисао таквог става нашао је у чињеници да је начело законитости начело заједничко уставним традицијама држава чланица,[38] избегавајући упућивање на концепт уставног идентитета, било држава чланица било ЕУ, и тумачење садржаја клаузуле националног идентитета предвиђене чланом 4 став 2 УЕУ. Према мишљењу неких аутора, Суд је том приликом пропустио шансу да се о садржају поменуте клаузуле јасно изјасни (Bruggeman, Larik 2020, 31).[39] Примењујући тумачење Суда правде у конкретном спору, Уставни суд Италије је ипак оставио могућност да оцењује уставност

до некажњавања осумњичених за организовање удружења ради извршења кривичних дела у области пореза на додату вредност у периоду од 2005. до 2009. године, што би аутоматски значило повреду финансијских прописа ЕУ.

35 Уставни суд, Ordinanza n. 24 del 2017, 23. новембар 2016, решење доступно на енглеском језику *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf*, последњи приступ 10. јануара 2025.

36 Ordinanza n. 24, пара. 1–2, 4, 7–9.

37 CJEU, Case C-42/17, *M.A.S. and M.B*, ECLI:EU:C:2017:936, пара 64.

38 *M.A.S. and M.B*, пара. 53.

39 Подсетићемо, концепт уставног идентитета ЕУ Суд правде је развио тек шест година касније у две идентичне пресуде које се тичу Пољске и Мађарске.

мера које буду донете у складу и са тако преиначеним правилом *Taricco*, сматрајући да је и у допуњеној верзији супротно уставном систему Италије, као и да се не може директно применити.[40]

Крај саге *Taricco* наводи на два закључака. Прво, иако се сусретљивост у заједничком дијалогу не може негирати, Уставни суд Италије ипак није томе дао примат (Amalfitano, Pollicino, 2018). Остао је на ставу да је на њему да одлучи, у складу са клаузулом националног идентитета, датој у члану 4 став 2 УЕУ, шта чини уставни идентитет Италије и шта га угрожава, без обзира на начело супрематије права ЕУ.[41] Сходно том суду, то произлази из начеле лојалне сарадње, у складу са којим, ЕУ и државе чланице, уз пуно узајамно поштовање, помажу једне другима у обављању задатака који произлазе из Уговора.[42] Друго, упадљив изостанак борбених нота у одбрани италијанског уставног идентитета у контексту европских интеграција сугерише да „лисабонска" клаузала националног идентитета, и када се тумачи као клаузула уставног идентитета, не мора да буде разорна по европске интеграције (Galimberti, Ninatti 2020, 441).

4.2. Офанзивно крцкање права ЕУ: „много буке ни око чега"?

4.2.1. Пракса у Чешкој

Уставни суд Чешке је у неколико наврата одбио да прихвати супрематију права ЕУ позивајући се, између осталог, и на уставни идентитет Чешке. Тако је, још 2006. године, тај суд нагласио да улогу чувара Устава задржава и да ће контролу уставности вршити увек када неки пропис ЕУ угрози темеље државног суверенитета или основна начела Устава која не могу бити предмет ревизије.[43] Основу за одлучивање о

[40] Уставни суд, 115/2018, 10. април 2018, G. U. 06/06/2018 n. 23, пара. 10–13, доступно на енглеском језику *https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf*, последњи приступ 10. јануар 2025.

[41] Вид. Ordinanza n. 24, пара. 6.

[42] Члан 4 став 3 УЕУ.

[43] Уставни суд, Pl. ÚS 50/04: *Sugar Quotas III*, 8. март 2006, пара. VI.A.-3, енглески превод је доступан на *https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2050–04.pdf*, последњи приступ 4. јануара 2025.

неуставним амандманима Суд је нашао у члану 9 став 2 Устава Чешке Републике којим се забрањује мењање основних постулата демократске државе, која се темељи на владавини права.

У јуриспруденцији тог суда реторика о уставном идентитету ипак је упечатљивија од самог његовог концепта. То је посебно видљиво у предмету *Holubec* (или *Slovak Pensions*), у којем је Уставни суд прогласио пресуду Суда правде у предмету *Landtová*, *ultra vires*.[44] Таквој одлуци је претходио спор између Врховног управног суда и Уставног суда Чешке о начину исплате пензија осигураницима бивше Чехословачке, након њеног распада. Ради заштите чешких држављана, Уставни суд је својом праксом установио право на увећање пензија, као допуну правила из споразума Чешке и Словачке о начину утврђивања износа пензија постојећих осигураника након распада Чехословачке.[45] Због уласка Чешке у ЕУ, поставило се питање усаглашености такве праксе са забраном дискриминације садржане у праву ЕУ, због чега се Врховни управни суд обратио Суду правде, који је неусаглашеност потврдио у предмету *Landtová*.[46] Проглашавајући ту одлуку Суда правде *ultra vires*, Уставни суд је истакао да Суд правде није упознат са уставним идентитетом Чешке, који она црпи из заједничке уставне традиције са Словачком, и да је неразликовање правних односа који настају распадом државе од правних односа насталих за потребе социјалне сигурности и слободе кретања у ЕУ непоштовање европске историје.[47] Како поједини аутори примећују, питање уставног идентитета у тој одлуци није толико било усмерено против Суда правде и права ЕУ већ је Уставни суд покушао да њоме„цементира положај у домаћој судској хијерархији“ у односу на Врховни управни суд (Zbíral 2012, 16; Maes 2024, 28). Штавише, иако је изгледало да је то револуционарна одлука због исказаног става према праву ЕУ, она ипак није уздрмала ауторитет права ЕУ у Чешкој (Capik, Petschko 2013, 76).

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[44] Уставни суд, Pl. ÚS 5/12: *Slovak Pensions*, 31. јануар 2012, енглески превод доступан је на *https://www.usoud.cz/en/decisions/2012–01–31-pl-us-5–12-slovak-pensions*, последњи приступ 2. јануара 2025.

[45] Видети, на пример, одлуку Уставног суда ÚS 252/04, 25. јануар 2005.

[46] CJEU, Case C-399/09, *Marie Landtová v. Česká správa socialního zabezpečení*, ECLI:EU:C:2011:415.

[47] *Slovak Pensions*, 13–14.

4.2.2. Пракса у Немачкој

Савезни уставни суд Немачке је, у пресудама које се тичу вођења монетарне политике ЕУ у околностима последње велике финансијске кризе, практично потврдио раније заузет став да је уставни идентитет Немачке имун на ефекте начела супрематије права ЕУ и да је одлучивање о садржају уставног идентитета Немачке у његовој искључивој надлежности.

Повод за прву пресуду била је Одлука Европске централне банке (ЕЦБ) из 2012. године о одређеним техничким карактеристикама директних монетарних трансакција (ОМТ) Евросистема за куповину државних обвезница на секундарном тржишту.[48] У поднетим уставним жалбама Савезном уставном суду истицано је да је том одлуком ЕЦБ прекорачила своја овлашћења и да је повредила демократско право на глас садржано у Основном закону, чиме је угрожен уставни идентитет Немачке.

Уставни суд је одбио да одлучује о уставним жалбама које су поднете директно против Одлуке ЕУ, али је прихватио надлежност за активности националних органа поводом те одлуке. Како се у току поступка поставило питање тумачења УФЕУ због спорне надлежности ЕЦБ, Суд је упутио Суду правде захтев за тумачење, инсистирајући и даље на концепту уставног идентитета развијеном у „*Маастрихт*“ и „лисабонској“ одлуци.[49] Оспоравајући овлашћења Евросистема да купује државне обвезнице, Савезни уставни суд је навео да то не значи само да је ЕЦБ деловала *ultra vires* него и да програм ОМТ може да делује на демократско одлучивање о националним буџетима, са могућим негативним ефектима по уставни идентитет Немачке.[50] У контексту наше дискусије у овом раду треба истаћи да је, образлажући свој став, Суд направио разлику између националних „темељних политичких и уставних система“ на које реферира клаузула националног идентитета из члана 4 став 2 УЕУ, с једне стране, и фундаменталних уставних вредности које чине језгро Основног закона, односно уставни идентитет Немачке, с друге стране. С тим у вези посебно је индикативно мишљење Суда да се контрола поштовања уставног идентитета, коју врши искључиво тај суд,

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[48] Technical features of Outright Monetary Transactions, *https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html*, последњи приступ 16. јануара 2025.

[49] Савезни уставни суд, Beschluss (решење) 2 BvR 2728/13, 14. јануар 2014, BVerfGE 134, 366–438.

[50] Beschluss 2 BvR 2728/13, пара. 36–43, 69, 80, 102.

суштински разликује од контроле из члана 4 став 2 УЕУ коју врши Суд правде, уочивши разлику између појмова националног идентитета и уставног идентитета:

> Дакле, провера идентитета коју врши Савезни уставни суд суштински се разликује од контроле из чл. 4 ст. 2 УЕУ коју врши Суд правде Европске Уније. Чл. 4 ст. 2 тач. 1 УЕУ обавезује институције Европске Уније да поштују националне идентитете. То се заснива на концепту националног идентитета који не одговара концепту уставног идентитета не само смислу чл. 79 ст. 3 Основног закона, него и више.

Сходно томе, Савезни уставни суд Немачке изричито је нагласио да фундаменталне вредности које чине уставни идентитет Немачке не могу бити подређене начелу супрематије права ЕУ и да је њихово тумачење у његовој искључивој надлежности.[51]

Игноришући наводе о уставном идентитету, Суд правде је потврдио оспорену надлежност ЕЦБ истичући да се програмом ОМТ спречавају даљи економски ризици. [52] Савезни уставни суд Немачке је тај став на крају прихватио, нашавши да се тиме не крши демократско право на глас нити угрожава буџетско право Бундестага.[53] Ипак, у одлуци којом је одговорио на уставне жалбе поводом програма ОМТ поново је нагласио ограничену примену начела супрематије права ЕУ у Немачкој, подвлачећи да уставни идентитет чини брану његовој апсолутној примени и да је ЕУ дужна да тај уставни идентитет поштује сходно члану 4 став 2 УЕУ.[54] Одлука је критикована не само због искључивог става суда у тумачењу клаузуле националног идентитета (Galimberti, Ninatti 2020, 437–438) него и због нејасног стила у образлагању контроле идентитета често обојене„митолошком представом о суверенитету и идентитету“, што ипак није довело до другачијег положаја тог суда у контексту европских интеграција (Payandeh 2017, 416).

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51 Beschluss 2 BvR 2728/13, пара. 29.

52 CJEU, Case C-62/14, *Peter Gauweiler v. Deutscher Bundestag*, ECLI:EU:C:2015:400.

53 Савезни уставни суд, 2 BvR 2728/13 u. a. (*OMT* одлука), 21. јун 2016, BVerfGE 142, 123–234, пара. 114.

54 Одлука *OMT*, пара. 188.

Концепт уставног идентитета поново се појавио у тзв. одлуци *PSPP* која је наговестила раскол у дијалогу између Савезног уставног суда Немачке и Суда правде.[55] Повод је била одлука ЕЦБ из 2015. године (која је измењена 2017) о програму куповине хартија од вредности јавног сектора на секундарним тржиштима (програм *PSPP*), која је донета због примећеног повећаног ризика на даљи ток кретања цена.[56] Поступак пред Савезним уставним судом поново је иницран уставним жалбама у којима се оспорава овлашћење ЕЦБ за доношење те одлуке и тврди да су активности немачке Централне банке у спровођењу те одлуке и пропуштање Савезне владе и Бундестага да јој се успротиве у супротности са начелом демократије, које чини уставни идентитет Немачке.

Раскол је почео подношењем захтева за покретање претходног поступка, у којем је Савезни уставни суд, осим питања која се тичу тумачења права ЕУ, а која су слична као у захтеву у вези са програмом OMT, истакао да је програм *PSPP* ризичан за савезни буџет јер се последице примене програма не могу са сигурношћу унапред проценити, због чега Бундестаг не може слободно да користи своје право на одлучивање о буџету, а то чини садржину уставног идентитета гарантованог чланом 79 став 3 Основног закона.[57] Уз сличну аргументацију као у пресуди поводом механизма OMT, Суд правде је у предмету *Weiss* закључио да ЕЦБ није прекорачила овлашћења јер се одлука о *PSPP* програму не може сматрати вођењем економске већ искључиво вођењем монетарне политике, да забрана пружања финансијске помоћи државама чланицама није повређена и да програм PSPP задовољава начело пропорционалности.[58]

Уследио је радикалан одговор Савезног уставног суда који је у одлуци *PSPP* прогласио одлуку ЕЦБ о програму *PSPP* и пресуду Суда правде у предмету *Weiss ultra vires*.[59] Том одлуком је поново потврдио да је ригидно схваћен демократски конституционализам, који чини уставни

[55] Савезни уставни суд, 2 BvR 859/15 u. a. (*PSPP* одлука), 5. мај 2020, BVerfGE 154, 17–152.

[56] Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1), OJ L 16 of 20/1/2017, p. 51.

[57] Савезни уставни суд, Beschluss 2 BvR 859/15 und andere, 18. јул 2017, BVerfGE 146, 216–293, вид. пара. 124, 129, 131.

[58] CJEU, Case C-493/17, *Heinrich Weiss and Others*, ECLI:EU:C:2018:1000.

[59] Одлука *PSPP*, пара. 117, 119.

идентитет Немачке, а који обухвата срж уставне демократије – суверености народа, демократска начела и право гласа, ван домашаја начела супрематије права ЕУ.[60]

Упркос заоштреном дијалогу судија, проблем је решен на политичком нивоу, резолуцијом немачког парламента којом је потврђена усаглашеност програма *PSPP* са одлуком *PSPP* Савезног уставног суда (Maes 2024, 26). Штавише, и поред офанзивне реторике о уставном идентитету, тај суд је у званичној изјави за медије нагласио да се неће противити мерама финансијске помоћи које је ЕУ усвојила да би ублажила кризу након пандемије вируса корона, иако су те мере биле врло сличне мерама којима се претходно противио (Anagnostaras 2021, 827–829).

4.3. Уставни идентитет: мера односа између правних поредака ЕУ и држава чланица

Пракса Суда правде у односу на члан 4 став 2 УЕУ и наведени примери из судске праксе националних судова држава чланица сведоче о релативном ауторитету националног уставног идентитета у односу на право ЕУ, више него о релативизацији начела супрематије права ЕУ због заштите уставног идентитета држава чланица.

С једне стране, национални идентитет представља ограничење ЕУ дато у УЕУ у односу на примену начела супрематије права ЕУ (Albanesi 2021, 109). Имајући у виду коме је упућена обавеза из члана 4 став 2 УЕУ, сложиле би се да је ЕУ ограничила примену начела супрематије, а тиме и свој аутономни поредак, у корист националног идентитета држава чланица у случајевима ниског интензитета који нису од примарног значаја за примену права ЕУ. То, међутим, не значи да је ЕУ тиме прихватила да, у сукобу уставног идентитета држава чланица и начела супрематије права ЕУ, уставни идентитет даје националним уставима карактер више норме у односу на право ЕУ.

С друге стране, наведени примери сведоче о томе да концепт уставног идентитета у пракси националних тела задужених за контролу уставности ипак није закочио или паралисао европске интеграције. Наиме, кључ за разумевање односа између ЕУ и држава чланица је идеја уставног плурализма која подразумева да у сукобу два правна поретка који паралелно постоје (нпр. ЕУ и државе чланице) не постоји хијерархијски однос већ да сваки поредак у сопственом оквиру признаје

[60] Одлука *PSPP*, пара. 101–108.

легитимитет оног другог (MacCormick 1999, 104). У контексту европских интеграција заснованих на уставном плурализму, уставни идентититет представља меру односно механизам за решавање питања односа између правних поредака ЕУ и држава чланица, који се уређује судским дијалогом. Другим речима, питање супериорне власти у контексту европских интеграција је отворено питање, које се решава у судском дијалогу између судија држава чланица и Суда правде, настојећи да тим дијалогом узајамно прилагоде два правна система, како би се неутралисали узајамни сукоби. Претходно понуђени примери из судске праксе сведоче у прилог томе.

Међутим, уставни судови у Мађарској и Пољској озбиљно су угрозили успостављену везу између уставног плурализма и уставног идентитета, злоупотребљавајући уставни идентитет у сврху одбране популистичких режима. О томе говоримо у наставку ове дискусије.

5. ЗЛОУПОТРЕБА УСТАВНОГ ИДЕНТИТЕТА У СВРХУ ОДБРАНЕ ПОПУЛИСТИЧКИХ РЕЖИМА

5.1. Кратак осврт на појам популизма

У досадашњем току наше дискусије неколико пута смо поменуле постојање популистичких режима у Мађарској и, донедавно, у Пољској, и њихов утицај на злоупотребу концепта уставног идентитета у тим државама. Пре него што наставимо дискусију, кратко ћемо објаснити карактеристике популистичких режима да би злоупотреба уставног идентитета била јаснија.

Дефинисати популизам је изазован задатак, с обзиром на то да расправа о томе шта је популизам и даље траје. Према речима Исака Берлина (*Isaiah Berlin*), то је концепт оптерећен синдромом Пепељуге – постоји ципелица („популизам“ као појам), али не и одговарајуће стопало (дефиниција) (Берлин 1967, 6). Разлог је у чињеници да се популизам дефинише контекстом у којем се појављује (Rasmussen 2019, 56), па самим тим може имати позитивну и негативну конотацију (Várady 2019). Концепт уставног идентититета у Мађарској и Пољској појавио се у контексту антидемократског популизма који се, из нормативне перспективе, сходно мишљењу Дејвида Расмусена (*David Rasmussen*), може дефинисати као одређена врста паразитске патологије која напада репрезентативну демократију (Rasmussen 2019, 56). Јан Вернер Милер (*Jan-Werner Müller*) то детаљније објашњава, истичући да је реч о политици заснованој на критици елита и антиплурализму (Müller 2017).

Милер сматра да је популистичка политика увек идентитетска зато што популисти тврде да само они представљају народ; то уједно значи да свако ко се са њима у политичком смислу не слаже није део „истинског“ народа већ корумпиране елите; пошто је искључив, популизам је као такав опасан по демократију (Müller 2017, 2–3).

Враћајући се на предмет дискусије у овом раду, треба истаћи да су Мађарска и Пољска дуже време биле, или су то још увек, перципиране као прве недемократске државе чланице ЕУ. Популистички режими у обе земље упорно су радили на ерозији онога што су Розалин Диксон (*Rosalyn Dixon*) и Дејвид Ландау (*David Landau*) назвали „демократским минимумом“, који обухвата слободне и поштене изборе, поделу власти, заштиту људских права и одговорност владе за свој рад (Landau, Dixon 2020, 1323). У сврхе овог рада треба истаћи да, у условима таквог назадовања демократије (*democratic backsliding*), одговори уставног судства могу бити тројаки: уставно судство се може одупрети популистичком режиму, може га подупирати или остати само пасивни посматрач популистичке политике (Hailbronner, Landau 2017). Након бруталне измене састава уставних судова у Мађарској (Bodnár 2022) и Пољској (Matczak 2019) у режији популистичких влада, уставни судови Мађарске и Пољске показали су низом одлука да припадају групи судова који подржавају популистичку политику, попут Врховног суда Венецуеле или Врховног суда САД за време првог мандата председника Трампа (Бешировић 2019, 194). О томе сведоче, између осталих, и одлуке које се тичу уставног идентитета.

5.2. Уставни идентитет у одбрани идентитетске политике у Мађарској

Злоупотребом концепта уставног идентитета и инструментализацијом клаузуле националног идентитета из члана 4 став 2 УЕУ, Уставни суд Мађарске је развио доктрину уставног идентитета да би ограничио примат права ЕУ са циљем заштите идентитетске политике популистичког режима.

Према мишљењу тог суда, национални идентитет је природно уграђен у устав сваке државе: „дефиниција националног идентитета државе је по правилу најосновније и неотуђиво право државе и њене конститутивне политичке заједнице, које се првенствено, али не искључиво, огледа у њеном уставу. Због тога је примерено да политичка заједница једне државе у устав, кроз конститутивну власт, уне-

се одређене елементе националног идентитета државе".[61] Полазећи од тог става, природно би било очекивати да Уставни суд уставном идентитету дâ уобичајени смисао института који је инхерентан Основном закону, који уједињује све припаднике политичке заједнице и говори о правним достигнућима Мађарске. Међутим, уставни идентитет у пракси тог суда, а затим и у VII амандману на Основни закон, усвојен као парадигма те праксе, упечатљиво од тога одступа. Створен на таласима популизма, уставни идентитет постоји изван устава, хијерархијски је супериорнији у односу на устав и укључује само припаднике мађарске нације повезане са хришћанском културом. Како се то догодило?

Све је почело намером тада и сада владајућег популистичког режима у Мађарској да се супротстави мигрантској политици ЕУ, прецизније одбијањем мађарске владе да прихвати политику премештања мигранта на основу квота коју је ЕУ усвојила 2015. године за време тзв. мигрантске кризе.[62] У намери да оправда одбијање, влада је 2016. године иницирала измену устава и предложила амандман на Основни закон, којим је у његовој преамбули прецизирано да се уставни идентитет Мађарске темељи на историјском уставу, потом намеће обавеза свим државним органима да штите мађарски уставни идентитет и на крају забрањује настањивање страног становништва у Мађарској (Halmai 2018, 28–29). За његово усвајање је била потребна двотрећинска већина у парламенту, зато што мађарски устав припада групи тзв. меких устава који се усвајају и мењају само у парламентарној процедури, без обавезе одржавања референдума. Амандман ипак није усвојен јер у то време потребне двотрећинске већине није било.

Иницијативу за спас идентитетске политике зато је преузео Уставни суд узимајући изненада у разматрање захтев омбудсмана, поднет годину дана раније, којим је тражено тумачење члана Е Основног закона о приступању и сарадњи Мађарске са ЕУ (Bárd, Chronowski, Fleck 2023, 620).[63] У одлуци донетој 2016. године Уставни суд је конструисао уставни идентитет као самодефинишућу вредност која је постојала пре

[61] Уставни суд, 32/2021. (XII. 20.) AB, 7. децембар 2021, пара. 95.

[62] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248 of 24/9/2015, p. 80–94.

[63] Члан Е (2) Основног закона гласи: „У циљу учешћа у Европској Унији, као држава чланица Мађарска може, на основу међународног уговора, да у обиму неопходном за остваривање права и испуњавање обавеза утврђених оснивачким уговорима, врши неке од својих надлежности које произилазе из Основног закона заједно са другим државама чланицама, преко институција Европске Уније."

и постоји независно од мађарског устава, коју устав не ствара него је само препознаје.[64] Потом, у одлуци из 2021. године тако конструисан уставни идентитет је искоришћен као основа која омогућава Мађарској да у области подељених надлежности делује пре него што ЕУ почне да врши надлежности или их врши на начин који не обезбеђује ефикасну примену права ЕУ, под изговором да то нарушава њен уставни идентитет.[65] Такав став Суда противан је праву ЕУ јер државе могу да делују у областима подељене надлежности само ако ЕУ није почела да делује или је одлучила да престане да врши своју надлежност (Бешировић 2023, 137). Ставови мађарског Уставног суда о уставном идентитету представљају својеврстан *carte blanche* влади да увек кад јој то одговара прогласи да су прописи ЕУ донети у областима подељене надлежности непримењиви у Мађарској.

5.2.1. Уставни идентитет као резултат антимигрантске политике

Сходно члану Е Основног закона, који представља својеврстан „Европа" члан, Мађарска у оквиру ЕУ неке од својих надлежности може да врши заједно са другим државама чланицама путем институција ЕУ. У захтеву којим је тражио тумачење члана Е, омбудсман је поставио питање да ли би пребацивање 1.294 особе из Италије и Грчке у Мађарску на основу одлуке Савета ЕУ представљало кршење уставне забране о колективном протеривању без обзира на то што трансфер спроводи друга држава.[66] Након што је указао на постојећу праксу уставних или врховних судова држава чланица у вези са преношењем надлежности на ЕУ, Уставни суд Мађарске прихватио је надлежност и објаснио да „по релевантном захтеву и у току вршења својих надлежности [Уставни суд, *прим. наша*] може у крајњем случају, поштујући уставни дијалог међу државама чланицама, преиспитати да ли се заједничким вршењем надлежности са другим државама чланицама ЕУ или институцијама ЕУ нарушава људско достојанство, или друго индивидуално право, суверенитет Мађарске или њен уставни

[64] Уставни суд, 22/2016. (XII. 5.) AB, 30. новембар 2016.

[65] Вид. Одлуку 32/2021.

[66] Члан XIV Основног закона гласи: „(1) Мађарски држављани не могу бити протерани са територије Мађарске и могу се вратити у било које време. Странци који се налазе на територији Мађарске могу бити протерани само на основу законите одлуке. Забрањено је колективно протеривање. (2) Нико не може бити протеран или изручен држави у којој би био у опасности да буде осуђен на смрт, мучење или подвргнут другом нечовечном поступању или кажњавању."

идентитет заснован на историјском уставу државе".[67] Вршење заједничких надлежности у контексту европских интеграција условљено је, према томе, изостанком кршења људских права, суверенитета или уставног идентитета Мађарске.

Конструишући први пут доктрину уставног идентитета, Уставни суд је навео да је реч о идентитету који постоји изван устава и не садржи затворену листу статичких и непромењивих вредности.[68] Према мишљењу Суда, појединачне вредности које чине уставни идентитет, као што су слобода, подела власти, република као облик државе, поштовање аутономије јавног права, слобода вероисповести, вршење легитимне власти, парламентаризам, једнакост права и судска власт, достигнућа су мађарског историјског устава, на којем почива Основни закон и целокупан мађарски правни систем.[69] Потреба заштите уставног идентитета, истиче тај суд, може се појавити у случајевима који утичу на животне услове појединаца, нарочито на приватност и личну и социјалну сигурности, на одговорност за доношење одлука заштићену основним правима, као и у случајевима који се односе на лингвистичке, историјске и културне традиције Мађарске.[70]

Том одлуком Уставни суд је успоставио и основе за тумачење уставног идентитета истичући да се тумачење врши од случаја до случаја, на основу целокупног Основног закона, његове сврхе, преамбуле и достигнућа мађарског историјског устава.[71]

Чим је владајући режим на новим изборима 2018. године поново освојио двотрећинску већину у парламенту, искористио је наведене ставове Уставног суда да предложи VII амандман на Основни закон, који је и усвојен, а којим је уставни идентитет уграђен у уставни документ (Gardos-Orosz 2021, 1340–1341). Формулација VII амандмана указује на недвосмислену супериорност уставног идентитета у евентуалном сукобу мађарског са другим правним системима, укључујући и право ЕУ:

Члан Р

(1) Основни закон је основа правног система Мађарске.

(2) Основни закон и закони су обавезујући за све.

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67 Одлука 22/2016, пара. 46.

68 Одлука 22/2016, пара. 64–65.

69 Одлука 22/2016, пара. 65.

70 Одлука 22/2016, пара. 66.

71 Одлука 22/2016, пара. 64.

> (3) Одредбе Основног закона тумаче се у складу са њиховом сврхом, националним заветом [преамбулом, *прим. наша*] садржаним у њему и достигнућима нашег историјског устава.
>
> (4) Заштита уставног идентитета и хришћанске културе Мађарске обавеза је сваког државног органа.

Уставни суд је наставио да развија доктрину уставног идентитета у одлуци из 2021. године да би учврстио популистичку политику која се тицала азиланата и која је била супротна праву ЕУ. Тадашња влада је поднела захтев за тумачење Основног закона због пресуде Суда правде из 2020. године којом је тај суд утврдио да је Мађарска прекршила прописе ЕУ о азилу и азилантима тзв. праксом враћања (*the push-back practice*) свих држављана трећих држава који илегално бораве на територији Мађарске, без поштовања гаранција предвиђених релевантним правом ЕУ.[72] У владином захтеву се тврдило да због те одлуке Суда правде Мађарска губи контролу над становништвом, што представља тешку повреду уставног идентитета државе (Bárd, Chronowski, Fleck 2023, 622).

У одлуци по том захтеву Уставни суд је убио две муве: прво, избегао је сукоб са Судом правде одбијајући да подвргне контроли његову пресуду, наводећи да пресуде тог суда не подлежу апстрактној контроли уставности, као и да наведени случај не захтева разматрање начела супрематије права ЕУ.[73] Друго, подупро је владину политику у односу на тражиоце азила закључујући да заједничко вршење надлежности са другим државама чланицама ЕУ, предвиђено чланом Е Основног закона, мора бити у складу са захтевом заштите основних права и не сме да ограничава неотуђиво право Мађарске да утиче на њено територијално јединство, становништво, облик владавине и организацију државе, што је одлика њеног уставног идентитета.[74] Према мишљењу Уставног суда, Мађарска може да делује у области подељених надлежности пре него што ЕУ почне да врши надлежности, онда када их ЕУ врши на начин који не обезбеђују ефикасну примену права ЕУ или онда када вршење подељених надлежности негативно утиче на описане прерогативе државе.[75]

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[72] Вид. Одлуку 32/2021.

[73] Одлука 32/2021, пара. 21, 63.

[74] Одлука 32/2021, пара. 110.

[75] Одлука 32/2021, пара. 79–80.

5.2.2. „Међу јавом и мед сном": извори и хијерархијски статус уставног идентитета у правном систему Мађарске

Теоретичари који се баве изучавањем уставног идентитета, и они који сматрају да је уставни идентитет недовољно прецизан појам, погодан за манипулацију и они који га оправдавају и сматрају неизбежним у теорији уставног права, слажу се у једном: Уставни суд Мађарске не само да је погрешно интерпретирао изворе, садржај и сврху уставног идентитета него је тај појам и злоупотребио, проширујући га и дајући му јачу правну снагу у односу на устав, у сврху подупирања идентитетске политике популистичког режима (Halmai 2018; Fabbrini, Sajó 2019; Kelemen, Pech 2019; Gardos-Orosz 2021; Bárd, Chronowski, Fleck 2023; Faraguna 2024; Scholtes 2023; Maes 2024). Према нашем мишљењу, следећих неколико разлога говори у прилог томе.

Прво, мађарски Уставни суд стао је на становиште да уставни идентитет није инхерентан уставу већ да постоји независно од њега. Устав, то јест Основни закон, према мишљењу тог суда, не ствара уставни идентитет него га само препознаје као фундаменталну вредност која постоји пре устава. Као такав, заснован је на историјском уставу. Сходно томе, Основни закон је схваћен само као инструмент који увезује Мађарску у политичку заједницу на основу уставног идентитета који потиче из историјског устава. Због тога је уставни идентитет хијерархијски надређен Основном закону, што је сасвим неуобичајени став у теорији уставног права. Уобичајено је да изнад устава, с обзиром на то да га усваја уставотворац који је суверен, нема вредности чија су правила супериорнија од устава. Тиме је Уставни суд Мађарске обезбедио простор за манипулацију приликом утврђивања шта је уставно а шта је неуставно, с обзиром на то да га не обавезују оно што у Основном закону пише.

Друго, поставља се питање како мађарски Уставни суд објашњава историјски устав. Осим што повремено указује на његова одређена достигнућа, Уставни суд нити даје његову дефиницију нити га објашњава. Мађарски аутори истичу да је реч о нејасном, чак измишљеном концепту, чије је постојање дискутабилно, као и његова природа, и о којем не постоји консензус међу уставним теоретичарима (Halmai 2018; Gardos-Orosz 2021; Bárd, Chronowski, Fleck 2023). Претпоставка је да тај појам обухвата бројне законе, краљевске повеље, доктрине и обичаје почевши од IX века. Ту се посебно издваја доктрина о светој круни која је доминирала међу теоретичарима који су се у периоду од XIII до XX века бавили проучавањем суверенитета, државе и јавног права (Bárd, Chronowski, Fleck 2022, 3–7). Они који оспоравају постојање историјског

устава истичу да је тај концепт, ако је икад постојао, престао да постоји након II светског рата, када је усвајање првог писаног устава сигнализирало комплетан раскид са уставном историјом Мађарске (Bárd, Chronowski, Fleck 2022, 7), односно да је природа хиљадугодишње историје уставности Мађарске углавном ауторитарна (осим у ретким периодима, као што је онај након пада берлинског зида), па да је, самим тим, реч о концепту који није комплементаран уставној демократији (Halmai 2018, 41). С друге стране, постоје аутори који наводе да Основни закон, усвојен од политичког режима 2011. године, када је престао да важи Устав из 1948, представља мост између данашње републике као форме уставне владавине и периода историјског устава (Schweitzer 2013, 128).

Било како било, због мноштва нејасноћа, став Уставног суда сходно којем уставни идентитет почива на историјском уставу спречава могућност преиспитивања те прошлости јер се, да подсетимо, уставни идентитет обликује континуираним редефинисањем вредности које га чине. При томе, ослањање на прошлост, односно да позајмимо Флечеров израз, „загледање у правну традицију", само по себи није проблем; питање је само каква је та традиција и шта се из ње издваја уколико се инсистира да је она основ за тумачење уставног документа данашње генерације. Другим речима, давање на значају историјском уставу чији су концепт и садржина спорни отвара могућност легитимисања ауторитарне политике популистичког режима.

Треће, да је Уставни суд злоупотребио појам уставног идентитета у сврхе подршке владајућем режиму, говори и веза коју је тај суд успоставио између суверенитета и уставног идентитета. С обзиром на то да устав не ствара него само препознаје уставни идентитет, сходно мишљењу Уставног суда, Мађарска се не може одрећи свог идентитета путем међународног уговора. Ако би то урадила, то би уједно значило да се одриче свог суверенитета, а самим тим и своје независне државе. Дакле, уставни идентитет је нераскидиво повезан са суверенитетом државе, тачније уставни идентитет је инхерентан суверенитету а не уставу. С тим у вези, мађарски суд је истакао да се уставни идентитет манифестује у суверeном акту усвајања устава.[76] Ако се пође од тога да се у преамбули Основног закона наводи да га доносе припадници мађарске нације, онда веза између уставног идентитета и суверенитета коју је установио Уставни суд указује на то да се уставни идентитет своди на радикализован национални идентитет – идентитет мађарске нације, који претходи држави. Дакле, то је затворен а не инклузиван

[76] Одлука 32/2021, пара. 21, 99.

концепт уставног идентитета, који не уважава ограничења и премисе конституционализма на којима почива уставна демократија него инсистира на хомогености мађарске нације, баш као и сам премијер Орбан (*Viktor Orbán*), који је у изјави из 2017. године истакао да је „очување етничке хомогености веома важно" (Halmai 2018, 36 фн 44).

Подсетићемо да без обзира на то што постоје различите дефиниције уставног идентитета, о којима смо претходно говориле, свака инсистира на томе да уставни идентитет уједињује, односно интегрише све припаднике једне политичке заједнице. Концепт који је развио Уставни суд Мађарске одступа од тога јер је установљен као употребна вредност у пружању отпора европским интеграцијама. У прилог тој тези говоре и наводи Уставног суда о томе да је заштита суверенитета и уставног идентитета задатак Уставног суда све док је Мађарска суверена држава.[77] Инспирацију за такав став нашао је у претходно разматраној „лисабонској" одлуци Савезног уставног суда Немачке, занемарујући чињеницу да, за разлику од немачког Основног закона, мађарски Основни закон не садржи тзв. клаузулу вечности која представља ограничење за преношење надлежности на ЕУ, као и то да је појам уставног идентитета у Немачкој развијен ради заштите људских права, а не њихове ерозије у сврху антимигрантске политике владајућег режима. Према томе, Уставни суд Мађарске је инструментализовао доктрину уставног идентитета да би спречио примену права ЕУ увек када је то право у супротности са ауторитарним тенденцијама популистичког режима.

5.3. Злоупотреба уставног идентитета у одбрани правосудне реформе у Пољској

5.3.2. Први чин: уставни идентитет у раним јадима бившег режима

Злоупотреба уставног идентитета којој је прибегао Уставни суд Пољске у сврхе подупирања популистичке политике наставак је, као и у Мађарској, режимског ослањања на тај институт, али не са циљем спровођења антиимиграционе политике већ ради сламања независности судске власти.[78] Са тим циљем, интервенције владајућег режима обухватале су (ноћни) упад у уставни суд, промене у саставу судова и злоупотребу процеса именовања (*court packing*), дисциплинско

[77] Одлука 22/2016, пара. 67.

[78] Овај део рада се делимично ослања на Бешировић 2025.

кажњавање судија, превремено пензионисање судија, суспендовање делотворних судских механизама, а посредно и дестабилизацију система европског налога за хапшење (Bogdanowicz, Taborowski 2020; Kochenov, Scheppele, Grabowska-Moroz 2020; Gajda-Roszczynialska, Markiewicz 2020; Bogdanowicz 2020; Бешировић 2022).

Нашавши се на ветрометини, пољски судови су се окренули Суду правде и у претходном поступку, у којем се одвија дијалог европских судија у сврхе тумачења права ЕУ, тражили његово реаговање на урушавање уставног начела владавине права и уставом прокламоване судске независности. У томе им се, у неколико наврата, прикључила и Европска комисија, покрећући низ поступака пред Судом правде против Пољске због повреда права ЕУ.[79] Штавише, фронтални напад бившег режима на пољско правосуђе приморао је ЕУ да први пут у својој историји активира санкције милитантне демократије сходно члану 7 став 1 УЕУ.[80] Да подсетимо, поступак предвиђен у том члану има циљ да дисциплинује државе чланице које озбиљно и континуирано подривају основне уставне вредности из члана 2 УЕУ, укључујући демократију и владавину права, тако што се оне искључују из процеса гласања у Савету ЕУ (Besselink 2017, 128–144; Бешировић 2022, 85–86). Покрећући тај поступак Европска комисија је истакла да активности тадашње пољске владе у погледу правосуђа „[представљају] јасан ризик од озбиљног кршења владавине права од стране Републике Пољске из члана 2 УЕУ".[81] Најзад, илустративна је и чињеница да је Суд правде изрекао казну Пољској од милион евра дневно за непоштовање привремене мере коју је изрекао, којом је Пољска обавезана да распусти Дисциплинско веће Врховног суда и да основано кажњава режиму непослушне судије (Scheppele 2023, 146).[82]

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[79] Вид. нпр. CJEU, Joined cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v. Sąd Najwyższy (прев. Врховни суд)*,EU:C:2019:982*)*,(независност дисциплинског већа); CJEU, C-824/18, *A.B. and Others*, ECLI:EU:C:2021:153, (именовање судија Врховног суда); CJEU, C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531 (независност правосуђа, независност Врховног суда, смањење судијама границе за пензију по основу година); CJEU, C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, (некомпатибилност режима судске дисциплинске одговорности).

[80] European Commission (EC) Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland, Brussels of 20/12/2017 COM (2017) 835 final (EC Reasoned Proposal).

[81] EC Reasoned Proposal.

[82] CJEU, Case C-204/21 R, *Order of the Vice-President of the Court of 27 October 2021*, *European Commission v. Poland*, EU:C:2021:878.

Прва реакција бивше пољске владе на покретање поступка по члану 7 УЕУ уследила је 2018. године. На налазе Европске комисије пољска влада је одговорила у форми беле књиге (*White Paper*), указујући на то да ЕУ није надлежна да се меша у реформу правосуђа у Пољској, имајући у виду да је уставни идентитет државе, који произлази из Устава Пољске, ограничио могућност преношења надлежности на ЕУ, укључујући и уређење правосудног система.[83] Према мишљењу тадашње владе, могуће разлике између држава чланица ЕУ у систему правосуђа произилазе управо из националног уставног идентитета:

> Правни систем Европске Уније заснива се на уставном плурализму држава чланица. [...] Свака држава има специфична уставна решења која су укорењена у њеној историји и правној традицији и ове разлике су заштићене уговорним правом Европске Уније. [...] Уставни идентитет, суштинска вредност сваке националне заједнице, одређује не само најосновније вредности и у складу са њима задатке државних органа, већ и поставља границу регулаторне интервенције Европске Уније.[84]

Да би овај закључак поткрепио, владајући режим злонамерно је тумачио релевантну јуриспруденције немачког Савезног уставног суда о уставном идентитету и јуриспруденцију Суда правде о националном идентитету држава чланица, истичући само ставове ових судова који су ишли у прилог његовом схватању уставног идентитета, а изостављајући оне које нису.[85]

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[83] White Paper on the Reform of the Polish Judiciary, The Chancellery of the Prime Minister, 7/3/2018.

[84] White Paper, пара. 169–170.

[85] White Paper, пара. 171–183.

5.3.2. Други чин: судски ветар у леђа популистичком отпору праву ЕУ

Ноторном одлуком из 2021. године, познатој по свом броју К 3/21, Уставни суд Пољске је, злоупотребљавајући институт уставног идентитета, не само значајно нарушио независност судске гране власти, већ се и директно супротставио начелу супрематије права ЕУ, проглашавајући примат Устава Пољске над целокупним правом ЕУ.[86]

Истине ради, треба истаћи да је, и пре него што је популистички режим извршио удар на пољско правосуђе, уставни идентитет заузимао истакнуто место у јуриспруденцији Уставног суда која се тицала европских интеграција. О томе најбоље говоре ставови Суда у одлуци о ратификацији Уговора из Лисабона из 2010. године.[87] Прво, ослањајући се на одлуке Савезног уставног суда Немачке базиране на аргументу суверенитета, које су се тицале Уговора из Мастрихта и Уговора из Лисабона, Уставни суд дефинисао је уставни идентитет такође као манифестацију суверенитета Пољске: „[...]у светлу којег се суверенитет Републике Пољске изражава у неотуђивим надлежностима државних органа, које чине уставни идентитет државе.“[88] Друго, Суд је нашао да обавеза очувања уставног идентитета произлази из члана 90. став 1. Устава који предвиђа ограничену могућност преношења надлежности на међународне организације, очигледно сматрајући да то укључује и ЕУ.[89] Треће, према Уставном суду, надлежности важне за ову дискусију, укључујући надлежности које се тичу начела правне државе, начела субсидијарности и надлежности за утврђивање надлежности (тзв. *Kompetenz-Kompetenz*) не могу се преносити на ЕУ. [90]

У поменутој одлуци К 3/21, реагујући на конфликт између правног система Пољске и права ЕУ, да би оспорио примат права ЕУ, Уставни суд се, уместо позивања на суверенитет, позива на уставни идентитет и проглашава чланове 1, 2, 4. став 3, и 19. став 1. УЕУ противним Уставу Пољске, у суштини зато што наведене норме УЕУ дозвољавају националним судијама да, у складу са јуриспруденцијом Суда правде о

[86] Уставни суд, Ref. No. K 3/21, 7. октобар 2021, на енглеском језику доступна на *https://trybunal.gov.pl/en/ hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej*, последњи приступ 14. јануара 2025.

[87] Уставни суд, Ref. No. K 32/09, 24. новембар 2010, на енглеском језику доступна на *http://www.europeanrights.eu/public/sentenze/Polonia-24novembre2010.pdf*, последњи приступ 8. јануара 2025.

[88] Одлука К 32/09, 22.

[89] Одлука К 32/09, 23.

[90] Одлука К 32/09, 22–23.

гаранцијама независног судства, преиспитују гаранције независности пољских судова, што не спада у надлежности које су поверене ЕУ.[91] Пре него што детаљније анализирамо ову одлуку, потребне су две напомене.

Прво, одлука је донета као одговор на одлуку Суда правде о изменама закона о поступку именовања судија Врховног суда Пољске којом је Суд правде нашао да измене могу да доведу то кршења права ЕУ због изостанка ефикасног механизма судске контроле над одлукама Националног савета судства, који би требало да води поступак, и до повреде члана 267 УФЕУ, ако би Суд правде био спречен да врши своју надлежност у претходном поступку.[92] Суд правде је посебно истакао да начело супрематије права ЕУ обавезује национални суд да не примени законодавне измене којима се крши право ЕУ.[93]

Друго, треба имати у виду да је два месеца пре него што је Уставни суд донео одлуку у предмету К 3/21 којом је утврдио да је УЕУ делимично супротан Уставу Пољске, Европски суд за људска права заузео став да се Уставни суд Пољске не може сматрати легитимним судом сходно члану 6(1) Европске конвенције за заштиту људских права и основних слобода, с обзиром на то је у његовом одлучивању учествовао судија који је незаконито изабран на судијску функцију.[94] Сходно томе, сложиле бисмо се са мишљењем Димитри Коченова (*Dimitry Kochenov*) да се одлука К 3/21 може сматрати формално незаконитом (Kochenov 2021).

Погледајмо сад злоупотребу уставног идентитета у тој одлуци. Да поновимо: узимајући у обзир да су организација и функционисање националног правосуђа били подвргнути стандардима ЕУ, Уставни суд је закључио да су чланови 1, 2, члан 4 став 3 и члан 19 став 1 УЕУ некомпатибилни са пољским Уставом у мери у којој дозвољавају Суду правде да преиспита организацију и структуру правосудног система државе чланице, а националним судовима да заобиђу одредбе пољског Устава примењујући право ЕУ. У чему се огледа злоупотреба уставног идентитета? Подсетимо на став тог суда у „лисабонској" одлуци да се „надлежности, чије је преношење забрањено на међународне организације, манифестују у уставном идентитету и стога одражавају вредности на којима се Устав заснива".[95] Имајући то у виду, у одлуци

[91] Вид. Одлуку К 3/21, пара. 1–3.

[92] Вид. *A.B. and Others*.

[93] *A.B. and Others*, пара. 140–150.

[94] EctHR, *Xero Flor w Polsce sp. z o. o. v. Poland*, Appl. No. 4907/18, пара. 289–291.

[95] Одлука К 32/09, 22–23.

К 3/21 Уставни суд је заузео став да организација и функционисање правосудног система припадају језгру уставног идентитета које се не може пренети на међународну организацију нити може бити предмет контроле Суда правде. О којим надлежностима је овде реч?

Прво, треба имати у виду да је доношење поменуте одлуке имало циљ да се предложена овлашћења председника Републике и Националног савета судства у процесу именовања судија очувају. Због тога је Уставни суд нагласио да је мешање Суда правде у правосудни систем у Пољској било у супротности са уставним одредбама о надлежностима националних органа у поступку именовања судија.[96] Друго, према мишљењу Уставног суда, такво мешање је нарушило уставне одредбе које обезбеђују независност судства јер је требало да судије буду подвргнуте само Уставу и законима, али не и праву ЕУ.[97] Треће, подупирући отпор тадашње владе Пољске праву ЕУ, Уставни суд је навео да праксу Суда правде није требало схватити као основу пољским судовима да ставе ван снаге домаће законе које је Суд правде сматрао некомпатибилним са чланом 19 став 1 УЕУ (владавина права), због тога што је то овлашћење у супротности са уставним начелом владавине права.[98] Према мишљењу Уставног суда, главни извор такве неуставне праксе произлази из члана 1 УЕУ, који је омогућио нову фазу у европским интеграцијама дајући нове надлежности Суду правде које превазилазе оне које су поверене ЕУ.[99] Сходно томе, Уставни суд је закључио да је члан 1 УЕУ у супротности са члановима 2, 8 и 90 Устава Пољске, у којима се Република Пољска дефинише као демократска држава, њен устав проглашава највишим правним актом и ограничава могућност преношења надлежности на ЕУ.[100] Укратко, независност правосуђа се уређује националним законодавством, заснованим на уставном идентитету. Због тога, с обзиром на то да је обавеза ЕУ, дефинисана у члану 4 став 2 УЕУ, да поштује националне идентитете држава чланица, њен задатак није да се, под маском владавине права гарантоване у члану 2 и члану 19 став 1 УЕУ, меша у начин на који Пољска организује своје правосуђе.

[96] Одлука К 3/21, пара. 3; вид. Устав Пољске, члан 179 у вези са чланом 144 став 3 тач. 17 и чланом 186 став 1.

[97] Одлука К 3/21, пара. 2; вид. Устав Пољске, члан 178 став 1.

[98] Одлука К 3/21, пара. 2; вид. Устав Пољске, члан 7.

[99] Одлука К 3/21, пара. 1.

[100] Одлука К 3/21, пара. 1.

5.3.3. Трећи чин: шта је „труло" у одлуци К 3/21?

Приступ Уставног суда Пољске концепту уставног идентитета двоструко је манипулативан. Прво, проблематичан је приступ Суда питању шта чини национални уставни идентитет. Да подсетимо, када су десничарски популисти дошли на власт 2015. године, важио је Устав усвојен 1997. године, који и данас важи. За разлику од мађарских популиста, пољски популистички режим није мењао постојећи устав нити је покушао да донесе нови. Утемељен на либералним вредностима, тај уставни оквир предвиђа уобичајене протагонисте начела поделе власти, са судском као посебном граном власти, независном од друге две гране власти. У Уставу је тако прецизирано да су „судије у вршењу своје функције независне и подложне само Уставу и законима".[101] У разматраној одлуци К 3/21 Уставни суд је такав статус судске власти прихватио, али само да би прекинуо сарадњу са Судом правде, као да је Суд правде тај који угрожава независност правосуђа у Пољској. Штавише, како би спречио пољске судове да примењују националне закона које је Суд правде сматрао некомпатибилним са гаранцијом владавине права из члана 19 став 1 УЕУ, Уставни суд је селективно и манипулативно тумачио уставну гаранцију владавине права, сматрајући да владавина права обавезује судове да поступају само у складу са уставом и законом, искључујући чињеницу да је и право ЕУ „закон" који обавезује Пољску. Истовремено, прецизирајући које релевантне одредбе чине језгро уставног идентитета, Уставни суд је занемарио чињеницу да уставна одредба којом се прецизира значење владавине права у смислу да „органи јавне власти функционишу на основу и у оквиру граница закона"[102] – намеће обавезе и политичким органима власти, а не само судовима.

Према томе, уставни идентитет није схваћен као манифестација конституционализма већ обрнуто, као инструмент којим се уништава однос између устава и конституционализма. Како смо раније нагласиле, у уставним демократијама уставни идентитет се не може одвојити од нормативних идеала конституционализма. Уставни суд је пропустио да нагласи да владавина права обавезује све носиоце власти, а не само правосуђе. Постоји још један проблем. Пратећи поменуту Трипковићеву поделу на опште и посебне аспекте уставног идентитета, може се закључити да се владавина права, као општи аспект уставног идентитета, не може напустити зарад специфичности пољског друштва које

[101] Устав Пољске, члан 178 став 1.

[102] Устав Пољске, члан 7.

формирају специфичне аспекте уставног идентитета. Међутим, то у овом случају и није ни био проблем. Реформа правосуђа је остварена законима а не уставним амандманима, па се због тога не може посматрати као део специфичног уставног идентитета Пољске који би могао да надјача опште елементе уставног идентитета, укључујући и владавину права. Другим речима, Уставни суд је превидео да у контексту европских интеграција Пољска може да бира начин на који ће устројити и организовати правосудни систем, али да у изабраном систему судије морају да буду независне и непристрасне.

Друга врсте манипулације којој је прибегао Уставни суд огледа се у његовом ставу да су право ЕУ и пољски уставни систем два одвојена режима владавине права, између којих нема додирних веза. Тај погрешан закључак први пут се појавио у поменутој „лисабонској" одлуци Уставног суда, када је тај суд закључио да се неке надлежности, укључујући и гаранцију владавине права, никада не могу пренети на ЕУ. Међутим, ниједна од неотуђивих надлежности не односи се на специфичне карактеристике пољске државе већ на фундаментална начела и вредности заједничке свим државама чланицама. Главни захтев за сваку државу која жели да приступи ЕУ јесте да са другим државама чланицама и ЕУ дели основне вредности које чине уставни идентитет ЕУ, као што је владавина права. Та обавеза не престаје када се чланство материјализује. Уместо тога, Уставни суд у одлуци К 3/21 владавину права третира, да позајмимо израз Бертрана Матјеа (*Bertrand Mathieu*), као „инструмент асимилације", који се, према Матјеовом схватању, може користити за наметање идеолошких вредности упркос чињеници да је владавина права део заједничких европских вредности (Mathieu 2022, 34).

Теза да је владавина права „инструмент асимилације" и да је режим владавине права држава чланица одвојен од режима владавине права ЕУ погрешна је из два разлога. Прво, у контексту ЕУ, национални судови су судови ЕУ. Стога би било апсурдно, имајући у виду да владавина права има сличну функцију у свим правним системима утолико што ограничава власт, тврдити да, када примењују национално право, национални судови прибегавају одређеној верзији владавине права која се разликује од оне на коју се ослањају у примени права ЕУ. Актери који су обавезни да поштују владавину права у ЕУ могу се разликовати, али је суштина те обавезе иста. Друго, иако су концепти владавине права и независности судства подложни различитим тумачењима, могуће је да се само злонамерним тумачењем одступи од премисе да владавина права захтева од судије да, када одлучује у предметима, поступа према предвидљивим правним правилима, независно од било каквих утицаја,

личних, професионалних или политичких. Такав положај носилаца судске власти није био могућ у реформи правосуђа коју је пољски Уставни суд желео да легализује злоупотребом уставног идентитета.

6. ЗАКЉУЧАК

Правни поредак ЕУ има аутономну природу и постоји паралелно са правним системима држава чланица. Аутономан правни поредак ЕУ подразумева две чињенице: прво, ЕУ дели јавну власт са државама чланицама тако што у извесним областима доноси одлуке које стварају права и обавезе не само за државе чланице него и за грађане држава чланица; друго, право ЕУ је надређено праву држава чланица. Аутономан правни поредак подразумева и то да државе чланице не могу да бирају на којим принципима ће успоставити однос са правом ЕУ, што представља значајну разлику у односу на међународно право (Бешировић 2023, 102). Однос између националног и међународног права свака држава уређује самостално, бирајући да ли ће тај однос уредити сходно, упрошћено речено, монистичком или дуалистичком схватању тог односа. За разлику од тога, Суд правде је државама чланицама наметнуо начела на којима је уређен однос између правног поретка ЕУ и њихових правних поредака, инсистирајући пре свега на начелу супрематије (надређености) права ЕУ праву држава чланица.

Иако су добровољно пристале да пренесу део свог суверенитета на ЕУ, одрекавши се потпуно или делимично неких надлежности које им припадају, то не значи да су државе чланице у потпуности прихватиле начела Суда правде којима се уређује однос правног система држава чланица и правног система ЕУ. Начело супрематије права ЕУ у односу на законе и друге прописе никада није изазивало проблеме у примени, али јесте његова примена у односу на националне уставе будући да она подразумева да постоје прописи хијерархијски супериорнији од националног устава, који је у државама чланицама дефинисан као акт најјаче правне снаге.

Концепт суверенитета је дуго био мера којом су уставни и врховни судови држава чланица постављали границе продору права ЕУ у национални правни поредак, да би, ступањем на снагу Уговора из Лисабона, појам суверенитета био замењен појмом уставног идентитета, који је неодређен и подложан широком тумачењу, слично као и појам суверенитета.

Ветар у леђа напорима националних уставних тела која врше контролу уставности да ограниче примену права ЕУ дала је клаузула националног идентитета, уграђена у члан 4 став 2 УЕУ као резултат компромиса између оних који су видели будућност европских интеграција у федералној Европи и оних који нису делили ту визију. У обавези ЕУ да „поштује једнакост држава чланица пред Уговорима, као и њихов национални идентитет, неодвојив од њихових темељних политичких и уставних система, укључујући и регионалну и локалну самоуправу", национално уставно судство је пронашло основу за утицање на ток европских интеграција позивањем на национални уставни идентитет, увек када је ЕУ одлазила један корак даље у стварању све чвршћег савеза међу народима Европе.

Расправа у овом раду указала је на две тенденције – на употребу уставног идентитета у дијалогу између Суда правде и националних судова у контексту разграничавања надлежности између два правна поретка и на злоупотребу концепта уставног идентитета којој су прибегли уставни судови Мађарске и Пољске да би у истом том контексту дали подршку владајућим режимима чији је начин владавине карактеристичан за ауторитарне системе. Те тенденције указују на следеће закључке.

Прво, очигледно је да је уставни идентитет заменио суверенитет као нормативни концепт развијен у контексту разграничавања надлежности између ЕУ и држава чланица, чији се однос заснива на уставном плурализму, односно на идеји да ти правни системи паралелно постоје и ниједан није супериорнији од оног другог. И док Суд правде инсистира на примени начела супрематије права ЕУ, национално уставно судство настоји да, позивајући се на фундаменталне вредности које чине језгро њиховог уставног идентитета, ограничи продор права ЕУ у национални правни систем, а тиме и контролише ток и темпо европских интеграција. Остаје да се види да ли ће доктрина о уставном идентитету ЕУ, коју је развио Суд правде и која почива на вредностима заједничким уставним демократијама, коначно приволети државе чланице да од тога одустану.

Друго, употреба уставног идентитета у дијалогу између Суда правде и уставног судства држава чланица није довела у питање везу између уставног идентитета и конституционализма без обзира на интензитет националне реторике. Другим речима, циљ позивања на уставни идентитет у пракси уставног судстава држава чланица, укључујући праксу уставносудских тела у Немачкој, Италији, Француској, Чешкој и Ирској, које је у овом раду размотрено, није била ерозија демократског система у тим државама. Понуђени примери указују на то да је, у контексту

европских интеграција, реторика о уставном идентитету држава чланица наметнута да би се очувао значај устава који почива на демократском легитимитету или да би се истакла или проширила надлежност уставног судства у националним системима организације власти.

Насупрот томе, циљ злоупотребе уставног идентитета од уставних судова у Мађарској и Пољској било је раскидање везе између уставног идентитета и конституционализма, ослањањем на митски концепт уставног идентитета у присуству којег је и сам устав изгубио важност. Такво схватање уставног идентитета потврђује страхове оних који су сумњали да уставни идентитет може да представља нешто више од обичног „џокера" који се користи за постизање политички пожељних резултата, с једне стране, и за разарање правног поретка ЕУ, са друге стране, који због тога показују да би доктрину о уставном идентитету требало напустити. Не бисмо могле да се сложимо са тим квалификацијама. Флуидна природа уставног идентитета често је извор различитих тумачења, као што је то случај у тумачењу многих других појмова у уставној теорији, који су такође нејасни и широко постављени, укључујући суверенитет, слободу, једнакост, сецесију и многе друге. Као нормативни концепт, уставни идентитет није опасан сам по себи; опасност произилази из његове злоупотребе.

Најзад, национално уставно судство вероватно неће престати да се опире начелу супрематије права ЕУ, али неће ни Суд правде, својом доктрином о уставном идентитету ЕУ и тумачењем „лисабонске" клаузуле националног идентитета, престати да спречава државе чланице да манипулишу националним уставним идентитетом са циљем супротстављања праву ЕУ и ерозији демократије.

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Violeta BEŠIREVIĆ, PhD

Professor, Union University Law School, Serbia

Ana VLADISAVLJEVIĆ, LL.M.

Teachning Assistant, Union University Law School, Serbia

CONSTITUTIONAL RESISTANCE TO EUROPEAN INTEGRATIONS: THE USE AND ABUSE OF CONSTITUTIONAL IDENTITY

Summary

The EU Member States have accepted the principle of supremacy of EU law over national legislation – but not over national constitutions. The discussion in this paper reveals that: (1) the use of constitutional identity to control the penetration of EU law into national legal systems serves to preserve the importance of the national constitution and/or strengthen/ expand the jurisdiction of the national constitutional judiciary; (2) relying on constitutional identity for these purposes has not threatened the constitutional pluralism on which the relationship between the legal orders of the EU and the Member States rests; (3) the abuse of constitutional identity by the constitutional courts of Poland and Hungary, aiming to support the resistance of populist regimes to European integrations, has broken the link between constitutionalism and constitutional identity, and as such, has managed to threaten the further functioning of constitutional pluralism within the EU.

Key words: *Constitutional identity. – National identity. – Populism. – Supremacy of EU law. – European Union.*

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Boris BEGOVIĆ, PhD*

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Is contemporary merger control, as an indispensable segment of competition law, stringent enough, or should it be tougher, especially in the case of horizontal mergers? Should more mergers be challenged and prohibited than has been the case in the past few decades? Is competition policy, especially merger control, in decline, and should this decline be blamed for the rise of big American companies, modern corporate superstars, and the ostensible surge of market power in that country? These are questions that have dominated recent debates on competition law, especially in the US.

There are some available answers to these questions. For example, the New Brandeis movement has provided an unequivocal answer: Yes, merger control in the US has been too lenient and must be more stringent. Since this movement dominated the US antitrust authorities during the Biden administration, it produced the 2023 Merger Guidelines (US Department of Justice and Federal Trade Commission 2023), aiming to make mergers more difficult to materialise. From January 2025 there is a new sheriff in town, Biden's New Brandeis protégés (e.g. Lina Khan and Jonathan Kanter) are out

* Professor (retired), University of Belgrade Faculty of Law, Serbia, *begovic@ius.bg.ac.rs*, ORCID iD: 0000–0001–7343–190X.

of office (FTC and US DoJ, respectively), but since the sheriff is thoroughly obsessed with rising tariffs – which he considers a Swiss army knife tool for all the US economic trouble, real or ostensible – nobody knows what will be the policy of the 47th POTUS administration regarding merger control and whether the MMGA (Make Mergers Great Again) movement will emerge now in the US, with a more friendly attitude towards merger control – nobody, including the POTUS himself.

Nonetheless, in his latest book, Louis Kaplow claims all these questions are wrong, whatever the answer may be; accordingly, any answer to these questions would be defective. The reason why all these questions are wrong, according to the author, is that the incumbent horizontal merger control approach in competition law is fundamentally and fatally flawed. Everything in that approach is defective. The problem cannot be solved by fine-tuning or slight adjustment of the existing mechanisms and procedures. The author demonstrated that the reigning emperor (Merger Control the 1st) is naked, revealing grim distortions of his body, i.e. profound and fundamental flaws in the existing horizontal merger control paradigm. This provocative book is an appeal for a paradigm change, nothing less; it is a sobering cry to turn upside down the horizontal merger control procedures of competition authorities throughout the world (although the author primarily focuses on the US).

There are many attempts by some colourful people to demonstrate that certain government activities are fundamentally flawed, starting with the UFO policy. These attempts have been rightfully swept away. That cannot be done in this case! Louis Kaplow is one of the globally most prominent scholars in the field of economic analysis of law, a professor of law & economics at the Harvard University School of Law, a person with a flamboyant intellect, one of the most prolific authors in the field of economic analysis of competition law (e.g. Kaplow 2013; Kaplow 2015; Kaplow 2017), and a person who vividly demonstrated his ability for creative thinking outside of the box (constructed by both the academia and competition authorities) and who has the intellectual courage to jump into unknown territory regardless of the consequences. Louis Kaplow's previous contributions have demonstrated that even if one does not agree with his every insight, one must painstakingly ponder the rationale for rejecting his proposition. The point is that it is such an author that produced the book claiming not that 'something is rotten in the state of Denmark' but rather that everything is rotten in the state of horizontal merger control. Such a contribution cannot be ignored or sidelined.

In the Introduction, the author promises: 'This book seeks, often relentlessly, to ask all relevant questions without regard to where the answers may lead or whether they can directly be implemented in merger review' (p. xi). Furthermore, the forthcoming change of paradigm attitude is easily spotted early on, as Kaplow points out that '[t]his book also departs from much merger policy advocacy by analyzing how optimally to order mergers, from the most dangerous to the most beneficial, rather than advocating for more or less stringency' (p. xi).

Chapter 1 ('Introduction') is beneficial for the reader because the author not only spells out a detailed and precise synopsis of the book but also provides his main points and succinct arguments. This chapter is a tasteful teaser for the reader from the field of industrial organisation (IO) and competition law & economics. In addition to these points and arguments, Kaplow shares a few essential insights, starting with his experience: 'Some of the conclusions presented here surprised me and conflict with my own prior writing and teaching. But often, before I began digging into a subject, I was unaware of the significance of some of the key questions, much less of what answers would emerge' (p. 2). The two guiding principles follow. 'A guiding principle in this enterprise has been not to be deterred from asking hard questions by the possible lack of immediate, practical answers. I aim throughout to advance knowledge as far as I can, sometimes covering a good distance but other times coming up short. On some fronts, there are fairly direct implications for policy and practice. On others, research agendas are outlined. Another guiding principle has been to choose subjects in light of my own comparative advantage. Mostly, the analysis here is theoretical and conceptual, the realm of my prior work' (pp. 2–3). Accordingly, this is very shrewd management of expectations. Those who began reading the book for the rich conceptual analysis, with no stone left unturned, and imaginative new paths to the essence of what competition law is not, but should be, are buckling up in their seats and are set in the top gear, since 'The analysis in this book is complementary to an increasingly sophisticated body of applied research in industrial organization' (p. 3). Those seeking immediate practical and, if possible, painless solutions in the area of competition law enforcement are somewhat disappointed and wonder whether they should remove the reading of this book from their to-do list. They should not. The task of this review is to convince them why they should stick to reading the book.

Chapter 2 is about the framework in which competition authorities decide on merger control, allowing or prohibiting/challenging horizontal mergers.[1] The framework should have relevant elements, and they must be arranged appropriately, in order to guide merger analysis, reduce errors, and avoid omissions. The chapter deals with 'decision analysis and information collection' and from the start points out the anomaly that 'expected values should guide decision-making even though, for example, U.S. legal rules are sometimes interpreted to hinge on probabilities alone' (p. 16). Based on the expected value rationale, unanimously accepted in economics, Kaplow points out that optimally a merger associated with a modest probability of significant anticompetitive effects and a high probability of negligible effects should be prohibited, whereas a merger with a larger probability of modest anticompetitive effects and a somewhat smaller probability of significant benefits should be allowed. Nonetheless, a rule that prohibits mergers if and only if they are more likely than not to be non-trivially anticompetitive would err in both of these cases.

A more significant and perhaps critical issue that emerges throughout the merger review decision-making process is the sequential siloing of the following sort. First, anticompetitive price effects of the merger are examined: if they are estimated to be negligible, the merger is cleared; if not, if anticompetitive price effects are evaluated to be significant, and only in that case, the efficiencies generated by the merger are explored, and entry conditions are considered. The process of information collection is also sequential siloing in the same way. At first glance, it may even seem reasonable: why collect information about efficiencies, if this information will possibly not be used (in the case of negligible anticompetitive price effects)? Nonetheless, Kaplow demonstrates that much information in merger investigations pertains directly to multiple factors. 'For example, better understanding the merging firms' cost functions illuminates competitive interactions, helps to identify demand, informs efficiencies, and bears on entry. [...] Once substantial information has been collected to analyze anticompetitive effects, one has already learned much about these other considerations, so it would be irrational not to consider and revise those estimates as well' (p. 18).

Kaplow points out diminishing returns in particular avenues of inquiry – the optimal next steps will often alternate between different issues, e.g. anticompetitive effects and efficiencies. Moreover, the optimal next steps are

[1] The EU-style competition law encompasses competition authorities that can prohibit mergers. In US-style jurisdictions, competition authorities can only challenge the merger, and the (first instance) decision rests with the courts.

endogenous to what has been learned thus far. 'No one-size-fits-all rubric makes sense, much less one that purports to front-load anticompetitive effects, consider them exhaustively, and only then (if they are sufficiently established) turn to efficiencies. Recalling that much information pertains to both (and to entry), and that many individual pieces can be understood only with multiple considerations in mind, we can see that optimal information collection and decision-making are inherently intertwined processes that depart substantially from a sequential, soloed approach' (p. 19). Accordingly, the only way to optimise the information collection process is to equate marginal benefits and marginal costs, and that can be achieved only if all information pertinent to the merger is gathered simultaneously. According to Kaplow, this 'broad front' approach is essential for many reasons, not only because of the economy of information gathering, but also because it is this point where it all begins.

The most crucial topic of Chapter 2 deals with what Kapow refers to as neoclassical merger motives and the merging firms' rationality constraint. 'Firms are assumed to propose only jointly profitable mergers, and profits are understood to arise from some combination of anticompetitive effects and efficiencies' (p. 22). This claim is undoubtedly true – it is almost trivial – but it is very often forgotten. It reinforces the need to collect simultaneously all the information about the merger – regardless of whether they are about anticompetitive (price) effects (including entry conditions) or about efficiencies – because even in the early stages of analysis, as Kaplow argues, if data points to limited increases in efficiencies, the motive of the merger seems to be anticompetitive effects, therefore more information about the price effects is needed. Furthermore, the rationality constraint prevents firms from mergers that, due to easy entry (i.e. low barriers to entry), will not generate additional profit from anticompetitive effects that are not higher than the merger's transaction costs: 'anticipation of post-merger entry may render unprofitable a merger proposal motivated primarily by the prospect of anti-competitive effects' (p. 23). The reader ponders: so much for easy entry and a remedy against anticompetitive mergers – the merging firms already consumed it due to their rationality constraints.

Kaplow emphasises that not all mergers are undertaken due to neoclassical merger motives, and the merging firms' rationality constraint should be applied cautiously in such cases. Merger proposals can arise as a consequence of agency problems (empire-building), behavioural infirmities (optimism bias and hubris), market pricing imperfections (an under-priced target or overvalued securities used to finance an acquisition), or tax savings. The rule of thumb suggested by the author is clear. 'If less profitability is required, expected anticompetitive effects and efficiencies are both lower'

(p. 24). Unfortunately, there is no rule of thumb provided for distinguishing one type of merger from the other. Nonetheless, Kaplow provides a list of questions that competition authorities should ask if they have second thoughts about the merger evaluation because non-neoclassical merger motives compromised the merging firms' rationality constraint, at least to some degree.

The rest of the chapter deals with bias in collecting and structuring information about the merger, which downplays the information about entry, exit, and investments, especially from the long run perspective, focusing on the short run only, although all these phenomena (entry, exit, investments, in addition to technological progress and innovation) are long run issues. Furthermore, information collection is focused on the partial, single market equilibrium. However, it is reasonable to assume that the merger effects, as well as the effects of the decision not to clear the merger, are disseminated throughout the entire economy, therefore general equilibrium consideration is desirable, regardless of the practical issues related to this approach.

Chapter 3 discusses what most of the competition authorities are concerned with in the merger control exercise: price effects and market definition. Kaplow claims that their concern about the price effects of horizontal mergers is well placed, but their approach to this matter is entirely flawed. For those not involved in competition law, such as micro economists with a specialisation far from this area, a reasonable, common-sense question is: Why are price effects coupled with the market definition? Kaplow profoundly understands this anxiety, which is precisely the starting point of his devastating criticism of the price effects dogma incumbent among competition authorities.

In short, this dogma consists of two sequences. First, the relevant market should be defined. Second, inferences of price effects are made based on the pre– and post-merger market share of the merging firms, embodied in market concentrations, and structural presumptions.[2] Within such a dogma, the first step must be a relevant market definition; otherwise, market shares cannot be calculated, and market concentration cannot be figured out.

[2] The notion of 'structural presumption' is a parlance typical of US-style competition law, which Kaplow mainly refers to. Nonetheless, the very content of the procedure is the same in the other jurisdiction, regardless of the parlance. In EU competition law stipulates that '[m]arket shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors' (EC 2004). This is nothing but a structural presumption.

The problem with the concept of relevant market, Kaplow points out, is that it does not exist in IO. There is no economic theory of the relevant market.[3] There is hardly any economic meaning to the notion. It is merely a fiction created by the competition authorities that enables them to adhere to the dogma. Furthermore, the legislators have not developed that fiction – the administrators have.[4]

The next issue is how the relevant market is defined. The regular procedure is to apply the hypothetical monopolist test (HMT), starting with an arbitrarily selected market (in terms of product and geographic area) and answering the question whether a hypothetical monopolist could sustain at least a small but significant and non-transitory increase in price (SSNIP), of 5 to 10 per cent, i.e. whether such a price increase would increase or at least not decrease its profit.[5] If the answer is yes, it is inferred that all encompassed products and geographic areas are close substitutes, and this market is worth monopolising. Furthermore, with a positive answer to the question, the market is then enlarged to include new products and geographic areas, and the process continues until the answer to the question is no. Suppose the relevant market is defined without enlargement, in that case Kaplow refers to such a market as 'narrow'; if enlargement (or rather several steps of it) happens in the process of relevant market definition,

[3] Perhaps that was one of the reasons why the 2010 US Horizontal Merger Guidelines abandoned market definition as an indispensable step in horizontal merger analysis. Nonetheless, the 2023 US Merger Guidelines (which handle both horizontal and vertical mergers) brought the relevant market back into the game. Prominent IO academic economists (Shapiro 2010, Shapiro 2024) consider the 2023 US Merger Guidelines a huge step back from the 2010 US Horizontal Merger Guidelines (US DoJ, FTC 2010). A prominent US economist, a panellist at the 2024 CRESSE Conference (Chania, Crete, Greece), pointed out on the sidelines of his presentation that (quoting him from memory): 'The US 2023 Merger guidelines are like a blueprint for a Mars rocket without [relying on insights of] physics'. There was a consensus about that specific shortcoming of the 2023 US Merger Guidelines in a topical issue of the 2024 *Review of Industrial Organisation* (Vol. 65, Issue 1, Special issue on the 2023 Merger Guidelines).

[4] The relevant market is not mentioned in key pieces of legislation of the two most important competition laws: the US competition law (Sherman Act and Clayton Act) and the EU competition law (Treaty on the Functioning of the European Union). Hence, it is not a concept specified by the statutes but by sub-statutory texts, such as the EC Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, *OJ* C372/5 [1998].

[5] For example, 2023 US Merger Guidelines stipulate that '[w]hen considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value' (US DoJ, FTC 2023, 43). Details on the procedure of applying HMT in the EU competition law are provided by Bishop and Walker (2010).

Kaplow refers to such a market as 'broad'. He associates narrow relevant markets with homogeneous goods and broad markets with heterogeneous goods.[6]

The main problem with applying HMT, at least if it is used properly is that it must be based on the crucial information for price effects – the price elasticity of demand.[7] Instead of directly using this information to evaluate the proposed merger's price effects – for example, the calculation diversion ratio – the crucial quantitative information on demand elasticity is utterly lost in defining the relevant market. Accordingly, instead of estimating the price effects directly using information on the elasticity of demand, especially cross-elasticity, the competition authorities are now turning to the calculation of the market shares of firms and inferring conclusions on the proposed merger's price effects based on the post-merger market concentration of firms and its change due to the merger, measured by the HHI and the ΔHHI.[8]

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[6] In both the book and this review, 'goods' is shorthand for both goods and services, i.e. products. Furthermore, Kaplow's assumption that 'broad' markets are associated with heterogeneous goods is reasonable, but it seems that 'narrow' markets should not necessarily be associated with homogeneous goods. Everything depends on the arbitrarily chosen initial market on which SSNIP is applied. Accordingly, even 'narrow' markets can be markets with heterogeneous goods.

[7] There is a critical level of price elasticity of demand that enables monopolisation. If the price elasticity is above that critical level, which depends on the shape of the demand curve/function, monopolisation is not feasible because an increase in price will produce a decrease in the firm's revenues and profit, i.e. increased revenues due to a higher price will not offset decreased revenues due to lost sales. Furthermore, the more inelastic the demand, the bigger the price effects of mergers due to a decrease in price competition will be. This is IO 101 (Carlton, Perloff 2015).

[8] HHI stands for Herfindahl–Hirschman index, which is calculated as the sum of the squares of the market shares of all the firms in the (relevant) market. If there is a monopoly, HHI is 1 or 10,000, because it is multiplied by 10,000 in applied competition law analysis. If there is an infinite number of firms, a feature of perfect competition, HHI tends towards 0. HHI is essentially a measure of how far a market is from being a perfectly competitive market with an atomised firm structure – the higher HHI, the further away the market structure is from the structure of the market in perfect competition. This makes the HHI completely counterproductive as a tool of competition law, since a perfectly competitive market – a concept based on very restrictive assumptions – exists only in microeconomic textbooks, and it is used as a theoretical reference point. Accordingly, it is senseless to set the aim of competition policy to move market structures closer to perfect competition.

The rationale is that the higher both the HHI and the ΔHHI, the lower the presumed competition, which is a structural presumption, based on the SCP doctrine.[9]

The crucial problem with this approach is that the information on elasticity of demand is entirely lost, even though it is essential for estimating the magnitude of the price effects. Kaplow rightfully points out that 'If the post-merger HHI is 3000 and the ΔHHI is 300, is the typically imagined price increase 18%, 1.8%, or 0.18%? We do not know even within an order of magnitude' (p. 45). The necessary, although not sufficient, condition for estimating the price increase due to the proposed merger is demand elasticity, however, the information on that is lost after the relevant market definition, or perhaps never obtained in such an approach.[10]

Kaplow analyses three cases of price effects of mergers. He starts with unilateral effects in the case of homogeneous goods, pointing out that the Cournot quantity competition model can be used to analyse those effects and is often used by competition authorities. The use of that model, under some restrictive assumptions, makes 'the output-weighted mark-up (share-weighted Lerner index) equals HHI/|ε|, where ε is the market elasticity of

[9] SCP stands for Structure – Conduit – Performance. According to this doctrine, completely rejected by modern IO, market structure is exogenous, and the causality goes from the market structure via the firms' conduit to their performance – the more concentrated the market structure, the more anticompetitive the behaviour, and the greater the market power, i.e. price effects. Nonetheless, Kaplow points out that modern IO considers market structure endogenous, since due to the market exit of less competitive firms (selection function of the market), efficient and competitive firms increase their share. The share of Walmart in the US retail sector is a typical case of a firm's endogenous market share. Accordingly, higher market concentration can be a testimony of strong competitive pressure on the market, as only a few (efficient) firms survive. In short, the SCP doctrine, embodied in the structural presumption that competition authorities have subscribed to (that low market concentration creates strong competitive pressure), is misleading.

[10] Perhaps it does not exist, i.e. the information was not obtained in the first place, depending on how the HMT was carried out. With some prior knowledge, it is only a segment of the demand function that is considered. Only a rough estimate of the demand price elasticity may be used, in only some segment of the demand function (local in terms of quantity). Therefore, competition authority staff may access the hard drive to retrieve the information, but it may not be available because the price elasticity of demand is not estimated for the entire function, especially taking into account that the demand elasticity is variable, as the coefficient of the price elasticity of demand increases (in absolute values, the coefficient is negative by definition) with the increase in price.

demand for the homogeneous good' (p. 50).[11] Hence, in this very specific case, there is at least some use of HHI, though supplemented with the coefficient of elasticity of demand.[12] Nonetheless, Kaplow points out that the Cournot quantity competition can easily deteriorate to the Bertrand price competition model, which drives prices to marginal costs; hence, none of the results based on the Cournot quantity competition model are valid.

As to the unilateral merger effect in the case of heterogeneous goods, according to the author, there is a consensus within the IO community that the Cournot quantity competition model is not applicable, meaning that any measure of market concentration, e.g. HHI, is irrelevant. Accordingly, the relevant market definition is redundant. With the Bertrand price competition model as the basis for the merger price effects consideration, the only relevant information is the diversion ratio, based on the price cross elasticities of demand for the good produced by merging firms. Nobody needs a market definition for calculating diversion ratios.

As to the coordinated merger effects, the effects that facilitate collusion in the market, Kaplow has no second thoughts. 'Perhaps the most systematic effect that facilitates coordination is that a merger of two firms reduces the number of firms by one, which lightens the coordination burden and reduces the number of possible sources of disagreement. Once one determines the premerger number of significant competitors and knows the post-merger reduction (here taken to be one), the HHI and ΔHHI provide no

[11] The Lerner index (Lerner 1934) is the relative price–cost margin, i.e. the (positive) gap between the price and the marginal costs divided by the price. It is often used as an indicator of market power. Nonetheless, careful reading of Lerner's contribution demonstrates that inelastic residual demand, i.e. a negatively sloped residual demand curve, is a necessary condition for market power. In short, the positive gap between price and marginal cost can be the consequence of many things that are not due to market power. For example, since firms in the same market are heterogeneous, with different cost functions, due to the absolute cost advantage (lower average costs), some firms obtain significant price–cost margins, while others only break even, with a zero price–cost margin, although there is no market power of any firm in the market at all, and the price is exogenous to all the firms.

[12] In short, under a set of assumptions, comparing pre– and post-merger HHI, i.e. ΔHHI, divided by the absolute value of ε, can provide some indication of the order of magnitude of the price effects of the merger. As Kaplow points out, HHI itself is irrelevant, and its change (ΔHHI) alone cannot provide that information on price effects without the price elasticity of demand. Accordingly, the critical values of HHI and ΔHHI in the merger guidelines are counterproductive, because mergers that produce both values above the critical values can result in smaller price effects than those below the critical values, as everything depends on elasticity. The critical values of HHI and ΔHHI without demand elasticity are the curse of the structural presumption approach, especially taking into account how these presumptions are important for the final decision on the merger (Hovenkamp, Shapiro 2018).

further illumination' (p. 71). The author points out numerous difficulties in analysing the possible coordinated effects of the proposed merger. Still, one thing is certain – there is no need for a relevant market definition for any of those analyses.

Taking all this evidence into account, is it reasonable to conclude that the relevant market paradigm is useless? Unfortunately, it is much worse than that – it is counterproductive for two reasons. The first is that an enormous amount of energy and resources is allocated to defining the relevant market in every merger review. The merging parties' experts do their best to demonstrate that the relevant market is 'broad' so the market shares of the merged firms would be lower, the HHI and ΔHHI would hopefully be below the thresholds, and the merger would be cleared. The broader the relevant market is, the better it is for the merging party. If the competition authority aims to challenge or prohibit the merger because its prior belief that the merger is anticompetitive (based on other evidence or no evidence at all), the authority's experts will do their best to demonstrated that the relevant market is 'narrow', meaning that the market shares of the merged firms would be higher, the HHI and ΔHHI would hopefully be above the thresholds, and according to structural presumptions – the merger would be *lege artis* challenged or prohibited. Hence, neither party is willing to ascertain the facts, i.e. to uncover the truth. The battle of the experts is a clash solely over an irrelevant issue, regardless of the facts, instead of focusing on allocating resources to gather information about more important issues, such as the price effects of the merger, and analyse them to determine their magnitude.[13]

The second point is that the entire process of decision-making is reversed and ridiculed. Hence, the price effects analysis ends in the debate on the relevant market definition. 'And if it is thought that a merger should be blocked, then a case can be brought that may embody, at least to some extent, a reverse-engineered approach to market definition. Specifically, a narrow market will be advanced, in which the market shares are high, satisfying the merger guidelines' thresholds and court precedents. And judges deciding cases may, at least implicitly, proceed likewise, finding a narrow market definition more convincing when they believe (based on

[13] In his review of the book, one of the most prominent IO academics honestly testifies to supporting this view. 'I confess to having done so myself on more than one occasion' (Shapiro 2025b, 1102).

other evidence) that the merger is indeed anticompetitive, but adopting a broad market definition when they are unconvinced of the merger's alleged anticompetitive effects' (p. 80).[14]

Chapter 4 of the book focuses on efficiencies. Kaplow's primary recommendation is an integrated assessment of efficiencies and anticompetitive effects in the merger control analysis. Something that is far from the incumbent procedures of competition authorities. For the author, due to the previously mentioned rationality constraint for the merging firms, merger decision-making inevitably involves the balancing of anticompetitive effects and efficiencies – and that must be done simultaneously. 'Whether at an early screening stage in an agency or various subsequent points, one obviously should consider both sides. Importantly, suppose efficiencies in a given merger seem unlikely to be significant. In that case, the anticompetitive effects required to justify blocking the deal should be lower, and conversely if efficiencies seem likely to be large' (p. 108).

For the author, there is a nexus between efficiencies and anticompetitive price effects. Still, the incumbent merger control policy insists that only the efficiencies must be merger-specific, because that policy takes for granted the merger specificity of the anticompetitive effects. Kaplow points out that symmetry must be established. 'Then we are back to the case of a direct trade-off because both the efficiencies and anticompetitive effects are not only merger specific but, more importantly, arise in the same part of the proposed combination' (p. 83). To clarify what is merger-specific, all available options should be specified, which is not common practice. 'Yet another important dimension that has received little attention in this regard concerns the alternatives to merger, whether they involve internal expansion or contractual arrangements between the merging firms short of merger. After all, inquiries into merger specificity entail comparison to a but-for world without the merger (which often differs from the status quo ante), so it is necessary to both characterize and analyse the hypothesized

[14] The same reversed process has been spotted in the EU competition law in the case of application of Article 102 of the TFEU. First, the EC decides (based on whatever information and evidence) that an abuse of dominant position took place, then it is necessary to establish that the abusing firm (an 'undertaking' in the EC parlance) has a dominant position, which is specified by its market share. Accordingly, the narrow relevant market is defined by the EC, as narrowly as feasible, because the threshold for dominance is then easier to reach (Cini, McGowan 1998). Naturally, legal representatives of the dominant firm insist on a broad relevant market definition, as broad as feasible. In short, there is no incentive for any party to ask what is the true definition of the relevant market.

non-merger scenario' (p. 83). Accordingly, Kaplow stands for a proper counterfactual analysis that would demonstrate the effects of all available options.

Since specificity has been clarified, Kaplow moves to the relationship between merger specificity and the theory of the firm. Quite a reasonable move, because it was Coase (1937) who launched the modern economic study of the theory of the firm by posing provocative questions about comparative transaction costs of exchanges that take place within or between firms.[15] In that sense, the merger-specific efficiencies question can be reformatted as whether the merger would substantially decrease transaction costs. 'Legal form – here, the distinction between contracts and firms – cannot guide our analysis; we need to examine the underlying substance' (p. 88). Kaplow provides the nuts and bolts of that substance, and the reader realises that none of those exist in merger decisions, whether to clear or to block the merger, understanding Kaplow's puzzlement about the divorce of competition law and theory of the firm. At the end of the day, contracts (market) and the firms, in Coasian tradition, are nothing but two alternative ways to arrange business activities and exchanges. Kaplow refers to Williamson (1975) and his distinction between the two. 'The marketplace is taken to entail one amalgam of attributes: high-powered incentives, specified obligations, and formal adjudication of disagreements through the legal system. By contrast, firms are taken to employ a different package of properties: low-powered incentives, discretionary authority, and their own informal systems of dispute resolution. These differences are regarded not as independent choices but rather as constituting complementary bundles' (p. 90).

It is precisely the theory of the firm that enables Kaplow to point out that most of the efficiencies in the horizontal mergers involve synergies that involve the combination of complementary assets. In short, most of

[15] According to Coase (1937) and his model, in a world with zero transaction costs, there would be no firms whatsoever and all exchanges and all cooperation would be done on the market, governed by contracts. Coase's contribution was neglected for decades, but then in the 1970s, a surge of contributions emerged, basically following up on Coase's approach (Alchian, Demsetz 1972; Williamson 1975; Jensen, Meckling 1976; Grossman, Hart 1986; Hart, Moore, 1990). The consideration of the firm as a substitute for contracts cleared the way for the economic theory of incomplete contracts (Hart 2009; Hart 2017). Three of these authors won the Nobel Prize for economic sciences (officially the *Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel*): Ronald Coase (1991), Oliver Williamson (2009), and Oliver Hart (2016). Kaplow points out several times in the book, that the competition authorities completely neglect the contribution of those Nobel prize laureates, which is crucial for understanding the merger-specificity of efficiencies.

the merger-specific efficiencies should be expected from the economies of scope, not scale, since 'the synergy from combining firms arises from the complementary, vertically related features rather than concerning the core asset subject to scale economies. Arguably, most types of efficiencies in horizontal mergers are vertical in character. Complex contracts designed to coordinate economic activities that might better be conducted inside a single firm typically involve complementary activities and assets rather than identical ones. When horizontal mergers involve two firms that do not each consist solely of the same type of stand-alone asset, there will be vertical elements. When those features are entangled with the purely horizontal ones, as they often are (which is why they are already conducted within at least one of the merging firms), there may be vertical efficiencies from horizontal integration' (p. 95).

This fresh view on the merger-specific efficiencies is based on a fact that is frequently neglected in competition law enforcement – that the firms successfully operating in the market are heterogeneous, i.e. that it is not one-size-fits-all when it comes to firms. Accordingly, the merger of two heterogeneous, distinctive firms creates something new that can be more efficient than the two separate old firms. This is not to say that economy of scale is irrelevant, especially when technological progress changes the cost function in a way that increases the share of fixed costs. In such conditions, a merger is a reasonable reaction of the industry to technological change and business challenges, or rather opportunities, because of the efficiencies that will be achieved. This is the case of what Kaplow calls 'pure economy of scale'.

As to the usual complaint of the competition authorities that it is difficult to obtain relevant evidence, which can be understood as the reason for them to avoid analysing efficiencies, Kaplow provides a straightforward answer: 'if it is harder to obtain and analyse evidence on efficiencies than on anticompetitive effects (to the extent that the two are separable), optimal information collection, guided by consideration of the diagnosticity-to-cost ratio, will reflect that in any event' (p. 111). This is practical advice to the competition authorities, part of Kaplow's advocacy of the approach aimed at a nexus between efficiencies and anticompetitive effects.

Chapter 5 of the book is about entry. At the very start of the consideration, the author points out that entry may, but not necessarily, enhance variety and innovation, however, it also (necessarily) consumes additional resources. This is a welcome departure from the conventional wisdom in the competition authorities community that entry is always good.[16]

There are two general cases of entry that Kaplow considers. The first case is ex post entry, something that competition authorities are so familiar with. Their conventional wisdom is that if barriers to entry are low enough, a merger with substantial anticompetitive price effects should be allowed, because post-merger economic profit will attract new entry, the number of competitors (structural presumption again) will be at least restored, consequently prices will move downwards, and there will be no more economic, only normal profit, as was the case before the merger. In short, if there are low barriers to entry, even an anticompetitive merger should be allowed, because its price effects will be zero or negligible. Low barriers to entry and new entries are considered a panacea by competition authorities.

Kaplow convincingly undermines this logic. The consideration, he believes, should start with the rationality constraint of the merging firms. If the barriers to entry are low, and if the new entry will siphon off all economic profit generated by the merger, i.e. profit surplus due to the anticompetitive price effects, then they do not have any incentive to start the merger in the first place, because such a move involves transactional costs and no future excess profit will cover these costs. If competition authorities are aware of low barriers to entry, the so are the firms considering a merger, with perhaps even better information, as they have a stronger incentive to acquire it. In short, such a merger will never be proposed, let alone completed.

If the firms decide to merge and propose (i.e., notify) the merger to the competition authority despite low barriers to entry, it means they expect to generate some surplus profit even after new entry. Kaplow believes that there can be two rationales for such behaviour. The first is that the new entry will not completely undo the anticompetitive price effects, i.e. the prices will be higher after the post-merger new entry compared to the pre-merger equilibrium. The evidence supporting this view is that the firm that

[16] This difference in view is apparently the consequence of the difference between Kaplow's general equilibrium approach and the competition authorities' partial equilibrium obsession. A trained economist has no second thoughts on the superiority of the general equilibrium approach, which takes into account all welfare effects. To what extent this is feasible and how it can be achieved – are different questions altogether.

would enter the market after the merger did not do so before the merger – the market price was too low for that firm to break even at the time. This is testimony that new entry is less efficient than the merging firms, even before the merger, which can enhance the efficiency of the merging firms. Again, firms are heterogeneous, with distinctive cost functions, meaning different levels of production efficiency. Without merger, the market provides selection efficiency, keeping inefficient firms out of the market. In short, new entry in these conditions is not socially optimal, i.e. not desirable regarding the welfare from the general equilibrium point of view – in these circumstances, a new entry is the wrong remedy. Yet, it is very likely that the competition authorities would clear such a merger, because of the prospect of swift entry.

The second rationale for firms to go ahead with a merger, despite low barriers to entry, is that they expect a merger-specific efficiency increase, for example, due to the economy of scope. In such cases, the profit of the merged firm would increase both due to the price effects and due to the decreased average costs – a result of increased efficiency.[17] Both the merged firm and the entry would appropriate profit, but the profit rate of the merged firm would be significantly higher. The overall welfare effect of a cleared merger in this situation would depend on the relative magnitude of the loss due to inefficient entry and the gains due to increased efficiency of the merged firm. The reader is not convinced that the competition authorities recognise this trade off (regardless of the outcome), sticking to the new entry as a panacea in the merger evaluation cases.

The second case is ex ante entries – something Kaplow claims competition authorities have been neglectful of. The point is that many startups, many new companies are created with the strategic aim to be acquired one day – nothing else. In many instances, the entrepreneurs starting up the venture are motivated solely by the prospect of a subsequent buyout premium. Merger control regime substantially influences the prospects of such a buyout and, in that way, creates incentives relevant for investment decisions and for starting up businesses. Kaplow analyses the welfare effects of different merger control regimes and the incentives they inevitably create ex ante for investors and entrepreneurs. 'In simple settings – with homogeneous goods, a dominant firm, and some other assumptions – the prospect of entry for buyout tends to be inefficient. In such cases, a tough merger policy may raise

[17] Caradonna, Miler and Sheu (2025) provide a model of such a merger with differentiated, i.e. heterogeneous goods, with some reference to the T-Mobile–Sprint merger.

social welfare by discouraging inefficient entry' (p. 118).[18] Nonetheless, Kaplow points out that many of these start-ups are very innovative, and they contribute to product variety, innovation, and efficiencies – some of them due to merger synergies.[19] Without ex ante incentives, embodied in prospects for premium buyout in due course, there would hardly be such innovative start-ups. Consequently, dynamic efficiency would be compromised.

At the same time, Kaplow emphasises that acquisitions by dominant incumbents may extinguish disruptive threats posed by nascent entrants. According to the author, in reviewing subsequent acquisitions, competition authorities will naturally be inclined to take the target's existence and capabilities as a given – it is exogenous. In short, these authorities do not even consider that these start-ups are endogenous to the merger-control policy, i.e. that the merger-control policy creates incentives for these investments. Furthermore, by labelling these buyouts as 'killer acquisitions', the competition authorities emphasise the motives of the dominant incumbent firm for removing the prospective competitive threat posed by the nascent entrants, rather than the efficiencies that can materialise in such a buyout and the efficiencies that were generated by the sheer start-up beginning operation.[20] If competition authorities do not take into account ex ante mergers and do not accept that their harsh merger control policies can undermine innovative start-ups, the consequences of the innovation process and economic growth based on increased total factor productivity could be devastating, especially in countries that are close to the technological frontier (primarily the USA) and whose economic growth is predominantly based on productivity increase.

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[18] This insight by Kaplow is a perfect example of the application of general rather than partial equilibrium thinking. The opportunity cost of the investment in one industry is the forgone investment of exactly these resources in the other.

[19] In a very well researched review article, Shapiro (2025a) provides ample evidence to support the thesis that most of these start-ups are in the area of high-tech industries, that they are innovative and that the entrepreneurs who start these projects do not believe that they will have sufficient resources to finish the job, i.e. to make the innovation marketable. That should be a job for well-established, big, dominant firms with ample resources and experience in this segment of operations.

[20] This was precisely the motivation of the FTC to open the case against Facebook (Meta) for the acquisition of WhatsApp and challenge the merger two years after the very same institutions cleared the acquisitions (Begović, Ilić 2024). In the FTC complaint, there is no word about efficiencies due to synergies that materialised after the merger. To be fair to the competition authorities, the notion of 'killer acquisitions' holds ground in the academic community (Cunningham, Ederer, Ma 2021).

After the crescendo in the three chapters dedicated to the trinity of competition law – price effects, efficiencies, and entry – the tension in the book inevitably plunges. That is not to say that the following chapters do not deal with relevant issues of horizontal merger control, but the pressure of the steam in the engine slowly goes down. Chapter 6 ('Priors, Predictions, and Presumptions') addresses the difficulty of analysing anticompetitive effects, efficiencies, and entry in the review of proposed mergers, because of information limitations and the inherent challenges of prediction. The chapter demonstrates that Kaplow understands very well the position of competition authorities tasked with merger control and the obstacles that they face. The bottom line is that information-hungry competition authorities should seek different types of evidence that can illuminate merger review: industry studies, merger retrospectives, merger simulations, stock market event studies, and industry expertise – with all their strengths and limitations (well explored in the book). No rules of the thumb, no shortcuts, only 'toil, tears and sweat' – the good news is that blood is missing.

Chapter 7 is about institutions, their internal organisation and operations regarding merger control. Most of the chapter is, quite appropriately, about competition authorities, as Kaplow considers the enhancement of their skill sets through greater expertise in business operations and organisation, as well as knowledge of particular industries. The author also examines whether greater use of ex post merger review may be valuable, given the difficulty of predicting the effects of mergers, particularly in the case of acquisitions of nascent entrants in rapidly changing industries. Since the book predominantly focuses on the US competition law (antitrust in said jurisdiction's parlance), in which the courts decide to block or clear mergers, this chapter briefly discusses how the US courts could better adjudicate merger challenges by drawing more directly on the expertise of all types to help structure litigation in a manner that would better engage with battling experts, business witnesses, and other evidence. Since there is substantial wisdom in these recommendations, they can be applied in other jurisdictions, especially for the courts as a second instance in the legal process, where a competition authority decides about the merger in the first instance. Finally, in this chapter, Kaplow provides some comments on the division of regulatory labour between competition authorities and other government entities – a topic especially relevant for regulated industries.

Chapter 8 discusses the objectives of competition law. Perhaps it should have come earlier, but this is not a bad way to conclude the book. The first dilemma regarding the objectives is the choice between consumer and total welfare standards. This is not the first time that this dilemma has been considered. Still, Kaplow provides the background of the debate and suggests

that solving this dilemma may depend on the outcome of some other dilemmas regarding the objectives of the competition law. The conventional wisdom among academic economists – based on the welfare economics insight – is that the total welfare standard is superior, but the issue of (re) distribution has produced a consumer surplus standard.[21] That becomes clear with the insight that 'consumer welfare might better be viewed as total welfare minus the producer surplus of the parties under scrutiny' (p. 189). Kaplow has no second thoughts about income distribution as an objective of competition law. 'Both institutional considerations and the principle that instruments should be appropriately matched to targets favor a total welfare approach. Competition agencies, like environmental protection agencies, occupational health and safety agencies, and many others, do not have expertise in income distribution, do not in fact typically analyze distributive effects, do not state social welfare functions or offer preferred estimates of labor supply elasticities in their published or internal rules, and do not seek to coordinate their regulatory efforts with the activities of the income tax and transfer system, including social insurance' (p. 189). Nonetheless, most jurisdictions, as well as some economists,[22] stick to consumer welfare, rather than the total welfare standard.[23]

[21] Kaplow reminds that the rise of a consumer welfare standard in US case law, notably that of the Supreme Court, reflects an interesting path dependence and some confusion. Bork (1978) advanced consumer welfare but actually meant total welfare; the view being attacked was one that sacrificed both consumer and total welfare to the protection of small producers. But his misnamed term became adopted, Kaplow points out, no doubt because of the appeal of the consumer welfare standard to less sophisticated audiences and subsequent increasing concerns about economic inequality. Accordingly, the consumer welfare standard in the literal sense has become increasingly common.

[22] Pittman (2007) provides arguments for using consumer welfare standards for merger control, especially having in mind US mergers. Depending on the assumptions, this standard can prevent some of the redistribution in the aftermath of the merger, provided that total welfare standard is applied.

[23] It is taken for granted that EU competition law applies the consumer welfare standard. Nonetheless, the term 'consumer welfare' was first spelt out by a senior EU official (Joaquin Alamunia, European Commissioner for Competition) as late as 12 May 2010. The Treaty of Functioning European Union only specifies in Article 101 (essentially formulated back in 1957), and the exemptions from Article 101, according to Article 101(3), will be given to the agreements that 'contribute to [...] promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits'. This is hardly a consumer welfare standard. Furthermore, the EC 2004 Merger Guidelines (EC regulation 139/2004) stipulated (Article 79) that 'The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger. For that purpose, efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant

In addition to the consumer or total welfare standard dilemma, Kaplow examines an essential and intertwined choice that has received less attention: should the focus be on short– or long-run outcomes of merger decisions and merger policy as a whole. It is evident that in the long run, fixed costs and quasi-rent (producer's surplus) disappear as motives for entry, meaning that the consumer and total welfare tend to converge.

The author points out that pragmatic considerations may favour a short-run framing when competition authorities examine particular merger proposals because time and other resources are scarce, and the ability to predict the future beyond a few years is quite limited. He believes that these points are well taken, although with some qualifications. 'First, agencies should employ general rules and other protocols that are conducive to long-run welfare maximization, even if the most useful proxies and shortcuts do not involve undertaking anywhere near a complete long-run analysis. Second and relatedly, many of the most important effects of merger decision-making do not materialize immediately, so a short time frame can be incomplete and even misleading. [...] an important rationale for permitting a firm with market power to charge a supracompetitive price is that the prospect of such profits induces ex ante investment that tends to raise consumer welfare in the long run' (p. 196). For any reader who thinks that it is too narrow, too technical, Kaplow spells out the essence of the long-run approach to merger analysis. 'More broadly, as already noted, effects of competition policy on innovation [...] manifest themselves in the long run. Long-run welfare, including consumer welfare, depends largely on an economy's dynamism. An important purpose of competition policy is to preserve and enhance dynamism, not to reduce it. However difficult these effects may be to determine, simply ignoring them in formulating rules may produce choices that reduce welfare, perhaps greatly' (pp. 198–199). This approach effectively shifts the focus from the competition authorities' emphasis on the price effects of mergers and price effects-led competition law to innovation – a direction previously suggested by Gilbert (2020). Again, this is especially important for economies that are close to the technological frontier. Effectively, moving competition law from the short to the long run framework means changing the paradigm from minimising price effects and market power to maximising innovation. Quite a change!

markets where it is otherwise likely that competition concerns would occur'. The bottom line is 'that consumers will not be worse off as a result of the merger'. Again, this is hardly a consumer welfare standard.

The author does not stop there but moves forward and considers 'almost entirely neglected' matter of whether to adhere to the single-sector partial equilibrium approach that is currently done in scholarship on competition law and in competition authorities practice, or to consider 'as well' the multisector general equilibrium effects of competition policy that may substantially amend or upset conventional enforcement protocols and priorities. For understanding this dilemma, 'as well' is a crucial notion – it is not either/or. Kaplow does not advocate that standard partial equilibrium analysis should be abandoned, but only that it should be enhanced by general equilibrium consideration. His consideration of excessive, socially undesirable entries in the book (Chapter 5) is precisely the example of such an approach.

Kaplow somewhat reluctantly reminds the reader that he has a powerful intellectual ally – Lerner (1934) and his seminal paper on mark-ups and market power. Lerner's point, made in the paper published more than 90 years ago (but the Lerner index is still used as a measure for market power), was that the economy-wide level of mark-ups is irrelevant to total welfare – their 'deviations' are all that matter. 'The simple intuition is that deadweight loss from price in excess of marginal cost arises from too few resources being spent in the distorted sector; they flow instead to other sectors, where marginal utility is lower relative to production costs. However, if every sector is marked up by the same proportion, resources have nowhere else to go' (p. 202). There would be no effect on total welfare, and consumer welfare would be lower precisely by the amount of the producer's surplus increase. It is only income distribution that is affected. Nonetheless, as already demonstrated, in the long run, the two welfare standards (consumer and total) converge.

At the end of the chapter and the book, Kaplow takes up the possibility that competition rules should aim to protect competition as a process rather than to directly seek to obtain good outcomes, whether for consumers (consumer welfare) or society (total welfare). This is essentially a response to the New Brandeis movement attitude (Kahn 2018) that competition law should protect competition considered as the competitive process, which allocates resources to their best uses and provides incentives through price signals. The problem with this approach is that it aims to restore perfect competition, although such competition has never existed. Kaplow has no second thought about such an aim. '... perfect competition is infeasible, and policies aimed to approximate it as closely as possible would be highly destructive. In most sectors, truly atomistic firms could not accomplish much of what is done in a modern economy. And if prices never exceeded marginal costs, most investments could never be recovered'

(p. 206).[24] It is the prospect of quasi-rents that incentivise investment and innovation, Kaplow concludes. In this way, his rebuttal of the protection of competition as a process, the reader concludes, is the lethal blow to the concept of competition as static, as opposed to dynamic, i.e. an essential feature of protection of competition as process. In short, the New Brandeis movement considers competition through comparative statics of different market structures. Kaplow, along with the vast majority of mainstream IO economists, considers it Schumpeterian creative destruction.

At the end of the day, Kaplow concludes that economists deal with things that can be measured. More competition? More competitive pressure, competitive constraints, in the EU parlance? 'But what would be the measure of such strength? And what counts as a competitive force rather than a competitively neutral or anticompetitive one? And how would these features be converted to a common denominator with the direct reduction of rivalry? And how would that rivalry reduction itself be measured? It is no surprise that economists have not developed such an abstract index of rivalry or competition but instead have focused on the analysis and measurement of effects on welfare, or effects on prices, quality, and other determinants of welfare' (pp. 208–209). End of (New Brandeis movement) story!

In the final chapter, Kaplow spells-out that 'This book attempts to identify overlooked questions, sharpen our appreciation of existing deficiencies, advance analysis by building on the strengths of what is already known in industrial organization economics and other areas of inquiry, and offer suggestions for further research, policy formulation, and the practice of merger review' (p. 213). The reader expected this sentence in the Introduction, but actually, it is much better to have it here, at the end of the book, having digested the rich insights.

This book is suitable only for a very restricted, specialised audience, consisting only of IO specialists, academics specialising in the economic analysis of competition law, and competition authority specialists (including judges in the US and similar jurisdictions). Even for them, this book will be difficult to read for three main reasons. The first one is that the book is

[24] This point by Kaplow is very important for putting into context the fascinating debate about the existence and the increase of price–cost margin in the US economy in recent decades, and the conclusion that this development is evidence for the competition decline in the US markets (Hall 2018; De Loecker, Eeckhout, Unger 2020). Basu (2019) and Syverson (2019) provide devastating methodological criticism on the way how the price–cost margin is estimated, and question whether the price–cost margin is a proper indicator for inferring the decline of competition. Begović (2022), insisting on the heterogeneity of firms and pointing out the existence of quasi-rents without any market power whatsoever, surveys the debate.

densely packed with insights and evidence supporting them. One page of the book contains more wisdom about competition law and its enforcement than multiple academic articles put together. For that reason, the reader will keep going back again and again to the pages already read, to see whether they have got it right. The second reason is that Kaplow's writing style is very demanding: he expects a fully engaged reader, so there is no room to relax and for easy reading. The third reason is that some of the claims are counterintuitive – it takes time and effort to follow Kaplow's arguments. Based on these insights, a caveat is in order. The potential reader who is a novice in IO and economic analysis of competition law should skip this book and first proceed to readable textbooks in those areas, and then both landmark and review academic articles. Substantial accumulated specialised knowledge is a non-negotiable prerequisite for reading Kaplow's book.

Although it produces ample new insight about merger control, both positive and normative, this book is not a castle in the air. It is well-founded on the insights of modern IO, and that is one of the reasons why it is so convincing. This book does not start from square one. The author provides ample references, so the reader interested in some of the claims can do their own further research on the topic.

As to the impact of Kaplow's provocative book, it challenges the very foundation of conventional merger analysis, and Kaplow argues that mergers should be evaluated using entirely different methodology (Shapiro 2025b). What Kaplow is advocating is nothing less than the change of the paradigm, because the incumbent one is faulty. He does not offer practical solutions (he was clear in the Introduction that this was not his intention), nor guidelines for reaching these solutions. Instead, he provides guidelines for further thinking and consideration of what can be practically done and how to achieve it. For example, he claims that although long-run general equilibrium analysis is infeasible in the review of particular mergers, the broad contours of policy as well as practical protocols should be developed with these effects in mind.

Taking all this into account, the specialised academic community will definitely enjoy reading this book (again, not an easy task, but academics are used to such things). Whether they will like it or not, whether they will agree with the claims – is another question altogether. What will be the reaction of the competition law practitioners, especially competition authorities, to this book that is an appeal for a paradigm change? Paradigm change is difficult and costly, so competition authorities have strong incentives to ignore the book, whatever the excuse may be. Perhaps something along the lines of 'Professor Kaplow is a very clever and knowledgeable person, but he misses the points that only we, in the trenches of competition law enforcement, with

bullets fired from big corporations whistling over our heads, can see, as we feel the nuts and bolts of competition law enforcement'. It would be a pity if that happened because Kaplow's book provides ample food for thought for substantial improvements in competition law and the radical advancement of protecting and enhancing competition. Ultimately, improvements are made on the front line, but the ideas that improvements are needed and the strategy for these improvements are formulated in general staff cabinets, far removed from the trenches. Yes, one must see the whole forest to realise that something is wrong with the trees – deeply flawed in the case of the merger control forest. Precisely for that reason, the change, if it comes, will take time. Nonetheless, even 'a journey of a thousand miles begins with a single step'. Acknowledging the insights from Kaplow's path breaking book should be the first step for competition authorities.

Louis Kaplow did his part of the job – now it is time for the others. A careful and painstaking reading of the whole book should be a reasonable first step. For those who may be daunted by the task, Kaplow (2025) provided an article, a short version of the book. Warning: this is only a short, not a light version of the book, *á la Gitanes* light. The article is *Gitanes* short. The reader must still fully inhale the intense fumes of the original cigarette recipe. There is no other way. *Bonne chance*!

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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.

Слике се прилажу у фајловима одвојено од текста и треба да буду јасно обележене.

Не треба користити сенчење или боју на графичким приказима. Ако је потребно визуелно истаћи поједине разлике, молимо вас да користите шрафирање и унакрсно шрафирање или друго средство означавања.

Не треба користити оквир за текст испод или око слике.

Молимо вас да користите фонт *Times New Roman* ако постоји било какво слово или текст на слици. Величина фонта мора бити најмање 7.

Графици не садрже било какву боју.

Наслови слика су наведени и на засебној страници са двоструким проредом под називом – Легенда коришћених слика.

Слике не могу бити веће од 10 cm x 18 cm. Да би се избегло да слика буде значајно смањена, објашњења појединих делова слике треба да буду постављена у оквиру слике или испод ње.

CIP – Каталогизација у публикацији
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АНАЛИ Правног факултета у Београду : часопис за правне и друштвене науке = The Annals of the Faculty of Law in Belgrade : Belgrade law review / главни и одговорни уредник Марија Караникић Мирић. – [Српско изд.]. – Год. 1, бр. 1 (1953)–. – Београд : Правни факултет Универзитета у Београду, 1953– (Нови Сад : Сајнос). – 24 cm

Тромесечно. – Преузео је: Annals of the Faculty of Law in Belgrade. – Друго издање на другом медијуму: Анали Правног факултета у Београду (Online) = ISSN 2406-2693.

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Факултетски научни часопис *Анали Правног факултета у Београду* излази од 1953. године (ISSN: 0003-2565) као потомак часописа *Архив за правне и друштвене науке* који је излазио од 1906. године.

Главни уредници *Архива за правне и друштвене науке* били су: Коста Кумануди и Драгољуб Аранђеловић (1906–1911), Коста Кумануди (1911–1912), Чедомиљ Митровић (1920–1933), Михаило Илић (1933–1940), Ђорђе Тасић (1940–1941) и Јован Ђорђевић (1945).

Главни уредници *Анала Правног факултета у Београду* били су: Михајло Константиновић (1953–1960), Милан Бартош (1960–1966), Војислав Бакић (1966–1978), Војислав Симовић (1978–1982), Обрен Станковић (1982–1985), Дејан Поповић (1996), Миодраг Орлић (1997–2004), Данило Баста (2004–2006), Сима Аврамовић (2006–2012), Мирољуб Лабус (2013–2015) и Мирко Васиљевић (2016–2018).

У часопису се објављују научни чланци, критичке анализе, коментари судских одлука, прилози из међународног научног живота и прикази књига. Часопис излази и у електронском облику (eISSN: 2406-2693).

Радови објављени у часопису подлежу анонимној рецензији двоје рецензената, које одређује редакција.

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БУЛЕВАР КРАЉА АЛЕКСАНДРА 67
11000 БЕОГРАД
СРБИЈА
anali@ius.bg.ac.rs
anali.rs