АНАЛИ
ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ

ANNALS
BELGRADE LAW REVIEW

ЧАСОПИС ЗА ПРАВНЕ И ДРУШТВЕНЕ НАУКЕ
БЕОГРАД 2026 /БРОЈ 1 /ГОДИНА LXXIV

UDC 34/35 : ISSN 0003-2565

ИЗДАВАЧ /

Правни факултет Универзитета у Београду

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UDC 34/35 : ISSN 0003-2565

Анали Правног факултета у Београду
Година LXXIV, бр. 1/2026, стр. 1–183

UDC 34/35
ISSN 0003–2565

САДРЖАЈ

ЧЛАНЦИ

ПРИКАЗИ

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The Annals of the Faculty of Law in Belgrade
Year LXXIV, No. 1/2026, pp. 1–183

UDC 34/35
ISSN 0003–2565

TABLE OF CONTENTS

/ЧЛАНЦИ

UDC 316.62:321; 519.83:316.334.2/.3

CERIF: S 180

DOI: 10.51204/Anali_PFBU_26101A

Andreas SERAFIM, PhD*

PROJECT FEAR: EMOTIONS, GAME THEORY, AND FAILED PERSUASION IN ANCIENT GREEK AND CONTEMPORARY POLITICS

This paper examines Project Fear, the use of threat-based rhetoric to influence collective decisions, by analyzing Thucydides' Melian Dialogue and Demosthenes' On the Liberty of the Rhodians and comparing them with Brexit (2016) and Grexit (2015), respectively, using the theoretical frameworks of cognitive theories, particularly game theory and prospect theory. Two cognitive distortions affecting kairos, rational understanding, and decision-making are identified: hope (elpis) and anger (orgē). Project Fear fails when the stronger party relies on high-intensity threat signals without recognizing that, once the weaker audience perceives its status quo as one of massive, existential loss, hope and anger act as psychological multipliers, transforming negligible possibilities into viable strategies.

Key words: *Project Fear*. – *Game theory*. – *Prospect theory*. – *Decision-making*. – *Brexit*.

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1. FROM MELOS TO BREXIT: THE COGNITIVE MECHANISMS OF (FAILED) PERSUASION

The article examines examples from ancient Greek prose literature, particularly historiography and oratory, in which speakers exploit the emotion of fear to persuade or manipulate the audience but do not achieve the intended outcome.[1] The first part of the article's title, "Project Fear", refers to a phenomenon related to a recent historical moment in the UK: the referendum on leaving the European Union, commonly known as *Brexit*. The term was coined to describe the argumentative and rhetorical strategies used to instill fear among decision-makers during the crucial UK referendum on EU membership in 2016. Supporters of the EU campaign were accused by the Leave campaign (notably Boris Johnson, later Prime Minister; Nigel Farage, then leader of the UK Independence Party; and Michael Gove, a prominent Conservative Party member and minister in several Tory governments) of spreading warnings about the disastrous political and economic consequences that the UK's exit from the European Union would bring about, threatening, if not entirely destroying, the future of multiple generations.[2] Despite intense pressure on the British public to support the pro-EU campaign, people voted against remaining in the European Union, regardless of several dramatic warnings from David Cameron's government

[1] I would like to thank the editors of the *Annals of the Faculty of Law in Belgrade* and the three anonymous reviewers for their incisive comments and constructive criticism, which improved my article and prevented errors. This article is dedicated to the students of the Department of Social and Political Science at the University of Cyprus. It was a privilege to teach such exceptionally intelligent and hard-working individuals in the module "Special Issues of Political Theory: Interstate Relations in Ancient Greece and the Contemporary World". Our exchange was profoundly rewarding. I learned a great deal from them, and I trust the experience was mutual. To them, with respect.

[2] While Project Fear was a term strategically used by the Leave campaign to delegitimize economic warnings from the pro-EU establishment, it is important to note that the referendum was not simply a clash between "fear" and "hope", as the Leave campaign claims, but rather a competition between two distinct fear-based narratives. The Remain campaign focused on the material fear of economic instability, while the Leave campaign successfully mobilized a sociopolitical fear – specifically, concerns about immigration and the loss of national sovereignty. In game-theoretical terms, the electorate was presented with two different threat signals. The failure of the pro-EU Project Fear suggests that the audience found the fear of uncontrolled borders and diminished agency a more potent driver of their utility function than the fear of economic recession. Although many of the economic warnings have materialized ex post, at the moment of decision, the Leave campaign's focus on identity and control served as a more effective rhetorical deterrent to the status quo.

officials, opposition party members (especially from the Labour Party), and representatives of European and British independent organizations, such as Mark Carney, then Governor of the Bank of England. Project Fear has produced similar outcomes elsewhere in the world, at least when considered as a rhetorical strategy of high-intensity threat signaling. An example discussed in this paper is that of the Greeks, who voted against the terms proposed by the European Commission, the International Monetary Fund, and the European Central Bank in 2015 for the country's bailout during the sovereign debt crisis – also known as *Grexit*.

Despite its widespread contemporary use, Project Fear as a politicized practice and general cultural phenomenon (cultural in the sense that it reveals how actors in public discourse judge the level and practice of thinking, understanding the world, and decision-making within interpretive communities) is not new. In the debate presented in Thucydides 5.84–114, the Melians, despite hearing the Athenians' scaremongering when the latter tried to persuade them to surrender in 416 BCE, decided to resist the invaders of their city-state and fight to preserve their independence. The Athenians failed to persuade them by means of fear. A similar failure is recorded in Demosthenes' *On the Liberty of the Rhodians*: in 351 BCE, the speaker was unable to persuade the Athenians to send assistance to the Rhodians, who were besieged by the Carians. These crucial decision-making processes, both ancient and modern, led to unfortunate consequences for the interpretive community. The siege of Melos by the Athenians ended in the destruction of the city, the execution of the men, and the enslavement of the women and children. The Athenians lost an ally who remained under the rule of the Carians, their enemies who sympathized with the Persians. The Greek government signed a bailout package with terms worse than those already rejected by referendum, and the UK has been mired in political crisis and economic instability since 2016.

Could the Melians, the modern Greeks, and the British people not have foreseen these outcomes? Did they believe they could resist an overwhelmingly stronger power – militarily in the case of the Melians and economically in the case of the modern decision-makers? What carried more weight in the decision-making process than the fear of future uncertainties? What strategic and tactical game did they believe they could play to win? Was there a viable rationale for victory, or did a mixture of thoughtless hopes and irrational expectations lead them to "certain" doom? Were the Athenians unable to foresee the unfortunate consequences of their vote for both the Rhodians and themselves? Was their anger stronger than their rational thinking? Drawing on game theory, prospect theory, and cognitive studies, this work aims to clarify how audiences were (or were

not) persuaded at specific historical moments, and what similarities exist between modes of decision-making at crucial points in history, from antiquity to the contemporary world – an analysis with the potential to offer interdisciplinary approaches to contemporary deliberative processes and outcomes in democratic institutions.

Game theory outlines the principles that govern interactive environments. Game theory emanates from the mathematical language, propositions, theorems, and proofs by the mathematicians Emile Borel and John von Neumann and the economist Oskar Morgenstern (see, e.g., Borel 1921; Borel, Ville 1938; von Neumann 1928; Doxiadis, Mazur 2012; Margolin 2012, 505–531). Narratives also exhibit mathematical features, as Jacqueline de Romilly argues for that in Thucydides ("relations have a rigorous almost mathematical character" and "it is the coherence of the narrative – from premises to conclusions – that has an air of necessity" (Romilly 1956, 34, 48, translated by Dal Borgo 2016, 32); cf. Connor 1984, 2–3). Game theory is primarily a cognitive theory concerned with describing interactions between agents and their ability to process these interactions and predict outcomes. The broad definitions highlight the shared focus of narratology and game theory on the players' perspectives – their perceptions of the world or a particular event, the roles they assume within or outside the narrative, the actions they undertake, and their interactions with individuals, groups, objects, and circumstances, as well as the choices they make. The options available to players are also shaped by spatial and temporal contexts – the specific circumstances that generate events, which are connected to and influence players' preferences, actions, and outcomes. The reader's task is to decode the narrative structure through which these game-theoretical choices are presented. The classification of these interactions as noncooperative, one-off games is crucial to this decoding. Unlike repeated games, where players may prioritize long-term cooperation to build trust, the cases of Melos, Brexit, and Grexit represent one-shot scenarios. In such situations, the incentives are fundamentally different: players perceive the outcome as final, raising the stakes and often leading to zero-sum logic, where one party's gain is seen as the other's total loss. By recognizing that the historian's framing often highlights the tension between calculated strategy and these high-stakes, noncooperative outcomes (de Jong 1987; Hornblower [1994] 2011; Bakker 1997; Rood 1998; Lowe 2000), we can better understand why Project Fear failed to achieve the coordination that the persuaders expected.

Building on the methodology and definitions established by Dal Borgo (2016, 27), this analysis employs a classical game-theoretical framework consisting of five core components: *players*, *rules*, *actions*, *preferences*, and *outcomes*. A *player* is an individual or group involved in a case requiring

decisions about actions; they possess the knowledge, incentive, and ability to decide how to act. *Actions* are shaped by temporal, geographical (space), cultural (community actions), and other circumstantial factors to which the player may be exposed. *Rules* define what a player can do; these are the possible actions. The player has *preferences*, meaning they compare options and determine which is preferable in the context of time, place, and specific circumstances. The combination of a player's actions and preferences produces the set of possible *outcomes*. In ancient narratives, the description of a game typically takes a threefold form: *players–actions–preferences*. Based on the variables described above, there are two types of games: competitive or noncooperative games, in which one wins or loses, such as in wars, and coordination games, in which one player acts to the advantage of another. Examples of the unsuccessful use of the rhetoric of fear for persuasive purposes will be analyzed according to these principles of game theory, to examine not only their manifestations in ancient Greek prose literature, but also the mechanisms by which the target audience was not persuaded in each case.

Thucydides being labelled a game theorist is not new: the narrative and style of his *History of the Peloponnesian War* are considered almost mathematically rigorous and medically precise, without obscure or superfluous detail, and with accounts that diagnose the motivations and goals behind the actions of individuals or collectives (Dal Borgo's 2016 unpublished thesis is one of the recent discussions of Thucydides as a game theorist). Nicholas Lowe, commenting on Aristotle's evaluation of history in *Poetics* 9.1451b11 and 23.1459a22–23, argues that "history is a discourse of causality and explanation, not a dispassionate chronicle of 'whatever was the case in that period about one man or more'" (Lowe 2000, 89). This is precisely what Thucydides attempts in his retelling of events, in contrast to what Aristotle theorizes about such a retelling. Aristotle attributes the study of the sequence of things that can occur by necessity or probability (*κατὰ τὸ εἰκὸς ἢ τὸ ἀναγκαῖον*, *Poetics* 1451a24–39) to tragedy rather than history – a suggestion that Thucydides' accounts of history strongly challenge. The semantic significance of probability can be broadly summarized in two concepts: *kairos*, calculable probability, and *paralogos*, an outcome beyond calculable probability. *Kairos* arises through calculation from the close examination of the general context in which an action occurs and the results from cognitive processes and outcomes associated with *logos* and *logismos*, i.e., reason and reasoned analysis of circumstances and actions. An important note should be made here: *paralogos* should not be understood merely as bad luck or a random accident. Rather, in game-theoretical terms, it represents the systematic failure of the expected utility model. While *kairos* refers to the window of opportunity accessible through

rational data and probability, *paralogos* occurs when the internal logic of a player – distorted by the emotional variables of *elpis* or *orgē* – diverges so sharply from material reality that the resulting outcome becomes invisible to standard strategic calculus.[3]

In addition to *kairos*, according to Aristotle's analysis of causality and reflecting the general cultural mindset in classical Athens, another criterion is the interference of gods and supernatural divine elements, e.g., *tychē*, in human actions.[4] I will not side with Aristotle when he calls this dimension *paralogos* nor with those scholars who emphasize the "irrational" nature of any thought about nonhuman factors determining human affairs. Oratory is full of references to how and to what extent the divine determines history, the actions of individuals and communities, and their wellbeing. Irrationality is an approach to ancient thought and practice shaped by modern sensibilities: the customs of ancient religion are so alien to us that we tend to disregard their value and importance in warfare and in political or decision-making processes. As William K. Pritchett notes, "[w]here the ancients assigned a religious motive to some military action, modern discussion seeks political or military ones" (Pritchett 1979, 3). To the people of the time, however, religious considerations did not seem irrational, as they might to us. Religious practices and discourse were not excluded from political or legal matters.[5] This may be because – as scholars have started to argue – rationality was not seen as contradictory to traditional religious ideas. Thucydides' secularity, which may indeed mean that *kairos* and *tychē* are mutually exclusive, as scholars argue, describes the historian's attitude toward people and their actions, but it does not invalidate our approach to what he says the decision-making audience was considering when they were about to decide.

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[3] On *orgē*, as a structured rationalized component of Greek political and legal life, rather than merely a chaotic emotion, see Chaniotis 2012; Whitchurch 2025.

[4] References to the decisive intervention of the gods or supernatural powers, such as *moira* and *tychē*, in human affairs can be found in a wide range of extant rhetorical texts, e.g., Antiphon 5.6 and 6.15; Lycurgus 94; Isocrates, Archidamus 31; *Panegyricus* 68, *Against Callimachus* 32; Demosthenes' dense array of references to *tychē* in speech 18. References to the gods, *moira* and *tychē*, are a means of justifying the failed political actions of leaders (cf. Hypereides, *Against Diondas* 136v30–137v8; Demosthenes 18). On references to the gods in Attic oratory and politics, see Martin 2009; Serafim 2021.

[5] The criticism of irrationality is profound in several ancient texts and contexts. The case of the author of the treatise *On the Sacred Disease*, who sets out a rational and natural causation of epilepsy, is a telling example of this criticism. See Lloyd (1979, 15–29); Whitmarsh (2015). However, scholars were not invariably good representatives of the popular beliefs and practices of their time.

For this reason, both *kairos* and *tychē* are examined in this analysis of the cognitive approaches that players encounter when aiming to anticipate events that establish rules, preferences, and actions leading to outcomes, even though the Thucydidean Pericles is presented as denouncing the role that *tychē* plays in determining human actions against expectation (*para logon*, as in 1.140.1). Within the framework of modern game theory, action is only irrational if it fails to pursue the player's own stated preferences. The failures of Project Fear do not result from a loss of logic by the audience, but from a recalibration of the utility function that the persuader fails to recognize, as the following analysis of ancient and contemporary decision-making at crucial points will show.

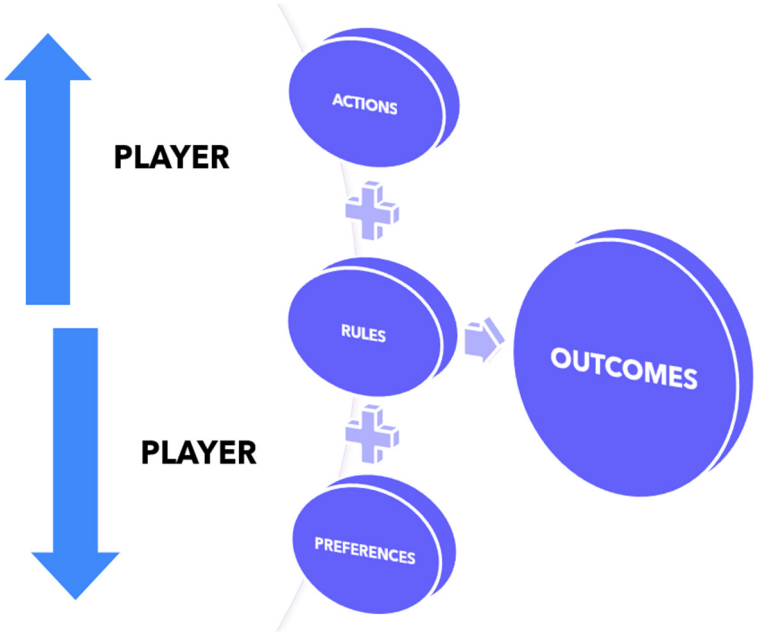
Fear is also discussed by scholars as a cause of irrational behavior, especially when it takes on the character of mass psychology. However, fear also serves as a vital mechanism for rational risk assessment: in many contexts, it acts as a safeguard that prompts agents to take defensive action against credible threats. Whether perceived as an irrational impulse or a calculated response to danger, fear is a powerful means of persuading or dissuading an audience to act in a certain way. The Peloponnesian War, for example, is justified by fear in 1.23.4–6: "to the question of why they broke the treaty, I begin by giving an account of their grounds for complaint and points of difference, so that no one need ever ask the immediate cause that plunged the Hellenes into a war of such magnitude. In my view, the real cause was the one most deliberately concealed: the growth of Athens' power and the alarm this caused in the Lacedaemonians (*φόβον παρέχοντας τοῖς Λακεδαιμονίοις*) made war inevitable." The Corinthians' speech at the First Spartan Congress highlights how *phobos* is expressed specifically in the context of decision-making about the war between Athens, Sparta, and their allies in Greece. The Corinthians seek to instill fear and jealousy in their hosts by portraying the Athenians as an unstoppable hegemonic force in Greek affairs. In its relentless drive for expansion, Athenian democracy evokes the examples of Minos and Agamemnon, the heroic kings from the distant past, so exaggeratedly positive, even flattering, is the depiction of the Athenians in the Corinthians' speech. The contrast with the Spartans is stark and zero-summing: the Corinthians argue that Spartan political practices are outdated compared to those of the Athenians and therefore represent a decisive disadvantage. The Corinthian rhetoric proves effective – at both the first and second Spartan congresses, they achieve their desired outcome, although Thucydides makes it clear that their speech was not the decisive factor in persuading the Spartans to go to war (1.88.1). In this Thucydidean context, Spartan fear is not mass hysteria but a rational response to a perceived existential threat, a preventive measure intended to preserve their security before the shift in power becomes irreversible.

When analyzing the target audience's approach to events, a general behavioral pattern emerges: audiences who are hopeful or convinced of victory tend to take risks, while those who are fearful or convinced of defeat are risk-averse – a dimension of decision-making extensively discussed by Ober and Perry. The literature also notes that inducing fear in the audience and shaping their mental state to favor the speaker's strategy and goals can trigger the use of various stimuli, such as medical imagery and disease terminology, in passages where religious discourse also appears, as in Demosthenes 19.259 and 262.[6] For Aristotle, *Rhetoric* 1382a, fear is "a painful or troubled feeling caused by the impression of an imminent evil that causes destruction or pain; for men do not fear all evils, for instance, becoming unjust or slow-witted, but only such as involve great pain or destruction, and only if they appear to be not far off but near at hand and threatening, for men do not fear things that are very remote." A long-standing area of psychological research on attitude change focuses on the role of a particular emotion in persuasion: the study of appeals to fear (Janis, Feshbach 1953, 78–92; Leventhal, Singer, Jones 1965, 20–29; Baron *et al.* 1992, 323–346; Gleicher, Petty 1992, 86–100). Increased fear can be associated with decisive action to eliminate the fear-inducing threat.[7]

The cognitive architecture of this decision-making process is shaped by the convergence of specific variables, *kairos*, *tychē*, and fear, which establish the rules and preferences that ultimately determine a player's outcome. As shown in the following diagram, the player (whether a city-state or a modern electorate) acts as an agent of motive and knowledge, processing these variables through an internal engine composed of *actions*, *rules*, and *preferences*.

[6] Demosthenes 19.259: "for a terrible disease, men of Athens, has fallen upon Greece, a serious one needing some very good luck and care on your part"; 19.262: "Holy Mother Earth! If I am to speak as a sane man, we stand in need of the utmost vigilance, when this infection, moving in its circuit, has invaded our own city. Therefore, take your precautions now, while we are still secure. Let the men who have brought it here be punished with infamy. If not, beware lest you discern the wisdom of my words too late when you have lost the power of doing what you ought."

[7] On fear as a means of controlling the law court audience, see Rubinstein 2004, 188–189; Konstan 2006, 129–155.



Source: Author

In a standard game-theoretical framework, these components are additive and interdependent; they function as a stable mechanism designed to predict future states and maximize utility.

While the Spartan example demonstrates how fear can serve as a rational deterrent or a catalyst for preventive strategic action, the Project Fear cases examined here represent a different cognitive phenomenon. In these instances, the persuader's logic does not merely fail; it collapses completely. When *elpis* and *orgē* are introduced into a high-stakes decision, the player does not necessarily discard their utility function but instead undergoes a radical recalibration of it. While the underlying preferences may remain stable, the subjective probabilities assigned to potential outcomes shift dramatically. I have come to see *elpis* and *orgē* as psychological force multipliers: they take a faint low-probability possibility and magnify its perceived feasibility until a desperate No seems the only rational response to certain loss. This is not a neat linear addition; it is a cognitive transformation in which the fear of inevitable ruin pulls the decision-maker away from the optimal timing of *kairos* and into what the Greeks called *paralogos*. Modern game theory typically treats acts of self-destruction as anomalies in the system. However, my argument is that these are not irrational moments;

they are, in fact, highly structured, defensive reactions to being cornered – what prospect theory describes as the domain of loss. By applying these ancient Greek categories to analyze our concepts of utility, I aim to challenge the often-unsubstantiated binary of *rational versus irrational* in political decision-making. Project Fear fails because those making the threats do not realize that their target has already crossed the threshold. The target has stopped trying to play it safe and has started seeking a way to go down fighting. They are pursuing a form of reputational victory that a standard materialist model simply cannot recognize.

A potential methodological challenge arises when applying modern cognitive frameworks – developed within the context of 21st-century behavioral economics – to affairs of ancient Greek poleis. One might argue that differences in historical experience, education, and the scale of the decision-making body introduce an element of anachronism. However, this analysis adopts the position of cognitive realism: while the media of information and the complexity of the rules have evolved, the biological and evolutionary architecture of human decision-making remains constant. Game theory and prospect theory are employed here not as descriptions of historical sameness, but as tools for mapping how the human mind processes existential threat and asymmetric information. Whether in the Pnyx or at a contemporary ballot box, the cognitive engine that weighs a certain loss against a hopeful gamble responds to the same stimuli of *elpis* and *orgē*. By using these theories, I do not suggest that the Melian and the British voters are identical actors, but rather that both are subject to the same structural fallibilities when pushed into the domain of loss.

One final methodological caveat is necessary. The selection of Brexit and Grexit as contemporary parallels is not merely illustrative but is driven by a specific typological correspondence with the ancient cases. I have chosen these examples based on the primary cognitive variable that disrupts the rational assessment of *kairos*: in the cases of Melos and Brexit, the disrupting variable is hope (*elpis*), which leads to a risk-seeking preference in the domain of loss; in the cases of Rhodes and Grexit, the disrupting variable is anger (*orgē*), which shifts the utility function toward a spiteful equilibrium and symbolic revenge. While other modern instances of failed persuasion exist, these two were selected because they provide the clearest data for testing how these specific emotional force-multipliers recalibrate the expected utility model in high-stakes one-shot political games. This paired approach allows for the controlled analysis of two distinct modes of *paralogos*, ensuring the comparison remains focused on the structural mechanics of the decision-making process rather than broad historical generalization.

2. THE "MELIAN TRAP": OVERCONFIDENCE AND THE FAILED FEAR IN THUCYDIDES AND BREXIT

The first case study to be analyzed using the principles of game theory is the Melian Dialogue in 5.84–114, which illustrates the "Melian trap": a strategic impasse where a dominant power's high-intensity threat signaling inadvertently forces a weaker opponent into a "nothing-to-lose" position. This scenario serves as a foundational text for political realism, famously highlighting the view that "might makes right". In this trap, the persuader's overconfidence in the efficacy of fear overlooks the cognitive shift of the target. While the Athenians argue that justice is a concept applicable only between equals – and that consequently the weak must suffer what they must – the Melians undergo a radical recalibration of their utility function. Faced with a choice between certain submission (slavery) and a risky gamble for autonomy, the Melians perceive the latter not as irrational, but as the only logical path to preserving agency.

In the historical context of 416 BCE, Melos, a Spartan colony that refused to submit to Athenian control, was besieged by a strong force of foreign troops when emissaries arrived in the city to ask the population to submit voluntarily to the power and authority of the would-be invaders. The Athenians make a single offer, but the Melians request further negotiations in the hope of improving the terms of the ultimatum. They attempt to submit the offer to a court of arbitration for revision, which the Athenians refuse because they believe they are the stronger party and can enforce their terms on the weaker party. The Athenians argue, rather discouragingly for the Melians, that "the strong do what they can and the weak suffer what they must" (5.89; cf. Aristotle, *Nicomachean Ethics* 1131a; *Politics* 1280a11, 1282b18). The Athenians present the Melians with a dilemma: either they ally with them to preserve their security within the polis, with the obligation to pay tribute (5.111.4), or they start a war and lose everything (5.113). In 5.116.4, we learn that the Athenians killed all the men of military age, enslaved the women and children, and sent out five hundred colonists to repopulate the city. The Melians confer among themselves and come to the same conclusion as before, not to give in (5.84.2), until they reach an agreement that is favorable to both sides (5.112.3), but which is disputed by the Athenians.

This conversation between two opposing powers – the arrogant stronger and the reluctant weaker – is viewed through the lens of morality, with the main discussion focused on the moral basis of the Athenians' arguments and claims: whether the powerful imposes rules on the weaker and whether those rules are just and moral – whatever those terms may mean within the

value system of those who use them. From a game-theoretical perspective, the dialogue represents a clash of incompatible game structures. The Melians attempt to propose a coordination game based on neutrality, suggesting a win–win scenario in which they remain independent and pose no threat to Athens. The Athenians, however, explicitly reject this, reframing the interaction as a noncooperative, zero-sum game. In the Athenian view, Melian freedom and Athenian security are mutually exclusive; they perceive Melian independence not as a neutral state, but as a direct loss to Athenian credibility and a sign of weakness to their subject allies. This rigidity is further driven by a structural mandate constraint: in Dal Borgo's (2016: 162) model, the Athenians calculate that while submission benefits both parties (represented as a payoff of *x*), the destruction of Melos serves as a neutral status quo for the empire (represented as *0*), but inflicts a total loss of *–1* on the Melians. This turns the dialogue into a reputation game, where the aim of the stronger party is not only to acquire Melos but also to maintain a credible sign of ruthlessness to deter future rebellions elsewhere in their empire. The Melians are engaged in a genuine one-shot game, where their objective is immediate survival and the consequences of failure are fatal. For the Athenians, however, the siege is a single episode within a broader repeated game. Although the physical confrontation is unique, the Athenians' strategic calculation addresses multiple audiences: the Melians and, more importantly, their subject allies. In this context, the rational choice for the stronger party is to accept the short-term costs of a difficult siege (as seen in 5.116.3) to establish a credible reputation for enforcing their authority, thereby deterring future rebellions throughout the empire.

The most important endeavor is to understand how the Melians concluded not to submit to the rules and will of the Athenians. The latter conclude the debate by exposing the folly of the Melians' faith in Sparta and their reliance on *tychē* and *elpis*. The players' actions are problematic from a game theory perspective because they are not based on *kairos*, i.e., the rational assessment of the situation that would pit the Melians against a military superpower. Ober and Perry, and much earlier Diodotus in 3.45.5, argue that the correlation between hope and overestimation of advantage has a low probability of success (Ober, Perry 2014, 209–211). In Diodotus' words, "hope and cupidity – one leading and the other following, one conceiving the attempt, the other suggesting the ease of success – cause the greatest ruin. Although they are invisible agents, they are far stronger than the dangers that are seen." The Melians were no longer basing their actions on the visible strength of the Athenian fleet, but on a distorted version of the rules in which hope was treated as a legitimate strategic asset. This reliance on *elpis* to bridge the gap between their limited resources and their desire for independence led them to reject the Athenians' Project Fear. By treating an

unlikely hope as a calculable probability, the Melians shifted from a position of rational defense to one of high-stakes risk-seeking defiance. Within this game-theoretical framework, *elpis* is more than a mere emotion – it serves as a falsifier of expected utility. In a standard rational choice model, the Melians would have calculated the probability of Spartan intervention as nearly zero, given Sparta's historical reluctance to undertake risky overseas expeditions.

Although the Melians, as players in this game-theoretical process, fell into a flawed way of thinking about the prospects of securing their independent political status, which led to a completely destructive outcome for them, the Athenians themselves also seem to have been prone to risk-seeking behavior. Historically, the Athenians conquered Melos with far greater difficulty than they wanted the Melians to believe in the dialogue. The Melians were defeated by the strength of the siege and with the help of traitors from within the city's ranks (5.116.3). Dal Borgo summarizes this situation effectively as follows: "the Melians suffer from what the behavioural economists Daniel Kahneman and Amos Tversky call the *certainty effect* and the Athenians suffer from *overconfidence*" (Dal Borgo 2016, 163, emphasis in original; see also Kahneman, Tversky 1986, S251–278; Kahneman, Tversky 2000, 36; Kahneman 2011, 310–321).

This psychological impasse is best explained by the certainty effect in the context of loss. In prospect theory, individuals are not uniformly risk-averse; their appetite for risk depends on their initial position (on prospect theory, see Kahneman, Tversky 1979, 263–291; Tversky, Kahneman 1992, 297–323; McDermott 1998; Wakker 2010). For the Melians, the Athenian ultimatum presented a choice between a certain loss, i.e., immediate surrender and loss of independence, and a probabilistic loss, i.e., relying on the hopeful prospect of Spartan rescue. While a standard rational model might suggest damage control or loss minimization through surrender, prospect theory shows that when a certain alternative is perceived as an existential or total loss, human cognitive perception shifts toward accepting high-stakes gambles. By failing to offer the Melians a win–win coordination game, the Athenians inadvertently pushed their opponents into a "nothing-to-lose" position. In this state, defiance is not risk-seeking in the sense of a gambler's pursuit of profit, but rather a defensive escalation – a desperate attempt to minimize a certain, catastrophic loss by pursuing a marginal, albeit unlikely, path to survival. Project Fear fails when the stronger party relies on high-intensity threat signals without recognizing that, once the audience perceives its status quo as one of massive existential loss, hope acts as a psychological multiplier. Persuaders not only fail to persuade – they drive the audience toward the very defiance they aim to deter by making the "safe" option appear as certain ruin.

The Thucydidean context offers an additional layer of analysis: although the Melian Dialogue is often presented as an interaction between two unitary players, the eventual fall of the city reveals a structural breakdown within the Melian payoff matrix. Thucydides' observation that the city fell due to internal treachery highlights a principal–agent problem – a conflict of priorities between a person or group (the principal, in this case the Melian population) and the representative authorized to act on their behalf (the agent, the ruling council). Central to this problem is asymmetric information, where the agent possesses knowledge or secret channels inaccessible to the principal. When the interests of agent and principal diverge, the entity ceases to function as a coherent strategic unit. The traitors within Melos were, in effect, sub-agents who exploited this information gap: while the council maintained a public stance of collective defiance, the traitors privately calculated that the utility of personal survival through collaboration outweighed the council's stated preference for resistance.

Mutatis mutandis, similar logic influenced the decisions of participants in the case of the British, who voted for their country to leave the European Union. The Project Fear strategy used by the pro-EU establishment can be seen as a high-stakes reputation game. Like the Athenians, whose refusal to accept Melian neutrality was driven by the need to signal strength to their subject allies, the pro-EU campaign aimed to send a message that extended far beyond the British electorate. By portraying Brexit as leading to inevitable economic and political disaster, they signaled to other EU member states that the cost of leaving was prohibitively high. Athenian arrogance – prioritizing the credibility of the signal over the concerns of the immediate participant – made the establishment less flexible in its negotiations. By presenting the situation as a zero-sum game with no possible compromise, they inadvertently forced the undecided public into the binary dilemma that triggered the certainty effect and subsequent defiance.

In direct contrast to the establishment's rhetoric of fear, the pro-Leave campaign used *elpis* as a decisive strategic variable (strategically pairing it with a competing fear-based narrative about immigration and national sovereignty). Just as the Melians relied on the hope of Spartan intervention to bridge the gap between their limited resources and their desire for autonomy, the Leave camp reframed the act of withdrawal. They shifted the narrative from a noncooperative game of economic isolation to a coordination game with the wider world. In this cognitive reframing, leaving was no longer presented as an economic risk but as a strategic opportunity for a broader, albeit undefined and uncertain, international payoff matrix. By using *elpis* to reduce the perceived weight of the "dangers that are seen", i.e., economic warnings (simultaneously employing a more visceral fear of demographic change to override material

concerns), they encouraged a risk-seeking preference among voters. For those who felt they had little left to lose within the existing European framework, the promise of regained sovereignty acted as a psychological counterweight, making the high-stakes gamble of Brexit appear more rational than the certain loss of agency within the EU.

The pro-EU party's reliance on fear was a miscalculation of the payoff matrix; they failed to realize that when a signal is perceived as a manipulative threat to sovereignty, the audience's preference shifts toward defiance regardless of economic cost. The pro-Leave camp's reliance on *elpis* created its own trap, persuading the electorate that exit was a harmless coordination game rather than a high-stakes geopolitical disruption. These misguided rules and preferences led to *paralogos*, causing political instability and economic recession. While the post-Brexit crisis is not directly comparable to the destruction of Melos, the underlying mechanisms of failure remain the same. Analysis suggests that the cognitive fallibility of decision-makers remains a historical constant; when the hard data of *kairos* is replaced by the seductive, distorting lens of overconfidence or hope, the result is a catastrophic collision with reality. This parallel highlights a fundamental continuity in human nature: from the shores of Melos to the voting booths of the UK, the rejection of material threats in favor of symbolic agency reveals a strategic vulnerability that persists across millennia.[8]

3. WHEN ANGER OVERPOWERS FEAR: THE CASE OF DEMOSTHENES AND GREXIT

The Melian and Brexit cases illustrate the distorting power of hope. This section examines how the utility function is further recalibrated by the reactive aggression of anger. The focus of the section is Demosthenes' speech *On the Liberty of the Rhodians*, delivered in 351 BCE. The Carian dynast Mausolus exploited Rhodian resentment toward the Athenians and established Carian garrisons on Rhodes during the War of the Allies (357–355 BCE). The Athenians had declared this war on their former allies – the Byzantines, Rhodians, Chians, and people of Kos – who had refused to pay the allied contributions, known as pensions. When Mausolus died in 353/2, the Rhodian democrats attempted to overthrow Carian rule, but were confronted and defeated by Mausolus' widow, Artemisia. In 351 BCE, the Rhodian democrats sought assistance from the Athenians. Demosthenes

[8] I would like to thank one of the anonymous reviewers for highlighting this point.

then delivered a speech to the Assembly, urging his fellow citizens to respond to the Rhodians' democratic appeal for help. The orator had to oppose the pacifist policy of Eubulus, whose party had gained dominance in Athens after the War of the Allies. At this time, the basic policy of the Athenian state was to avoid military ventures unless vital Athenian interests were at stake. Demosthenes also had to contend with the anger of the Athenians toward the Rhodians, whose defection had drawn Athens into the disastrous War of the Allies, as well as the satisfaction some Athenians felt at the Rhodians' suffering because of this defection. Ultimately, the Athenians did not assist Rhodes, which remained under Carian occupation until the Persian state was overthrown by Alexander the Great.

Demosthenes' speech presents a case in which the processes and outcomes of game theory are discussed. The player in this scenario is the Athenian people: through their actions and cognitive approaches, shaped by geographical, temporal, and circumstantial variables, as well as the concept of *kairos* as defined elsewhere in this paper, the majority of Athenians rejected the speaker's pro-Rhodian arguments, with which he attempted to instill fear in them. This rejection influenced the rules, preferences, and ultimately the outcomes of the decision-making process. Notably, in this political debate, the rhetoric of fear was surpassed by another emotion – anger – which generated enmity; both appear to be stronger than the incitement of fear, even though the issue at stake was of paramount importance to Athens – the undermining of democracy. Demosthenes warned the Athenians (§§17–22) that if they abandoned the Rhodians, nondemocratic constitutions would inevitably prevail in the Hellenic world and, consequently, in Athens. Explicit and forceful fearmongering, as in §19, provides a concrete example of how the rhetoric of fear is articulated in Demosthenes' speech and is intended to have a significant impact on the audience: "Seeing that Chios and Mytilene are ruled by oligarchs, and that Rhodes and, I might almost say, all the world are now being seduced into this form of slavery, I am surprised that none of you conceives that our constitution too is in danger, nor draws the conclusion that if all other states are organized on oligarchical principles, it is impossible that they should leave your democracy alone." It is known that the fear of tyranny persisted throughout the classical period, albeit perhaps in a diminished form, and led the Athenians to enact laws against tyranny, such as the Law of Eucrates (337/6 BCE).[9]

[9] On the Athenian laws against tyranny, see Ostwald 1955, 103–128; Gagarin 1981, 71–77; Henderson 2003, 156; Ober 2003, 222–224; on the fear of subversion, see Carey 2005, 75.

The Athenian rejection of Demosthenes' warnings signifies a radical shift in the Assembly's utility function. While the traditional payoff in political deliberation is typically defined by objective metrics such as national security or economic stability, the emotional climate of 351 BCE recalibrated these preferences toward punitive satisfaction. In this context, the Athenian player entered a spiteful equilibrium: the psychological utility of witnessing the Rhodians suffer for their past defection outweighed the strategic utility of preventing an oligarchic encirclement. When revenge becomes the primary preference, the standard rules of rational deterrence are effectively suspended; the Athenians were willing to accept a diminished state of security – even the potential subversion of their own democracy – to ensure a negative payoff for their former allies.

This preference for revenge is sustained by the way anger acts as a powerful time-discounting agent. Demosthenes' use of the domino theory was an appeal to *kairos* – a calculation of future imminent risks. However, the intensity of reactive aggression caused the audience to discount these future threats in favor of immediate emotional catharsis. By focusing on the retrospective action of the Rhodians during the War of the Allies rather than the prospective outcome of Carian expansion, the Athenians fell victim to a temporal distortion. The invisible threat of future tyranny was silenced by the visible and visceral satisfaction of the present Rhodian misery. Ultimately, this represents a breakdown of the signaling game: even a high-quality, factually grounded sign of danger – such as the threat to the Athenian constitution – was entirely discounted because the receiver was locked in a self-destructive preference for symbolic revenge over material self-preservation.

Mutatis mutandis, this happened in the case of the Greek bailout referendum of 2015, where the question was whether the people should accept the bailout terms – jointly proposed by the European Commission, the International Monetary Fund, and the European Central Bank – in the country's sovereign debt crisis. The then left-wing Greek Prime Minister Alexis Tsipras argued that rejecting the bailout would mean that the Greeks would not be able to afford any further austerity measures, which had been imposed on them since 2010. However, European leaders and several economists warned that the No vote would mean that further bailout support for Greece could not be secured in time and that this would have severe financial consequences for Greece, including bankruptcy, a haircut on Greek bank deposits, a collapse of the banking sector, and many years of

deep recession. Despite the insurmountable pressure exerted on the Greeks and the widespread scaremongering, they decided to reject the bailout package by a majority of 61% to 39%.[10]

The decisive factor for the No vote was not fear, but anger: after five years of painful austerity measures that turned the lives of millions of Greeks upside down, the No vote became a vote for freedom. Anger at the European institutions over the way Greece was humiliated (at least according to most people's perception of the decisions made by the socialist and conservative governments preceding the left-wing government in 2015) led the public to overcome their fear of severe economic problems and symbolically take revenge on their "avengers". The decisive factor for the No vote was not a failure to understand the risks, but a fundamental change of preferences. After years of austerity, the Greek electorate shifted from risk aversion to risk-seeking behavior, driven by what behavioral economists identify as a preference for fairness – or, in this case, a spiteful equilibrium. The psychological utility of "freedom" and "revenge" against the perceived humiliation by European institutions outweighed the material utility generated by financial stability.

The EU's high-intensity signaling game failed because the "receiver", i.e., the Greek public, reframed the threat of bankruptcy. Rather than viewing it as a deterrent, they saw it as a sunk cost, making the pursuit of a spiteful equilibrium the only remaining way to reclaim political agency and change the rules of the creditor–debtor relationship. By 2015, the Greek public had already endured five years of severe austerity, resulting in a 25% contraction of the GDP and record unemployment. In this context of loss, these sacrifices became a massive sunk cost. Rather than encouraging risk aversion to protect what remained, the weight of previous suffering triggered an escalation of commitment to defiance. Voters saw the Yes vote (accepting further austerity) as an irrational continuation of a failed investment. As a result, the marginal cost of a potential total collapse was cognitively discounted. When the player feels they have already paid the

[10] It is important to note, as one anonymous reviewer has rightly observed, that the 2015 referendum also served as a strategic face-saving mechanism for the Tsipras administration. While the electorate's No vote was a genuine expression of *orgē* against perceived humiliation, the Greek government arguably used the result as a domestic mandate to pivot and accept a third bailout package. This pivot, though seemingly a betrayal of the vote, arguably enabled Greece to transition towards its current status as a stable and sound economy. In game-theoretical terms, this reinforces the logic of anger as a powerful mobilizing force, even when the ultimate political outcome is a return to a cooperative, though difficult, equilibrium with creditors.

ultimate price, the psychological distance between the current state and total ruin narrows, making a high-stakes gamble for dignity appear more rational than the certain continuation of a painful status quo. This thought transforms Project Fear from a deterrent into an affront: the threat of future pain carries little weight when the audience believes the greatest pain has already been suffered.

How powerful did the ancients consider anger and enmity? Aristotle discusses the two emotions in *Rhetoric* 1382a:

> Enmity may be produced by anger or spite or calumny. Now whereas anger arises from offences against oneself, enmity may arise even without that; we may hate people merely because of what we take to be their character. Anger is always concerned with individuals – a Callias or a Socrates – whereas hatred is directed also against classes: we all hate any thief and any informer. Moreover, anger can be cured by time; but hatred cannot. The one aims at giving pain to its object, the other at doing him harm; the angry man wants his victims to feel; the hater does not mind whether they feel or not. All painful things are felt; but the greatest evils, injustice and folly, are the least felt, since their presence causes no pain. And anger is accompanied by pain, hatred is not; the angry man feels pain, but the hater does not. Much may happen to make the angry man pity those who offend him, but the hater under no circumstances wishes to pity a man whom he has once hated: for the one would have the offenders suffer for what they have done; the other would have them cease to exist.

Both emotions share a common denominator: an inherent element of aggression. Anger is triggered by an individual's perception and evaluation of an external provocative situation, such as a threat or other triggers, such as injustice, insulting behavior, or disagreement, as in Plato's *Euthyphro* 7d. Anger is purely cognitive: it is exercised inwardly, controlled by the mind, and expressed both inwardly (as thoughts and attitudes toward the source that triggers the emotion) and outwardly (as verbal or nonverbal reactions to the trigger, further indicating the interdependence of hostility and anger).[11]

[11] Plato, *Euthyphro* 7d: "Is it not about right and wrong, and noble and disgraceful, and good and bad? Are not these the questions about which you and I and other people become enemies, when we do become enemies, because we differ about them and cannot reach any satisfactory agreement?"

Researchers argue that anger triggers reactive aggression[12] because its intensity and rapid onset have a significant impact on cognition, impairing the effectiveness of cognitive processing, decision-making, and self-control (Gable, Poole, Harmon-Jones 2015; Garfinkel *et al.* 2016).

These cognitive and emotional reactions of the Athenians, both after listening to Demosthenes' speech and reflecting on the troubles the Rhodians had caused them in the past, were sufficient to instill fear and led the decision-making body to conclude that no military aid should be offered to their former allies. Although the *kairos*, i.e., Demosthenes' arguments, was well-reasoned and well-suited to spreading fears of a possible subversion of Athenian democracy, anger and hostility changed the dynamics, overriding one of the Athenians' two preferences and leading to the specific outcome that they reached, to use game theory terminology. This cognitive impairment, driven by the rapid onset of reactive aggression, ultimately results in a failure of *kairos*; by the time the Athenian player or the Greek voter realizes the material cost of their symbolic revenge, the game has already reached its *paralogos*, an outcome that satisfies the heart's desire for justice while leaving the body politic in ruins.

4. CONCLUSION

Comparative analysis of the Melian Dialogue, Demosthenes' Rhodian oratory, and the contemporary referendums of Brexit and Grexit reveals a persistent cognitive architecture underlying the failure of Project Fear. By deconstructing these historical moments through the lens of game theory and behavioral economics, this paper has shown that the rejection of high-intensity fear signals is rarely an act of simple irrationality. Instead, it represents a fundamental change of preferences within the domain of loss.

The findings suggest that when a stronger party – whether the Athenian Empire or the European Union – presents a weaker opponent with an ultimatum implying a certain loss of agency or dignity, the target audience shifts from risk aversion to risk-seeking behavior. In the cases of Melos and Brexit, the Project Fear signal was neutralized by *elpis*, which acted as a falsifier of expected utility, leading decision-makers to gamble on low-probability coordination games with Spartans or global markets. In the cases of Rhodes and the 2015 Greek referendum, the signal was overridden by *orgē* and the

[12] On the link between anger and aggression, see Berkowitz 1993; Blair 2012, 65–74; Coccaro *et al.* 2009.

pursuit of a spiteful equilibrium. In these instances, the psychological utility of punitive satisfaction and symbolic revenge outweighed the material utility of economic or military security. The recurring failure of these persuasive strategies highlights a chronic neglect of *kairos* by the persuaders. By prioritizing their own reputation-signaling, seeking to project a message of ruthlessness to a wider audience, the stronger parties effectively blocked the possibility of a win–win outcome. This strategic overconfidence consistently forced the "receivers" into a binary choice where defiance became the only path to reclaiming political agency.

Ultimately, the history of failed persuasion from 416 BCE to 2016 CE illustrates that fear is a double-edged rhetorical tool. While it aims to enforce submission, its rapid onset often impairs cognitive processing and triggers reactive aggression, leading to *paralogos*: an outcome where the calculations of the elite collide with the emotional imperatives of the collective. In such scenarios, the heart's desire for justice or dignity is satisfied, but often at a cost that leaves the body politic in ruins, demonstrating that the most dangerous variable in any strategic game is the human refusal to be intimidated by "the dangers that are seen".

Case study	**The Project Fear signal**	**The disrupting variable**	**Cognitive/game theory concept**	**Result (*paralogos*)**
Melos	Military annihilation	**Hope, *elpis***	Certainty effect/ reputation game (Athenians)	Total destruction; city repopulated
Brexit	Economic collapse	**Hope, *elpis*** (+ competing fear)	Reframing as a coordination game	Long-term political instability/ recession
Rhodes	Subversion of democracy	**Anger, *orgē***	Spiteful equilibrium/ punitive utility	Capture by Carians, (Persian sympathizers)
Grexit	Banking/state bankruptcy	**Anger, *orgē***	Strategic signaling/ principal–agent pivot	Rejection of terms; eventual "capitulation" and deeper austerity

Source: Author

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Article history:
Received: 2. 1. 2026.
Accepted: 9. 3. 2026.

UDC 341.6:341.229; 347.85

CERIF: S 151

DOI: 10.51204/Anali_PFBU_26102A

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NAVIGATING DISPUTES BEYOND EARTH: A CRITICAL ANALYSIS OF THE PCA OUTER SPACE RULES

The rapid commercialization of outer space, including satellite deployment, space tourism, and asteroid mining, has created an urgent need for effective dispute settlement mechanisms. As private and international actors increasingly participate in space activities, disputes are likely to intensify. In response, the Permanent Court of Arbitration adopted the 2011 Optional Rules for Arbitration of Disputes Relating to Outer Space Activities, establishing a specialized framework for resolving space-related conflicts. This paper critically examines these Rules, highlighting features such as confidentiality

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protections, technical expertise, and party autonomy. It assesses their compatibility with existing international space law, including the 1967 Outer Space Treaty, while identifying challenges related to voluntary jurisdiction and enforcement of awards. Through illustrative dispute scenarios, the study evaluates the Rules' practical relevance and proposes reforms to enhance their accessibility, effectiveness, and alignment with contemporary international space governance.

Key words: *Outer space law. – PCA Outer Space Rules. – Dispute settlement. – Space activities. – Space debris.*

1. INTRODUCTION

Humankind's expansion into outer space has accelerated dramatically in recent decades, bringing new legal and governance challenges to the "final frontier". During the Cold War, space activities were dominated by a handful of state actors (primarily the United States and the Soviet Union), operating in a largely bilateral strategic context (Muszyński-Sulima 2023). Today, however, outer space activities have proliferated and include a wide range of participants, from private aerospace companies and startups to international organizations and emerging spacefaring nations, engaging in endeavors such as satellite mega-constellations, space tourism, asteroid mining, and deep-space exploration (Raitt *et al.* 2005). This democratization of access to space has yielded unprecedented opportunities for technological innovation and economic growth. At the same time, it has introduced complex and multifaceted disputes that transcend traditional legal boundaries. These disputes can span multiple jurisdictions, involve highly technical facts, and implicate overlapping legal regimes, making resolution via traditional courts or purely diplomatic channels increasingly inadequate.

The existing international legal regime for outer space is grounded in a set of foundational treaties and principles developed primarily in the 1960s and 1970s. Chief among these are the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (Outer Space Treaty or OST), the 1968 Rescue Agreement, the 1972 Liability Convention, and the 1975 Registration Convention, along with subsequent United Nations resolutions (UNOOSA 2025a). In addition, the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) forms part of the UN space treaty framework. Although it has a comparatively low number of ratifications and has not been adopted by major spacefaring nations, the Moon Agreement

is nonetheless considered one of the five core UN space treaties and is relevant for its provisions on the "common heritage of mankind" and the prospective international management of lunar resources (UNOOSA 2025b). These instruments establish fundamental norms – such as the peaceful use of space, the prohibition on national appropriation of celestial bodies, and the principle that states bear international responsibility for national space activities – and they generally envision that disputes will be settled through intergovernmental means. For example, the 1972 Liability Convention provides a state-to-state claims process (including a Claims Commission procedure) for damage caused by space objects. However, the Convention contains significant limitations, including the requirement that only states may bring claims, the nonbinding nature of Claims Commission awards unless the parties agree otherwise, and evidentiary challenges in proving "fault" for in-orbit incidents. These structural constraints reduce the Convention's practical effectiveness and contribute to the inadequacy of relying solely on it for contemporary space-related disputes. However, this mechanism is available only to states and its outcomes require the parties' consent to be binding, illustrating the limits of existing frameworks in addressing the full spectrum of potential disputes. Overall, current space treaties and institutions lack a comprehensive, specialized approach to adjudicating disputes that involve the newer landscape of actors (including private companies and public–private partnerships) and novel commercial activities (AALCO 2024). In the absence of a dedicated dispute-resolution forum with broad jurisdiction, unresolved conflicts in space law risk undermining the sustainability and orderly development of outer space activities.

Recognizing these gaps, in 2011 the Permanent Court of Arbitration (PCA) took a significant step by establishing the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (PCA Outer Space Rules). The PCA, an intergovernmental organization based in The Hague, with extensive experience administering international arbitrations, developed these rules to tailor arbitration procedures to the distinctive characteristics of outer space disputes (Feng 2024). The PCA Outer Space Rules represent a milestone as the first arbitral framework explicitly designed for space-related conflicts. They offer a neutral forum accessible to states, international organizations, and private entities alike, and incorporate features intended to address the unique challenges of space disputes – for example, by allowing the use of technical experts and protecting sensitive information through confidentiality measures.

At the same time, the introduction of this specialized arbitral mechanism raises important questions. The PCA Outer Space Rules are voluntary in nature, meaning that they apply only by the agreement of the parties. Their

success thus depends on parties choosing to incorporate or invoke them, yet to date they remain largely untested in practice. Observers have noted concerns about the willingness of parties to submit to arbitration under these Rules, the consistency of such arbitration with existing treaty obligations, and the enforceability of any resulting awards in the international arena (Consoli, Chalkias 2024). As humankind's space activities push further – toward lunar bases, asteroid resource exploitation, and even Mars expeditions – it is timely to assess whether the PCA Outer Space Rules are adequate and adaptable to the rising complexities of multi-jurisdictional, high-stakes disputes in outer space.

This paper aims to critically evaluate the PCA Outer Space Rules in light of current and future needs of outer space dispute resolution. The research addresses several objectives: (1) to describe the development and key provisions of the PCA Outer Space Rules and how they differ from general international arbitration rules; (2) to determine how these Rules interact with existing international legal instruments (such as space treaties and general arbitration frameworks); (3) to examine hypothetical and emerging dispute scenarios – including conflicts over space resource utilization, liability for space debris damage, and satellite signal interference – as a means of testing the practical applicability of the Rules; and (4) to discuss the broader implications of adopting these Rules, including any shortcomings or gaps, and to give recommendations for improving their accessibility and effectiveness. By doing so, the study seeks to illuminate whether and how arbitration can serve as a fundamental mechanism for peacefully managing conflicts in the evolving domain of outer space, and what further developments may be necessary to integrate this mechanism into the international space governance regime.

2. METHODS

This study employs doctrinal and analytical methodology grounded in the examination of legal texts, scholarly commentary, and scenario analysis. First, we conducted a thorough review of primary legal instruments relevant to outer space disputes, including the United Nations space treaties (OST, Rescue Agreement, Liability Convention, etc.), as well as the 2011 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. The text of the PCA Outer Space Rules and their drafting history are analyzed, with attention to how they incorporate or modify the well-established 2010 UNCITRAL Arbitration Rules, on which they are largely based. We also surveyed secondary sources, such as academic articles and

legal analyses, to contextualize the Rules within the broader framework of international dispute resolution. Key sources included works by specialists in space law and arbitration (e.g., Tronchetti 2013, 181–189; Hobe 2019, 3–4) that discuss the inception, content, and anticipated impact of the PCA Outer Space Rules.

Given that no publicly available arbitration cases under the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities have been reported, as confirmed by the PCA official case registry (PCA 2025a) and supported by recent legal commentary (Dreosti *et al.* 2023; Amerjee, Battisson, Hodgson 2025), the study adopts a hypothetical case approach in order to evaluate their practical significance. We constructed and examined representative dispute scenarios, drawn from current and anticipated space activities. These include collisions involving space objects (e.g., the 2009 Iridium–Cosmos satellite collision and potential future accidents caused by space debris or anti-satellite tests), contractual disputes in commercial space ventures (such as launch services agreements and satellite communication service failures), and conflicts over novel activities, such as asteroid mining and lunar resource extraction. For each scenario type, we analyzed how a dispute might be addressed under existing legal avenues versus how it could be handled under the PCA Outer Space Rules. This hypothetical analysis helps to illustrate the scope of the Rules, the procedural advantages they might offer, and any gaps or uncertainties in their application.

Throughout the study, we evaluated the PCA Outer Space Rules against criteria of effectiveness and consistency with international law. This involved comparing their provisions on jurisdiction, procedure, and enforcement with parallel mechanisms (e.g., the claims commission process of the Liability Convention and the arbitration rules of other institutions). Where appropriate, we also draw analogies from actual space-related arbitrations that have occurred under other arbitral regimes (e.g., arbitrations under general rules such as ICC or UNCITRAL in satellite contract disputes) to infer how the PCA Outer Space Rules might operate. The analysis is qualitative in nature, focusing on legal interpretation and logical reasoning supported by expert commentary and historical evidence. This mixed doctrinal and scenario-based approach allows the paper to remain grounded in established law while exploring the forward-looking question of how outer space disputes could be navigated through arbitration.

3. THE HISTORICAL EVOLUTION OF INTERNATIONAL ARBITRATION AND SPACE DISPUTES

The concept of resolving disputes through peaceful means has deep roots in international law, long predating the space age. The Hague Peace Conferences of 1899 and 1907 laid the groundwork for modern arbitration by establishing the Permanent Court of Arbitration and endorsing arbitration, mediation, conciliation, and commissions of inquiry as preferred methods for interstate dispute settlement (Pellet 2013, 2–3). In the aftermath of World War I, the international community sought more structured adjudication: the Covenant of the League of Nations created the Permanent Court of International Justice (PCIJ) in 1920 as the first global judicial body, and the 1919 Treaty of Versailles, along with other post-World War I peace treaties such as those of Saint-Germain, Trianon, Neuilly, and Sèvres, established Mixed Arbitral Tribunals to adjudicate private claims between nationals of former adversary states and between individuals and states. These tribunals marked a significant innovation in international adjudication by enabling nonstate actors to bring legal claims under peace treaties (Erpelding, Ruiz Fabri 2023, 9–26). These developments signaled an enduring commitment to the peaceful settlement of international disputes in general.

The establishment of the United Nations, after World War II, further reinforced this commitment. The UN Charter not only prohibits the threat or use of force (Art. 2 para. 4) but also obliges member states to seek peaceful means of dispute resolution (Art. 2 para. 3), listing arbitration and judicial settlement among the options in Article 33 (UNGA 1945). Subsequent UN General Assembly declarations – such as the 1970 Declaration on Principles of International Law concerning Friendly Relations and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes – reaffirmed and elaborated the duty of states to resolve conflicts without resorting to force, encouraging negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement as viable avenues (UNGA 1970; UNGA 1982). Over the 20th century, an expanded network of international courts and tribunals emerged (e.g., the International Court of Justice replacing the PCIJ, and specialized bodies for trade, law of the sea, human rights, etc.), reflecting the trend toward institutionalized third-party dispute resolution.

Despite these advances, the regime governing outer space remained relatively underdeveloped in terms of dispute settlement mechanisms. The core treaties of space law, notably the 1967 OST and its sister agreements, establish fundamental principles (e.g., requiring that space be used for peaceful purposes and declaring that no nation may claim sovereignty over outer space or celestial bodies) but they include no dedicated courts or

arbitration requirements to enforce these norms (UNOOSA 2025b). Disputes under these treaties were expected to be handled through diplomatic channels or, if necessary, through ad hoc procedures agreed by the parties. The OST provides for consultation between states if activities are thought to cause potentially harmful interference (Art. IX), but this is a political process rather than a legal adjudication. The 1972 Liability Convention offers a structured claims procedure for damage caused by space objects: states may present claims for compensation through diplomatic negotiations, and if that fails, the parties can convene a Claims Commission to make a determination. However, the decision of the Claims Commission is binding only if the parties agree beforehand to consider it final, which in practice makes its authority non-compulsory. Importantly, these treaties did not contemplate direct legal recourse by or against private companies (e.g., any claim for a satellite collision must be espoused by a state) and they did not set up a permanent venue to decide disputes involving technical space issues.

By the early 21st century, the absence of a specialized dispute resolution forum in space law became more glaring as the scale and complexity of space activities increased. Disputes arising from space activities began to surface in various contexts: for instance, contractual disagreements over satellite launches and services were sometimes submitted to arbitration under generic commercial rules, and investment arbitrations were initiated when state regulatory actions affected satellite ventures (Rosenberg, Dadwal 2021). These cases were handled in forums such as the International Chamber of Commerce (ICC) or under the ad hoc UNCITRAL Rules, indicating that arbitration as a method was indeed suitable for space-related disputes, but no tailored ruleset existed to address the particular needs of the space sector. Moreover, the proliferation of international judicial bodies in other fields raised concerns about forum fragmentation – multiple tribunals might have overlapped jurisdiction over aspects of a space dispute (e.g., an issue might engage the International Telecommunication Union processes for frequency allocation, as well as give rise to claims under treaties or contracts). This fragmentation could lead to inconsistent outcomes or procedural inefficiencies. These factors underscored that relying solely on traditional diplomatic negotiations or general-purpose courts could be inadequate for timely and technically informed resolution of space conflicts.

In response to these challenges, the PCA acknowledged the need for a dedicated arbitration framework for outer space. Building on its long-standing mandate to facilitate arbitration between states and others, the PCA convened an advisory group of experts in 2009 to explore the creation of specialized outer space arbitration rules (PCA 2011b, 4–5). The group included legal experts in space law, experienced arbitrators, scientific and

technical specialists, and representatives from both the government and private space sectors (Aceris Law 2024). They reviewed discussion papers on the nature of contemporary space activities – noting the rise of private actors and the high degree of international cooperation – and on the suitability of arbitration for space disputes. The consensus was that an effective dispute resolution mechanism for outer space needed to be accessible to all relevant parties (public and private) and capable of handling the complex technical evidence often involved (PCA 2011 b, 4–5). The Advisory Group proceeded to draft a set of arbitration rules tailored to space, taking the 2010 UNCITRAL Arbitration Rules as a procedural template and modifying them to reflect the "particular characteristics" of space disputes (Tronchetti 2013, 182). The PCA had prior experience in adapting arbitral rules to specialized contexts, notably, it had issued Outer Space Rules for arbitrating disputes in the domain of natural resources and the environment in 2001, which provided useful analogies because such disputes similarly involve scientific evidence and multiple stakeholders (PCA 2011a, 4). After two years of development, on 6 December 2011, the Administrative Council of the PCA formally adopted the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (PCA 2011b, 4–5). This marked an important evolution in the peaceful settlement toolkit: for the first time, parties would have at their disposal a set of procedural rules crafted expressly for disputes beyond Earth. These Rules were designed to bridge the gap between classical international law principles and the practical realities of modern space commerce and exploration, effectively bringing arbitration "into orbit", as a mechanism for space governance.

4. DEVELOPMENT AND KEY FEATURES OF THE PCA OUTER SPACE RULES

The 2011 PCA Optional Rules for Arbitration of Disputes Relating to Outer Space Activities closely follow the structure of the 2010 UNCITRAL Arbitration Rules, while incorporating targeted modifications to address the distinctive technical, legal, and confidentiality concerns associated with space-related disputes.

The PCA Outer Space Rules comprise 43 articles, organized into four sections, reflecting the structural framework of the UNCITRAL Rules but adapting certain provisions to accommodate the particular characteristics of outer space activities. Section I (Arts. 1–6) covers introductory provisions such as scope of application and notice of arbitration; Section II (Arts. 7–16) deals with the composition of the arbitral tribunal; Section III (Arts. 17–32)

governs the arbitral proceedings (including procedures for submissions, evidence, hearings, and interim measures); and Section IV (Arts. 33–43) addresses the award, including its form, effect, and mechanisms for recognition and enforcement (PCA 2011b, 4–5). While maintaining this familiar framework, the drafters introduced several innovations and clarifications to reflect the needs of outer space disputes. The most salient features of the PCA Outer Space Rules are discussed below.

4.1. Scope of Application and Jurisdiction

As an "optional" regime, the PCA Outer Space Rules apply only when all parties to a dispute agree to use them, either by a prior arbitration clause or by a submission agreement after a dispute has arisen. The jurisdictional breadth of the Rules is noteworthy. Article 1 para. 1 specifies that they govern arbitrations arising out of "disputes relating to outer space activities" where parties have agreed to arbitrate under these Rules (PCA 2011b, 4–5). Importantly, the Rules do not attempt to narrowly define what constitutes a "dispute relating to outer space" – in fact, the official commentary and the introduction to the Rules emphasize that no particular characterization of a dispute as an "outer space" dispute is required for jurisdiction, as long as the parties consent to use the Rules (Aceris Law 2024; Tronchetti 2013, 182). This flexibility was a deliberate solution, to avoid debates over justiciability: even if the precipitating events of a dispute occur on Earth (e.g., a breach of contract for a satellite launch service), the parties can still bring the matter under the Outer Space Rules by mutual agreement. In other words, the applicability of the Rules hinges entirely on party consent, not on a rigid geographic or technical threshold – a recognition that many "space" disputes are hybrid in nature, involving terrestrial contracts or downstream services related to space operations.

The Rules also allow a wide range of entities to participate in arbitration. Consistent with the PCA mission, eligible parties include not only states, but also state agencies, intergovernmental organizations, private corporations, and even individuals or other nonstate actors with legal personality (Tronchetti 2013, 182). This inclusiveness is critical given the privatization and commercialization of space; it ensures that, for example, a dispute between two companies from different countries, or between a company and a state, can find a neutral forum under the PCA auspices. All parties are placed on procedurally equal footing, helping to mitigate sovereignty-related asymmetries that might deter states from arbitrating private entities. Indeed, the voluntary nature of the Rules was designed in part to respect

state sovereignty; unlike a compulsory international court, arbitration under these Rules occurs only by the state's own agreement, which historically has made states more amenable to accept third-party resolution (Hobe 2019, 3). As Tronchetti (2013) notes, the optional character of the Outer Space Rules was seen as a "welcome step", to accommodate the reluctance of states to be bound by mandatory jurisdiction, thus encouraging their participation without formally ceding sovereign prerogatives (p. 182).

One significant legal hurdle in arbitration involving sovereign states or intergovernmental organizations is the doctrine of immunity from jurisdiction. The PCA Outer Space Rules directly address this by requiring an express waiver of immunity when a party agrees to arbitrate under the Rules. Article I para. 2 of the Rules provides that such an arbitration agreement "constitutes a waiver of any right of immunity from jurisdiction" with respect to the dispute, and the Rules include a model waiver clause in an annex for this purpose (PCA 2011b, 4–5). In practice, this means that if a state or an international agency submits to arbitration under these Rules, it cannot later claim sovereign immunity to avoid the proceedings or to frustrate the tribunal's jurisdiction. This is a crucial provision because it closes a loophole that might otherwise allow a respondent to derail the arbitration; it gives private parties confidence that a consenting state or international organization cannot subsequently invoke jurisdictional immunity to avoid or derail the proceedings once arbitration under the Rules has been accepted. Similarly, immunity from execution of an award – i.e., protection of state assets – is typically addressed by requiring a separate explicit waiver if parties want to ensure an award can be enforced against sovereign assets, though such issues are often handled at the enforcement stage under national laws.

Another adaptation in the Outer Space Rules pertains to the applicable law. Space-related disputes may engage a patchwork of legal sources: international treaties (e.g., the OST or ITU regulations), national space laws and licensing regulations, contractual agreements, and general principles of law. The Rules acknowledge this by giving parties the autonomy to choose the substantive law or rules of law that the arbitral tribunal should apply (Art. 35, mirroring UNCITRAL Rules). If the parties cannot agree, the tribunal will select the law it deems appropriate. Notably, the appendices to the PCA Outer Space Rules list various instruments potentially relevant to outer space disputes, including treaties, national laws, and even the constitutive instruments of international agencies, thereby signaling to arbitrators that an amalgam of public and private law might govern a case (Tronchetti 2013, 182). This broad approach to applicable law is intended to ensure that tribunals have the flexibility to apply sources of law most pertinent to the dispute's subject matter, bridging the gap between international space law

obligations and commercial contractual frameworks. It also highlights the expectation that arbitrators may need to interpret space treaties or principles when resolving certain disputes (e.g., issues of liability or allowable activities under the OST), underscoring the importance of selecting arbitrators with expertise in public international law as well as commercial law.

4.2. Tribunal Composition and Specialized Expertise

A hallmark of the PCA Outer Space Rules is the integration of scientific and technical expertise into the arbitral process. Recognizing that many outer space disputes involve complex aerospace technology and scientific data (such as satellite technical failures, orbital mechanics, frequency spectrum interference, etc.), the Rules make special provisions for expert arbitrators and expert advisors. Under Article 10 para. 4, the PCA Secretary-General is tasked with maintaining a panel of arbitrators experienced in space-related disputes (Rosenberg, Dadwal 2021). The Permanent Court of Arbitration maintains a specialized Panel of Arbitrators and Experts for Space-Related Disputes, which comprises individuals with expertise in space law and space-industry matters. This official list of panel members is public, available on the PCA website and provides detailed profiles of the arbitrators and experts (PCA 2025). When constituting a tribunal for an outer space dispute, the parties are free to appoint arbitrators outside of this list, but the existence of the list is a resource to assist them in identifying qualified candidates. Moreover, the Rules depart from the UNCITRAL Rules by stipulating that the *appointing authority* for arbitrators is the PCA Secretary-General by default (Art. 6) (Rosenberg, Dadwal 2021). In UNCITRAL ad hoc arbitrations, parties often choose an external appointing authority or request one to be designated, but here the PCA Secretary-General centrally handles appointments if the parties cannot agree. This streamlines the process and ensures that the person selecting arbitrators (when needed) is intimately familiar with the space arbitrator panel and the technical requirements of the case.

The PCA maintains a dedicated Panel of Scientific and Technical Experts for Space-Related Disputes, as provided under Article 29 of the Outer Space Rules, comprising individuals with expertise in areas such as satellite technology, orbital dynamics, and space engineering. These experts may be appointed by arbitral tribunals to assist with complex technical matters relevant to the dispute. A public list of these experts is maintained

and accessible through the PCA website.[1] For example, in a dispute over interference between two satellite systems, the tribunal might appoint a spectrum engineer as an independent expert to provide an unbiased analysis of the signal data. The Rules also allow the tribunal to request the parties to provide nontechnical summaries of complex scientific information (Art. 27 para. 4), helping arbitrators to understand the context before delving into technical evidence, especially if they are legal experts without deep technical training. These innovations aim to ensure that arbitral decisions are well-informed by appropriate expertise, thereby increasing the credibility and accuracy of outcomes in the eyes of the space industry. They also reduce the risk of "dueling experts" paralyzing a case – the tribunal's own appointed expert or confidentiality adviser (discussed below) can cut through partisan claims when needed.

The appointment procedure under the Outer Space Rules follows the UNCITRAL model: typically, a three-member tribunal with each side appointing one arbitrator and the two arbitrators selecting the presiding arbitrator, unless the parties agree to a sole arbitrator or another number. Given the potential for multiparty disputes (e.g., a collision involving several operators or a constellation affecting many actors), the Rules include provisions for consolidating arbitrations or appointing arbitrators in multi-party settings, similar to the UNCITRAL Rules (PCA 2011b, 4–5). The PCA's experience with multi-party cases can be particularly valuable here, and the Secretary-General can help coordinate these appointments fairly. Importantly, once constituted, the tribunal – even if not all members are technical experts – can always draw on the aforementioned expert lists to inform specific questions. This structural flexibility addresses a key critique often leveled at traditional courts dealing with space issues (such as the ICJ or domestic courts): judges in those forums may lack technical knowledge, whereas the PCA arbitration system is built to incorporate such knowledge directly into the decision-making process.

[1] Permanent Court of Arbitration. Case No. 2013–09, CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (PCA), Case information. *https://www.italaw.com/cases/1962*, last visited February 18, 2026.

4.3. Confidentiality and Procedural Safeguards

Confidentiality is a significant concern in many outer space disputes. Space activities often implicate national security information, proprietary technology, and commercially sensitive data. Parties may be hesitant to engage in any dispute resolution process that could expose launch codes, satellite design secrets, or strategic vulnerabilities to public view or even to their adversaries (Blessing 1996, 191–222). The PCA Outer Space Rules tackle this issue with more robust confidentiality options than standard arbitration rules. By default, PCA arbitrations are not public, and the Rules explicitly allow parties to designate information as confidential and to request special protective measures (Art. 17 para. 6) (Rosenberg, Dadwal 2021). If a party asserts that certain information (e.g., technical schematics or operational data) is highly sensitive, the tribunal must determine whether disclosure of that information would likely cause serious harm to the party. If so, the tribunal can order appropriate measures; this might include limited disclosure only to counsel, holding portions of hearings in camera, or sealing parts of the award.

One of the most distinctive tools provided is the option for the tribunal to appoint a confidentiality adviser (PCA 2011b, Article 17 paras. 7–8). A confidentiality adviser is an independent expert (appointed under Article 29) who is given access to the confidential information and is tasked with reviewing it and reporting to the tribunal in a generalized or redacted form. In this way, the core issues can be addressed without the full details ever being revealed to the opposing party or the arbitrators. For instance, imagine a scenario where a private company claims damages because a rival's satellite allegedly took high-resolution images of its proprietary technology on the ISS. The evidentiary details might be classified or export-controlled. A confidentiality adviser (perhaps a technical expert with security clearance) could examine the classified data and then testify to the tribunal in general terms about whether the images show what the claimant alleges, without divulging the sensitive specifics. This mechanism attempts to balance the need to protect secrets with the need to resolve the dispute on the merits. It is a relatively novel solution in arbitration, reflecting practices seen in national security litigation (like courts using special masters or cleared counsel). The tradeoff is that it adds complexity and potentially cost, but for high-stakes space disputes, it may be essential to give parties the confidence to arbitrate rather than avoid legal recourse entirely.

The PCA Outer Space Rules also incorporate safeguards to prevent undue delay and obstruction – issues that can be acute given the time-sensitive nature of some space disputes (e.g., a dispute over orbital slot interference

might need quick resolution to avoid service outages). The Rules empower tribunals to issue interim measures (Art. 26) to preserve the status quo or prevent harm, which could be vital in a space context (e.g., ordering a satellite operator to refrain from transmitting on certain frequencies while the case is pending, if interference is claimed). Furthermore, the Rules encourage expeditious proceedings: Article 25 calls for the proceedings to be conducted so as to avoid unnecessary delay and expense. If an arbitrator becomes unable or unwilling to act, the Secretary-General can step in to appoint a replacement promptly (PCA 2011b, 4–5). Unlike some domestic courts that might get bogged down, an arbitration under PCA Outer Space Rules can be more readily tailored for speed – parties can even agree to expedited schedules. In practice, parties often set timetables for submissions and hearings; the Rules nod to this by allowing the mandate of the arbitrator to terminate if an award is not made within any agreed time limit (Art. 33 para. 1). While complex space cases may require substantial time to gather technical evidence, these provisions pressure all participants to proceed efficiently.

Finally, regarding awards, the Outer Space Rules state that the arbitral award must be in writing, final and binding on the parties (Art. 34). Parties are required to undertake to carry out the award without delay. This finality is a cornerstone of arbitration and is particularly valuable in space commerce – it provides certainty and closure, enabling parties to move forward with missions or business plans rather than being stuck in protracted litigation or diplomatic standoffs. The enforceability of an arbitral award from a PCA Outer Space Rules arbitration would typically be governed by the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, to which over 160 states are party, if the award is considered a commercial arbitration award. In scenarios involving only states or state entities, enforcement might rely on diplomatic compliance (since states are not subject to national courts in the same way), but even then, the award's binding nature carries moral and political weight. The PCA provides mechanisms for recognition of awards in national legal systems and the Rules allow that copies of the award may be deposited with the PCA for safekeeping and potential disclosure to national courts if needed for enforcement (PCA 2011b, 4–5). The award can only be challenged or set aside on limited procedural grounds (possibly under the law of the arbitral seat, if one is designated, similar to other arbitral regimes), meaning parties cannot easily relitigate the matter once it is decided. This aspect is crucial for maintaining order and predictability in space affairs; if, for example, a company wins an award for damages caused by another entity's satellite,

that company can invoke the New York Convention to enforce the award in domestic courts where the losing party has assets, rather than having to lobby its government to pursue diplomatic claims.

In summary, the PCA Outer Space Rules furnish a comprehensive procedural framework that marries the flexibility and party autonomy of international arbitration with special features tailored to the outer space context. They broaden who can access arbitration (beyond states, to private actors), ensure expert knowledge is available to the decision-makers, protect sensitive information, and strive for efficient, conclusive outcomes. These features collectively aim to overcome many of the perceived deficiencies in existing dispute resolution avenues for space – namely, the lack of a neutral forum for mixed disputes, the risk of politicization in diplomatic negotiations, the slow pace and technical ignorance of some courts, and the inability to handle multi-party technical evidence. The true test of these Rules, however, lies in their application to real-world disputes, which we explore through hypothetical scenarios in the next section.

5. ILLUSTRATIVE DISPUTE SCENARIOS IN THE SPACE DOMAIN

In the absence of publicly reported cases under the PCA Outer Space Rules so far, hypothetical and emerging scenarios provide insight into how the Rules might function and why they are needed. This section examines several types of outer space disputes, drawing on actual incidents and plausible future conflicts, and considers how arbitration under the PCA Outer Space Rules could address them.

5.1. Satellite Collisions and Space Debris Liability

One prominent category of disputes involves physical collisions or damage caused by space objects – a risk that is growing as orbital congestion increases. A real-world example was the February 2009 collision between an active U.S. Iridium communications satellite and the defunct Russian Cosmos-2251 satellite. This incident created a cloud of debris and highlighted the question: who is responsible for the losses? Under existing law, the Liability Convention attributes liability to the launching states of space objects for damage caused in outer space on a fault-based standard, as provided in Article III of the 1972 Convention on International Liability for Damage Caused by Space Objects (UNGA 1972). However, any claim would need to be pursued diplomatically by one state against the other, and private

operators, like Iridium, themselves have no standing under the treaty except through their national government. Ultimately, no claim under the Liability Convention was filed in the Iridium–Cosmos case, despite the incident being widely cited as a textbook example of potential treaty application. Scholars have noted that evidentiary complexity – especially in attributing fault for in-orbit collisions – and the diplomatic sensitivity of state-to-state claims likely discouraged formal proceedings (von der Dunk 1992, 363). This underscores how the current liability regime, while theoretically robust, remains underutilized in practice.

If a similar incident were to occur today, for example, involving a collision between a commercial satellite and a piece of space debris or another operator's satellite, the PCA Outer Space Rules could provide a neutral forum for resolving liability and damages. For instance, suppose Company A's active satellite is destroyed by debris resulting from Company B's satellite break-up. Absent arbitration, Company A might lobby its government to espouse a claim against the government of Company B (if B's state is responsible under treaty law), or sue B in domestic court (raising jurisdiction and enforcement issues across borders). By contrast, if both companies (or their states) agreed to arbitrate, the dispute could be heard by a technically knowledgeable arbitral tribunal applying the Liability Convention standards and any relevant contracts between the parties. The Rules are well-suited for this: technical experts from the PCA panel could be engaged to analyze orbital data and debris trajectories to determine fault (Iannotta 2009). Moreover, the confidentiality provisions would allow sharing of sensitive satellite telemetry and military tracking data under protective measures, enabling a factually informed decision. An arbitral award could apportion damages and determine compensation more expeditiously than a diplomatic process, and it would be enforceable against the liable party's assets under international arbitration enforcement norms. This scenario underscores how the PCA Outer Space Rules can supplement the Liability Convention; rather than replacing the state-to-state mechanism, they offer a parallel path where the actual operators and insurers can directly resolve the issue. It is worth noting that arbitrating such disputes also avoids some of the political overtones of blaming a state for a collision; it reframes it as a juridical matter of fault and damage, decided by experts. As space activities extend to crewed stations and possibly lunar bases, the ability to arbitrate liability (e.g., damage caused by a falling rocket stage or an explosion in orbit) could prove vital to providing remedies and accountability in a depoliticized manner.

5.2. Contractual Disputes in Commercial Space Projects

Another common source of conflict is breach of contract in the space industry. This can range from launch services agreements and satellite manufacturing contracts to commercial agreements for telecommunications or Earth observation services. A notable example is the 2011 dispute between the UK-based company Avanti Communications and U.S.-based SpaceX. Avanti had contracted SpaceX to launch a satellite, but after delays and issues, Avanti initiated arbitration and ultimately won an award for damages (SpaceNews 2011). In that case, arbitration was conducted (reportedly under an ICC or other clause) and Avanti obtained a remedy. Many such contracts today include arbitration clauses, but they often reference general rules (ICC, LCIA, UNCITRAL) without special provisions for space. If the PCA Outer Space Rules were incorporated (e.g., via the model clause provided in the Rules' Annex), such disputes could benefit from the tailored features.

Consider a hypothetical scenario: a satellite operator contracts a launch from a launch provider, but the launch is repeatedly delayed, causing the operator to lose a critical telecom contract. The parties have a clause to arbitrate under PCA Outer Space Rules. When the dispute arises (operator claims lost profits, launcher claims force majeure due to technical rocket issues), they initiate PCA arbitration. The case might hinge on highly technical evidence about the rocket failure or delay causes. Under the Outer Space Rules, the tribunal can quickly bring in a rocket engineering expert from the PCA list to evaluate whether the delays were due to negligence or unforeseeable technical challenges. If some documents about the rocket are export-controlled or proprietary, the confidentiality adviser mechanism can be used so that the expert and tribunal see them but not the opposing party's personnel. The tribunal, possibly seated in a neutral country, applies the governing contract law to decide liability. This process could be faster and more specialized than litigating in national courts (which might struggle with jurisdiction if the contract spans countries, and with technical evidence). It also avoids disparate results: without such an arbitration agreement, the operator might only have political recourse (pressuring the launch provider's national agency) or might sue in the launch provider's home courts, where procedural disadvantages, unfamiliar legal standards, or national bias could reduce the claimant's chances of success. The arbitration award, once given, would be binding and if not paid voluntarily, the operator could seek enforcement in any country where the launch provider's assets exist, pursuant to the New York Convention. In essence, the PCA Outer Space Rules here facilitate a level playing field for transnational commercial disputes and ensure that technical facts are properly understood in adjudicating contract breaches. To date, many satellite contract disputes have been resolved

quietly via arbitration; the adoption of the PCA framework could make such resolutions more straightforward by offering off-the-shelf rules geared to space matters.

Another area of growing importance are intellectual property (IP) disputes related to space technology. As companies develop proprietary processes for things such as in-orbit satellite servicing, 3D printing in space, and asteroid mining tech, IP conflicts are likely. For example, two companies might dispute the rights to a patented component used on a spacecraft, or an international collaboration on a space telescope might break down amid disagreements over data sharing and IP ownership. These disputes often have a contractual backbone (e.g., nondisclosure agreements, licensing contracts). The PCA Outer Space Rules could be employed to arbitrate such disputes in a neutral forum, perhaps crucially because one party might be a state-owned enterprise and the other a private firm – a situation where a national court system is now viewed as impartial. Consoli (2024) points out that space-related IP issues are emerging as significant, given the dual-use nature of much space technology and the lack of a specialized international IP regime for space. Under the PCA Outer Space Rules, an arbitral tribunal could apply patent law or licensing law as needed (drawing experts in space technology IP if necessary) and do so confidentially (important if the details of the technology are not yet public). This provides a way to resolve IP claims without public litigation that could inadvertently disclose the very secrets in dispute.

5.3. Interference and Regulatory Disputes

The use of outer space is also subject to regulatory coordination, especially in the radiofrequency spectrum and orbital slots, via the International Telecommunication Union (ITU). With the advent of satellite mega-constellations, tensions have emerged between operators regarding interference and priority – for instance, if one network's satellites interfere with another's signals, or if there are conflicting filings for the same orbital shells. While the ITU procedure handles allocation and technical coordination, it does not issue binding resolutions of disputes between companies. If Company X believes Company Y's satellite network is causing harmful interference, in violation of ITU rules or their operator-to-operator coordination agreement, X could seek relief. A real example is the dispute that arose in the late 2010s when a satellite operator accused another of causing interference and not following the coordination agreement (this has happened occasionally between telecom satellite companies). The PCA

Outer Space Rules could serve to arbitrate such a dispute: the tribunal could interpret any memorandum of understanding that the operators had, or even apply the general principles of the ITU Radio Regulations as contractual context. Technical experts in satellite communications would be key to determining whether harmful interference occurred and whether it was due to negligent operation or spectrum misuse. An award could potentially order the offending operator to take mitigative actions (like modify transmissions or pay damages for losses incurred due to outages). While enforcement of an order to cease interference could be challenging, as it would constitute a form of specific performance or injunctive relief rather than a monetary award, arbitral tribunals under the PCA Outer Space Rules are empowered to issue such remedies, though actual compliance may depend on the cooperation of the parties. Having an arbitral decision would carry weight; it could be communicated to regulators or used as evidence to pressure compliance. At minimum, damages could be enforced monetarily if the interference caused quantifiable harm.

5.4. Future Resource Utilization Conflicts

Looking ahead, disputes may arise from activities such as mining of lunar or asteroid resources, the operation of private space stations, or the establishment of infrastructures on celestial bodies. Currently, international law on resource extraction in space remains underdeveloped. The Outer Space Treaty prohibits national appropriation but is silent on private mining. Although Article 11 of the 1979 Moon Agreement declares the Moon and its resources to be the "common heritage of mankind" and prohibits private ownership over extracted resources, its practical impact is limited, as major spacefaring nations have not ratified the treaty. Meanwhile, several countries have enacted national laws recognizing private rights to extracted resources. several countries have passed national laws granting companies rights to extracted space resources, a practice that has raised debate over whether such legislation constitutes a form of national appropriation, potentially in tension with Article II of the Outer Space Treaty. Suppose, in a future scenario, Company A from Country A and Company B from Country B, each land on the same platinum-rich asteroid. Both claim the right to mine a particular region; confrontations ensue over access, perhaps with equipment interference or sabotage allegations. There is no international court with compulsory jurisdiction over two companies in such a matter, and it is unclear whether states would get involved directly (they might, but that raises political tension). If there were a prior agreement (e.g., both companies signed the same international industry code of conduct

committing to dispute resolution) or even ad hoc consent, they could take the conflict to PCA arbitration. The tribunal might have to apply a mix of legal principles: the Outer Space Treaty (which says space is the province of all mankind and no sovereignty can be claimed) would form the backdrop, national laws on space resource exploitation might supply some rules, and the specific agreements or principles accepted by the parties (maybe an industry standard or a clause in their mission documentation) would fill in details. The arbitrators – likely needing both a legal and a technical background – could determine whether either party has a legitimate prior right, whether any actions violated international norms (e.g., causing harmful contamination, which is barred by the OST Article IX due regard principle), and how to allocate the resources or compensation. While this is highly speculative, it demonstrates the potential role of arbitration in the absence of clear treaty regimes: it can provide an equitable solution based on general legal principles (such as unjust enrichment, or liability for damage) and the facts, until formal laws catch up. The legitimacy of the award would derive from the parties' consent and the arbitrators' impartial application of law, and it could prevent a resource conflict from escalating into a diplomatic or even physical confrontation. Essentially, arbitration could act as a "stopgap" legal system for new space activities in cases where international law is still evolving.

Through these scenarios, a common thread emerges: the PCA Outer Space Rules offer a flexible, party-driven mechanism to resolve disputes that might otherwise fall into a legal void or provoke interstate friction. They can handle mixed public–private disputes, bring in needed expertise, and yield enforceable outcomes, thereby injecting rule of law into situations that might otherwise be governed by power dynamics or uncertainty. However, the effectiveness of this mechanism in practice will depend on parties actually choosing to use it. As of 2025, many space-related disputes have been resolved in arbitration, but under other rules – for example, the well-known cases of investors versus states over satellite licenses in *Devas v. India*[2] and *Deutsche Telekom AG v. India*[3]. were administered by the PCA but used generic UNCITRAL Rules, not the space-specific ones (Rosenberg, Dadwal 2021). This suggests that awareness and acceptance of the PCA Outer Space Rules is still limited. The next section will discuss why this might be and what challenges and improvements are pertinent, drawing on the findings above.

[2] PCA, Case No. 2013–09. *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*.

[3] PCA, Case No. 2014–10. *Deutsche Telekom AG v. Republic of India*.

6. DISCUSSION

6.1. Implications and Challenges of the PCA Outer Space Rules

The analysis of the PCA Outer Space Rules reveals them to be a thoughtfully crafted instrument that fills an important gap in international dispute resolution. In theory, these Rules align well with the principles of peaceful dispute settlement, championed by the UN, and offer a forum compatible with existing space law obligations. By allowing both states and nonstate entities to resolve disputes on neutral ground, the Rules operationalize the OST's broad mandate of cooperation and due regard among space actors, in a judicial form. The incorporation of scientific expertise and confidentiality measures shows an acute awareness of the practical needs in this high-technology field. Moreover, the flexibility regarding applicable law means that arbitrators can (and indeed must) take into account the relevant space treaties (such as the OST and Liability Convention) when making decisions, ensuring consistency with the fundamental legal principles of space activities. In essence, the PCA Outer Space Rules can be seen as a procedural bridge between the established corpus of space law (which is mostly substantive and state-centric) and the fast-evolving landscape of space commerce (which demands dispute mechanisms that include private stakeholders).

However, the success of any legal framework lies in its use and acceptance. A critical observation is that since their inception in 2011, the PCA Outer Space Rules have had minimal traction in actual disputes (Rosenberg, Dadwal 2021). As of 2025, there are still no publicly known cases in which the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities have been invoked to resolve a space dispute, although the PCA has administered space-related arbitrations under other rules. This limited uptake points to several challenges:

1. **Awareness and Preference of Parties:** The international space industry may simply be insufficiently aware of the PCA Outer Space Rules or unconvinced of their added value. Many commercial contracts continue to use familiar arbitral venues (ICC, LCIA, AAA/ICDR) or standard clauses, possibly because lawyers stick to what is known or because major space companies have established relationships with certain institutions. Additionally, private entities might not distinguish between general UNCITRAL-based PCA rules and the specialized Outer Space Rules; from their perspective, any arbitration under PCA auspices might seem equally capable. As Rosenberg and Dadwal (2021) suggest, a survey indicated low awareness of the PCA's offerings among industry respondents. This is a practical barrier: one cannot expect parties to opt into a regime they

do not fully understand or even know exists. Overcoming it will require outreach and education – by the PCA, by space law practitioners, and perhaps endorsement by bodies such as the International Institute of Space Law (IISL) and the UN Committee on Peaceful Uses of Outer Space (UNCOPUOS). If industry players see successful precedents or receive guidance that the PCA Outer Space Rules are advantageous, they may be more inclined to incorporate them into contracts.

2. **Voluntary/Optional Nature – A Double-Edged Sword:** The optional character of the PCA Outer Space Rules, while respecting sovereignty and party autonomy, inherently limits their reach. No matter how well-designed the Rules may be, they cannot compel parties to use them. In disputes where one side prefers not to arbitrate (perhaps hoping to avoid any binding outcome), there is no way to force arbitration unless a prior agreement exists. For example, if a state is accused of violating the OST, it cannot be hauled before a PCA tribunal unless it consents – something states may be loath to do post-dispute. This is a classic problem in international law: *compulsory jurisdiction* is rare, and the Outer Space Rules did not change that reality. The Rules might have benefited from a broader international endorsement – for instance, if the UN General Assembly had recommended states to consider them for certain disputes, or if they were annexed to a multilateral agreement where states commit in advance to arbitrate categories of disputes. Lacking that, they remain an option that must be contractually agreed. In the realm of state-versus-state disputes, this is particularly limiting. States generally prefer diplomatic solutions or, if going legal, might opt for the ICJ or an ad hoc tribunal under their own terms. The PCA Outer Space Rules could offer a tailored forum for state disputes (e.g., one state alleging another failed to control its space object causing damage), but so far, no such arbitration has occurred. The hesitation of states to commit in advance to binding outcomes remains a core challenge. While the Outer Space Rules reflect the foundational arbitration principle of party consent, this very consensual structure can lead to inertia: when parties do not agree to use the Rules, disputes may remain unresolved altogether. In other words, the optional model avoids infringing on sovereignty, yet at the cost of potentially fewer referrals. This challenge is intrinsic to arbitration and not easily remedied without states taking a more forward-looking stance on space governance.
3. **Enforcement and Compliance Concerns:** Even if parties arbitrate and obtain an award, enforcing it can be problematic, especially against sovereign or quasi-sovereign entities. A winning party might face a scenario where the loser, if a state, refuses to comply and hides behind

sovereign immunity from execution (unless a waiver was clearly given). While the Outer Space Rules include an implicit waiver of jurisdictional immunity once a state consents to arbitration, they do not extend to enforcement immunity. Waiving immunity from execution against state property typically requires an explicit and separate declaration, which is not automatically triggered by consent to arbitration. This means that if a state lost an arbitration and did not voluntarily pay damages, the winning party could have difficulty seizing assets without a further waiver. On the commercial side, enforcement against companies is generally straightforward under the New York Convention, but if the company is a state-owned enterprise or in a jurisdiction with weak rule of law, collection is not assured. These realities might make parties question the utility of arbitrating: will they be able to enforce the award? This is not a flaw of the PCA Outer Space Rules per se – it is a general arbitration challenge, but it is heightened in space disputes because many key players are government-controlled or have political importance. One possible mitigation is that simply having a neutral decision might carry weight even if not enforceable through the courts; in the space community, reputational factors and the need for ongoing cooperation can pressure compliance. Nonetheless, the lack of an overarching enforcement regime in outer space (no "space sheriff") means arbitration awards ultimately rely on terrestrial legal systems for execution. As space activities globalize, cross-border enforcement will remain a concern and an area where international cooperation (For example, developing norms for honoring space-related awards) could be beneficial.

4. **Ensuring Consistency with International Space Law:** A theoretical concern that may make some states wary is whether arbitrators applying the PCA Outer Space Rules will faithfully adhere to the states' treaty obligations and not issue awards that contradict or undermine international law precedents. For example, consider a resource mining dispute: an arbitrator might have to opine whether extracting resources is lawful under the OST. States might worry that a tribunal's interpretation could set an informal precedent or affect their interests if they are not party to the case. There is an inherent tension between party autonomy in arbitration and the erga omnes character of certain space law obligations, particularly those grounded in the "common heritage of mankind" principle, which frames outer space and celestial bodies as belonging to all humankind. If arbitrations were to proliferate, there is a risk that inconsistent interpretations of the Outer Space Treaty could emerge. To help mitigate this, the PCA has established panels of arbitrators and scientific experts with backgrounds in space law and related disciplines. While these panels are currently modest in size, they

are publicly listed on the PCA website and are intended to support legally coherent and expert-informed adjudication (PCA 2025b). Additionally, awards could be kept confidential (so not all would become precedents). But the concern remains as a psychological factor: states might simply be more comfortable with intergovernmental resolution (like diplomatic negotiation or UN forums) for issues they see as touching core space treaty principles, rather than entrusting those to arbitrators. Over time, if a body of arbitral jurisprudence in space is built up and proves to be balanced, this fear may subside. For now, it is an impediment to state buy-in. The best way to address it is likely transparency (when possible) and quality – ensuring that any early cases under the Rules are handled by arbitrators of impeccable authority and yield decisions seen as legitimate under international law. This would build confidence that arbitration complements rather than clashes with the treaty system.

5. **Multiplicity of Forums and Lack of Exclusivity:** As identified in the results, the Outer Space Rules do not contain an explicit clause preventing parallel proceedings or subsequent relitigation of the same dispute in other forums. This contrasts with the ICSID Convention, where Article 26 provides that once both parties have consented to arbitration, that consent becomes exclusive and precludes the pursuit of other dispute-resolution remedies for the same dispute (ICSID 2006). In theory, a party could start arbitration under the PCA Outer Space Rules and simultaneously lobby its government to bring a case to the ICJ or raise it in diplomatic channels. This could undermine the effectiveness of arbitration. While in practice arbitrators might pause proceedings if a very similar case is before the ICJ (to avoid conflicting rulings), there is no legal bar to two tracks. This lack of forum exclusivity might dissuade parties who fear the opponent is not fully committed to arbitration. To improve this, parties can contractually agree not to pursue other forums once arbitration is invoked – but that requires foresight. The formal addition of an exclusivity provision to the Rules (or guidance encouraging it) could strengthen the regime by ensuring arbitration is the one-shot process for that dispute. In the absence of it, we must rely on good faith. Most arbitration agreements implicitly rule out court litigation (via the doctrine of arbitration agreement primacy), but they cannot preclude diplomatic efforts. A related point is third-party rights: if a dispute affects others (e.g., a debris collision impacting multiple operators), bilateral arbitration cannot bind third parties. While ICJ judgments may appear broader in scope, the Court is also subject to the "necessary third party" doctrine, which bars adjudication if the legal interests of a non-consenting state are essential to the outcome. In practice, multilateral negotiations may be more effective for fully inclusive dispute resolution.

The PCA Outer Space Rules currently have no mechanism for joinder of third parties without their consent – understandably, as arbitration is consensual. Yet space disputes often have a collective dimension (e.g., debris mitigation or spectrum use). The inability to bring in all interested parties can be a limitation. One possible improvement could be developing amicus curiae practices in these arbitrations – allowing, for example, an international organization or another state to submit a brief if a matter of general interest (Tronchetti 2013, 188–189, hints at wider participation issues). This would not give them a say in the outcome but would help arbitrators consider broader impacts. At present, the Rules do not mention amicus briefs, but arbitral tribunals typically have discretion to accept them. Encouraging such openness (while balancing confidentiality) could mitigate concerns that a small arbitration might inadvertently decide issues of wide import without broader input.

6.2. Recommendations and Future Directions

In light of the challenges identified, several steps are recommended to enhance the efficacy and acceptance of the PCA Outer Space Rules:

- **Increasing Outreach and Integration into Space Governance:** International institutions and national space agencies should actively promote awareness of the PCA Outer Space Rules. For instance, the UNCOPUOS or the UNOOSA could include references to the availability of PCA arbitration in their capacity-building workshops and consensus documents. The inclusion of an arbitration clause referencing the PCA Outer Space Rules in multinational projects (e.g., the Artemis Accords agreements and the ESA contracts) would familiarize stakeholders with the process. Additionally, states could agree, even informally or in a UN resolution, that they view the PCA Outer Space Rules as an acceptable means for settling appropriate space disputes. Such political endorsement would lend legitimacy and encourage parties to consider arbitration before conflicts escalate. Another avenue is industry associations (satellite operators, launch providers) developing model contracts that include PCA Outer Space Rules arbitration clauses – this bottom-up approach can normalize the practice in commercial dealings.
- **Enhancing Accessibility and Reducing Costs:** One practical reform would be to ensure that arbitration under these Rules remains affordable and user-friendly, especially for smaller commercial actors or agencies of developing countries. The PCA already has flexible fee structures, but further measures could be instituted, such as capped fees for certain

categories of disputes and expedited "light" procedures for low-value cases. This addresses the criticism that international arbitration can be expensive and favors wealthier players. If a NewSpace start-up, understood as a privately financed and innovation-driven entrant to the space industry characterized by cost efficiency and responsiveness to market demand (Lisk & de Zwart 2019, 446), or a developing nation's space agency sees that it can reasonably afford to arbitrate a dispute (compared to litigating in foreign courts), it will be more inclined to choose the PCA forum. The PCA should also consider offering administrative support funds or cost-sharing for space arbitrations that raise important precedents (some professional organizations or governments might sponsor this as part of fostering space law development). Improving accessibility also means providing clear, publicly available guidance on how to invoke the Rules, sample clauses, and perhaps a roster of available arbitrators with their credentials, so parties have confidence in the quality of adjudicators.

- **Encouraging Early Use Cases (Pilot Arbitrations):** The first few cases often set the tone. It could be beneficial for the PCA, in cooperation with willing parties, to push several non-sensitive disputes through the process to demonstrate its value. For example, states could refer a relatively contained issue (e.g., a disagreement over interpreting a provision of a bilateral space agreement) to a PCA Outer Space Rules arbitration as a test case. If those awards (or even the smooth conduct of proceedings) become known in the community, it will serve as a proof of concept. Such cases might even be conducted publicly (if parties consent) to maximize learning and transparency. The arbitration community could also publish redacted summaries of any awards (with party permission) to build a corpus of *lex arbitri* for outer space. Seeing concrete outcomes would alleviate abstract concerns and provide precedents to guide future arbitrators and parties. In the same vein, training programs or moot courts focused on the PCA Outer Space Rules (similar to the Manfred Lachs Space Law Moot Court which currently simulates ICJ cases) could be introduced to build familiarity among the next generation of space lawyers.
- **Strengthening Provisions for Broad Participation and Enforcement:** At the rules level, PCA and stakeholders might consider modest updates or protocols to address some of the identified gaps. For third-party participation, an amicus curiae guideline could be issued by the PCA (even without formal rule amendment) encouraging tribunals to accept submissions from entities such as the UN Office for Outer Space Affairs or industry groups when a case touches on general interest (subject to party agreement). This would help bring in wider perspectives and increase

the legitimacy of decisions without compromising the parties' control. Regarding exclusivity, while one cannot unilaterally impose it, the PCA could recommend a model commitment that once arbitration is invoked, parties will not seek parallel resolutions (except interim measures, if urgent). If such language were to become standard in arbitration clauses, it would reduce the risk of multiple forums and signal that arbitration is the parties' chosen path. As for enforcement, states could be encouraged to explicitly waive execution immunity for awards in their arbitration clauses with private parties – this could even be included in the model clause annex (currently the annex has a simple model clause; it could add "The Parties agree that any award rendered shall be enforceable, hereby waiving any objection to enforcement on grounds of sovereign immunity, to the extent applicable"). Gaining agreement with that is problematic, but if a state is genuinely willing to arbitrate, it should logically be willing to stand by the result. Highlighting this issue during contract negotiations can prevent headaches later.

- **Alignment with Evolving International Initiatives:** The coming years may see new international instruments for space traffic management, space resource utilization, and debris mitigation. It would be prudent to integrate dispute resolution mechanisms into those instruments, and the PCA Outer Space Rules could be an obvious choice. For example, if a future "Moon Agreement 2.0" or a multinational accord on asteroid mining is negotiated, states could insert a clause that disputes arising under the agreement *may* (or *shall*) be submitted to binding arbitration under the PCA Outer Space Rules. Similarly, any global framework on space traffic coordination (to avoid collisions and interference) could use arbitration as the backstop if coordination breaks down. By dovetailing the PCA mechanism with new regulatory regimes, the arbitration Rules gain relevance and legitimacy as part of the broader governance toolkit. This also addresses the concern of being an isolated, unused option – instead, arbitration becomes a built-in part of the rule-making for new space activities.
- **Continued Review and Improvement:** Finally, as actual cases are handled, it will be important to conduct after-action reviews. The PCA and the space law community should remain open to refining the Rules based on lessons learned. For instance, if a particular technical challenge in evidence arises frequently (e.g., handling classified military data), perhaps a standardized procedure or memorandum of understanding with governments (for sharing data with PCA under safeguards) could be developed. Or if certain terms in the Rules prove ambiguous in practice, an explanatory note or revision might be warranted. The PCA Outer

Space Rules are not a static legal instrument; they can be amended by the PCA Administrative Council relatively easily, if needed. Such flexibility is an advantage – the Rules can evolve alongside the fast-changing space environment, unlike treaties which are difficult to amend. Stakeholder feedback from arbitrators, parties, and experts involved in cases should feed into periodic updates, ensuring the Rules remain *fit for purpose* as space activities reach new frontiers (such as commercial human spaceflight liability, planetary defense efforts, etc.).

6.3. Theoretical and Broader Implications

From a theoretical standpoint, the move toward arbitrating outer space disputes underlines the increasing privatization and decentralization of international law in certain domains. Traditionally, space was seen as a realm of state-centric activity managed by diplomacy and international organizations. The embrace of arbitration – a private law mechanism – for space indicates a blending of public and private international law. This has both positive and cautionary implications. On the positive side, it suggests that even in areas traditionally dominated by states, flexible legal processes can emerge to handle new realities (much as commerce forced adaptation in other fields). This empowers nonstate actors to have their grievances heard and resolved, contributing to what one might call the "democratization" of space governance: not all issues need to be escalated to nation-state negotiations – they can be settled by rule of law between the actual stakeholders. This can reduce politicization and perhaps lead to more technically sound outcomes, as arbitrators are chosen for expertise rather than political influence.

On the other hand, heavy reliance on arbitration could lead to a body of semi-private jurisprudence that is not easily accessible or transparent to the broader international community. Important interpretations of the Outer Space Treaty or determinations of fault might be locked in confidential awards. This raises questions about the development of *lex spaceria* (space law jurisprudence) – will it bifurcate into public ICJ opinions (rare as they may be) and private arbitral awards? Could differing approaches create uncertainty? The challenge for scholars and practitioners will be to ensure cross-fertilization, i.e., that insights from arbitration inform public law discourse and vice versa. Efforts such as publishing key findings from awards (with party consent) and arbitrators writing academic commentary (without breaching confidentiality) can promote transparency and coherence in space law. These measures also respond to concerns familiar from the investment

arbitration context, such as opaque decision-making, far-reaching awards that may affect public policy, and the limited ability of third parties or states to influence outcomes.

Furthermore, the use of arbitration must be complemented by robust international cooperation. Arbitration addresses the symptoms (disputes) but not the root causes of issues such as space debris proliferation or resource competition; it is a dispute resolution tool, not a regulatory regime. The presence of the PCA Outer Space Rules does not diminish the need for global norms and preventative measures – in fact, it accentuates it, as arbitrators ultimately apply whatever rules exist. If the substantive law is lacking (e.g., no clear rule on mining rights), arbitrators can only do so much; their decisions may rely on general principles or equity, which could vary from case to case. Thus, one implication is that the international community should not view arbitration as a panacea that replaces treaty-making – rather, it is a safety valve that buys time and manages conflicts while harder multilateral agreements are negotiated. In an ideal scenario, as new treaties or agreements emerge, they will specify how arbitration fits in (as discussed, possibly by mandating or recommending it).

Finally, the PCA Outer Space Rules experiment could serve as a model for other emerging global commons and high-technology domains. For example, discussions are already occurring about dispute resolution for cyberspace incidents and polar regions activities, where traditional mechanisms are weak. The outer space arbitration framework might inspire similar specialized rules for those domains, indicating a broader trend of adapting arbitration to areas of international commons and complex multi-actor engagement. This cross-domain influence would reinforce the role of arbitration in global governance but also require careful tailoring to the particularities of each domain.

7. CONCLUSION

The 2011 PCA Outer Space Rules represent a forward-looking innovation at the intersection of international law and the new space economy. The critical analysis in this study shows that the Rules are both necessary and nuanced: they respond to a clear gap in the peaceful settlement of outer space disputes by providing a forum that all space actors can access, and they thoughtfully integrate features to handle the technical and sensitive nature of those disputes. The Rules bring to the table advantages of neutrality, expertise, and enforceability that, if utilized, can greatly strengthen the rule of law in outer space affairs. They ensure that as human endeavors in space

continue to expand, there is a conflict resolution mechanism that is more formal than diplomatic negotiation yet more flexible and inclusive than existing courts.

However, the journey of these Rules from paper to practice is still in its early days. The fact that they remain underused after more than a decade of existence highlights that legal innovation must be coupled with community acceptance. Overcoming hesitations – whether due to lack of awareness, sovereignty concerns, or strategic calculus – is crucial. With appropriate reforms and proactive engagement from both the international community and industry stakeholders, the PCA Outer Space Rules can be made more accessible and attractive. The recommendations provided, such as promoting the Rules in new international agreements, encouraging model clauses, and possibly tweaking certain provisions, aim to catalyze their adoption.

It must be acknowledged that the PCA Outer Space Rules are not a panacea or a final solution for all outer space disputes. Some issues will still fall to diplomacy or require political consensus that arbitration cannot impose. Moreover, as space activities evolve (e.g., mega-constellation crowding or potential conflicts over lunar zones), the nature of disputes may change in ways that test the limits of the current Rules. In that sense, the Rules are an evolving legal instrument – a "bridge" as described earlier, connecting well-trodden arbitration practice with the novel realities of space. They will likely undergo refinement as they encounter real cases, and perhaps one day they will pave the way for a more permanent judicial mechanism, if the community deems it necessary.

In conclusion, the PCA Outer Space Rules offer a fundamental piece of the governance puzzle for an increasingly crowded and commercialized outer space. By providing a means to peacefully navigate disputes beyond Earth, they contribute to the stability and predictability necessary for sustainable space development. To fully realize their potential, concerted efforts must be made to integrate them into the fabric of international space activities and to address the practical challenges that hinder their use. If those efforts are undertaken, one can envision a future where arbitration under the PCA Outer Space Rules becomes a common and trusted way to settle differences in space – thus ensuring that as humankind's reach for the stars continues, our capacity to resolve conflicts keeps pace with our ambitions.

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Article history:
Received: 13. 9. 2025.
Accepted: 9. 3. 2026.

UDC 347.447:004.8
CERIF: S 130
DOI: 10.51204/Anali_PFBU_26103A

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ARTIFICIAL INTELLIGENCE IN CONTRACTUAL PERFORMANCE: LIABILITY FOR BREACH OF CONTRACT

Artificial intelligence (AI) is taking on a larger role in contract performance. Due to the use of AI, debtors may fail to perform their obligation in the agreed manner, thereby causing damage to creditors. Since this matter is not regulated by EU hard law or soft law, the contractual liability arising from the use of AI is governed by the applicable domestic law. This raises the issues regarding the applicability and adequacy of the rules on contractual liability. In legal systems where contractual liability is strict, the rules can be directly applied. However, in systems that require fault, proving it becomes difficult when AI is involved, leading to a liability gap. The paper analyses four approaches to overcoming the liability gap: granting legal personality to AI, treating AI as an agent, regarding AI as an auxiliary, and introducing an exception in the form of strict liability.

Key words: *Artificial intelligence*. – *Contractual liability*. – *Agency law*. – *Auxiliary*. – *Strict liability*.

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1. INTRODUCTION: ARTIFICIAL INTELLIGENCE AND ITS USE IN CONTRACT PERFORMANCE

Artificial intelligence (AI, *Künstliche Intelligenz*, *intelligence artificielle*) and its application in many professions and fields is a topic that will undoubtedly mark the third decade of the 21st century.[1] Although ideas about intelligent machines appeared as early as the mid-20th century,[2] it took another sixty years for their full realization. Until a few years ago, the idea of artificial intelligence was mostly associated with robots that imitate humans in appearance, behaviour, and speech. The general public primarily perceived it as hardware, certainly not necessary for their day-to-day life. Today, however, it manifests itself as software implemented in different devices, with the aim of making everyday activities easier. This change in perspective is largely due to large language model-based AIs capable of generating and understanding human language, such as ChatGPT, which was introduced to the public in November 2022. This was followed by Microsoft launching Copilot in 2023, and Google making Gemini broadly available in 2024. Concurrently, AI assistants Siri and Alexa were developed, the former introduced by Apple and the latter by Amazon. Thanks to these AI systems, artificial intelligence is no longer perceived as a robot imitating humans, but rather as a widely accessible technology that can make everyday life easier.

What is artificial intelligence? Intelligence itself is defined as '*an innate ability to correctly understand things and phenomena in life and the world* [...] *that is, the ability of comprehension and perception*' (Vujaklija 1966, 361, translated by author). If applied to AI, the definition must be modified in two ways. First, naturally, a machine cannot possess an 'innate' ability. Second, intelligence also implies the ability to make independent decisions about how to act in different situations. In this sense, the European Commission states that a distinctive trait of AI systems lies in their capability to infer.[3] Accordingly, artificial intelligence can be defined as the ability of machines to correctly perceive and comprehend phenomena, and based on such understanding, to decide on how to act in certain circumstances.

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1 See Stanford Institute for Human-Centered Artificial Intelligence (HAI) 2025.

2 The term "artificial intelligence" was first used at the Dartmouth workshop, held in 1956 at Dartmouth College, also known as the founding event of the academic field of AI (Krauss 2024, 108).

3 See Recital (12) of Regulation (EU) 2024/1689 (AI Act). *https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng*, last visited September 8, 2025.

In this sense, artificial intelligence has a wide application in contract law. In the negotiation stage, the parties may use artificial intelligence for market analysis, the assessment of their own needs and transaction costs, in order to decide whether to conclude a certain contract. By analysing large volumes of data, companies can tailor their advertising, relying on the behavioural patterns of their clients and exploiting their 'vulnerability', which leads to a significant asymmetry of information (Ebers 2021, 207–208).[4] The AI in the pre-contractual phase is being widely used in the banking and insurance industries.[5] The role of AI is particularly emphasized in the conclusion of contracts, given the widespread use of contracting tools based on artificial intelligence and machine learning (e.g. in the financial instruments market), as well as chatbots (Ebers 2022, 22).[6] Furthermore, the contracts are often performed in such a way that the debtor fulfils their obligation using AI. Finally, artificial intelligence can assist in dispute resolution by processing claims and enabling online dispute settlement (Ebers 2022, 22–23); its capacity to analyse vast amounts of data can likewise be utilized in the examination of existing case law, which is a function of particular significance in legal systems grounded in common law.[7]

This paper considers the use of artificial intelligence in the performance of contracts, and in particular, the breaches of contract involving artificial intelligence. Such breaches are also called digital breaches of contract (Beckers, Teubner 2021, 6). The author examines how the rules on contractual liability apply if the debtor fails to perform their contractual obligation using artificial intelligence. At present, AI systems are not automatic, e.g. programmed to follow user inputs, but autonomous, thus capable of acting and deciding on its own. A machine based on AI itself is presently not a legal subject and therefore cannot bear liability. In order to understand the peculiarities of contractual liability involving the use of AI, one must understand how AI can be applied in this context. AI can be

[4] A clear example is provided by airlines, which advertise tickets at a higher price if the customer has already searched for the same flight or destination, since they use cookies and the IP address to identify repeated searches.

[5] In these sectors, artificial intelligence is used for the evaluation of clients and their creditworthiness, so that a bank can determine whether it a loan may be granted, or an insurance company can assess whether to conclude an insurance contract and under what conditions (see Ebers, Poncibò, Zou 2022, vi).

[6] The literature refers to the *Motionize* contract-drafting software, an artificial intelligence-based tool that operates as a Microsoft Word add-in (Solanki 2023, 1141).

[7] On the other hand, when it comes to the search for and, in particular, the interpretation of applicable legal rules, artificial intelligence has, in the author's view, still not reached a sufficient level of development to be used for such purposes.

used during contract performance in various ways and forms, as well as in different scopes.[8] The author will classify all cases into two categories, according to the extent of AI involvement and the degree to which the debtor retains control over the performance of the obligation.

First, the debtor may use AI in performing the obligation in the same manner as any mechanical or other tool. Such cases remain by far the most frequently encountered in practice. For example, an architect uses AI for calculations, a nutritionist uses AI when creating a meal plan, a coach uses AI when developing a training programme, and a lawyer uses AI when drafting a contract.[9] AI technology can also be placed into the personal computers/devices. Hence, robotic AI, such as drones that inspect wind turbines, can be used to automatically capture images, analyse them, point out possible irregularities, and suggest adequate actions, but the final repair decision remains with a human (Janssen 2022, 62). The common element across all these cases is that the debtor has full control over the performance of their obligation. Hence, the system cannot be regarded as autonomous in this case. The debtor controls whether they will use AI and to what extent. Furthermore, they determine whether the information obtained in that manner is correct and decide whether to rely on it for the performance of the contractual obligation. The debtor is entirely free to modify and improve the output, in whole or in part, to the extent they deem necessary. They may also decide not to rely on the information provided by AI at all, but to perform the obligation entirely themself. The contract is concluded with the debtor because of their expertise, which, when AI is used, lies in their ability to assess whether the output is reliable and appropriate. In such cases, the creditor may even be unaware of the use of AI or, if aware, consents to it, provided that the obligation is duly performed in accordance with the contract. This group of cases will hereinafter be referred to as 'AI solely as a tool'.

Second, the role of the debtor in the performance of the obligation may be significantly reduced in terms of controlling the performance itself. The contracting party (or even both parties) may outsource their decisions to algorithms (Beckers, Teubner 2024, 53). There are obligations that may be performed mainly depending on AI, being able to make the key decisions

[8] For instance, the AI Act imposes a risk-based approach, classifying AI systems as unacceptable risk, high risk, limited risk and minimal risk AI systems, based on the level of risk they generate. See European Commission n.d. AI Act. *https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai?utm*, last visited September 8, 2025.

[9] Janssen (2022, 60) uses the term 'human in loop-scenarios'.

through the process, which leads to the act of performance becoming less transparent for the debtor. Furthermore, the debtor may not even be aware of obstacles that AI has dealt with, the reasoning behind its performance in such a manner, and alternatives that were taken into consideration. For example, in autonomous stock trading, the debtor (e.g. the brokerage firm) may use an AI trading system for the performance of their contractual obligation to manage the client's investment portfolio, allowing the AI to buy and sell stocks in real time without seeking the debtor's prior approval for each transaction. Because of the lack of transparency and autonomous decisions made by AI, those are cases where the creditor is usually aware that their obligation has been performed using AI and consents to it.[10] This group of cases will hereinafter be referred to as 'AI as more than a mere tool'.

Nevertheless, it is not always simple to classify a specific case of AI model use in the first or the second category. The classification primarily serves a didactic purpose in this paper, aiming to provide a clearer understanding of the issue. In reality, however, there are partially autonomous systems or hybrid arrangements (e.g. decision-support AIs, where human oversight is weak but not entirely absent). For example, a bank uses an AI to assess loan applications and recommend approval or denial. Although a human officer formally approves the decision, in practice they rarely override the AI due to its opaque logic and institutional pressure to 'trust the model'. Also, a hospital may use AI to assist radiologists in interpreting scans. Doctors make the final diagnosis but usually follow the AI's suggestion. When the system misses a tumour that a human might have detected, the boundary between tool and autonomous decision-making becomes blurred. In all three scenarios, AI is not a 'mere calculator' (tool) nor a fully independent actor. Human oversight exists, but it is weakened by complexity and opacity (the human cannot realistically verify the AI's reasoning), organisational pressure (staff are incentivised to follow AI), or reliance patterns (the system is trusted by default). This grey zone makes it particularly difficult to apply traditional contractual liability rules.

[10] For example, see Section 5 (Services Offered) in the terms and conditions of the online trading platform AlgosOne (AlgosOne. n.d. Terms & Conditions. *https://algosone.ai/terms/*, last visited 9 August 2025). On the other hand, there are such platforms that use AI solely as a tool, assuring the decisions are made and contract performance is provided by humans. The example is Interactive Brokers, which introduced AI for generating news summaries and AI-powered commentary generator for their clients in 2024, but left the actual trading to humans. See Interactive Brokers. n.d. About the Interactive Brokers Group. *https://www.interactivebrokers.com/en/general/about/info-and-history.php*, last visited August 9, 2025.

This paper examines the application of existing rules on contractual liability in situations where a contract involving artificial intelligence is breached. The analysis focuses on how the legal consequences of non-performance may differ depending on the manner in which AI is deployed in the contractual relationship: solely as a tool or as more than a mere tool. The paper considers how the applicable legal framework determines liability, taking into account whether the given legal system requires the debtor's fault as a precondition for contractual liability, or whether liability arises objectively, irrespective of culpability. By addressing these two dimensions together, the paper seeks to clarify the extent to which traditional concepts of contractual non-performance remain adequate in governing breaches caused by the deployment of AI systems.

The aim of the paper is to examine how contractual liability applies to breaches caused by AI and evaluate four possible approaches to closing the liability gap in fault-based systems. Given the possibility of a liability gap in such legal systems, the author examines potential solutions, as well as the advances and obstacles in legal theory and practice. This research adopts a doctrinal and comparative approach. The analysis is grounded in the contract law systems of England, France, Germany, the Netherlands, Serbia, and Croatia, with the aim of examining how each addresses contractual liability in cases involving AI-related performance. The proposed approaches include: granting legal subjectivity to AI; applying the rules of agency law; operation of rules on vicarious liability or liability of an auxiliary – in the sense of the debtor's liability for the acts of auxiliaries in those legal systems that regulate such liability; and introducing an exception – strict liability in cases of the use of AI in the performance of contractual obligations *de lege ferenda*. The four identified solutions are evaluated using clear and consistent criteria: conformity with existing private law structures, fairness in risk allocation, technological feasibility, and systemic effects.

2. THE CURRENT LEGAL STATUS OF ARTIFICIAL INTELLIGENCE IN CONTRACT PERFORMANCE: A TOOL

Before analysing the rules of contractual liability applicable to the usage of AI during contract performance, one must determine the current legal status of AI-powered systems. Some authors compare AI systems to slaves and *alieni iuris* persons in Roman law, pointing out that both are objects of law rather than the subjects of law (Čerka, Grigiene, Sirbikyte 2015, 10). Others argue that AI systems are more than slaves, i.e. 'digital slaves with

superhuman abilities' (Beckers, Teubner 2021, 11). Nevertheless, the review of the literature and overview of normative efforts regarding this matter reveal that, in terms of contract performance, AI is regarded simply as a tool.

According to the leading view in jurisprudence, AI-powered systems are considered merely as tools employed by humans, i.e. by debtors (Ebers 2021, 213; Beckers, Teubner 2021, 51, 65). AI technology, in this sense, is comparable to any other instrument employed to fulfil contractual obligations, though admittedly more sophisticated in its operation. The focus lies not on the AI system itself, but on the conduct of the debtor who uses such software in performing their obligation. The debtor exercises control over the software and the outcomes it produces in this manner. This approach has also been endorsed by English courts.[11]

When it comes to AI-regulation on a supranational level, it must be noted that far greater attention has been devoted to issues of non-contractual liability arising from the use of artificial intelligence than to issues of contractual liability. For instance, there was a published proposal for a directive on adapting non-contractual civil liability rules to artificial intelligence (2022),[12] preceded by a white paper on AI (2020).[13] However, the proposed directive was withdrawn in February 2025 because there was no consensus among the Member States and stakeholders regarding the crucial provisions.[14] On the other hand, the matter on contract law when AI is involved remains largely within the domestic competence. A common feature of the analysed domestic laws is the lack of specific provisions regarding contractual liability in cases involving AI technology, leaving the matter to be governed by the general rules. These rules vary from one country to another, especially when it comes to contractual liability. Hence, it is unsurprising

[11] See *Software Solutions Partners Ltd. v, HM Customs & Excise* (2007, EWHC Admin 971, para. 67), where the judge concluded that software's role was limited to a technical function and it could not be regarded as an agent in the legal sense (Beckers, Teubner 2021, 51 fn. 31).

[12] European Commission. 2022. Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence. *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0496*, last visited September 8, 2025.

[13] European Commission. 2020. White Paper on Artificial Intelligence: A European approach to excellence and trust. *https://commission.europa.eu/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en*, last visited September 8, 2025.

[14] Luca, Stefano De. 2025. A New Plan for Europe's Sustainable Prosperity and Competitiveness, European Parliament. *https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-ai-liability-directive*, last visited September 12, 2025.

that there have not been any attempts to regulate contractual liability and AI, given that even the proposal on non-contractual liability failed, despite that field being more harmonized.[15] Other than the provisions of the applicable legislation, when concluding contracts, the contracting parties are generally unrestricted in their agreement on risk allocation and liability issues, even when AI technology is used, since the relevant norms are dispositive.

Nevertheless, the conclusion that AI is regarded merely as a tool can only be drawn indirectly. First, UNCITRAL states that, in general, the natural person or a legal entity on whose behalf a computer was programmed *should ultimately be responsible for any message generated by the machine* (UNCITRAL 2007, 70). It is important to note that this rule applies only to automatic, not autonomous machines, i.e. only to machines that operate strictly within the limits of their pre-programmed technical framework.[16] Also, in accordance with the OECD Recommendation of the Council on Artificial Intelligence, AI users should apply continuous risk management throughout the AI system's lifecycle, in line with their role and ability to act, and adopt responsible practices to address related risks, including through cooperation with other stakeholders.[17] Finally, the EU Artificial Intelligence Act (2024) provides a set of rules that users of AI systems must follow. They are required to ensure human oversight, monitor system performance, keep relevant records, provide adequate training, and maintain transparency towards affected parties.[18] Therefore, the latter two instruments impose numerous obligations on AI technology users, yet AI remains merely a tool in their hands, which, due to its specific nature, requires special control and oversight. In the context of contractual liability, compliance or non-compliance with the imposed obligations may serve to determine whether due care has been exercised or not.

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[15] Even the EU consumer law leaves the regulation of damages to Member States, even though it regulates the other remedies. See Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. *https://eur-lex.europa.eu/eli/dir/2019/770/oj/eng*, last visited August 26, 2025, Art. 14 para. 4; and Directive 2019/771 on certain aspects concerning contracts for the sale of goods. *https://eur-lex.europa.eu/eli/dir/2019/771/oj/eng*, last visited August 26, 2025, Art. 13 para. 4.

[16] See UNCITRAL 2007, 69.

[17] See principle 1.5. of Recommendation of the Council on Artificial Intelligence, *https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449*, last visited September 5, 2025.

[18] See articles 26, 27 and 50 of Artificial Intelligence Act.

This stance is completely justifiable when AI actually serves only as a tool. However, it appears inadequate in situations referred to as 'AI as more than a mere tool' (see above), since an autonomous decision-making system may behave unpredictably, from a human perspective. In such cases, the debtor has no control over the behaviour of the AI system, nor over the outcome it produces.

3. BREACH OF CONTRACT AND CONTRACTUAL LIABILITY FOR DAMAGE CAUSED BY USE OF AI IN CONTRACT PERFORMANCE

A breach of contract occurs when a debtor does not fulfil their obligation in accordance with the contract (Burrows 2016, 107). Depending on the gravity of the breach (typical of common law legal systems) or the type of breach (common in civil law legal tradition),[19] legal systems provide a range of remedies available to the creditor. One of the legal remedies available to the creditor in the event of a breach of contract, common to all legal systems, is compensation for the damage suffered. The principle of liability for damages requires that the debtor, under certain conditions, compensate the creditor for losses caused by non-performance or improper performance. These conditions vary depending on the specific legal system. In this section, the author will analyse what occurs when artificial intelligence is introduced into the equation and how this affects the rules on contractual liability.

There are three conditions required, regardless of the legal system in question. These are: a breach of contract, damage suffered by the creditor, and a causal link between the breach and the damages sustained. Furthermore, some legal systems require the fault of the debtor. Can these conditions be stretched enough to accommodate the improper performance when AI is involved? The author will separately address legal systems that establish

[19] The conditions for contractual remedies in the event of non-performance differ significantly between common law and civil law systems. Civil law jurisdictions, grounded in the Roman causal tradition, distinguish between multiple forms of non-performance, such as non-delivery, defective performance, and delay, each of whom trigger different legal consequences. Common law legal systems, by contrast, adopt a uniform concept of breach of contract. In general, every deviation from contractual terms constitutes a breach, but the available remedies vary depending on the seriousness of the breach. In English contract law in particular, termination is permitted only where a breach concerns a condition of the contract or where the breach is sufficiently serious to justify bringing the contract to an end (fundamental breach). See Vicente 2012, 186–191.

contractual liability without requiring fault and those that do require it. However, it is important to note that the distinction between fault-based and strict liability systems in contract law is far less binary than it may initially appear. The differences in practical application are often nuanced rather than categorical. For example, even legal systems traditionally classified as strict liability regimes recognize situations in which the debtor's duty is merely to exercise an adequate level of care (typically in service contracts), rather than to guarantee a specific result. Such an obligation, by its very nature, can only be subjective (see Karanikić Mirić 2024, 729). In fault-based systems, the debtor's liability may be 'stricter' in cases involving so-called generic obligations, where opportunities for exoneration are limited due to the allocation of the procurement risk. In that manner German law, which traditionally requires the debtor's fault, states that '[t]he obligor is responsible for intent and negligence if a higher or lower degree of liability neither is laid down nor is to be inferred from the other subject matter of the obligation, in particular the giving of a guarantee or the assumption of a procurement risk'.[20] It is considered that the debtor assumes the procurement risk when goods are generic (Schulze, Dannemann 2020, 405). Moreover, in Serbian law, many contracts contain a mix of result-oriented and diligence-based duties (e.g. contract of mandate).[21] Finally, even in fault-based systems the creditor does not need to prove that the debtor was at fault, as their liability is presumed until proven otherwise.

3.1. Strict Liability-based Contractual Liability Regimes

Regarding the breach, the damage and the causality, legal scholarship is not concerned with the usage of AI. The first condition for establishing the debtor's liability is the breach of an enforceable contract. Thus, the creditor has not received the performance as it was stipulated in the contract, i.e. they may not have received performance at all, or received partial, late, or defective performance. The use AI, whether it has been used 'solely as a tool' or as 'more than a mere tool' (see section two), has no bearing on the fulfilment of this requirement. In any event, the creditor will have little difficulty proving that the obligation has not been (properly) performed. Similarly, the damage suffered, as the second condition, may be proved

[20] § 276 para. 1 German Civil Code (*Bürgerliches Gesetzbuch*, BGB). *https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html*, last visited January 28, 2026.

[21] Art. 751 Serbian Law on Contracts and Torts (*Zakon o obligacionim odnosima*, ZOO).

regardless of the usage of AI during the performance. The scope of damages in contractual liability varies depending on the particular legal system. Most legal systems limit liability to damages that were foreseeable at the time of contract formation, bearing in mind the ordinary course of things and the special risks the debtor was aware of (Andrews 2016, 324).[22] Furthermore, some legal systems further restrict the damages to material damages only, which encompasses both *damnum emergens* (actual loss) and *lucrum cessans* (loss of profit).[23] The creditor is also required to prove that the damage was suffered as a result of non-performance, late or defective performance of the obligation (causality). In other words, it is necessary that the damage has occurred as a materialization of a risk within the debtor's sphere of control. Since AI is generally regarded as merely an instrument employed by the debtor, the creditor need not distinguish whether the harm was caused by an autonomous decision of the AI system or by the debtor's own conduct. Merely linking the suffered damage and the non-performance – proving that the debtor's breach is the cause of the creditor's loss – is sufficient (Andrews 2016, 323).

Whether or not fault is required for the debtor's liability, non-performance must be attributed to the debtor, meaning that the debtor is the one who bears the risk of it (Smiths 2021, 211). Attribution is often defined in negative terms, by listing situations in which non-performance cannot be attributed to the debtor. As stated in English jurisprudence, non-performance cannot be attributed to debtor, if the debtor's liability is explicitly excluded in general or for specific situations (exception or exclusion clause), if there is a fault on the part of the creditor or the creditor has waived their right to complain about the breach (Andrews 2015, 441; Andrews 2016, 266). Unlike in English law, where exemption from liability due to force majeure must be expressly stipulated in the contract, continental legal systems release

[22] This is often named as the 'remoteness of the damage' (see Andrews 2016, 324). The rule was set in the *Hadley v. Baxendale* (1854) case. However, this limitation does not seem suitable for the usage of AI technology. In that sense, Janssen (2022, 63, 65) states that from the perspective of the debtor, foreseeability is obscured by the unpredictability of machine learning, especially due to the diversity of possible uses and circumstances in which AI is applied. Unlike traditional tools, AI systems may generate outcomes that exceed or deviate from the expectations initially held by the contracting party. As a result, the boundary between foreseeable and unforeseeable harm becomes blurred, potentially undermining the core function of foreseeability as a limiting criterion for contractual liability.

[23] There are states where the starting point is that all damage is recoverable (e.g. France, Belgium, Slovenia, Hungary, Spain, Luxembourg) and states where the starting point is that the recovery of immaterial damage has to be explicitly provided by law (e.g. Germany, Austria, Poland, Italy, the Netherlands, the Nordic countries, Serbia) (European Commission 2022, 164–165).

the debtor from liability in cases of force majeure by operation of law (see Smiths 2021, 211).[24] The issue to be examined is whether such grounds for exemption may apply to cases of non-performance due to the use of artificial intelligence.

In the scenario where AI-usage had contributed to the breach, the contractual parties may exclude liability for damage caused by AI in general or for a certain kind of damage (e.g. damage arising from the malfunction of the AI) or limit it specifically. The ensuing question is whether those types of clauses are valid. The answer again depends on the domestic legal system in question, since neither the Digital Content and Services Directive[25] nor the Sales of Goods Directive[26] regulates the right to damages (Ebers 2021, 213).[27] Neither common law nor civil law systems permit parties to exclude or limit liability for intentional misconduct or gross negligence (Andrews 2011, 425).[28] Beyond this common foundation, civil law jurisdictions often introduce additional restrictions on limitation of liability clauses, which differ from state to state. For instance, under French contract law, a debtor may not exclude or reduce liability for breach of an essential contractual obligation, for causing bodily injury, nor in contracts concluded between a consumer and a professional (see Bénabent 2017, 336–337).[29] Similarly, Swiss law empowers courts to invalidate a limitation of liability clause even in cases of ordinary negligence if the creditor is in a position of subordination to the debtor, or where the debtor's activities are subject to special state

[24] See, for instance, Art. 1231–1 French Code Civil or Art. 263 Serbian Law on Contracts and Torts.

[25] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. *https://eur-lex.europa.eu/eli/dir/2019/770/oj/eng*, last visited August 26, 2025.

[26] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC. *https://eur-lex.europa.eu/eli/dir/2019/771/oj/eng*, last visited August 26, 2025.

[27] On the other hand, the Digital Content and Services Directive 2019/770 (Art. 14 para. 4) and the Sales of Goods Directive 2019/771 (Art. 13 para. 4) do regulate the other remedies: repair or replacement, price reduction or termination of contract (Ebers 2022, 37).

[28] Many European civil law jurisdictions expressly prohibit contractual clauses that exclude or limit liability for intent (and gross negligence), rendering such provisions as null and void; for example, Germany (§ 276 para. 3 BGB), Switzerland (Art. 100 para. 1 Code of Obligations), and Serbia (Art. 265 para. 1 Law on Contracts and Torts).

[29] Art. 1170 Code Civil.

regulation.[30] In English law, the primary focus is on whether the exclusion clause has been properly incorporated into the contract and expressed clearly.[31] Additional constraints may follow from the Unfair Contract Terms Directive 93/13, whose Annex, although initially seen as merely illustrative, has been recognized by the Court of Justice of the European Union (CJEU) as a key reference point in judicial assessment (Ebers 2021, 213).[32]

The user (in this case the creditor) may be negligent in the application of an AI system, for example by using it in an inappropriate environment, under unfavourable conditions, or contrary to the instructions (Geistfeld *et al.* 2023, 27). Such a fault on the creditor's part would discharge the debtor from liability. For example, if the creditor inputs incomplete and outdated data into an AI-based risk-assessment tool and blindly relies on its output, any resulting damage cannot be attributed to the debtor; the creditor using AI technology contrary to its purpose would lead to the same outcome.

Force majeure is usually defined as an event characterized by three features: it is unavoidable, unforeseeable, and external (Bénabent 2017, 286). This paper argues that under no circumstances should the deficiency in the AI system be considered force majeure, neither when it is used 'solely as a tool' nor when used as 'more than the mere tool'. Even though it concerns a complex and autonomous system, AI is internal to the debtor (a tool they use in the fulfilment of their contractual obligations) and not external to them. Accordingly, the condition of an external cause is inherently negated. Therefore, defective AI technology may not be regarded as force majeure.[33]

Hence, contractual liability for the damage caused to the creditor through the use of AI-based autonomous technology can be attributed to the debtor in the legal systems where contractual liability is regarded as a strict liability. Strict liability governs the machine's functioning and attaches to the person it serves, regardless of whether the specific conduct was anticipated or envisaged (Čerka, Grigiene, Sirbikyte 2015, 10). The conditions for the debtor's liability are met, the liability may be attributed to them, and force majeure cannot be

30 Arts. 100 and 101 Swiss Code of Obligations.

31 The courts first examine whether the party relying on the clause took reasonable steps to draw it to the other party's attention. If incorporation is established, the clause is interpreted according to ordinary rules of construction. Provided that the wording is sufficiently clear and unambiguous, liability may in principle be excluded even for negligence or for serious breaches of contract (Andrews 2015, 420–433).

32 Over time, the CJEU has elaborated the Annex's abstract criteria, thereby laying the groundwork for Europe-wide standards on the fairness of liability-limiting clauses for AI systems (Ebers 2021, 213–214).

33 See Janssen 2022, 65.

deemed to have occurred. This is typical of common law legal systems. Also, many European legislatures do not require the debtor's fault (e.g. French law for *obligation de résultat*,[34] Serbian law,[35] Croatian law[36]).

3.2. Fault-based Contractual Liability Regimes

When AI is employed in the performance of a contract, establishing a debtor's fault may prove difficult, if not impossible. Courts will assess whether the standard of due care has been met, which implies that the debtor employed appropriate AI technology and used it in a proper and responsible manner. Nonetheless, certain difficulties may arise. First, the AI-powered system may have malfunctioned during the performance and thus caused damage to the creditor. Even when operating in accordance with its design, the AI system may nonetheless generate an unintended outcome due to its capacity for self-learning and adapting its behaviour to novel circumstances (Geistfeld *et al*. 2023, 27).[37] Moreover, AI systems that are integrated into hardware may cause damage because of defects inherent to the hardware or owing to the features of the AI that triggered hardware failure (Geistfeld *et al*. 2023, 27). Also, the implementation of AI systems often relies on interaction with other technologies, frequently AI-based themselves, which drastically increases the difficulty of identifying the actual cause of damage (Geistfeld *et al*. 2023, 28). In all these situations the debtor used the AI technology properly and

[34] French jurisprudence divides the obligations to *obligations de moyen* and *obligations de résultat*. The first category requires the debtor to undertake every effort that a reasonable person in such circumstances would be expected to make, while the latter obliges the debtor to achieve a specific result, namely the one agreed upon in the contract (Smiths 2021, 213). When it comes to *obligations de moyen*, the debtor is liable only if the creditor proves that they did not undertake such an effort (the burden of proof of the debtor's fault is on the creditor), while the debtor is presumably liable if they failed to fulfil the *obligations de résultat* (the debtor bears the burden of proving that they are free of fault) (see Benabent 2017, 321–322). However, it is not always east to classify the obligation into one of these categories. There are the so called 'relaxed *obligations de résultat*', where the debtor can prove the absence of his fault and thus escape the liability, as well as '*obligations de moyen renforcée*' which require a higher level of effort (see DiMatteo *et al*. 2025, 565).

[35] See Karanikić Mirić 2016, 46–64.

[36] See Nikšić 2022.

[37] Geistfeld *et al*. (2023, 26–28) discusses these difficulties in the context of causation, but I would argue that this is not a matter of causation, but rather of the absence of the debtor's fault.

indeed can prove it (Beckers, Teubner 2021, 6). This list is not exhaustive, but it shows some of the possible situations where the creditor did not receive proper performance, yet the debtor exercised reasonable care.

In these scenarios, we should distinguish between situations where AI was used 'solely as a tool' and when it was utilized as 'more than a mere tool'. If AI was used merely as a tool, the debtor retained (or at least should have retained) full control of the system, with access to all its decisions and the ability to promptly influence or modify them. Hence, they should have noticed the malfunction and prevented the damage in accordance with the required standard of care. The courts will examine whether the choice of instrument itself was reasonable. Therefore, the creditor will be able to prove the negligence on the debtor's part.[38] By contrast, if the debtor could not maintain supervision of AI and had no insight into its decision-making process or the possibility to intervene, their fault cannot be proved. This is the scenario for AI as 'more than a mere tool' usage. In this case, not even the lowest degree of fault–negligence on the part of the debtor can be established, since the act of performance was carried out by the AI-powered system. For creditors, proving fault or even causation in cases of AI malfunction is often practically impossible, as they lack access to the necessary technical information. This evidentiary asymmetry is rarely acknowledged explicitly, yet it lies at the very core of the existing liability gap. Consequently, the creditor is left without compensation and the *casum sentit dominus* principle applies (Beckers, Teubner 2021, 7). The conditions for establishing the debtor's liability are not met and the AI system is not a legal subject. Thus, neither of them is responsible and therefore a liability gap arises.

This reflects the approach taken in some civil law jurisdictions rooted in German legal tradition: a debtor can avoid responsibility by proving that they acted with reasonable care under the given circumstances (Reimann, Zimmerman 2006, 922). Under German law, a breach (*Pflichtverletzung*) must be committed intentionally or negligently in order for the creditor to claim

[38] Moreover, it may even be possible to establish gross negligence (e.g. a trainer creates a training plan using AI that includes exercises the client should not perform because they had back surgery, or a marketing agency, without verification, uses AI and sends the client ads with prohibited claims, causing serious harm). On the other hand, it is nearly impossible to prove intent because the debtor can argue that the non-performance was a matter of oversight or misplaced reliance on AI, rather than a deliberate intent to harm the creditor.

damages (Smiths 2021, 213).[39] In French law, in the case of *obligations de moyens*, the debtor is liable for damages solely when they do not display the diligence and best efforts reasonably required of them (Smiths 2021, 213).

4. ADDRESSING THE LIABILITY GAP IN FAULT-BASED SYSTEMS WHEN AI IS USED AS 'MORE THAN A MERE TOOL'

In this section, the author examines how the liability gap could be overcome in cases where, cumulatively: 1) a breach of contract has occurred; 2) AI technology was used in performing the obligation; 3) AI technology acted autonomously in a way that the debtor had no control over it; 4) the legal system in question requires the debtor's fault as a condition for liability; and 5) the debtor can prove that the AI-powered system had been used correctly. For example, company A undertakes to carry out automated safety testing of electronic components for company B using an AI-based inspection system. The system autonomously determines whether each component meets the agreed safety and technical specifications. However, it incorrectly classifies certain defective components as compliant, resulting in a breach of contract. Company A can show that the system was properly configured, regularly maintained, and used with due care, and that the error was attributable solely to the autonomous operation of the AI, not to any fault on its part.

This question of liability in such a case, both of considerable theoretical and increasing practical importance, may be resolved using several possible solutions. In this section, the author will lay out each of these approaches, providing the arguments both in their favour and against them.

4.1. AI as a Legal Subject

The first possible solution is to attribute the acts of the AI to itself. In order to do so, legal subjectivity must be granted to autonomous AI-powered systems, so that the responsibility may be attributed to them. Namely, to be recognized as a subject of a legal relationship, an entity must be a legal subject (*Rechtsubject*, *personne juridique*). Legal subjectivity (personhood) refers to the status of being a subject of rights and duties. Typically, legal subjects are understood to be natural and legal persons, though some

[39] See §276 and § 280 BGB.

scholars also include animals (see Vodinelić 2020, 333). Applicable law does not recognize AI-powered systems as legal subjects, regardless of their autonomy in terms of decision-making. The possibility of a different solution was discussed by Lawrence Solum more than three decades ago. At this time, the matter was solely theoretical, since no AI model had the capacity that would justify serious concern about the issue of legal personhood (Solum 1992, 1231). Solum (1992, 1258), among other things, points out that AI lacks 'some critical component of personhood, for example souls, consciousness, intentionality, or feelings', and it will forever remain nothing more than human property. Because of a lack of consciousness on its part, it cannot make a legally valid declaration of intent. Although the AI models have gained autonomy in terms of making decisions and have been developing rapidly, modern scholarship majorly shares the same view as Solum.[40] However, Beckers and Teubner (2021, 58) argue that, although AI technology lacks consciousness, it may nonetheless be possible to recognize its digital equivalent. Nevertheless, if AI was granted legal subjectivity, an additional set of issues would emerge, especially when it comes to its appearance before a court of law. Regardless of whether the AI model would be a plaintiff or a defendant, it cannot represent itself in court but must be represented by humans instead (Koops, Hildebrandt, Jaquet-Chiffelle 2010, 514). Since it possesses no assets, an AI-powered system would have to be insured against liability (Solum 1992, 1245). However, this would relieve manufacturers and users of responsibility, thereby creating a moral hazard (Beckers, Treubner 2021, 11). Additionally, it is impossible to prove that an AI system had acted with intent, and therefore it cannot be held liable on that basis in both civil and criminal proceedings (Koops, Hildebrandt, Jaquet-Chiffelle 2010, 514). Considering all the concerns outlined above, it appears that, at present time, there are no grounds to confer legal capacity upon AI technology *de lege ferenda*, as is the case with natural persons and legal entities, regardless of its degree of autonomy.

4.2. Application of Agency Law

In many cases, AI-powered models operate on behalf of humans, in a manner akin to agents. An agent is usually defined as a person who has agreed to act on the principal's behalf (Peel 2015, 16–001; Dalley 2011, 500). For example, in financial markets, an AI trading system may be authorized to buy and sell securities on behalf of an investor, thereby acting as an

[40] See Koops, Hildebrandt, Jaquet-Chiffelle 2010; Čerka, Grigiene, Sirbikyte 2015.

agent, while all legal effects of the transactions are attributed directly to the investor. The human principal determines the scope of authority, objective, instructions and means, whereas the AI system operates on their account (Koops, Hildebrandt, Jaquet-Chiffelle 2010, 512). Thus, can AI be regarded as an agent? Some scholars argue that this should be the proper qualification, especially in the context of concluding a contract by means of an AI system acting in an autonomous capacity (see Beckers, Teubner 2021, 54–55).

The precondition for agency is legal subjectivity. Thus, the prerequisite for such legal qualification would be to grant a narrow legal subjectivity to an autonomous AI-powered system (see Beckers, Teubner 2021, 55–57). The objections against granting legal subjectivity to AI systems stated above apply here as well, even for the narrower scope. Treitel (Peel 2015, 16–013) states that the agent needs to be capable of consenting to act as an agent. Even if some form of legal capacity were to be recognized, it would remain doubtful how AI could satisfy this requirement. Namely, whether it could genuinely refuse to consent, and on what such a possibility would ultimately depend. A similar problem arises with defects of consent, which must be assessed at the level of the AI system, namely whether the declared will was founded on a mistaken perception of reality (Appelmans, Herbosch, Verheye 2021, 347). If the principal (the AI, in this case) acts outside the scope of the contract, it would generally be liable for damages caused to a *bona fidae* third party, yet the problem persists, since the AI lacks assets from which compensation could be paid (Appelmans, Herbosch, Verheye 2021, 350–351). Furthermore, agency presupposes the capacity to make choices guided by moral judgment and responsibility, which AI systems, unlike natural persons, do not possess. Above all, the idea of qualifying AI as an agent does not really solve the problems of contract performance and breach of contract. Agency rules are primarily concerned with the conclusion of contracts – the binding of the principal through the acts of the agent and thus concern the legal acts. Contrarily, the performance of obligations is the material act. The law of agency does not extend to this stage and therefore offers little guidance in terms of liability for breach of contract. Therefore, the agency rules (e.g. unauthorized agency, acting beyond the scope of authority) are not suitable. The approach that software cannot be regarded as an agent (not even in the contract formation) has been affirmed by the German courts, holding that a malfunction in software is to be equated with an error made directly by the person controlling it and considered indistinguishable from it.[41]

[41] A company sold computers through its website, but due to a software malfunction a laptop was displayed at price EUR 245 instead of EUR 2,650. A customer ordered the laptop at the lower price, received automatic email confirmation, and the product was delivered to him. The seller later sued him and

4.3. AI as an Auxiliary

Some legal systems (e.g. French, German and Swiss law) recognize the concept of liability for auxiliaries (*auxiliaire*, *Erfüllungsgehilfe*, *Hilfsperson*). An auxiliary is a person whom the debtor engages in the performance of the obligation. They are chosen by the debtor and act in accordance with the debtor's instructions and under their control. For example, French courts hold that a debtor who uses an auxiliary for performance remains responsible for the auxiliary's misconduct (*faute de l'auxiliaire*).[42] Similarly, the German Civil Code provides that the debtor is liable for the fault of a *Hilfsperson* to the same extent as for his own fault, thereby ensuring that any breach committed by a person engaged in the performance of the obligation is attributed directly to the debtor.[43] The same approach is adopted by the Swiss law.[44] Hence, any liability incurred by the auxiliary is imputed to the debtor. From the creditor's perspective, the auxiliary is not considered a third party, given the absence of any contractual relationship between them (Benabent 2017, 328). The creditor cannot be put in a worse position because their obligation was fulfilled by the auxiliary instead of the debtor. In the absence of an express contractual rule, other legal systems derive similar principles from the inherent principles of the law of obligations. There is no 'transfer of liability' to sub-debtor, but the 'original' debtor remains liable to the creditor for the breach occurred (Peel 2015, 17–012).[45]

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declared avoidance of the contract, arguing the price resulted from a software error. The courts held the seller was entitled to avoid the contract on the grounds of an error in declaration, treating the software malfunction as equivalent to a human mistake or as a transmission error through a technical medium (§ 120 BGB). This reasoning underscores that AI functions merely as an instrument of execution, not as an agent, and that the will and liability remain solely with the human. See Federal Court of Justice, judgment of 26 January 2005 – VIII ZR 79/04. *https://lorenz.userweb.mwn.de/urteile/viiizr79_04.htm*, last visited August 30, 2025.

42 See Cour de Cassation, Chambre mixte, 22 April 2005, 02–18.326.

43 § 278 BGB. However, the difference when the debtor uses the auxiliary in performing the obligation is that they may be released in advance from liability for (the auxiliary's) intent, which is not possible when they perform the obligation by themselves (compare § 276 BGB and second sentence in § 278 BGB).

44 A person who delegates the performance of an obligation or the exercise of a right arising from a contractual obligation to an associate, such as a member of their household or an employee, is liable to the other party for any damage the associate causes in carrying out such tasks, even if their delegation was entirely authorised (Art. 101 para. 1 of Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations).

45 In the case *Stewart v Reavell's Garage* (1952), the court decided that even though the car owner had agreed to the work being done by a sub-contractor, the defendants were still liable for the poor workmanship. Their contractual liability

Can the AI-powered system be regarded as the auxiliary (sub-contractor)? Some authors argue that the usage of AI and human assistants during contract performance must lead to the same legal consequences, because the damage caused by both falls within the debtor's sphere of control (Janssen 2022, 70–71). A different solution (i.e. the exemption of the debtor from liability when using AI technology) would be unjust, because of the privileging of debtors who use AI technology instead of human helpers (Janssen 2022, 70–71). However, similarly to the reasoning applied in relation to the agent, owing to the absence of legal personhood, AI cannot qualify as an auxiliary, since it is not a subject of law.[46] It has no legal capacity to act as one, as such liability arises if the human assistant breaches the contract (Beckers, Teubner 2024, 6). Similarly to the agency law approach, this obstacle may be overcome by granting AI-powered models (narrow) legal capacity, as argued above. Nevertheless, all the applicable rules and legal theory regulating the liability of auxiliary lead to the sole liability of the debtor themself. Thus, even if we qualify an autonomous AI system as an auxiliary, we obtain no further insight beyond the prevailing view that regards AI merely as a tool, since the legal effects remain the same.

4.4. Imposing Strict Liability if AI technology Was Used for Performance

Finally, the liability gap in legal systems that require the debtor's fault could be resolved by introducing a strict liability exception for the use of AI in contract performance. In addition to closing the existing liability gap, this would ensure equal treatment between the use of human assistants and AI and provide greater legal certainty for creditors, while encouraging operators to exercise due care when employing AI systems. Nevertheless, appropriate exceptions should be introduced to mitigate potential excessive rigidity of strict liability solutions.[47]

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was not transferred, and the sub-contractor had no contractual liability towards the owner (Peel 2015, 17–012).

[46] There are German scholars who state that AI systems shall be regarded as agents, e.g. Phillip Hacker, Jan-Erik Schirmer, Gunther Teubner (Ebers 2021, 213 ff. 61).

[47] It has already been pointed out why the force majeure exception is not applicable here (see above).

The Dutch Civil Code prescribes an interesting solution regarding the usage of objects (things) during contract performance. 'Where, in the performance of an obligation, a thing is used that appears to be unfit for that purpose, the non-performance which might result from this, is attributable to the debtor, unless this would be unreasonable in view of the content and necessary implication of the juridical act from which the obligation arises, the generally accepted principles (common opinion) and other circumstances of the situation'.[48] Hence, the rule imposes strict liability if the debtor used an unsuitable object for contract performance and breached the contract because of its unsuitability, but this rule is followed by noteworthy exceptions (Graaf, Wuisman 2022, 268). In the context of a breach of contract involving autonomous AI technology, this rule may apply when the AI itself is the 'object' employed, even though it is not literally an object, but functionally equivalent to one (Graaf, Wuisman 2022, 272–274).[49] The prescribed exceptions also seem reasonable when it comes to the debtor's liability and AI malfunction. The debtor is liable for breach of contract when they used AI technology during the contract performance, regardless of the implied standard of care (strict liability). The first exception should be applied when the debtor had no freedom to choose whether to use AI, or when the AI was provided by the creditor. For instance, if a supplier (debtor) is forced to use a state-mandated AI system to deliver a service, and the system fails, it would be unfair to claim that the supplier breached the contract, because the use of AI was not their choice. Furthermore, an additional requirement is the debtor's lack of control over the system during performance, in the sense that they were unable to intervene in its decision-making process. The second exception regards common opinions, as views that are shared by the majority of society, which serve as an additional corrective and protect the debtor in cases where, according to general perception, it would be unfair for them to bear the risk of non-performance under the precise circumstances (Graaf, Wuisman 2022, 268–269).

Introducing such an exception in legal systems that base contractual liability on the debtor's fault would resolve the issue of the liability gap arising from the use of AI technology. As a rule, the debtor would be liable, while exceptions would allow release from liability in situations where it would be unfair to impose the risk of non-performance, whether because the debtor had no choice but to use the given AI model and had no control over it,

[48] Art. 6:77 Dutch Civil Code. *http://www.dutchcivillaw.com/legislation/dcctitle6611aa.htm#sec0619*, last visited January 30, 2026.

[49] It cannot be defined as an object because the object is necessarily under human control, and autonomous AI is often not.

or because it would otherwise be unjust to impose liability, considering the general societal principles. This solution addresses the liability gap without requiring interference with the fundamental principles of civil law, such as the rules on legal capacity. Moreover, AI is not inappropriately located within the framework of another legal institution, rather, it remains a tool in the hands of the debtor, for which the debtor is liable, except in cases where such liability would be unreasonable.

Furthermore, the new EU Product Liability Directive[50] illustrates a broader European shift towards strict liability in situations involving autonomous decision-making. According to this directive, manufacturers may be held strictly liable for damage caused by defective products incorporating AI-based components, without the need for the injured party to prove fault.[51] While this reform primarily concerns product liability rather than contractual liability, it reflects a normative trend in EU law aimed at addressing the specific risks associated with autonomous and unpredictable behaviour of AI systems. This trajectory reinforces the argument that an exception introducing strict contractual liability for AI-related breaches could be viewed as consistent with the developing European legal framework.

On the other hand, imposing strict liability is not costless. It may over-deter the use of beneficial AI technologies, create unfair burdens on small debtors, and shift costs inefficiently. Parties might therefore avoid using innovative AI systems out of fear of excessive risk and liability, which could slow down technological progress in the long run. However, the introduction of strict liability may at the same time encourage contracting parties to implement adequate preventive, safety, and monitoring mechanisms in order to minimize AI malfunctions and detect them as early as possible. Moreover, strict liability ensures that responsibility rests with the party who operates, supervises, and benefits from the use of the AI system – *cuius commodum eius damnum* (in this context the debtor) (Karanikić Mirić 2016, 37–38). After all, the use of AI systems inherently generates an increased risk of harm, which justifies the imposition of strict liability.

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[50] Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC. *https://eur-lex.europa.eu/eli/dir/2024/2853/oj/eng*, last visited December 7, 2025.

[51] See Directive (EU) 2024/2853 Recitals 2, 6, 9, 13.

5. CONCLUSION

Despite the rapid advancement of AI technology, the law has yet to keep pace, particularly regarding the deployment of AI in the performance of contractual obligations. The defining feature of an AI system – its autonomy, e.g. its capacity to make decisions independently rather than merely following predetermined instructions – seems to be overlooked by legislators for now. Its additional aspects, such as unpredictability, opacity (the 'black box' problem), and the impossibility of fully monitoring the inputs as well as the outputs also complicates the application of liability rules. By contrast, AI technology in this context is treated merely as a tool, a means in the hands of the debtor over which they exercise full control and which they are expected to operate in line with their will and expertise. The use of AI in a manner where the debtor retains full control over performance throughout the process, makes all decisions, and determines how to handle AI-generated information represents only one possible way of employing AI for the fulfilment of contractual obligations ('AI solely as a tool'). AI technology, on the other hand, can also be employed in performance in a manner where the system itself makes decisions, with the debtor having neither full insight into the process nor control over the output ('AI as more than a mere tool'). Regardless of the scope or manner of AI use, a breach of contract may occur because of a malfunction of the system, its inadequate adjustment to the circumstances, or something else. However, the latter situation is particularly problematic in light of the existing legal framework.

EU law so far does not regulate contractual liability in the context of AI technology, nor does it provide a model for national legislators to follow – not even through soft-law instruments. Instead, the domestic contract law is applied. Depending on whether fault is required as a basis for contractual liability, legal systems can be classified as those that impose strict liability and those that follow a fault-based model. For the first group of systems, there is no difficulty in applying the existing rules to situations where a contractual obligation is breached using AI technology. For the creditor, the burden of proving the breach, the damage suffered, and the causal link remains unaffected by the fact that AI technology was involved. However, the problem arises in the second group of legal systems. In cases where the breach of contract results from a malfunction of the autonomous AI system, the debtor can effectively defend themselves by arguing that they acted with due care. This would especially be the case where AI technology is employed as more than a mere tool, since in such instances the debtor does not exercise full control over the system. It is in such circumstances that the liability gap emerges: the debtor is not liable for damage that occurred, AI is not a legal subject, but a mere tool, and the creditor has no contractual

relationship with the AI manufacturer and is often not even aware of which exact technology was employed. As a result, the principle of *casum sentit dominus* applies. The liability gap is therefore not merely conceptual, i.e. arising from the fact that AI systems are not legal subjects, but also profoundly practical, reflected in the difficulty for the creditor to prove fault, the pronounced information asymmetry, and the lack of contractual privity with AI developers and manufacturers.

It should be noted that contract law already contains mechanisms capable of extending liability, such as the duty to select appropriate instruments or tools, the principle of foreseeability of malfunction, and contractual risk allocation. Nonetheless, these mechanisms alone can be insufficient, bearing in mind the mentioned autonomy, opacity and unpredictability of such technologies. Even the most diligent parties may be unable to fully evaluate the reliability or potential risks of complex AI systems. The principle of foreseeability becomes ineffective in the context of AI, as malfunctions may stem from inherently unpredictable, self-learning processes that operate beyond human understanding or control. Contractual risk allocation is left to the parties' discretion rather than being legally prescribed. Moreover, the technical uncertainty surrounding AI makes it difficult to identify and allocate risks *ex ante*, especially if the creditor is not familiar with the technology.

The liability gap that arises under the circumstances explained above could be resolved in several ways. The first is to grant legal subjectivity to autonomous AI systems. This way, actions performed by such systems could be attributed to them, and AI models could also be held liable for the damage, which would in turn require them to be insured. However, there are numerous theoretical and practical obstacles: AI lacks genuine will, consciousness, and emotions, difficulties arise regarding its representation before the courts, and such a solution would also create moral hazard on the part of the debtor (as well as the manufacturer). Another option would be to apply the rules of agency law, given that AI acts on behalf of the person who employs it. Yet this approach once again encounters the problem of the absence of genuine will, which raises the issue of AI's consent. Overcoming this difficulty would require granting AI at least a limited form of legal capacity, thereby triggering the aforementioned challenges. Moreover, since the performance of a contractual obligation is a material rather than a legal act, agency law does not appear to be the most suitable framework. The third solution would be to treat an AI system as an auxiliary. This solution would likewise require granting AI at least a limited legal capacity, yet in substance it produces the same effect as treating AI merely as a tool, since any other solution would unjustly favour AI technology over human auxiliaries. Finally, the fourth option, which appears least problematic from both a theoretical and practical standpoint, is to

establish an exception whereby the debtor incurs strict liability if autonomous AI technology has been employed in the performance of the obligation. Such a solution necessarily entails the introduction of exceptions. Dutch law could serve as a model, as its norms provide the release of the debtor from liability where they had no choice but to employ a particular AI technology, or where imposing liability would, in view of common opinion and the particular circumstances, be considered unfair.

Nevertheless, it is certain that the law will continue to evolve in the direction of addressing peculiarities that AI technologies introduce into contract law, including, among others, the existing liability gap. Recent EU initiatives, such as the AI Act and the reform of the Product Liability Directive, are likely to influence the interpretation and adaptation of domestic contract law. These instruments may serve as a reference point for redefining standards of diligence, risk allocation, and accountability in contractual relationships involving AI.

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Article history:
Received: 13. 10. 2025.
Accepted: 8. 12. 2025.

UDC 316.62:321(497.11); 316.334.2/.3:334.722(497.11)
CERIF: S 210, S 212, S 214
DOI: 10.51204/Anali_PFBU_26104A

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LEGAL CONSCIOUSNESS OF BUSINESSPEOPLE IN SERBIA: RELATIONAL, POLITICAL AND INCONSISTENT?

This exploratory study examines the legal consciousness of small business owners in Serbia during intense political crisis and institutional instability. We analyze perceptions of the law and how they are shaped, and the findings show that respondents view the law primarily as an instrument of the political elite rather than a safeguard of individual rights and freedoms, with selective enforcement and the elite's legal impunity being the most notable features of the Serbian legal system. We thus conclude that legal consciousness is (1) macro-relational and closely intertwined with perceptions of governance and the political elite, and (2) micro-relational and grounded in direct personal experience with legal institutions. In the Serbian context, featuring political ruptures and legal abuses, legal consciousness is less about the shared creation of legal meaning and more about perceptions of the political elite's behavior. The study proposes distinguishing between macro and micro relational levels of legal consciousness.

Key words: *Legal consciousness. – Relational legal consciousness. – Macro-relational. – Micro-relational. – Democratic backsliding.*

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1. INTRODUCTION***

Businesspeople in Serbia operate in an environment where formal rules often lack the authority and stability that would make them a reliable guide for everyday behavior. Laws are frequently perceived as flexible, negotiable, and selectively enforced, especially when political or economic elites are involved (Vuković, Spaić 2022; Pavlović 2020; Cvejić 2016). This perception is reinforced by a long history of weak institutional independence, pervasive clientelism, and the normalization of informal arrangements that bypass official procedures (Vuković, Stefanović 2024). In such contexts, compliance is less about adhering to universal principles and more about navigating personal networks, avoiding state interference, and adapting to shifting political winds. For small business owners, whose decisions often straddle the formal and informal spheres, these attitudes toward law shape how legality is understood, engaged with, and strategically avoided.

Since the early 1980s, the concept of legal consciousness has provided socio-legal scholars with important insights into the mutually constitutive relationships between law, individual experience, and broader social and cultural structures (Ewick, Silbey 1998; Hertogh 2004; Hertogh, Kurkchiyan 2016). This body of work has illuminated how people make sense of legality in their everyday lives, how law interacts with identity, and how it both reinforces and challenges social hierarchies and power dynamics. Legal consciousness has thus become a flexible and evolving paradigm, applied across diverse contexts and methodological orientations (Chua, Engel 2019).

Having this in mind, we present and analyze data drawn from qualitative research of legal consciousness of businesspeople in Serbia. The exploratory research, which consisted of nine in-depth interviews, was conducted during a period marked by deep political instability stemming from months-long anti-government protests. The protests were initially sparked by a tragic incident in which the collapse of a concrete canopy at a train station in Novi Sad claimed the lives of 16 people in November 2024. The accident

*** This paper is the result of research conducted within the scientific strategic project of the University of Belgrade Faculty of Law for 2025 "Problems of Creation, Interpretation and Application of Law". The paper was presented at the 5th ISA Forum of Sociology, held at Mohammed V University in Rabat, Morocco as part of the RCSL panel "Legal Alienation in Ordinary Legal Consciousness: Everyday Experiences". The paper was also presented at the ELTE Faculty of Law in Budapest at the RCSL Workshop on Legal Consciousness and Legal Cultures. We are grateful to the participants in the both conferences for their insightful comments and engaging discussion.

served as a catalyst for public outrage, unifying citizens around demands for legal accountability. The protests led to widespread disruption: all state universities were shut down, classes and exams were suspended; elementary and high school teachers joined the strike en masse; the Serbian Bar Association entered a month-long strike, and agricultural workers blocked roads across the country. In February 2025, the entire government resigned under pressure, but the protests remained active throughout the summer.

The fieldwork part of the study was conducted during a politically tense time. However, this increased the relational and complex character of legal consciousness and enabled us to show that it is shaped not only by formal legal frameworks, lived experiences, and daily interactions with the state but also by political attitudes, values, and perceptions of procedural fairness and the impartiality of state authorities.

The article proceeds as follows. In the first section, we outline the theoretical background, focusing on the concepts of legal culture and relational legal consciousness. The second section discusses the socio-legal context in which the research was conducted, featuring selective law enforcement, widespread informality, and general distrust. After the methodology section, we present and analyze our findings. We highlight the complexity and relational nature of legal consciousness and its close ties to political attitudes and perceptions rather than personal experiences with the law. In the final section, we identify additional areas for future research.

2. SITUATING LEGAL CONSCIOUSNESS: RELATIONALITY, POLITICS AND BROADER SOCIAL ATTITUDES

Legal consciousness is generally understood as a "cognitive image of law that is constructed through the life experience of people," while "[c]ollective legal consciousness consists of a pattern of thinking among people about what law is and how they relate to it" (Hertogh, Kurkchiyan 2016, 404, 405). It is often considered central, if not synonymous, with the study of legal culture (Fekete, Szilágyi 2017, 326). Hertogh (2004) makes a key distinction between American and European traditions: the former focuses on how people perceive official law, while the latter examines what people perceive as law, emphasizing informal, everyday understandings. Ewick and Silbey's (1998) typology – *before the law*, *with the law*, and *against the law* – illustrates different ways individuals position themselves in relation to legality based on their lived experiences.

Building on this, Hertogh (2018) introduces the concept of *legal alienation* – a subjective sense of detachment from law, marked by confusion, distrust, or misalignment with legal values. He identifies four dimensions of this alienation: legal meaninglessness, powerlessness, cynicism, and value-isolation. These give rise to four normative profiles: legalists, loyalists, cynics, and outsiders, offering a framework for understanding how people engage with or disengage from law. This typology provides a conceptual bridge to the next generation of legal consciousness scholarship, which increasingly emphasizes its relational and co-constitutive nature.

In their influential reassessment of the field, Chua and Engel (2019, 335–353) categorized the rich tradition of legal consciousness research into three interpretive "schools": the *Identity* school, which emphasizes the role of legality in shaping the self; the *Hegemony* school, focused on reproducing power through law; and the *Mobilization* school, which explores how legal meanings support or inhibit collective action. While each of these schools maintains a distinct analytical orientation, Chua and Engel argue that they have all progressively shifted away from individualistic models of legal reasoning toward a relational paradigm, one that views legal consciousness as fundamentally shaped through social interactions, networks, and institutional contexts. They emphasize that legal consciousness should not be viewed merely as a property of individual cognition, but rather as a relational and co-constitutive phenomenon, produced in and through interactions with others, including family members, clients, bureaucrats, and state officials. Chua and Engel (2019, 335–353) suggest that future research should take up the challenge of studying relational legal consciousness in a more systematic and theoretically grounded way, particularly in settings where institutional instability or authoritarian drift reshape legal meaning and practice.

Hertogh and Kurkchiyan (2016, 404–419) provide a significant empirical contribution to the relational legal consciousness framework by highlighting its collective and politically embedded nature. In their comparative study of the UK, Poland, and Bulgaria, they argue that legal consciousness is inseparable from broader political perceptions, particularly those concerning the legitimacy, credibility, and responsiveness of state institutions. Rather than viewing law as an abstract set of norms, they show that collective legal consciousness is shaped by how people interpret political authority, both domestically and at the EU level. Their analysis reveals that law is not perceived in isolation but is entangled with prevailing narratives about governance, trust, and power, resulting in national patterns of legal meaning rooted in political experience. Perceptions of the law are not shaped only by first-hand personal experience of the law or the relevance of the law to personal interests, but also by a broader interpretation of the political

process, and – even more so – by the degree of trust that they have in the foundations of their political system (Hertogh, Kurkchiyan 2016, 414–419). This understanding deepens the relational perspective by underscoring that legal consciousness is not merely produced through social ties or encounters with legal institutions, but also through shared orientations toward the political system. Such insights provide an essential backdrop for more recent studies, such as Kubal (2024, 41–65), which examine how political crisis and authoritarian drift can further reshape relational legal meaning.

Kubal (2024) develops the concept of relational legal consciousness to explain how judges in Poland reoriented their understanding and use of the law amid a period of deep political and institutional crisis. Drawing on Chua and Engel's (2019) paradigm, Kubal conceptualizes relational legal consciousness as a legal understanding that emerges not in isolation but through relationships and interactions with lawyers, NGOs, judicial associations, civil society, and transnational institutions, such as the European Court of Human Rights. Rather than viewing law as a stable, autonomous system, this perspective emphasizes that legal meaning is co-produced through social ties, collective identity, and political context (Kubal 2024, 41–65).

In Serbia, where democratic backsliding and legal inconsistencies are salient features of public life, relational legal consciousness offers a particularly fruitful framework. It allows for an analysis of how legal meaning is produced through personal experience with law, as well as through informal networks, politics, and broader social values and attitudes.

3. RULE OF LAW, POLITICAL CAPITALISM, AND GENERALIZED DISTRUST

Over the past three decades, Serbia has oscillated between phases of competitive authoritarianism and periods of democratic opening, only to return to an increasingly authoritarian mode of governance (Ilić 2021; Vladisavljević 2020). These authoritarian tendencies have been more explicit in recent years: the ruling elite routinely violates formal laws, corruption is widespread, and public scandals frequently go unpunished. This is made possible through the systematic capture of key institutions – such as the judiciary, media, regulatory agencies, and public administration – by party-based clientelist networks (Cvejić 2019; Vuković 2022; Vuković, Stefanović 2024). These networks effectively parasitize and exploit formal institutions for private and political gains, and selectively enforce laws.

Serbian party clientelist networks are stable, centralized, and, as elsewhere, based on norms of loyalty, reciprocity, and obligation (Lawson, Green 2014; Auyero 2000; Cvejić, 2016; Vuković, Stefanović 2024). In such systems, formal state institutions and laws end up serving to sustain informal clientelist networks, creating *institutional* and *normative dualism* or *parallelism* (Vuković, Spaić 2023).[1] Laws are enforced selectively: while ordinary citizens live in a legally ordered world where laws regulate contracts, property is relatively secure, public services function to a certain degree, and basic rights are often protected – members of the political and economic elites enjoy a level of legal impunity.

To enable such selective enforcement of laws, party networks capture formal institutions, such as courts, inspections, and public prosecutors, through party patronage. If they achieve this, they effectively parasitize these formal institutions (Lauth 2015), diverting their functioning to serve the interests of the network and its members. Public trust in the state and its institutions becomes eroded because these networks challenge the core principles of democracy and rule of law: fair procedures and equality before the law (Kitschelt, Wilkinson 2007, 339).

Clientelist networks are the backbone of endemic and deeply institutionalized systemic corruption,[2] which is regularly reported in public opinion surveys as one of the most critical social and political issues that Serbian society faces (CRTA 2024). Despite a widespread belief that Serbian society is thoroughly corrupt, only a small share of up to 15% of respondents report that they or their family members had a direct exposure to bribery (Quality of Government Institute 2015, calculation by author). This reveals that pervasive corruption is not related to these personal experiences: Serbian citizens perceive corruption as prevalent, even if they have not personally experienced it, while respondents from Finland, the Netherlands, and Germany believe their nations are free from corruption, even when they have encountered instances of bribery (Charron 2016, 11). It appears that exposure to corruption-related information encourages a belief that corruption is widespread, framing it as a major social and political

[1] Here, we are building on the idea of the "dual state", first introduced by Ernst Fraenkel in his analysis of Nazi Germany (Fraenkel, Meierhenrich 2018), and later applied to the analysis of legal orders in various contexts, including the Soviet Union (Sharlet 1977; Sakwa 2010), contemporary Russia (Sakwa 2010; Hendley 2011), Latin America (O'Donnell 2004), and southern Italy (Catino 2015).

[2] The 2024 Transparency International's Corruption Perceptions Index gave Serbia its lowest score since 2012, at 35 out of 100 (ranked 105 of 180 countries), signaling broad distrust in public institutions and escalating impunity among elites (Transparency International 2024).

issue (Flinders 2012; Palau, Davesa 2013; Masters, Graycar 2015; Zhu, Lu, Shi 2013) or even leading to a generalized perception of how pervasive corruption is. The insight that perceptions of corruption are shaped at two levels – personal experiences and the general perception of society, politics, and the behavior of political and economic elites – will be key in our analysis of legal consciousness. It also provides inspiration for the two-tier concept of relationality: the micro level, which includes personal interactions with the law, institutions, and other people, and the macro level, which involves perceptions of the state, politics, and the legal system.

In addition, in public opinion surveys, corruption, as a proxy for impartial law enforcement, is also prominent in business surveys: 91% of Serbian businesses believe that corruption is widespread in their country, compared to the EU average of 65%. Similarly, nepotism and favoritism in public administration are seen as a major problem by 91% of respondents in Serbia, compared to the EU average of 55%. When asked about clientelist networks, particularly the idea that only those with political connections succeed, 95% of Serbian businesses agreed that they are a problem, a striking contrast to the EU average of 52% (European Commission 2025). Serbian businesspeople are skeptical about their ability to challenge government decisions or regulations legally: only 8% believe it is possible, 16% are unsure, and nearly three-quarters believe they cannot contest government decisions. As a consequence, only 7% of respondents were confident in the fairness of government officials (World Economic Forum 2017, calculation by author).

Businesspeople are critical of how the legal system functions; they feel powerless against the corrupt state and inefficient judiciary (Vuković 2022; Spaić, Đorđević 2022; Spaić, Đorđević 2024); they do not view the legal system as a way to challenge government decisions and tend to accept the rules of the market in Serbia, favoring adaptation strategies over confrontation with authorities. However, quantitative studies consistently show that they support the rule of law and are least likely to justify breaking the law either out of self-interest or because they believe the laws are unjust (Vuković, Cvejić 2019). Part of the explanation for these complex and seemingly contradictory attitudes lies in the nature of the Serbian economic system.

Serbia has a long history of the state dominating the economy, from the early 19th century to socialism and post-socialist transformation, which has resulted in a specific form of *political capitalism* that has remained to the present (Antonić 2002; Arandarenko 1995; Bartlett 2020; Lazić 2011;

Weber 1976).[3] It features close links between the state and the economy – between the political and economic elites – and a system of privileges derived from membership in clientelist networks. Decision-making and resource distribution mechanisms are personalized, mirroring the personalized relationships within clientelist networks, while the autonomy of the economy in relation to the state is limited. Connections between capitalist and democratic institutions are, at best, weak – even the wealth of powerful businesspeople depends on influential political patrons and networks (Bartlett 2020, 292). Widespread corruption, the impunity of the elite and the duality between the visible presence of legal order in daily life and the deep political instrumentalization of the law at the top have resulted in a fragmented legal consciousness. Serbian external legal culture, as operationalized by Gibson and Caldeira (1996) and measured in two waves (2012 and 2018), features strong support for legal compliance. Roughly speaking, half of the sample are legalists, a third of the sample are legal pragmatists (those who justify bending but not breaking the law), with a relatively small share (up to 15%) of legal skeptics or nihilists (Vuković, Cvejić 2019). The respondents do not believe in the neutrality of the law, and almost two-thirds feel alienated from it. Two critical insights are relevant for our analysis: support depends on socioeconomic status, as those who improved their socioeconomic position during the transition are more likely to support the rule of law and recognize the legitimacy of the legal system;[4] equally important, attitudes toward the law appear to be part of a broader set of pro-democratic beliefs and values.[5]

4. METHODOLOGY

This paper is based on a small-scale qualitative study that explores how businesspeople in Belgrade perceive and engage with the law in their everyday business practices. The research draws on nine semi-structured

[3] Max Weber defines political capitalism as a system where profit is gained by leveraging political power, using politically motivated groups or individuals, financing labor or revolutions, or supporting party leaders (Weber 1976, 130).

[4] This has also been confirmed in a pan-European study in 1996, which revealed that individuals who profit from existing socio-economic system tend to view law as a beneficent institution (Gibson, Caldeira 1996).

[5] Analyses of Russian legal culture show a similar pattern. Positive attitudes toward the rule of law are linked to better education and favorable views of democratic institutions, indicating that attitudes toward the rule of law are an integral part of the democratic belief system (Gibson 2003; Hendley 2012).

interviews conducted during May and June 2025, a period marked by significant anti-government protests across Serbia. This broader socio-political context likely influenced participant responses, particularly their perceptions of legal authority, trust in institutions, and experiences of (in) justice.

All participants were owners or managers of small businesses with fewer than 50 employees, operating across various sectors in Belgrade. The sample was gathered through personal networks and snowball sampling with two entry points. The majority of participants were male (seven out of nine), between the ages of 35 and 60, and held higher education degrees. Semi-structured interviews were conducted using an interview guide that covered five aspects: (1) perceptions of the law, including how the respondents understand the concept of law, the associations, images, and emotions it evokes, and whether these perceptions have changed over time; (2) the role of law in everyday private and professional life; (3) attitudes toward the state and institutions, including reliance on (in)formal mechanisms to protect private and business interests; (4) the functioning of institutions that enact and enforce the law, focusing on their responsiveness, efficiency, impartiality, and accessibility; and (5) views on the rule of law in general and in Serbia.

This study was exploratory and interpretive in nature, without claims to statistical representativeness. Instead, it sought to shed light on how businesspeople articulate legal consciousness in a specific local context, particularly during times of heightened political tension. Thematic analysis of the interview material focused on key areas, including perceptions of legal fairness, interactions with state institutions, and broader reflections on the role of law in business life. The findings are discussed in relation to existing socio-legal literature and theories of legal consciousness, especially in the contexts of political uncertainty and institutional fragility.

5. ANALYSIS AND DISCUSSION

5.1. Selective Enforcement and "Nonexistent Law"

Common associations with the term "law" include order, structure, and security. These views appeared repeatedly across various segments of the interviews. One quote[6] particularly illustrates this understanding,

6 All quotes are translations, by the author.

> *"Because I believe laws exist to create order, to establish rules, for the system to function, to provide guidelines and tracks to follow in our work and behavior, to define our boundaries, our limits – something like that. Security, yes. I believe that if laws are good and respected, they provide a sense of security for people"* (owner, retail trade).

However, these positive associations with the law are almost entirely overshadowed by negative perceptions. As a consequence, the law is inextricably linked to notions of legal loopholes and inconsistent enforcement. Interviewees see the search for loopholes and the creativity in circumventing laws as cultural patterns specific to Serbia and the broader Balkan region.

> *"We grew up in the Balkans. For a typical person in Serbia, the first association with the word 'law' is 'loophole'"* (owner, consulting).

> *"A good number of people enjoy looking for loopholes [...] Whether that's considered a violation or simply adapting to a situation, I don't know. I think we're quite creative in that sense – figuring out ways to circumvent the rules. And yes, I think a lot of that is done consciously, especially in recent years"* (co-owner, retail trade).

Skepticism toward laws and their implementation is widespread. Respondents state that while laws are generally important – providing order, security, personal dignity, and general behavioral guidelines – there remains a vast difference between laws as written and laws as applied. In various domains of life – such as work, property issues, or education – laws are often not enforced.

Personal adherence to legal norms is framed as part of one's upbringing and values, but also as a reflection of a broader Balkan culture that discourages compliance. Citizens lack sufficient education and self-awareness, leading to a lack of respect for the law. In some cases, education is implicitly linked to power, with respondents noting that less educated individuals view authority "submissively", "fearfully", "timidly" and are not prepared to "seek justice". When most people respect the law, it encourages others to follow suit. Conversely, when the predominant environment ignores the law, it heavily discourages compliance.

> *"So, when you go abroad, you adhere to the law; here, you don't. Some people are self-aware, through education or simply because they see others doing it [...] so they do it too – whether that comes from schooling or home upbringing, I don't know"* (entrepreneur, consulting).

All explanations point to a deeply ingrained cultural belief: the law is not respected in Serbia because non-compliance is culturally accepted. Respondents believe they operate in an environment where laws are often ignored, which sets a precedent that encourages more disobedience. Ultimately, non-compliance and selective enforcement are seen as systemic features of institutions perceived as captured and incompetent. Respondents distance themselves from cultural norms that accept or promote legal violations, yet often admit to occasional circumvention.

The gap between legislation and reality, along with broader dissatisfaction with the state of politics and society, shapes the perception that laws are generally not enforced. This is expressed in various ways – from outright claims that laws "do not exist" to more cautious statements suggesting selective or politically motivated enforcement. The underlying argument is simple: for laws to be considered real, they must be enforced nonselectively. Some respondents go so far as to claim they are not even sure laws exist, precisely because they are not enforced impartially.

> *"I'm not sure laws are enforced. I mean, laws exist, that's certain. I believe they are well-written, but do they govern? No. There's a difference between what's written and what's enforced"* (co-owner, retail trade).

> *"There are no laws. They exist on paper, but they're just empty words – unapplicable"* (owner, education and training).

> *"I don't believe in laws. A law is something that's written, not only in Serbia but across the Balkans, and it's applied only when it suits someone. So, in reality, there are no laws – unfortunately*" (owner, education and training).

However, what matters most is how inconsistently institutions apply the law – respondents are nearly unanimous on this issue. Inconsistency and arbitrariness in enforcement are seen as core features of the Serbian legal order.

> *"Personally, I think that laws do exist and that they are clearly defined, but I also think they are not respected. Well, maybe not entirely, but in many cases, they are not followed. From my experience – through my job and as a parent – I can say that many people break the law and are never sanctioned for it"* (owner, hospitality and tourism).

5.2. Everyday Business Practice

However, there are aspects of life and business where laws are respected, and public institutions responsible for law enforcement "do their job". When respondents need to enforce claims, they turn to courts and enforcement officers, often emphasizing that this "part of the system" works well. Those involved in import activities report positive experiences with customs authorities. Some micro-entrepreneurs and small business owners also share good interactions with the Tax Administration. Many openly stated that they try to follow the law and avoid legal disputes. Under such circumstances, government agencies, from inspectors and customs officials to tax authorities, tend to act professionally, and respondents generally speak positively of them. However, they emphasize that this relationship is mutual: businesses respect the law and institutions reciprocate by doing their job, resulting in a modest but real level of satisfaction.

The participants in the study emphasized that personal connections and informal practices influence how laws are understood and applied; they would first try to resolve problems through informal means before resorting to legal remedies. When faced with everyday business challenges – such as customer debts, supplier delays, or employee disputes – they prefer direct communication (calls, meetings, or personal contact) over formal legal channels, such as lawsuits. Sometimes they themselves initiate such relationships; other times, they receive helpful advice, legal solutions, or insider information from others through informal networks. These relationships often involve friendly or collegial ties with employees in state institutions, banks, etc. However, the most powerful informal networks are those connected to politics; and according to our respondents political ties and party-based clientelist networks make the crucial difference.

As we enter the gray areas of selective enforcement, we hear reports that market inspectors sometimes issue arbitrary or illogical requirements and that competitors do not follow the law – at all or only partially or only in certain areas – and that by doing so, they gain an unfair advantage. This

forces law-abiding businesses to adopt their own "creative interpretations" or workarounds to stay competitive; in other words, we uncover aspects of a relational attitude toward the law.

> *"If you follow the rules to the letter, your product ends up costing [gesture indicating high price], while someone else sells it for less simply because they skip a step. So, you have to adapt – even reluctantly. I wouldn't say it's necessarily illegal, but you avoid doing something that technically should be done"* (owner, manufacturing industry).

> *"A guy who does occupational safety told me that in one firm, they were supposed to install a water separator. But the cost was so high that they figured it would be cheaper to not install it at all – just pay the occasional fine. The penalty was negligible in comparison"* (owner, manufacturing industry).

Businesspeople typically aim to follow the law, but when they spot an opportunity to skirt a regulation without facing serious consequences, they view this as part of their business strategy. Despite predominantly positive personal experiences, there is a widespread belief that institutions fail to do their job, either by not enforcing laws or by applying them selectively. This behavior then creates space for businesspeople to ignore legal norms. As one participant noted

> *"A new regulation was introduced and we were instructed on what was happening and what we should implement. We started applying it, but after a while nothing came of it, and eventually we stopped implementing it"* (co-owner, retail trade).

Respondents often feel they have no influence over the law and are left with the choice of either complying or finding ways to circumvent its negative effects.

5.3. The Almighty State and Powerless Business

Despite legal loopholes and selective enforcement, the state is perceived as capable of protecting its interests and enforcing the law, particularly when there is a conflict with business. As one respondent put it, "I feel like you could never win against the state." The state has more resources than any business – and the most powerful one is political influence. Politicians can always sway institutions, such as courts or inspectorates, in their favor.

> *"Then you end up in a situation where they arbitrarily send you an estimated tax difference, for which you're not actually liable. It's all calculated roughly. So, we filed complaints and appeals... But it's no use. It always works out in their favor"* (co-owner, retail trade).
>
> *"I think you're more likely to win against a private individual than a government body"* (owner, hospitality and tourism).

The respondents frequently criticized the state for not backing businesspeople. Instead of aiding the growth of companies, they see it as a burden. One interview provided a nice example of interplay between the state, the business, and informal norms. The respondent explained how market inspectors may fine a hospitality venue for having "excess" cash on the premises. Inspectors know this money is tips that employees share later, yet they still penalize the business. The respondent even wrote to the Ministry of Finance and contacted acquaintances there to push for changes in relevant regulations so employees could receive tips legally. However, he reported that his efforts were met with indifference.

At the same time, many interviewees expressed a spirit of *etatism* – the belief that the state should support business more actively. From the perspective of micro and small enterprises, the state is expected to act as a partner, not a hindrance. However, in practice, the state enforces a range of policies and regulations that respondents find overly complex, illogical, or unfair, making it more difficult to do business.

> *"I wanted to grow my business more, but I'll be honest – I'm afraid. More growth brings more problems, and I don't know how to deal with them because I don't have a state behind me to support me"* (owner, hospitality and tourism).
>
> *"Speaking from my experience as a small business owner, we are not protected by the state. Honestly, we are on our own."* (owner, education and training).

Respondents clearly recognize the dual nature of the legal system and the elite's ability to alter the meaning of laws, to apply them selectively or merely formally, to circumvent or distort them, and ultimately to secure immunity from legal consequences. Laws are perceived as being enacted by the state, coming from a distant and abstract source. Respondents do not feel they can influence the content of law, nor do they believe that the law directly protects their rights and interests. As one respondent put it, the law

increasingly "serves to protect the state, not the people." Another stated that "they write laws to protect themselves, not the common people – regardless of whether it's about the environment or education."

5.4. Laws as an Instrument of the Political Elite

The idea of selective law enforcement is deeply ingrained in the respondents' perception of the law. They repeatedly emphasized that political connections and ties to ruling parties make a crucial difference.

> *"Laws govern selectively. They exist to be applied selectively. We live in a country where the citizens are not treated equally. To use the term 'connections' – this is how our system works. Laws may exist, but they are not consistently applied"* (owner, education and training).

The closer a person or issue is to the centers of political power, the less the law applies. Several respondents illustrated this idea.

> *"In our system, things work up to a certain level. Let's say there are ten levels – up to level seven, laws are followed. But from level eight onward, the protected individuals we mentioned earlier are exempt"* (owner, hospitality and tourism).

Respondents believe that politicians and political parties have captured the legal system. They enforce the law when and how it benefits them. At the same time, they hold a core belief that laws should be just and universally applicable. If they are not, then, in their view, they cease to be law.

> *"The law is only enforced when those in power want to show their strength by punishing someone who doesn't support them. That's not the rule of law. Here, whoever comes into power makes new rules"* (owner, education and training)

> *"Here, the law is tightly linked to politics, and politics are run by criminals. So, there is no law. The law will be applied to me if I break a rule – because I'm not one of them. That's not law, that's criminality"* (owner, education and training).

Businesspeople and managers interviewed in the study believe that laws are closely connected to politics and that this relationship is complex. Laws are, to some extent, influenced by political agendas and the interests of

political actors or social groups. Ordinary citizens – whom respondents see themselves as representing – have no say over the content or enforcement of laws, while politicians do. At the same time, politics function as a kind of passport for a world where legal constraints do not apply. Politics exempt individuals from the effects of the law, give them the power to manipulate institutions and the legal system, and enable selective enforcement as a tool to pressure businesspeople or punish political opponents.

> *"If you want to play the game, you have to play by its rules. If you don't, then don't play at all. It's the same with politics and with state-owned companies. The value systems are clear [...] if you can follow them, fine. If not [...] you'll be pushed out"* (entrepreneur, consulting).

In areas close to political power, laws are often not enforced or are applied selectively. Instead of following legal rules, actors in these areas operate based on political norms of loyalty, subordination, reciprocity, and trade. Some respondents openly refuse to participate in public tenders or work on public projects as (sub)contractors because they understand such engagements bring expectations and pressures to get involved in party clientelist networks. They are concerned they will not be able to resist these pressures or follow the unwritten rules that govern such spaces. These include inflating prices, paying a fee to the party, employing party cadres, and subcontracting party companies.

Politicians have the power to decide whether laws will be enforced. They can stop enforcement or selectively enforce laws. Their influence over institutions is so strong that laws often no longer apply to them.

> *"If someone holds a high-ranking position – this is just my opinion – if they can influence a prosecutor, judge, whoever, and if they are powerful enough, I believe they can't be convicted in this country"* (owner, hospitality and tourism).

The de facto legal impunity of the state, public institutions, politicians, and party clientelist networks is seen as the result of institutional capture by political parties. Although many respondents recognize these patterns as legacies of the 1990s or the communist era, they consistently stressed that the situation has worsened significantly in recent years.

> *"This happened in 2007–2008; a legal entity filed a lawsuit against a public institution – let's say the city – for breaching a contract. The contract was unilaterally terminated, the lawsuit*

> *was filed, and the court ruled in our favor. The judgment was enforced. That kind of thing just doesn't happen anymore"* (owner, hospitality and tourism).

Some even express nostalgia for earlier eras, despite acknowledging that those periods were far from lawful or just. One respondent, for example, highlighted the professionalism and integrity of public servants under the regime in the former Yugoslavia.

> *"Back in the 1990s, prosecutors and judges were educated in the old Yugoslav system. They possessed knowledge, dignity, integrity, and morality"* (owner, retail trade).

In some recollections, laws and institutions take on almost mythical qualities. Describing football matches in Prishtina (Kosovo and Metohija) when Serbia still had de facto control of the province, one respondent remarked,

> *"You want to see what law looked like under that awful communist regime? Two cops would show up at the stadium in a 'Fića' [Fiat 600 car], and no one dared make a sound. Today, you have dozens of undercover police just to manage 30 hooligans, criminals, and drug dealers. Back then, two cops in a little car, and that was all it took. That was law enforcement"* (entrepreneur, retail and wholesale trade).

6. CONCLUSION: INTERPLAY OF LAW AND POLITICS

Our findings show that legal consciousness in Serbia is contextual, political, and shaped simultaneously through macro-relational orientation (perceptions of political elites, institutional trust, and the legitimacy of state authority) and micro-relational interaction (informal networks, interpersonal problem-solving, positive encounters with institutions).

At the macro-relational level, legal consciousness among Serbian businesspeople is shaped by the political context, their interpretation of government policies, and the role of the law within this framework. The interviewees describe selective enforcement of laws as the main feature of legal life in Serbia. Non-compliance and selective enforcement are viewed as systemic features, rooted in institutional capture, widespread clientelism, and political interference. The law is perceived as a tool of the powerful, used to reward loyalty and punish dissent, rather than as a shared

normative order that is equally binding to all members of society. The sense of powerlessness and lack of recourse permeates the interviewees' views, reinforcing the belief that ordinary people cannot hold the state or political elites accountable.

At the micro-relational level, respondents often share positive experiences and emphasize the importance of law and institutions in everyday business. The courts, enforcement officers, tax officials, and bailiffs are praised as elements of the system that function well. The respondents try to abide by the law and avoid legal disputes, and highlight that, in such circumstances, institutions reciprocate by working in accordance with the law. However, these positive micro-level encounters do not accumulate into broader institutional trust; they remain overshadowed by persistent macro-level perceptions of selective enforcement and political capture.

This duality shows that relational legal consciousness involves everyday interpersonal interactions with law, as well as structural-relational processes through which people interpret the larger political and institutional environment, and that these two levels can contradict each other. Respondents engage with the law at multiple levels: they may experience the law as functional and necessary in everyday business, while simultaneously perceiving the broader legal system as being selectively enforced, politically instrumentalized, and effectively nonexistent. These tensions reflect a fragmented and ambivalent legal consciousness, in which legal institutions may function formally yet lack normative legitimacy in the eyes of those regulated by them.

The study results indicate a weak link between actual (often positive) experiences of and before the law and widespread perceptions of its ineffectiveness. This is reminiscent of the weak link between perceptions of corruption and actual experiences of it. Exposure to media reports and political discourse that emphasize the pervasiveness of corruption, selective law enforcement, and the elite's legal impunity creates a generalized perception of legal ineffectiveness or even irrelevance.

Furthermore, the strong role of macro-political narratives in shaping legal meaning – often powerful enough to neutralize or reinterpret positive personal experiences – demonstrates the importance of analytically distinguishing micro-relational from macro-relational dynamics within the relational framework. Under conditions of democratic backsliding and

institutional erosion, perceptions of systemic dysfunction appear to carry more weight than direct interactions with legal institutions, reinforcing a polarized and ambivalent understanding of law. This study contributes to that differentiation by showing how legal consciousness can be co-produced through interpersonal networks while simultaneously grounded in pervasive distrust toward the political and institutional order. As this research is exploratory, the findings should be considered preliminary. Future studies may further refine how relational legal consciousness operates across different relational scales, especially in political contexts marked by low institutional trust and perceived high selective enforcement of the law.

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Article history:
Received: 6. 10. 2025.
Accepted: 8. 12. 2025.

UDC 347.232.1:347.235

CERIF: S 130

DOI: 10.51204/Anali_PFBU_26105A

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ACQUISITION OF OWNERSHIP THROUGH ADVERSE POSSESSION OF SOCIALLY OWNED LAND

The removal of the provision prohibiting the possibility of acquiring ownership through usucapio of land in social ownership has created numerous dilemmas and made this legal institute topical. The courts have faced not only the challenge of determining how to assess the legality and conscientiousness of the possessor, but also the question whether the time that elapsed before the prohibition was lifted could be included in the time period for acquisition of ownership. Considering the significant number of court disputes, the authors believe that it is important to address this issue. Although it seems that the institute of usucapio is slowly fading into obscurity, because it contradicts the idea of properly maintained land registers, the fact is that courts still resort to its rules, since it sometimes remains a last resort in their attempts to transform certain factual situations into legal ones.

Key words: *Adverse possession (Usucapio). – Ownership. – Right of use. – Social ownership. – Calculation of time.*

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1. INTRODUCTION

One might think that social ownership (*društvena svojina*) is a long-forgotten phenomenon, completely undeserving of mentioning today. Such reasoning, however, would only indicate insufficient knowledge of the consequences that this institute has created, and thus directed the development of Serbian real estate law. The judicial practice of the entire former Yugoslav region still faces issues stemming from the former monopoly of social ownership. There are still ongoing disputes before the courts in which one of the parties claims to have acquired the right of ownership of land, even though the land is socially owned,[1] through adverse possession (usucapio). Therefore, although it is undeniable that the institute of usucapio is slowly becoming history today, in the so-called "old cases" it certainly finds application.

When it comes to the application of usucapio in cases of social ownership, there is a number of open questions to which judicial practice provides different answers, which all leads to the creation of uneven judicial practice. Problems arise not only in terms of whether a possessor can be considered a lawful and bona fide possessor when the land is socially-owned property, but also in terms of whether (and in what way) the time that elapsed before the amendments to the 1996 Law on Basis of Ownership and Proprietary Relations,[2] which abolished the prohibition on acquiring ownership of socially-owned property, can be included in the period required for acquiring property through usucapio.

However, before attempting to provide possible answers to the controversial issues in practice, it seems useful to briefly outline the historical development (and abandonment) of the idea of prohibiting the acquisition of ownership rights through usucapio of socially owned land, examine whether there are any socially owned lands on which property rights cannot be acquired through usucapio, and briefly outline the conditions necessary for acquiring property rights through usucapio of socially owned land.

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[1] The term "social ownership" will be used as a general term that also includes land that is in *state* ownership, since in most cases any clarification is not of practical importance. Clarification will be provided where deemed necessary by the authors. The term stems from the notion that the most important goods should belong to all members of the social community (Orlić 1969, 197).

[2] Law on Changes and Amendments of the Law on Basis of Ownership and Proprietary Relations, *Official Gazette of the FRY* 29/96.

2. HISTORY OF THE OPTION OF ACQUIRING OWNERSHIP THROUGH USUCAPIO OF SOCIALLY OWNED LAND

In order to provide a clearer picture, it is important to briefly present the historical development of the concept of the impossibility of acquiring ownership through usucapio of socially owned land.

First of all, an important regulation in this regard is the Law on Basis of Ownership and Proprietary Relations (ZOSPO), which entered into force on 1 September 1980.[3] According to Article 29 of the original text of the ZOSPO, the right of ownership of socially owned property cannot be acquired through usucapio. Therefore, the ZOSPO introduced a general prohibition on the possibility of acquiring the right of ownership through usucapio, in the sense that it applied to all socially owned property.[4] Such a ban was justified by the need to protect social ownership, which was considered "the most important form of ownership" (Stojanović, Pop-Georgiev 1983, 81).

However, new times brought new "customs". With the 1996 amendments to the ZOSPO, the provision of Article 29 was removed.[5] This made it possible to acquire the right of ownership through usucapio of socially owned property, both movable and immovable. This opened up a number of questions in court practice, both in terms of the way in which possession

[3] Law on Basis of Ownership and Proprietary Relations (ZOSPO), *Official Gazette of the SFRY*, 6/80, last amended 115/2005 – other law.

[4] Prior to the adoption of the ZOSPO, with regard to socially owned movable property, the accepted understanding was that it was possible to acquire property rights through usucapio, but with the passage of twice the period of 6 years. See the principal opinion of the Federal Supreme Court adopted at the session on 4 April 1960 (Ralčić 1983, 51). However, the ZOSPO introduced a general prohibition on acquiring property rights through usucapio, including movable property, which caused a lot of criticism in theory (Stojanović, Pop-Georgiev 1983, 82; Vodinelić 1981, 386ff).

[5] In Croatia, this was done in 1991, with the adoption of the Law on the Adoption of the ZOSPO. In Slovenia, it was disputed whether the prohibition on acquisition was lifted in 1997, when the Law on the Privatization of Socially Owned Property was adopted, or in 1989, when Constitutional Amendment No. 9 to the Constitution of the Republic of Slovenia was adopted, which provided that social, cooperative and private property are equal. The situation is similar in Republika Srpska, where it was unclear whether the acquisition of property rights by holding socially owned property was only enabled in 2010, when the Law on Real Rights of Republika Srpska came into force, or when Amendments 20–58 to the Constitution of the Socialist Republic of Bosnia and Herzegovina (*Official Gazette of the SR BiH*, No. 13/89) and Amendments 59–80 to the Constitution of the SR BiH (*Official Gazette of the SR BiH*, No. 21/90) were adopted, which, among other things, introduced equality of all forms of ownership rights (Povlakić 2019 304ff).

is qualified as lawful and bona fide, and in terms of the question of whether the time that elapsed before the introduction of the general prohibition can be included in the period for usucapio, but also the time while the property was privately owned during the prohibition period, which will be discussed further in the paper.

What is indisputable is that during the period from 1 September 1980 until the ZOSPO amendments entered into force on 4 July 1996, there was no possibility of acquiring the right of ownership by usucapio of socially owned property.

But what about the period prior to the ZOSPO entering into force?

It is not possible to provide a single answer, due to the fact that this issue was not regulated by law in a comprehensive and uniform manner.

Article 931 of the 1844 Serbian Civil Code (SGZ)[6] allowed for the possibility of acquiring property rights through usucapio of state (municipally) owned property, with a 36-year period required for acquisition.[7] A similar provision existed in Article 1472 of the General Civil Code, with a slightly longer period of 40 years.

However, the Law on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation[8] was passed in 1946, providing the basis on which all legal regulations that were in force on 6 April 1941 lost their legal force. As a result, only the application of the rules of pre-Second World War law was possible, unless they contradicted the new order.[9]

Therefore, the question is whether the application of the SGZ rule on the acquisition of property through usucapio of socially owned land be in accordance with the new order.

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[6] The Serbian Civil Code, *Official Gazette of the Kingdom of Yugoslavia,* 146/30 и 281/31 *https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf*, last visited July 30, 2025.

[7] The period of the Balkan Wars and the First World War was not included in the deadline, which, according to the 1920 Law on the State of Moratorium, amounted to 7 years, 1 month and 18 days (Ralčić 1983, 50).

[8] Law on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation, *Official Gazette of the FPRY*, 86/46.

[9] Art. 4 para. 1 of the Law on the Invalidity of Legal Regulations Adopted Before 6 April 1941 and During the Enemy Occupation.

Before answering this question, it is important to mention that prior to the ZOSPO entering into force, an explicit prohibition of the possibility of acquiring ownership through usucapio of socially owned agricultural land only with regard to agricultural land, since the enactment of the 1959 Law on the Utilization of Agricultural Land.[10] However, prior to 1959 such an explicit prohibition did not exist. Regarding forest and construction land, such a prohibition did not exist prior to the ZOSPO.[11]

So, is it possible to apply the rules of prewar law due to the absence of explicit rules on the possibility of acquiring ownership through usucapio of socially owned land?

Considering the prevailing understanding in theory (Gams 1974, 265–266; Ralčić 1983, 49–50) and the judicial practice of that time,[12] a negative answer is inevitable. The Federal Supreme Court emphasized, "Given the provisions of Article 16 of the Constitution of the Federal Republic of Yugoslavia and Article 1 of the Law on the Transfer of Land and Buildings, social ownership of real estate cannot cease and real estate cannot be transferred to private ownership based on usucapio. The legal rule on the acquisition of property through usucapio, contained in the laws that were in force on 6 April 1941, cannot be applied in relation to real estate that is socially (formerly state) owned."[13] Such an understanding stems from the more general rule that ownership of socially owned property can be acquired only in a manner prescribed by law (Simonetti 2008, 35). The very trading of socially owned property was quite limited.[14] It was considered that this was not in accordance with the constitutional order, that it was imperative to protect social ownership, and that the possibility of acquiring ownership, which was rather limited, in particular by the rule on the agrarian maximum, should

[10] See Art. 112 Law on the Utilization of Agricultural Land (ZIPZ), *Official Gazette of the FPRY*, 43/59. On the criticism of two exceptions, see Simonetti 2008, 33.

[11] An exception was the Law on Forests, *Official Gazette of the Socialist Autonomous Province of Kosovo,* 10/77, Art. 8. For the Croation law see Simonetti 2008, 34ff.

[12] See the decisions of District Court in Kraljevo, P. No. 544/72, 7 February 1975; Supreme Court of Serbia (VSS), Gž. 2758/77; Supreme Court of Kosovo, Gž. No. 465/78,18 January 1979 (Ralčić 1983, 55–57).

[13] Federal Supreme Court, 18 October 1957 (Stojanović, Pop-Georgiev 1983, 82, translated by author).

[14] See, e.g., the 1954 Law on Land and Buildings Transfer; the ZIPZ; the Law on Associated Labor, *Official Gazette of the SFRY,* 53/1976. The trading of agricultural and forest land, even when it was privately owned, was also limited first on the side of the acquirer, by the legal maximum, and then by the legal right of preemption in favor of agricultural and forest organizations – the aim was to have as much land as possible in social ownership (Arandjelović 1973, 10).

be limited only to cases prescribed by law. Private property was therefore not seen as an equal form of property in relation to social ownership. The privileging of social ownership can be seen as early as the 1946 Constitution of the FPR of Yugoslavia. It stipulated that "there cannot be large land holdings in private hands on any basis" and that "the maximum of private land holdings is determined by law."[15] Hence the obstacle to acquiring ownership of socially owned land (Simonetti 2008, 29). Although private ownership of land remained, albeit to a very limited extent, it lost much of its content and ownership powers. It practically became personal, only to the extent that it satisfied the personal needs of the owner (Aranđelović 1973, 9).

Since even stricter rules applied, in the case of forest and construction land the acquisition of ownership through usucapio was not considered possible,[16] although such a rule was not explicitly prescribed by law until 1980.

However, one thing remains unclear: if the ownership of socially owned land could be acquired by derivative means, in cases prescribed by law and with respect to the rule on the agrarian maximum, why the acquisition through usucapio was also not considered possible, with respect to the legal rules (especially the aforementioned rule on the agrarian maximum) (Vodinelić 1979, 414–415)? It may be concluded that usucapio was not regarded as an equal mode of acquiring ownership.

At the end of this relatively brief historical overview, it is useful to keep in mind that, in the case of land, the transition from the private to social ownership did not take place in one step nor on the basis of a single regulation. While the situation is somewhat simpler with regard to construction land, which was nationalized to a large extent through the 1958 Law on the Nationalization of Rental Buildings and Construction Land[17] and subsequently mostly converted from agricultural to construction land, the

[15] Art. 19 of the Constitution of the Federative People's Republic of Yugoslavia (FPRY), adopted on 31 January 1946.

[16] VSS, Rev. 1893/98, 18 March 1999, which states that the provision of the ZIPZ was applied accordingly to forest land (Krsmanović 2001, 76–77); VSS, Rev. 1548/05, 13 April 2006, *IngPro,* and VSS, Rev. 4939/99, 24 November 1999 (Krsmanović 2001,75); Supreme Court of Croatia, Gzz-7/81, 9 December 1981 (Ralčić 1983, 59).

[17] Art. 1 of the 1958 Law on the Nationalization of Rental Buildings and Construction Land, *Official Gazette of the FPRY*, 52/58 and 24/59. According to Art. 39 para. 1, the previous owner had the right to use the land free of charge or to provide it for use with or without compensation. This enabled the transfer of the right of use.

situation with regard to agricultural and forest land is more complicated because the transition occurred gradually, over the course of decades. The transition began in 1948, based on the Law on Agrarian Reform and Internal Colonization,[18] but continued through a number of different legal regulations,[19] which stipulated, among other things, that agricultural or forest land owned by a specific owner in excess of a certain maximum would become social ownership. Therefore, in order for such an (involuntary) transition to occur, it was necessary to determine for each specific case whether the legal conditions were met, and whether the registration in the real estate registers was carried out based on an individual legal act in each case. Therefore, it is crucial to examine at what point the transition occurred and whether there was an adequate legal basis for it.

3. THE CONDITIONS FOR ACQUIRING OWNERSHIP RIGHTS OF SOCIALLY OWNED LAND THROUGH USUCAPIO

As shown, Article 29 of the 1980 ZOSPO contained a provision by which the legislator prohibited the possibility of acquiring socially owned property through usucapio.[20] The 1996 amendments to the ZOSPO removed that

[18] Law on Agrarian Reform and Internal Colonization, *Official Gazette of the People's Republic of Serbia,* 5/48, 11/49, and 34/56.

[19] These are, among others, the Law on the Agricultural Land Fund of Social Ownership and the Allocation of Land to Agricultural Organizations, *Official Gazette of the FPRY*, 22/53, and *Official Gazette of the SFRY*, 10/65; the Law on the Transfer of Land and Buildings; the 1965 Law on Forests; the Law on the Conversion of Social Ownership of Agricultural Land into Other Forms of Ownership, *Official Gazette of the RS*, 49/92, 54/96, and 62/2006 – other law.

[20] When it comes to state ownership, the possibility of acquiring ownership is indisputably excluded for certain properties even today, regardless of the method of acquisition (Simonetti 2008, 30). The Law on Public Property, *Official Gazette of the RS*, 72/2011, last amended in 94/2024, explicitly stipulates that it is not possible to acquire ownership of natural resources and goods in general use, publicly owned networks, water land and facilities, cultural facilities, public property used by state authorities to exercise their rights and duties, and real estate used by healthcare institutions from the Healthcare Institution Network Plan (Arts. 9–17). Court of Appeal in Kragujevac, Gž. 6815/2018, 4 July 2019, *ParagrafLex*; Court of Appeal in Nis, Gž. 5715/17, 5 July 2018, *IngPro*; Court of Appeal in Kragujevac, Gž. 2571/2022, 16 November 2022, *ParagrafLex*; the Supreme Court, Rev. 3191/23, 9 October 2024, *IngPro;* Commercial Court of Appeal in Belgrade, Pž. 3835/18, 25 December 2018, IngPro; Commercial Court of Appeal in Belgrade, Pž.515/19, 25 March 2021, *IngPro*.

However, when it comes to other state owned land, it can in principle be the subject of acquisition of ownership through usucapio, if the legal conditions are met.

provision, which finally enabled such acquisition. The legislator did not dedicate special regulations to this case of usucapio,[21] which means that the general rules on ordinary and extraordinary usucapio apply. Thus, Article 28 para. 2 ZOSPO stipulates that "a bona fide and lawful possessor of an immovable property, over which another has ownership, acquires the right to that property by holding it for 10 years", while para. 4 stipulates that "a bona fide possessor of an immovable property, over which another has the right of ownership, acquires ownership by holding it for 20 years."[22]

When discussing the conditions for acquiring ownership, we mean the qualities of ownership and the deadlines or periods of time during which the possessor had peaceable ownership. The ZOSPO defines the qualities of possession within Chapter V. Article 72 para. 1 stipulates that possession is lawful if based on a lawful basis necessary for acquiring ownership and if it was not obtained by force, fraud or abuse of trust.[23] *Argumentum a contrario*, possession would be unlawful if it has no legal basis or has an invalid legal basis, or a legal basis that is not suitable for acquiring the right that is being exercised (Popov 2011, 112). Article 72 para. 2 defines bona fide possession as one where the possessor does not know or cannot know that the property does not belong to them.

The examination of legality and good faith, as qualities of possession, has caused certain dilemmas in practice with regard to socially owned land. This is just one of the reasons why we consider it appropriate to devote attention to the analysis of these qualities, especially in light of their specificity when it comes to possession of socially owned land. When it comes to peaceable possession, as a necessary quality of possession, we will not pay special attention to it. It is enough to emphasize that in any legal proceedings it is necessary to simply state that peaceable possession existed at all times, from the moment of entering into possession until the expiration of the usucapio period, i.e., that no one has successfully challenged it.[24]

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[21] According to Art. 159 para. 4 of the Croatian Law on Property and Other Real Rights, special rules apply to the acquisition of ownership of state owned property (including property owned by local and regional self-government units), churches and other legal charities; as a general rule it takes twice as long.

[22] Translated by author.

[23] There has been criticism in theory of Art. 72 ZOSPO (Dolović Bojić 2019, 171–172).

[24] Court of Appeal in Novi Sad, Gž. 3580/2018, 27 September 2018, *ParagrafLex*; Court of Appeal in Belgrade, Gž. 215/24, 24 January 2024, *IngPro.*

4. THE SPECIFICITY OF LEGALITY AS A QUALITY OF POSSESSION IN THE ACQUISITION OF OWNERSHIP THROUGH USUCAPIO OF SOCIALLY OWNED LAND

The usual understanding of the concept of lawful possession raises the question whether there is place for the application of the institute of usucapio of socially owned land. Namely, if lawful possession must be based on a legal act suitable for acquiring *ownership*, the question is how to apply that rule when it comes to socially owned land. In other words, if the possessor acquired possession of socially owned land, but not on a legal basis suitable for acquiring ownership, could it be considered that he has lawful possession? If we assume that the answer is negative, this means that the rules on ordinary usucapio cannot be applied to the acquisition of ownership through usucapio of socially owned land. However, the very fact that the legislator enabled the acquisition of ownership of socially owned properties by ordinary or extraordinary usucapio, indicates that it is necessary to view the concept of lawfulness differently here.

Namely, in practice, it was the right of use that was being acquired and transferred. Therefore, the only correct reasoning would be that lawful possession, in the context of the possibility of acquiring ownership through usucapio of socially owned land, implies possession based on an act suitable for acquiring the right of use of a specific socially owned property. The right of ownership could not be acquired and transferred, but only the right of use, allowing the holders of that right of use, which was clearly a surrogate for the right of ownership at that time, to prove that over time they acquired the right of ownership by applying the usucapio rule.[25]

So, although it is hard to imagine today, socially owned properties were traded. As explained in the theory, only economic (and not legal) transfer of ownership was being carried out, i.e. the transfer of objects in social ownership while the social ownership itself did not lose its character (Trifunović 1999, 91). In other words, the right of ownership was not traded,

[25] This is supported by the fact that both in our country and in the countries in the region, laws were passed on the basis of which the right of use was converted into the right of ownership. See, for example, the Law on Planning and Construction from 2009, the Law on the Conversion of the Right of Use into the Right of Ownership of Construction Land with a Fee from 2015. For the law of Slovenia, see, for example, *Zakon o lastninjenju nepremičnin v družbeni lastnini* (Law on the Privatization of Socially Owned Real Estate) from 1997. For the law of the Republika Srpska, see the Law on Real Rights, Art. 324, which regulates the conversion of the right of use, management and disposal into the right of ownership.

only the right of use, but economically the same effect was achieved.[26] This can also be concluded from the fact that there was a tax on the transfer of absolute rights, and that the transfer contracts themselves were often called sales contracts (although the right of use, not ownership, was being transferred). Such terminology is also accepted by domestic courts, which in their decisions state that "the plaintiff, as a bona fide and lawful possessor of agricultural land, which they acquired by a gift contract [...] for which ownership by the Republic of Serbia is registered."[27] Similar reasoning can be found in Montenegrin practice.[28]

It could therefore be concluded that although socially owned land legally belonged to the Republic of Serbia, it economically belonged to the legal entity with the right of use. In this sense, the right of use was seen as a surrogate for the right of ownership[29] and the holder of the right of use was seen as the owner, although legally this could not be the case.

Therefore, the lawfulness of possession may depend on the existence of the right of use. In a situation where the right of use arose by force of law or by decision of a competent state body, it is indisputable that lawfulness exists. In the case of a contract with a state body, the conditions for its formation and validity should be reexamined, with the expectation that few cases of unlawful possession would be identified.

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[26] "It is difficult to imagine how an entity, for which it is explicitly stated in constitutional documents that it is not the owner of a socially owned property, can legally sell that property to another entity, and not only that, but also for that other entity to acquire the right of ownership of the sold property, which the transferor did not have. Here, therefore, we use a legal construction. Namely, in order to enable the intended use of property, social enterprises are given the right to trade property, with the possibility of it changing its user, either collective or individual (e.g., in circumstances when an organization is liquidated, there is the possibility of putting socially owned properties up for public sale, monetizing them in order to settle obligations to the company and to creditors)" (Ilić-Popov 1991, 804, translated by author).

[27] Court of Appeal in Novi Sad, Gž 3417/2015, 18 February 2016, *IngPro*, translated by author.

[28] The court stated that the Agreement on Transfer of Ownership was concluded for the purpose of donating a cadastral plot that was registered as social ownership of the Municipality of Kotor. Higher Court in Podgorica, Judgment Gž 1005/2020, 6 April 2021, *https://www.sudovi.me/vspg/odluka/430589*, last visited January 26, 2026.

[29] The right of use does not only imply the authorization of use, but to a certain extent also the authorization of legal disposal (Jelić 2013, 123).

It is important to note that there are also situations in which the land in question was acquired while it was in private ownership but later nationalized and the possessor was never dispossessed.[30] In such cases, it should be deemed that subsequent nationalization does not affect the lawfulness of possession.

There were also situations in which a possessor acquired possession of socially owned land on the basis of an exchange, but the registration of private ownership never occurred, for various reasons.[31] Even in these cases, lawful possession suitable for acquiring ownership through usucapio should be indisputable.

Finally, it should be mentioned that there are also numerous cases in which the possessor had neither the basis for acquiring ownership nor the right of use, because they were a former owner who was not granted the right of use because it had been granted to someone else, but it was the former owner, and not the holder of the right of use, who enjoyed a long-standing peaceable possession. In such cases, ownership can only be acquired by applying the rule on extraordinary usucapio since the legal basis for acquisition, i.e. the lawfulness of possession, clearly does not exist. However, we do not exclude the possibility that the former owner might have an alternative means of acquiring ownership, by applying the rule on restitution.

However, the analysis of a large number of decisions by Serbian courts indicates that the courts generally apply the rules of extraordinary usucapio when it comes to socially owned land. In this way, the courts avoid examining the existence and validity of the legal basis for acquisition.

However, we believe that when determining the lawfulness of possession of socially owned land, the courts should take into account not only cases where possession was acquired on a lawful basis suitable for acquiring *ownership* (which are situations where the land was subsequently nationalized) but also cases where possession was acquired on a lawful basis suitable for acquiring the *right of use* (which are situations where the land was socially owned at all times, from the moment the possessor entered into possession). As previously pointed out, in such cases the concept of lawfulness has a specific

[30] See, for example, Court of Appeal in Kragujevac, Gž. 1026/2010, 23 March 2010, *ParagrafLex*.

[31] See, for example, Court of Appeal in Belgrade, Gž. 7904/2019, 26 May 2021, *ParagrafLex*; Court of Appeal in Novi Sad, Gž. 4005/2013, 6 February 2014, *ParagrafLex*; Commercial Court of Appeal in Belgrade, Pž. 10781/21, 31 March 2022, *IngPro*.

meaning, since it is indisputable that ownership was not transferable, only the right of use, which, in turn, could be obtained not only by contract but also by decision of a competent state authority, inheritance, or force of law.

5. HOW GOOD FAITH IS ASSESSED IN USUCAPIO OF SOCIALLY OWNED LAND?

5.1. General Information on the Concept of Good Faith as a Condition for Acquiring Ownership Through Usucapio

The legislator considers the bona fide possessor to be someone who believes that they are the owner of the property.[32] This belief should be justified (Dolović Bojić, Dabić Nikićević 2024, 134).[33] This means that "the good faith of the possession is assessed according to objective circumstances, which influence the formation of awareness of the existence of the right of a person who holds another's immovable property, and which are such as to exclude the possibility of knowing that the property they hold is not theirs."[34]

Although the legislator starts from a unitary concept of good faith, it is generally accepted in theory that the fulfillment of this condition is nevertheless assessed differently depending on whether it is a case of extraordinary or ordinary usucapio.[35] For a possessor to be bona fide in the sense of the rule on ordinary usucapio, it is sufficient for them to believe that they have acquired the property from the owner. On the other hand, since

[32] Art. 72 ZOSPO.

[33] Judgment of the Higher Court in Podgorica, Gž 1005/2020, 6 April 2021, *https://www.sudovi.me/vspg/odluka/430589*, last visited January 26, 2026. The Montenegrin courts also emphasize that "the quality of good faith of a specific possession depends on whether the possessor's mistake about the right to possession is excusable or inexcusable [...], i.e., when the misconception that they are in possession of their own property, and not someone else's, occurred despite the fact that they used the objective standard attention required in the existing legal transaction in that direction, and not because they just thought, considered that the property he possesses is his, so that a possessor who not only knows that the property they had in their possession is not theirs, but also one who, admittedly, does not know this, but could have known it according to the existing circumstances if they had applied standard diligence in that direction, is considered to be in bad faith" (translated by author).

[34] Supreme Court of Cassation (VKS), Rev. 6796/2024, 9 May 2024, *IngPro*, translated by author.

[35] For more information on the concept of good faith in ordinary and extraordinary usucapio, see Stanković, Orlić 1999, 87–89, 91.

the lawfulness of the possession is not required in the case of extraordinary usucapio, the existence of good faith requires not only a justified belief that the object was acquired from the owner, but also a justified belief in the existence of a lawful basis suitable for acquiring ownership.

5.2. Specific Understanding of the Concept of Good Faith as a Quality of Possession in the Acquisition of Ownership Through Usucapio of Socially Owned Land

Strictly adhering to the understanding of the concept of good faith in the sense of the possessor's belief that he is the owner, the institute of usucapio of socially owned property would apply only to situations in which the land was privately owned and subsequently nationalized. Even then, this would be reduced to an even smaller number of cases, since the rules on subsequent bad faith would have to be applied.[36] In other words, it would only apply to cases where the possessor did not subsequently learn that conversion into social ownership had occurred.[37]

The controversial question, therefore, is how is good faith assessed when acquiring ownership through usucapio of socially owned land. Should it be assessed in the same way as when acquiring ownership through usucapio when the land is privately owned, or should it be assessed differently due to the specificities of the social ownership?

Namely, the questions arise whether the possessor can be bona fide if the Republic of Serbia has been registered as the owner at the time of the acquisition of the possession or during the possession, and whether the allegations of a part of the judicial practice, according to which the possessor is not bona fide since they knew that they were not the owner of the disputed property, are well-founded. In this sense, in one decision the highest court considered that "the plaintiff does not have bona fide possession of the

[36] Subsequent bad faith requires that the possessor became aware of the facts that affect their good faith. Court of Appeal in Belgrade, Gž. 7650/2017, 10 January 2018, ParagrafLex; Court of Appeal in Belgrade, Gž. 215/24, 24 January 2024, *IngPro.*

[37] If this occurred by enactment of a law, this fact could not be considered unknown. The same applies in cases where social ownership was publicly registered and the possessor learned of it.

disputed immovable property because they must have known that it was not theirs since it was granted to them by the decision [...] as the possessor of the right of use, and not of ownership."[38]

It would be too strict and illogical to consider the possessor in bad faith if they knew that they were not the owner, because in this situation it is indisputable that they cannot be the owner. In the case of socially owned land, it was not possible to transfer the ownership, but only the right of use. However, the economic transfer was carried out because economically the property belonged to the legal entity that had the right of use (Trifunović 1999, 91). In this sense, some decisions of the highest court state that the defendant's successors "*sold* the right to use the subject plot to the plaintiff,"[39] and that the contractors concluded sales contracts involving the subject property, although it is indisputable that it is socially owned land.[40]

Therefore, when analyzing legal situations from the time of the monopoly of social ownership, it can be concluded that the judicial practice equated the right of ownership and the right of use. In this sense, the Federal Court took the position that "in order for someone to acquire the right of ownership, or rather, become the holder of the right of use of real estate located in the area where land registers are kept, it is necessary to have the prescribed method of acquisition and to have achieved the registration of their right in the land register, and it is not enough to have only a legal basis for acquisition."[41]

The question arises as to how the courts assessed good faith if we accept the view that a possessor who knows that they are not the owner (but rather the user) is also bona fide, taking into account the monopoly of social ownership. This is, therefore, a more flexible understanding of the concept of good faith, and the courts have tried to find different ways to justify the good faith of the possessor in specific cases. Thus, in one of its decisions, the Supreme Court of Serbia considered that the possessor of a socially owned

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[38] VKS, Rev. 4475/2021, 23 December 2021, *IngPro*, translated by author.

Similar reasoning can also be found in Croatian judicial practice. Namely, in the decision of the Supreme Court of the Republic of Croatia, Rev. 1009/1996, 27 August 1997, the reasoning was that the knowledge of the possessor that it was a socially owned immovable property, which was only given for use, excludes the good faith of the possessor in the sense of acquiring the property through usucapio (Brežanski 2009, 613).

[39] For instance, VKS, Rev. 3457/2019, 26 November 2020, *IngPro*, translation and emphasis by author.

[40] VKS, Rev. 7890/2021, 20 April 2022, *IngPro*.

[41] Federal Court, Gzs. 6/74, (Supreme Court of Serbia 1986, 13) translated by author.

plot of land was bona fide because they possessed the disputed plot as their own, despite the fact that they must have known that the plot, which they received as compensation for another plot in the process of consolidation of parcels, was socially owned and that they had no reason to believe that they are the owner of it.[42] In another decision, the Supreme Court similarly reasoned that the plaintiff could be a bona fide possessor despite the fact that the land was socially owned, justifying good faith by the fact that the plaintiff had a reasonable belief that they were the owner since they had acquired it through an oral sales contract on the basis of which a price was paid and possession was taken, and the seller, as the legal predecessor, showed the plaintiff the sales contract concluded with the agricultural cooperative as the basis on which they became the owner of the plot that they had sold.[43] Another of the many examples in favor of the position that one can be bona fide even though the Republic of Serbia is registered as the owner in the public registry,[44] is the decision of the Supreme Court, with the explanation that "the plaintiff's legal predecessors justifiably believed that they had acquired the right of ownership of the disputed cadastral plot in the 1965 agreement and the exchange of real estate, because they had obtained it in the process of consolidation of parcels, and therefore justifiably considered that for the transfer of ownership it was sufficient to actually exchange and hand over the plots."[45] Finally, the Supreme Court's ruling took the position that the possessor is bona fide "given that they had no reason to suspect that the property they possessed was not theirs, taking into account their aunt's will to give them the cadastral plot as a gift."[46]

Therefore, it is necessary to understand the concept of good faith more flexibly, because the opposite would lead to the absurd conclusion that the institute of usucapio cannot be applied when it comes to social ownership, which would be contrary to the will of the legislator. Also, one could reason that the mere reliance on a legal norm that allows the acquisition of property

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42 VSS, Rev. 6745/2023, 28 June 2023, *IngPro*.

43 VKS, Rev. 7890/2021, 20 April 2022, *IngPro*.

44 See for example: Court of Appeal in Belgrade, Gž. 2228/23, 13 December 2023, *IngPro*; Court of Appeal in Niš, Gž. 1654/2017, 2 March 2017, *ParagrafLex*; VKS, Рев. 445/2017, 21 September 2017, *ParagrafLex*; Court of Appeal in Belgrade, Gž. 2549/2021, 27 October 2021, *ParagrafLex*; Court of Appeal in Belgrade, Gž. 6397/2022, 23 February 2023, *ParagrafLex*.

45 VKS, Rev. 3238/2021, 20 October 2012, *IngPro*, translated by author. Similar: Court of Appeal in Belgrade, Gž. 5994/2022, 13 December 2022. *ParagrafLex*.

46 VKS, Rev. 15065/2022, 25 January 2024, *ParagrafLex*. In this sense, the Supreme Court of Montenegro also takes a position, Rev. 589/2022, 21 February 2024, *https://sudovi.me/vrhs/odluka/*542757, last visited January 27, 2026.

through usucapio of socially owned land makes some possessors bona fide in the sense that by interpreting it they come to the conclusion that they are "on the right track" to becoming owners.

5.3. (In)Dependence of the Concept of Good Faith from the Concept of Legality

The strictest understanding of the concept of good faith, motivated primarily by the maxim that "ignorance of the law excuses not", would be that good faith exists both when there is a legal basis for acquiring ownership/right of use and when the possessor is registered as the holder of ownership/right of use in the public register.[47] The first requirement, however, may provoke criticism: the existence of a lawful basis is not a condition of good faith but of lawfulness. However, assuming that a person is considered bona fide if they believe that they are the owner, then the question arises as to how can one believe they acquired ownership if the legal basis is not valid, since it does not meet all the requirements, e.g., those relating to form.[48] If someone believes that they are the owner, then they must be registered as the owner and have the legal basis for acquisition in accordance with the requirements of validity prescribed by applicable legal provisions, since "ignorance of the law excuses not". Today, when there are public notaries, this cannot happen in principle in the case of real estate transactions, but in the so-called old cases it is a very common occurrence.

The problem we create with such reasoning is that we narrow the field of application of the institute of usucapio, and especially that we question the possibility that the possession can be bona fide but unlawful, which is possible according to the ZOSPO since there are rules on both ordinary and extraordinary usucapio. So, although we are more inclined to the reasoning that requires stricter criteria for the existence of good faith, we also understand different court decisions, taking into account the given reasons.

This is particularly problematic when applying the rules on usucapio of socially owned land, since this is where we may have a number of "problems" in the field of the existence and validity of the legal basis for acquiring the right of use, and if we were to apply the aforementioned connection between

[47] The exception exists when it was not possible to make an entry in the public register.

[48] In this sense, the court takes the position that a contract that does not meet the formal requirements may render the possession not only unlawful but also in bad faith. See Court of Appeal in Novi Sad, Gž 698/2016, 20 April 2016, *ParagrafLex*.

lawfulness and good faith, in terms of a stricter understanding of the concept of good faith, the field of application of this institute would be significantly narrowed.[49]

However, the key to solving the problem could then be found in the division into ordinary and extraordinary usucapio. Namely, if it is a question of ordinary usucapio, then lawfulness is necessarily required, and the possessor's position regarding the existence and validity of the legal basis is completely irrelevant. In order to be bona fide, the possessor is required to believe that the predecessor is the owner, and this is examined in the field of the state in the public books. True, if there are no public books, the matter is more complicated, but then the concept of good faith itself is understood more flexibly. In the case of extraordinary usucapio, however, good faith also includes lawfulness, and it is important that the possessor believes both that he acquired from the owner and that he has a lawful basis for acquisition. It would therefore be sufficient for him to simply believe that, for example, an oral[50] or uncertified[51] contract was sufficient to acquire ownership. Otherwise, if we were to assume that "ignorance of the law excuses not", and that the possessor cannot believe that they are the owner, we would end up in a situation where we would be preventing the application of extraordinary usucapio in cases without any valid basis for acquisition – in other words, if the possession is not lawful, it cannot be bona fide.

Therefore, we would limit the application of the rules on extraordinary usucapio to situations of so-called seizure of another's property, i.e., to situations in which there is no basis for acquisition and consequently no legality, but where, for some reason, good faith nevertheless exists, because the possessor has reason to believe that they are the owner. In this sense, the Supreme Court of Cassation stated in one of its decisions that the condition of good faith was met in a case where the plaintiff's mother could not have known that the disputed plot was not included in the plots that were

[49] Thus, in the same case, we see different positions in the judgments of courts of different instances. We believe that both positions can be justified, as well as criticized. Namely, the first-instance court states that "the plaintiff was aware of the fact that he did not conclude a written gift agreement, so the contract never produced legal effects and the plaintiff could not reasonably believe that he became the owner of that plot of land". On the other hand, the second-instance court and the highest court reason differently, and they believe that "the conclusion of a gift agreement does not affect the good faith of the possessor, but the lawfulness of the possession". See. VKS, Rev. 15065/2022, 25 January 2024, *ParagrafLex*.

[50] Also, Court of Appeal in Niš, Gž. 1654/2017, 2 March 2017. and VSS, Rev. 489/2000, 5 April 2000.

[51] Also, Court of Appeal in Kragujevac, Gž 1993/2022, 1 November 2022.

assigned to her by the decision, since the disputed plot was located right next to one of the three plots that she owned, and into which possession the geometer put her. The court added that the plaintiff's mother, as well as the plaintiff, could not at any time doubted her right of ownership of the disputed plot, since they had been using it, as well as the other three plots, the entire time, and no one had interrupted them.[52]

The question here is whether we will go the route of a more flexible understanding of the concept of good faith in order to expand the field of application of the institute of usucapio – which is especially appropriate when it comes to resolving so-called old cases – or give importance to the principles of the real estate cadaster, and above all to the principle of registration and confidence in it.

However, as previously mentioned, when it comes to usucapio of socially owned land, the courts generally apply the rules on extraordinary usucapio and thus avoid examining lawfulness as a quality of usucapio. This is logical, since in a large number of cases it remains unclear whether a lawful basis exists. Bearing this in mind, it is completely understandable why courts generally assume that the possessor can be bona fide even when they must have known that the conditions necessary for the validity of a legal transaction were not met, i.e., due to the failure to meet the formal requirements. In most decisions, the courts consider the possessor bona fide nonetheless, requiring that the 20-year period of peaceable usucapio has elapsed. It is our belief that such a court stance is quite justified in the case of usucapio of socially owned properties, since a stricter understanding of good faith (however legally perfect it may be) would render the possibility of applying the institute of usucapio moot.[53]

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[52] VKS, Rev. 877/2020, 28 May 2020, *https://www.vrh.sud.rs/sr/%D1%80%D0%B5%D0%B2–8772020–31146*., last visited July 30, 2025.

[53] In this sense, the Court of Appeal in Niš also reasons, Gž 1732/2019, 21 March 2019: "*It follows from the case file that the plaintiff concluded a contract for the sale of the garage on 15 October 1996 and that he immediately entered into its possession. In a situation ... when he claims ownership only of the land under the building, the first-instance court correctly determines that he has this right in relation to the defendant as the owner of the entire plot, on the basis of peaceable and bona fide ownership after the expiration of a period of 20 years. Especially considering the reasons given by the first-instance court regarding the possibility of acquiring ownership through usucapio also of real estate in state ownership...*". (translated by author)

6. CALCULATION OF TIME FOR ACQUISITION OF OWNERSHIP THROUGH USUCAPIO OF SOCIALLY OWNED LAND

6.1. Introduction

The calculation of time limits for acquiring ownership through usucapio of socially owned land is not entirely straightforward: a number of uncertainties have arisen, stemming from the introduction and subsequent abolition of the prohibition on acquiring ownership through usucapio of socially owned property.

The principal uncertainty concerns the moment from which the period of 10 or 20 years for acquiring ownership through usucapio of socially owned land begins to run. More specifically, the question is whether the period for usucapio also includes the time that elapsed prior to the entry into force of the 1996 amendments to the ZOSPO.

In the search for an answer to this question, it is important to distinguish between: (a) cases in which social ownership existed continuously from the beginning of the possession; (b) cases in which private ownership existed at the beginning of the possession, but subsequently transitioned to social ownership. In the latter situation, two scenarios are possible: the period required for usucapio had expired prior to the transition from private to social ownership, but this was not promptly determined; or the period for usucapio had been running for some time during private ownership, but insufficient to acquire ownership.

6.2. Calculation of Time in Cases in Which the Land Had Been in Social Ownership Throughout the Entire Period of Possession by the Possessor and Their Legal Predecessors

The first group of cases is legally simpler.[54]

As previously mentioned, the prohibition on acquiring ownership through usucapio of socially owned land effectively existed from 6 April 1941 until the 1996 amendments to the ZOSPO, whether on the basis of explicit statutory prohibition or interpretations entrenched in judicial practice.

[54] See, e.g., VSS, Rev. 6745/2023, 28 June 2023, *IngPro*; VKS, Rev. 3238/2021, 20 October 2021, *IngPro*; Court of Appeal in Novi Sad, Gž. 1122/11, 6 April 2011, *Intermex*.

However, even with respect to cases where the land was socially owned during the possessor's entire possession, the question arose whether the removal of Article 29 ZOSPO was meant to validate the earlier state of possession, i.e., whether the period for usucapio also includes the time that had elapsed prior to the entry into force of the 1996 amendments. Similar questions also arose in other former Yugoslav states.[55] Serbian courts gave

[55] The original version of the Croatian Law on Ownership and Other Real Rights (Zakon o vlasništvu i drugim stvarnim pravima – ZVDSP) (Art. 388 para. 4) provided that, for the purpose of acquiring ownership of immovable property through usucapio, "the period of possession elapsed prior to 8 October 1991 shall also be counted for immovable property that, on that date, was in social ownership" (translated by author). This formulation implied that the time from 6 April 1941 until 8 October 1991 was to be taken into account in the same manner as the time before 6 April 1941 and after 8 October 1991. This provision, however, was annulled by the Constitutional Court of the Republic of Croatia. In its decision, the Court emphasized, inter alia, that laws cannot be applied retroactively; that retroactive application would place in an unfavorable position those who held certain rights to immovable property (without possession) but did not protect them, since they reasonably believed that ownership could not be acquired through usucapio; and that the contested provision would in effect permit acquisition of ownership through usucapio even before the prohibition had been lifted. Accordingly, the final text of the ZVDSP stipulates that, for immovable socially owned property, "the period of possession elapsed prior to that date shall not be counted" (translated by author) in calculating the time required for acquisition of ownership through usucapio (Simonetti 2008, 41; Brežanski 2009, 605).

The European Court of Human Rights (ECHR) also had the opportunity to address this issue, in the case of *Trgo v. Croatia* (ECHR Application No. 35298/04). The matter concerned land that had been confiscated in 1949, but the peaceable possession existed from 1953. The applicant filed a request to establish acquisition of ownership through usucapio prior to the Constitutional Court of Croatia declaring Art. 388 para. 4 ZVDSP unconstitutional. The court of appeal rejected the applicant's claim, the Constitutional Court subsequently dismissed the applicant's constitutional complaint, so they brought the case before the ECHR. The Court held that "the applicant, who reasonably relied on legislation, later on abrogated as unconstitutional, should not – in the absence of any damage to the rights of other persons – bear the consequences of the State's own mistake committed by enacting such unconstitutional legislation [...] the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned, especially where no other conflicting private interest is at stake" (ECHR, *Trgo v. Croatia*, Judgment, 11 June 2009).

Moreover, the ECHR adopted the same position in cases where an action to establish ownership through usucapio was filed after the Constitutional Court had declared Art. 388 para. 4 unconstitutional, provided that the statutory period for usucapio had expired while that provision was still in force (Kontrec 2017, 588).

The Supreme Court of Slovenia, in decision VSRS:2010:II.DOR.172.2009, No. VS0013568, 18 November 2010, held that the 1989 adoption of Amendment No. IX to the Constitution of the Republic of Slovenia should be considered

a negative answer: as stated, the removal of Article 29 ZOSPO "did not mean to validate the state of possession prior to the removal with respect to the conditions and time limits for usucapio,"[56] but only *pro futuro*.[57] This follows from the prohibition of the retroactive application of laws.[58]

Nevertheless, it is indisputable that the foregoing applies only in cases where the land in question was socially owned throughout the entire period of possession, which may go as early as 6 April 1941 and as late as the abolition of the prohibition in 1996. However, this is usually not the case. As mentioned previously, the transition of private into social ownership and vice versa had been carried out over a lengthy period of time. This means that the moment of transition from private to social ownership was not

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as the commencement of the period for usucapio. At that time, equality was established between social, cooperative, and private property. See *https://www.sodnapraksa.si/?q=priposestvovanja%20lastninske%20pravice%20na%20nepremi%C4%8Dninah%20v%20dru%C5%BEbeni%20lastnini&database[SOVS]=SOVS&_submit=i%C5%A1%C4%8Di&rowsPerPage=20&page=0&id=2010040815250117*, last visited November 21, 2025.

With regard to Republika Srpska, pursuant to Art. 344 para. 4 of the Law on In-Rem Rights (Zakon o stvarnim pravima), the period of possession during the time when regulations expressly excluding usucapio were in force cannot be counted as part of the time required for acquisition of ownership through usucapio of immovable socially owned property.

56 VSS, Rev. 2722/2005, 13 April 2006, *IngPro*; VSS, Rev. 2318/07, 11 October 2007, *IngPro*, translated by author.

57 In Serbian court decisions, one can see the argument that the ZOSPO "does not contain, in its transitional or final provisions, any rule providing for retroactive application, and therefore the periods for usucapio can only be calculated prospectively, as of the date of its entry into force." See, e.g: VSS, Rev. 2722/2005, 13 April 2006, *IngPro*; VSS, Rev. 2318/07, 11 October 2007, *IngPro*. (translated by author)

Nevertheless, it is debatable whether retroactive application would in fact have been possible even if the legislature had expressly provided for such a rule in the transitional or final provisions.

58 In this regard, our court practice has also emphasized the argument that "the vested rights of earlier holders of such rights would thereby be jeopardized, since they would be placed in a less favorable position compared to other subjects, given that the law expressly provided that ownership could not be acquired through usucapio of socially-owned property. Consequently, the failure to demand that the possessor hand over immovable property cannot benefit the possessor during the period required for acquisition of ownership through usucapio, as this would be contrary to the principle prohibiting retroactivity. The removal of the provision prohibiting acquisition of ownership of socially owned land (Art. 29) does not amount to statutory validation, since the prohibition expressed therein was not of minor significance." See VSS, Rev. 4976/98, 15 September 1999 (Krsmanović 2001, 77, translated by author).

identical for all land within the present territory of the Republic of Serbia. It depended not only on the type of land (construction, agricultural, forest) but also on other circumstances that constituted the basis for the transition: for certain types of land (e.g., construction land) the transition to social ownership occurred directly by operation of law, whereas for others it was necessary for the competent authority to issue a decision. Therefore, it is necessary to determine in each specific case when exactly the transition from private to social ownership and vice versa occurred.

What should, therefore, be regarded as indisputable is that the period during which certain land was socially owned, prior to the 1996 amendments to the ZOSPO, cannot be counted in the time required for acquiring ownership through usucapio.

At the end of this section, it is worth noting – although with little practical significance – that uncertainty also existed regarding the exact moment the 1996 amendments to the ZOSPO entered into force. Namely, some court decisions mention 4 July 1996 as the crucial date,[59] some 7 July 1996,[60] and some even 3 August 1996.[61] Given that the ZOSPO was published in the *Official Gazette of the FRY* No. 29/96, on 26 June 1996, and that pursuant to Article 36 it entered into force on the eighth day following its publication, we can conclude that it entered into force on 4 July 1996.

6.3. Calculation of Time in Cases in Which the Possession of the Land Began Before its Transition to Socially Owned Property

The second group of cases is far more complex, consisting of the cases in which the regime governing the land shifted from private to social ownership (or vice versa) during the possession. Such cases were not uncommon and can further be divided into two subgroups. The first subgroup consists of cases in which the conditions for acquiring ownership through usucapio

[59] Court of Appeal in Novi Sad, Gž. 3580/2018, 27 September 2018, *ParagrafLex*; Court of Appeal in Belgrade, Gž. 5994/2022, 13 December 2022, *ParagrafLex*.

[60] Court of Appeal in Kragujevac, Gž. 1993/2022, 1 November 2022, *ParagrafLex*;

[61] Court of Appeal in Niš, Gž. 1732/2019, 21 March 2019, *ParagrafLex*; Court of Appeal in Novi Sad, Gž. 3417/2015, 18 February 2016, *ParagrafLex*; Court of Appeal in Belgrade, Gž. 8196/2013(3), 22 January 2014, *ParagrafLex*; Commercial Appellate Court, Pž. 7282/10, 17 February 2011, *IngPro*; VSS, Rev. 2318/07, 11 October 2007, *IngPro*; Commercial Appellate Court, Pž. 459/17, 17 January 2018, *IngPro*. This date is mentioned in the decision of the Constitutional Court, Už. 393/2011, 5 June 2014, *https://sirius.rs/cyr/praksa/nuLKIQ*, last visited July 30, 2025.

were met prior to the transition to social ownership. These are situations in which the possessor had possession for a period of time sufficient to acquire ownership through usucapio, while the land was still privately owned. However, there was a failure to establish, in due time, that ownership had already been acquired through usucapio before the land became socially owned. The second subgroup consists of cases in which the possessor had possession of the land for a period of time before it transitioned into social ownership, but that period was insufficient to acquire ownership through usucapio.

With respect to these situations, at least three questions arise: first and foremost, can the time that elapsed while the land was still in private ownership be included for usucapio; second, if such time can indeed be included, how can this calculation be carried out; and finally, how does the transition to the social ownership affect the calculation of time – does it mean the interruption or suspension of the elapsed time?

6.3.1. Should the Time that Elapsed Before the Land Transitioned into Social Ownership be Counted for Usucapio?

Serbian court practice contains many significant inconsistencies regarding this issue.

Some courts firmly maintain the position that "the period prior to 4 July 1996 cannot be counted in the time required for acquiring ownership through usucapio of socially owned immovable property."[62] It is worth noting that in many decisions regarding the acquisition of ownership through usucapio, the courts attach no significance to the moment when social ownership of the land was established or to whether (and how much) time had previously elapsed.[63] This fact is, therefore, considered irrelevant. However, there are

[62] Court of Appeal in Novi Sad, Gž. 2792/2011, 21 March 2012, *IngPro*, translated by author. Similarly, see Court of Appeal in Belgrade, Gž. 2954/18, 25 May 2018, *IngPro*; Commercial Court of Appeal in Belgrade, Pž. 7874/14, 14 September 2016, *IngPro*; Court of Appeal in Novi Sad, Gž. 427/14, 2 April 2014, *http://bilten.osns.rs/presuda/sentenca?url=sticanje-prava-svojine-1*, last visited July 30, 2025: "*the periods for usucapio may only be calculated prospectively, beginning from the date of its entry into force. Therefore, in the present case, the period for usucapio is calculated from the date of entry into force of the amended law, namely from 4 July 1996.*"

[63] Court of Appeal in Belgrade, Gž. 3604/22, 2 September 2022, *IngPro*. From the available text, it appears that the court did not attach significance to the fact regarding when the land transitioned into social ownership, although it was established that the possessor had acquired the parcel through an exchange more than 60 years prior to the time of the judgment.

decisions in which the courts did regard this fact as relevant, but that did not lead to a different outcome. In one such decision, the court miscalculated the time periods: instead of determining the moment when the land transitioned into social ownership and examining whether sufficient time had elapsed by then, the court erroneously treated as relevant the moment that the ZOSPO entered into force, because it introduced a general prohibition on acquiring ownership through usucapio of socially owned property.[64] This is incorrect for at least two reasons: first, the land could have been socially owned even before the ZOSPO entered into force, in which case the period prior to that should also not be counted in the period required for usucapio; second, the land could have been privately owned even after the ZOSPO entered into force, in which case it is in fact important to count in the period prior to the transition of the land into social ownership. In another decision, however, the Supreme Court of Serbia found that sufficient time had elapsed for acquiring ownership through usucapio before the transition to social ownership, but that this right had transitioned into the right of use.[65]

Finally, the Supreme Court stated that the removal of Article 29 ZOSPO meant that "this method of acquiring ownership is allowed, but when it comes to socially owned property, the period for usucapio begins to run from 4 July 1996, when the Law on the Amendments to the Law entered into force,"[66] and that it did not "validate or reinforce the previous state of possession, nor was ownership established on the basis of usucapio with respect to assets and objects that were in social ownership,"[67] because the "the transitional and final provisions contained no rule regarding its retroactive application, for which reason the periods for usucapio can be calculated only prospectively, as of the day of its entry into force."[68]

Similarly, Court of Appeal in Novi Sad, Gž. 427/14, 2 April 2014, *http://bilten.osns.rs/presuda/sentenca?url=sticanje-prava-svojine-1*, last visited July 30, 2025.

64 See Court of Appeal in Belgrade, Gž. 8196/2013(3), 22 January 2014, *ParagrafLex.*

65 See VSS, Rev. 2786/2005, 8 November 2006, *ParagrafLex*: "If the plaintiffs' legal predecessor had acquired ownership of the land prior to its transition into social ownership, then, at the moment of the establishment of the legal social, i.e., state ownership, that right was transitioned into a right of use of the same land" (translated by author).

66 VSS, Prev. 26/07, 12 July 2007, *IngPro*.

67 Court of Appeal in Belgrade, Gž.. 3604/22, 2 September 2022, *IngPro*; Court of Appeal in Belgrade, Gž. 8196/2013(3), 22 January 2014, *IngPro*.

68 Court of Appeal in Novi Sad, Gž. 4005/2013, 6 February 2014, *IngPro*; Court of Appeal in Novi Sad, Gž. 427/14, 2 April 2014, *http://bilten.osns.rs/presuda/sentenca?url=sticanje-prava-svojine-1*, last visited July 30, 2025.

It seems that the aforementioned reasoning cannot fully withstand criticism. Namely, we agree that the period during which the land was socially owned property should not be counted in the time required for usucapio, but that is not the case here. The question is whether the period during which the land was in private ownership should be counted. With respect to that period, there is no need to retroactively apply any law, but rather the statutory rules that were in force during that time should apply. Thus, if the land was in the private ownership at the moment of acquiring possession of the land (or during the possession), it seems entirely logical that the general rules governing acquisition of ownership through usucapio should be applied; prior to 1 September 1980, this means the application of prewar legal rules, and thereafter the application of the rules provided by the ZOSPO.

Thus, the strongest argument in favor of including the time that elapsed before the immovable property transitioned into social ownership is the following: the application of the rules that were in force at that moment with respect to privately owned land. If such time were not to be included, this would completely disregard the rules that should to be applied to the given legal situation.

Consequently, the reasoning set forth in the aforementioned decisions is insufficiently convincing to support the view that the period prior to the land's transition to social ownership should not be counted. Moreover, the analysis shows that only the period after the entry into force of the 1996 amendments to the ZOSPO is regarded as relevant for usucapio: as shown, in some decisions it was even established that ownership had been acquired through usucapio before the land transitioned into social ownership, but such ownership rights were then transitioned into the right of use. This practically means that the possessor must once again meet the conditions for acquiring ownership through usucapio, now counting only the time after the 1996 amendments to the ZOSPO. The purpose of determining whether the conditions for acquiring ownership through usucapio were met before the transition to social ownership remains unclear, if such a possessor is treated in the same way as other possessors in whose case those conditions were not met prior to 1996. More importantly, this approach seriously undermines the protection of acquired rights.

Therefore, it seems that the reasoning expressed in the second group of court decisions, which uphold the opposite view, should to be accepted; these are the decisions in which the court considered it crucial to determine whether the periods for acquiring ownership through usucapio had expired before the land transitioned into social ownership.

An important decision in this regard was rendered by the Supreme Court of Serbia as early as 2000. Namely, the Court stressed as crucial that "it is necessary to determine, depending on when the disputed parcel became socially owned property, whether the plaintiffs could have acquired ownership rights if, by the time of the entry into force of the Law on Amendments to the Law on Basic Property Relations, the statutory period for usucapio had elapsed," as well as "when and on what basis the disputed parcel became socially owned property".[69] The similar opinion can also be seen in other court decisions.[70] Namely, the courts correctly stated that "the period for usucapio is a permanent legal fact, and when it exists both under the earlier and the new legal regime, then the rules of both legal regimes must be applied in combination for its calculation."[71] Recognition of the earlier legal regime is, as emphasized, in accordance with the principle of legal certainty.[72] Finally, a particularly significant decision in this respect was rendered by the Constitutional Court in 2014. The case concerned usucapio of land that had begun as early as 1958, while the regime of social ownership of land was established only in 1988. In such circumstances, the Constitutional Court stated that "the Court of Appeal failed to establish that the 20-year period required for usucapio had expired on 17 February 1978, and even if the rules of private law were to be applied, that period expired 4 years later – on 17 February 1982." According to the Constitutional Court, "such an omission by the Court of Appeal is of crucial importance for the decision."[73]

Such reasoning is therefore based on the premise that the rules governing the acquisition of ownership through usucapio of immovable property in private ownership must be applied up until the moment when the property transitioned into socially owned property. If sufficient time had elapsed, then it should be considered that the possessor acquired ownership at that moment. If not, that time must be added to the period after the removal of Article 29 ZOSPO.

Yet, it remains unclear: what significance does the transition of the land regime have?

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[69] VSS, Rev. 6725/99, 6 December 2000, *Intermex*, translated by author.

[70] Court of Appeal in Belgrade, Gž. 792/20, 5 February 2020, *IngPro*.

[71] Court of Appeal in Novi Sad, Gž. 5137/2013, 25 September 2014, *ParagrafLex*, translated by author.

[72] Court of Appeal in Novi Sad, Gž. 5137/2013, 25 September 2014, *ParagrafLex*.

[73] Constitutional Court, Už. 393/2011, 5 June 2014, *https://sirius.rs/cyr/praksa/nuLKIQ*, last visited July 30, 2025. Translated by author.

It seems particularly important to ask whether this created unequal opportunities for, on one hand, persons who claim acquisition of ownership through usucapio, and on the other hand, persons who acquired ownership in some other way but were deprived of it through the nationalization of land. Especially if such nationalization would have occurred anyway, regardless of who was the owner.[74]

We have seen that the Supreme Court of Serbia considered, in a decision from 2006, that the ownership right transitioned into the right of use. On the other hand, it should be noted that in a decision from 2020 the Belgrade Court of Appeal considered irrelevant the fact that the transition to social ownership had occurred, reasoning that "this would have an effect only in a situation where, by that time, the statutory periods required for acquiring ownership through lawful or conscientious possession had not yet elapsed".[75]

We believe that the aforementioned inequality does not in fact exist. An owner whose land was nationalized certainly has at their disposal the possibility to invoke the rules on restitution[76] in order to regain ownership, if they do not have possession. On the other hand, from the perspective of the possessor, it should be noted that in most cases, at the time of submitting the request for determining ownership acquired through usucapio, they have been in possession considerably longer than required under the ZOSPO (in some cases even for several decades). It seems unreasonable to require that the possessor, who in fact was never dispossessed, to once again meet the time condition, counting only the time from the entry into force of the 1996 amendments. It is important to establish that the possessor had possession of certain qualities for the period prescribed by law (10 or 20 years), but it is irrelevant whether that period comprises the first or the last 10/20 years of their possession – if the statutory conditions are met, ownership must be deemed acquired. The only condition is that the rights of any third bona fide persons must not be infringed. Finally, the matter must also be viewed in light of the reasons for the transition of the land ownership.

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[74] If the transition would not have occurred due to the timely establishment of acquisition through usucapio (prior to the transition), it would have been reasonable to consider that ownership was acquired at the moment when the conditions for such acquisition were fulfilled. In other words, the fact that the land subsequently transitioned to social ownership should be disregarded. This, of course, is subject to the condition that continuous possession existed throughout the relevant period, and that the rights of third parties acting in good faith are not thereby infringed.

[75] Court of Appeal in Belgrade, Gž. 792/20, 5 February 2020, *IngPro*.

[76] The term *reprivatization* is regarded as more precise than *restitution*. See Hiber 1998, 88 fn. 254.

6.3.2. Calculation of Time and Temporal Application of Laws

If we accept the view that the period for usucapio must also include the time that elapsed while the land was in private ownership, it raises the issue of the applicable methods for such calculations of time.

When considering the fulfillment of the conditions for acquiring ownership through usucapio, it is necessary to take into account the entire period of possession of the possessor and their legal predecessors, and to establish how long the immovable property was in the private ownership, with respect to that period. The matter is simpler if entry into possession occurred after the ZOSPO entered into force: in that case, only the provisions of the ZOSPO apply. However, if the period of usucapio began to run before the ZOSPO entered into force, "for that period the legal rules of private law apply," as the Constitutional Court emphasized in its 2014 decision.[77]

Thus, situations in which both the rules of prewar law and the ZOSPO must be applied may be particularly problematic, since the prescribed periods differ.[78]

According to Article 28 paras. 2 and 4 ZOSPO, the prescribed periods amount to 10 or 20 years.

Regarding the rules of prewar law, the prescribed period required for acquiring property through usucapio in the SGZ was 24 years.[79]

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[77] Constitutional Court, Už. 393/2011, 5 June 2014, *https://sirius.rs/cyr/praksa/nuLKIQ*, last visited July 30, 2025. Translated by author.

[78] The Federal Supreme Court, at its extended general session on 4 April 1960, adopted a general opinion that for immovable property not registered in the land books, the period amounts to 20 years (Gams 1974, 263). Although we consider the position of the Federal Supreme Court to be justified, it is disputable whether a general opinion of the Court could in fact serve to alter a legal rule.

[79] According to Article 929 SGZ (translated by author), "for immovable property, such as lands, houses, fields, meadows, orchards, vineyards, or mills, a period of 24 years is required for acquisitive prescription," which applies in cases of possession without title. If possession is with title and the property has been entered into the land register, 10 years suffice. However, in the case of immovable property belonging to state authorities, churches, or municipalities, the required period is 12 years "if entered in the land register in the name of the possessor," or 36 years if it is not.

Due to the uncertainties caused by situations in which both the rules of prewar law and the ZOSPO rules applied, a general position was adopted at the Joint session of the Federal Court, the republican and provincial supreme courts, and the Supreme Military Court held on 14–15 December 1983:[80]

> "The Law on Basis of Ownership and Property Relations contains no appropriate transitional provision regarding the calculation of time for usucapio that began under the earlier legal regime and ended under the regime of the new law. Therefore, the rule on the temporal applicability of laws must be applied, according to which the law in force at the time when the legal relationship arose is to be applied. However, the period for usucapio is a permanent legal fact, and when it exists both under the earlier and the new legal regime, then the rules of both legal regimes must be applied in combination for its calculation. By recognizing the earlier legal regime, in accordance with the principle of legal certainty, the time that had already elapsed must be included in the period for usucapio. Under the regime of the Law on Basis of Ownership and Property Relations, a period that began earlier cannot be longer than the period prescribed by this law."

As an additional guideline, it is stated that "if the Law on Basis of Ownership and Property Relations prescribes a shorter period, and upon the entry into force of the Law the remaining time is shorter than that prescribed by the Law, the period expires upon the lapse of the time determined by the earlier law. If, however, the remaining time under the earlier law is longer than that provided in the new law, the period expires upon the lapse of the time prescribed by the new law."

To illustrate with an example, if possession was acquired when the rules of prewar law were applicable, then if upon the entry of the ZOSPO into force the remaining time is shorter than that prescribed by the ZOSPO (shorter than 10 years for ordinary usucapio, or shorter than 20 years for extraordinary usucapio), the period expires upon the lapse of the time provided under the rules of prewar law.[81] On the other hand, if the remaining time is longer than the period prescribed by the ZOSPO (longer than 10 or 20 years), then the period expires upon the lapse of the time prescribed by the ZOSPO.

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[80] Quotes taken from the decision of the Constitutional Court, Už. 393/2011, 5 June 2014, *https://sirius.rs/cyr/praksa/nuLKIQ*, last visited July 30, 2025. Translated by author.

[81] Court of Appeal in Belgrade, Gž. No. 4623/12, 11 March 2013, *IngPro*.

6.3.3. The Transition to Social Ownership – Interruption or Suspension of the Period for Usucapio?

The idea that the period for usucapio should also include the time before social ownership was established – provided that the land was in uninterrupted possession of the possessor (and their legal predecessors) – raises yet another question. Namely, what significance does the transition to social ownership have with respect to the calculation of time for usucapio? Does it lead to an interruption or suspension of the period for usucapio?

According to Article 30 para. 3 ZOSPO, "the provisions on interruption and suspension of the statute of limitations for claims shall apply mutatis mutandis to the interruption and suspension of usucapio."[82]

The linking of these two institutions – usucapio and limitation of claims[83] – is also noticeable in the rules of prewar law in which they even terminologically coincide: instead of "usucapio" the term "limitation" was used.[84] Nevertheless, these legal institutes are, in essence, different: the rights that are acquired, lost, or weakened on the basis of these legal institutes differ from each other, and their effects are distinct. The problems of analogously applying the rules on interruption of the limitation period to the interruption of the period for acquiring ownership through usucapio have already been pointed out by legal scholars (Stanković, Orlić 1999, 95).

With regard to the reasons for the suspension of the limitation period, such analogous application is possible in principle (Stanković, Orlić 1999, 95–97). However, is it possible when it comes to the problem we analyze? In other words, can any of the reasons that lead to the suspension of the limitation period also lead to the suspension of the period for usucapio due to the fact that the land regime has changed?

Having in mind the provisions of the Law on Obligations (ZOO),[85] which regulates the institute of limitation, it makes sense to analyze Article 383 ZOO. According to that provision, limitation does not run for the entire period during which the creditor was unable to demand fulfillment of the

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[82] Translated by author.

[83] For more on the concept and effects of limitation (*zastarelost*) in more recent literature, see Živković 2024, 130–133.

[84] Article 929 SGZ.

[85] Law on Obligations – ZOO, *Official Gazette of the SFRY*, 29/78, last changes in 18/2020.

obligation via the courts, due to *insurmountable obstacles*. This provision was taken verbatim from Article 26 of the 1953 Law on the Limitation of Claims, which remained in force until the ZOO entered into force.

Could the transition to social ownership, due to which the possessor could not acquire ownership, be considered an insurmountable obstacle?

The commentaries on Article 383 ZOO explain that the limitation period cannot run against a person who is unable to conduct litigation (Studin 1980, 859). Therefore, this article primarily refers to situations in which the court had been prevented from operating, as a result of which the creditor was unable to protect their rights.[86] Nevertheless, as noted, Article 383 ZOO does not necessarily refer only to such situations; its formulation is broader so as to encompass all situations in which it was impossible for the creditor to protect their rights via the courts, due to insurmountable obstacles. As stated, "the rule contained in this article belongs to general clauses" (Studin 1980, 859, translated by author), and it may apply not only to situations in which the courts are prevented from operating but also in which the creditor was objectively prevented from protecting their rights.[87] Yet, perhaps most significantly for our analysis, an insurmountable obstacle may also consist in the enactment of statutory provisions that prevent the creditor from protecting their rights: an example may be the introduction of a moratorium, i.e., the compulsory postponement of debt payments imposed by law (Stojanović 1980, 932).

Can we then say that the (involuntary) transition to social ownership, at the time when it was not possible to acquire ownership through usucapio of socially owned property, constitutes an insurmountable obstacle that leads to the suspension of the period for usucapio?

We believe that the answer should be affirmative. The same ideas already exist in legal theory. Simonetti points out that the prohibition of usucapio of immovable property in social ownership, from 6 April 1941 until the abolition of such prohibition, is comparable to the rules on suspension of limitation periods due to insurmountable obstacles (Simonetti 2008, 44).

[86] See also Article 944 SGZ (translated by author): "when there are no courts in the country, as in times of war or plague, there is neither commencement nor continuation of limitation."

[87] The mentioned examples are: if the creditor, during the serving of a sentence, was in fact prevented from making the appropriate intervention before the court; or if, due to natural disasters, the imposition of quarantine, due to an epidemic or similar circumstances, the creditor was prevented from protecting their right for a certain period of time; etc. (Studin 1980, 859; Stojanović 1980, 932).

The legal situation created by a moratorium is comparable to the legal situation created by this prohibition (express or implied) (Simonetti 2008, 44).[88]

What would this mean practically? If, for example, the period for usucapio began to run while the land was in private ownership, the suspension happens at the moment of the transition to social ownership, but the time continues to run no later than 4 July 1996,[89] provided that the immovable property had been in uninterrupted possession of the same possessor, or their legal predecessors, until that date (Simonetti 2008, 45). It is also important to emphasize that the transition must have occurred against their will. The same applies to land in state ownership before 6 April 1941, and which later transitioned to social ownership.[90]

7. ACQUISITION OF RIGHT OF USE THROUGH USUCAPIO

An affirmative position has been taken in more recent case law, that the right of use may also be acquired through usucapio, under the same conditions.[91] Such a position is nevertheless not uniformly applied in Serbian case law.[92] Interestingly, the decisions permitting the acquisition of the right of use of socially owned property were rendered almost at the same time when the completely opposite position was taken in sessions of the Commercial Appellate Court Department for Commercial Disputes and

[88] Brežanski, however, notes that the position of the Supreme Court of the Republic of Croatia (Rev. 114/2008, 28 October 2008) is different, namely that the provisions on suspension of the limitation period apply only to causes prescribed by law, i.e., insurmountable obstacles of an objective nature, such as war and similar circumstances, and not to situations where the acquisition of certain rights is not permitted by law (Brežanski 2009, 619).

[89] Exceptionally, this may occur even before this date if private ownership of the land was reestablished prior to 4 July 1996 (Simonetti 2008, 45).

[90] Article 931 SGZ.

[91] See, e.g., VKS, Rev. 2036/2015, 16 June 2016, *ParagrafLex*; Court of Appeal in Niš, Gž. 1375/2017, 23 February 2017, *ParagrafLex*; Commercial Appellate Court, Pž. 557/17, 23 August 2018, *ParagrafLex*; VKS, Rev. 3464/21, 20 January 2022, *ParagrafLex*.

For Croatian law, see Brežanski 2009, 622; Kontrec 2017, 577ff.

[92] See, for example, Court of Appeal in Belgrade, Gž. 6539/10, 4 November 2010, *ParagrafLex*; Commercial Appellate Court in Belgrade, Pž. 3485/18, 17 December 2020, *ParagrafLex*.

the Department for Commercial Offenses and Administrative-Accounting Disputes – that Article 28 the ZOSPO applies only to ownership rights, and not to rights of use.[93]

If the right of use can be acquired through usucapio, under the same conditions as ownership, the question arises why would anyone go for the acquisition of the right of use if it meets the conditions necessary for acquiring ownership. The only logical explanation would be that usucapio was employed to acquire the right of use of socially owned land at a time when it was not permitted to acquire ownership through usucapio.[94]

One of the reasons may lie in the arguments of the Supreme Court, according to which "after the adoption of the Law on Planning and Construction, which allows for the conversion of the right of use into the ownership of land [...] the usucapio (as an institute of private law) may by analogy also be applied to the right of use."[95]

The question arises as to the rationale underlying the adoption of such a position.

If it is indisputable that ownership can be acquired through usucapio, then a fortiori the right of use can also be acquired through usucapio, provided that the same conditions are met. Given also the right of conversion of the right of use into ownership, this is a logical extension of that position, explaining how the right of use itself may be acquired, and introducing the possibility that this may also be through usucapio. In most cases, this concerns situations in which, at the time of concluding the contract on transfer of rights, it was not permitted to acquire ownership through usucapio. On the other hand, such a request was sometimes a "safer" path for acquirers, bearing in mind that the courts were more inclined to establish the existence of a right of use than ownership, and subsequently the plaintiff's right of use led to the acquisition of ownership, through the application of the institute of conversion.

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[93] Answers to questions by commercial courts, adopted at the sessions of the Department for Commercial Disputes of the Commercial Appellate Court on 3 November 2015, 4 November 2015, and 26 November 2015, and at the session of the Department for Commercial Offences and Administrative-Accounting Disputes, on 30 November 2015, *IngPro*.

[94] "In the present case, the highest court considered that the defendant, together with their predecessors, had acquired the right of use on the basis of regular acquisitive prescription, for which a shorter period of possession (10 years) is prescribed. For this form of prescription, in addition to 10 years of possession, two further conditions must be met: the lawfulness and good faith of the possessor" VKS, Rev. 2036/15, 16 June 2016, *ParagrafLex*, translated by author.

[95] VKS, Rev. 2036/15, 16 June 2016, *ParagrafLex*; VKS, Rev. 3457/2019, 26 November 2020, *ParagrafLex*, translated by author.

Nevertheless, we believe that there is another reason why, in certain decisions, the courts favored the acquisition of the right of use. Namely, as discussed, part of the case law holds that a possessor cannot be in good faith if they know that the property is socially owned – and therefore they cannot become the owner. In such cases, the court starts from the assumption that the condition of good faith is indisputably met when the possessor believes that they have the right of use; in that specific case the right of use (not ownership) may be acquired through usucapio, since good faith – in the sense of the possessor's belief that they are the owner – cannot exist.

It appears that by applying the institute of usucapio to the acquisition of the right of use of socially owned land, the courts pursue at least three objectives: first, they seek to increase the number of situations in which the institute of conversion can be applied; second, they give legal effect to factual situations in which the conditions for the application of usucapio were met, but during a period when it was not permitted to acquire ownership through usucapio of socially owned land; third, by establishing the right of use they avoid the criticism that the condition of good faith cannot be fulfilled.

It is nevertheless interesting that the view allowing the acquisition of the right of use through usucapio is presented as "new", even though it was also applied to situations dating to before 1996, when it was not permitted to acquire ownership of socially owned land through usucapio. Yet such a position is not new, as evidenced by literature from the 1970s, which notes that case law undoubtedly recognized the possibility of acquiring the right of use through usucapio (Gams 1974, 266–267).

8. CONCLUSION

The possibility of acquiring ownership of socially owned land through usucapio has traversed a path from impossibility of application, beginning on 6 April 1941, to possibility by the removal of Article 29 by the 1996 amendments to the ZOSPO. As the concept of monopoly of social ownership gradually weakened, the acquisition of private ownership of socially owned land became permitted, but the case law seems to have gone even further in relaxing the rules. There are at least two reasons for this: first, there was no longer a need to favor social ownership; second, strict application of the rules on lawfulness and bona fide possession would have significantly reduced the scope of application of usucapio. This would lead to an absurd situation – attempting to strictly apply the rules on the qualities of possession would be unlawful, since the rules on usucapio would almost never be applied to land in social ownership, despite the legislator indisputably permitting it.

An analysis of the case law related to the institute of usucapio in general indicates tendencies to "use" it for resolving so-called old cases, and thereby indirectly for regularizing the land cadaster. This would result in the reduction of the number of unregistered immovables for which there is some documentation, and to which the statutory rules on usucapio could be applied, albeit sometimes more flexibly understood.

The position of the courts in disputes regarding socially owned land would perhaps have been easier had the legislator devoted special regulation to this institute, instead of providing for the application of the same rules of usucapio regardless of the type of ownership of the land. Bearing this in mind, the case law has justifiably taken the liberty not so much to create new rules, as at least to interpret and apply the existing ones more flexibly.

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Article history:
Received: 30. 7. 2025.
Accepted: 8. 12. 2025.

/ПРИКАЗИ

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Taubman, Philip, William Taubman. 2025. *McNamara at War: A New History***. New York: W. W. Norton & Company, 483.**

WAR, LIES, AND EXCEPTIONALISM: HALF A CENTURY LATER

'Nobody thinks in terms of human beings.
Governments don't, why should we?'

Orson Welles as Harry Lime,
The Third Man by Carol Reed (1949)

Robert S. McNamara is hardly a household name in the third decade of the 21st century – not even in the US. Nonetheless, in the 1960s, he was more than a household name – and not only in the US. He was a symbol of the time and the token of the war. It is not for nothing that the Vietnam War was labelled 'the McNamara war': he was the key figure in the US administration regarding that war and served as Secretary of Defence under both John F. Kennedy and Lyndon B. Johnson. Widely considered one of the most brilliant men of his generation in the US, he wielded immense and decisive power

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to persuade presidents and other decision-makers of the necessity of US military engagement in full-fledged war and of its escalation. Whether he liked it or not – this is indisputable. Well, he did like it at first, believing in his capacity to solve hard problems and enjoying the power itself, before doubts surfaced, and from that moment on, it haunted him for the rest of his life. The reader has no sympathy for McNamara's nightmares and torments produced by the Vietnam War. After all, he died peacefully, aged 93, unlike tens of thousands of Americans and more than three million Vietnamese who were killed in the war for which he was the *spiritus agens*.

The authors – brothers Philip, a veteran New York Times reporter, and William, a historian and Pulitzer Prize-winning biographer of Khrushchev and Gorbachev – joined forces to provide a comprehensive biography of one of the 20th century's most effective and sophisticated American warmongers. This is not the first McNamara biography: three have been previously published (Trewhitt 1971; Shapley 1993; Hendrickson 1996).[1] Nonetheless, the authors had access to materials unavailable to previous McNamara biographers, including Jacqueline 'Jackie' Kennedy's letters to McNamara during the Kennedy and Johnson administrations and beyond; family correspondence dating back to McNamara's service in World War II; and, probably the most important source – secret diary kept by John McNaughton while serving as McNamara's closest Pentagon adviser on the Vietnam War, during 1966–1967.[2] Substantial segments of this meticulously researched book are accounts of McNamara's personal life, including his childhood and thorny relationship with his parents, his university years, and his life after leaving the Pentagon and the corridors of power (including a term as the President of the World Bank), with the authors' endless descriptions of his family relations and romantic engagements. The reader ponders whether all that was really necessary: a reasonable attitude is that a comprehensive biography should include all these details, but to the reader, these details seem trivial and redundant, given the millions killed in the Vietnam War due to McNamara's actions and inactions. For that reason, all these segments

[1] In addition to those three biographies, McNamara's period at the Pentagon, as a US Secretary of Defence, has been critically scrutinised by Halberstam (1972). The sequel was published 14 years later (Halberstam 1986).

[2] John McNaughton died in a commercial aeroplane crash in 1967, just days before he was to become the US Secretary of the Navy. A copy of the secret diary was made available to the authors, as acknowledged in the book, by John McNaughton's son, Alex – the only member of the McNaughton family who was not on the plane that fateful day.

of the book will be skipped in this review, which will focus solely on the Vietnam War, emphasising McNamara's role in it and asking what lessons can be learned from that disaster – not only by America.

Nonetheless, there are a few episodes from McNamara's pre-Vietnam life that should be taken into account when considering his role as the Secretary of Defence and a chief architect of the Vietnam War, the first being his academic career. After obtaining an undergraduate degree in economics from the University of California at Berkeley, McNamara graduated from the Harvard Business School (HBS) and found his academic home there, teaching accounting and excelling in the relatively new discipline of management accounting.[3] In short, this is a type of accounting that provides the basis for successfully managing companies, especially in making sound strategic managerial decisions. Well, the reader ponders, if there are enough reliable numbers, perhaps that kind of accounting can be applied to any human activity – whether it should be is an entirely different question.

Taking the versatility of management accounting and with excellent timing 'In 1941, HBS established an Industrial Administrator degree and a new Management Controls course that would form the foundation of the Army Air Force's Statistical School. The premise of this approach, David Halberstam later wrote, "was that this vast new mechanized war was as much about the production and allocation of resources as it was about combat bravery, and the best brains should be applied to that challenge"' (p. 57). This was especially the case since McNamara helped prepare the Army Air Forces Statistical Control Officers School, which opened at Harvard in June 1942. In short, accounting went to war on the Allies' side.

[3] There are two terms that are incorrectly used as synonyms, especially at the time of the nascency of the technique: 'management accounting' (sometimes referred to as 'managerial accounting') and 'control accounting'. The latter is only one segment of the former, so it is much narrower in scope and aim. Before this technique was developed, businesses had operated 'with a more limited set of tools for decision-making, relying heavily on traditional accounting, intuition, and ad hoc methods. While these methods provided a foundation for business operations, the lack of detailed cost analysis, budgeting, and financial forecasting meant that businesses had fewer insights into their operations and were less equipped to make strategic decisions. The emergence of managerial accounting represented a revolutionary advancement, providing businesses with the tools to analyze operations more deeply, plan strategically, and optimize performance. The new process was [...] developed at the E. I. du Pont de Nemours Powder Company in the 1920s, it was used with great success to revive and sustain General Motors after it suffered huge losses early in the Depression' (p. 37).

McNamara soon followed, making that the second important episode of his life. He enlisted and became an officer of the Army Air Force (predecessor of the US Air Force),[4] and in 1943 was dispatched to England to serve as a special consultant to the Eighth Air Force, whose mission was to bomb Germany. His stint in Europe was rather short, as he was recalled to the USA to start working as a consultant in management accounting, to ensure the greatest impact of a new US weapon: the B-29 Superfortress, a four-engine, long-range heavy bomber that was considered a weapon of choice for bombing Japan into submission. Soon enough, McNamara was assigned to the Twentieth Air Force under the command of General Curtis LeMay, whose mission was to end the war against Japan. McNamara's recommendations were based on management accounting, which calculated how to inflict more destruction. This persuaded the commanding officer to change the bombing strategy. From the precise bombing strategy previously applied against the German military and industrial capacities, which had proved ineffective against Japan, the tactic turned to nighttime low-level indiscriminate area bombing of cities using incendiary bombs. The premiere of the new concept was a Tokyo raid on 8/9 March 1945, in which about 100,000 civilians died, and a substantial part of the (wooden housing) city was scorched. During the next five months, American firebombing destroyed or gravely damaged more than sixty Japanese cities. Given this, the atomic bombings of Hiroshima and Nagasaki did not make a great difference in terms of casualties.[5] After the war, no-nonsense General LeMay admitted, 'If we'd lost the war, we'd all have been prosecuted as war criminals' (p. 73). For McNamara, it is evidence that his management accounting approach to warfare was the right one. Japan surrendered, didn't it?[6] That was the source of his confirmation bias two decades later, when he was in charge of the Vietnam War. Furthermore, it

[4] At the time of the World War II, the Air Force was not an independent branch, but rather operated under the auspices of the US Army. It was only in 1947 that the US Air Force became an independent branch of the US armed forces, with the enactment of the National Security Act.

[5] Ovrey (2025) provides details on the preparation and execution of the firebombing campaign of Japan. It took meticulous long-term planning to devise a bombing strategy to incinerate Japanese cities. Accordingly, McNamara was not the only one who contributed to the campaign of deliberately killing Japanese civilians, but he was an indispensable part of it.

[6] It took him 58 years to concur with General Le May's statement. It was too little too late: the too late is self-explanatory; it was too little because he did *not* say something along the lines of "it was a war crime, *regardless* of who won and who lost the war, and I am sorry, and I deeply apologise that it was I who recommended the policy that it was based on." His 58-year deferred concurrence is available in Errol Morris' 2003 documentary *Fog of War*, *https://www.imdb.com/title/tt0317910/*,

was noted that, in the bombing of Japan, McNamara helped to kill hundreds of thousands of civilians, but he was seemingly 'impervious to the human cost of his work' (Boot 2018, 365). This pattern repeated in Vietnam.

The third decisive episode in McNamara's handling of the Vietnam War was the 1962 Cuban Missile Crisis, in which he was already involved as Secretary of Defence. It was the Soviet Union's secret deployment of nuclear missiles in Cuba that triggered the crisis, which culminated in early October 1962, when the nuclear warheads were delivered to Cuba, making the missiles ready for use against the US Southeast, including Washington, DC. It was a hectic time in which the military leaders (including General LeMay, McNamara's superior in 1945) strongly advocated brute military force as a solution – the all-around (i.e. not only the missile sites) bombing of Cuba without any warning, followed by a full-scale invasion of the island.[7] It was McNamara who confronted the top brass, advocated a peaceful way out of the crisis, and persuaded President John F. Kennedy to decide that the US should go in this direction, while also effectively assisting him in pursuing it. The 1962 Cuban Missile Crisis made McNamara the most influential member of the Kennedy cabinet, save perhaps the President's brother, Robert, who was Attorney General. McNamara 'knew how to brief the president, work the bureaucracy, and control the flow of information' (Rhodes 2026, 44). His reputation as a brilliant technocrat with a sharp mind substantially increased after the 1962 Cuban Missile Crisis, as his belief in his own instincts and self-confidence grew; his arrogance also increased. McNamara was not liked by many but was highly respected by all in Washington, DC at the time.

The stage was set for McNamara's role as an architect of the Vietnam War.[8] Nonetheless, according to the authors, the conflict began much earlier: it can be traced back to the Japanese Instrument of Surrender, signed in Tokyo Bay on 2 September 1945, aboard the USS *Missouri*, which ended the Japanese administration in Vietnam. Japanese control had not come out of the blue; it was imposed after the collapse of the French administration of what was French Indochina, in the aftermath of France's 1940 defeat. On the day that the Japanese Instrument of Surrender was signed, Ho Chi Minh

last visited March 1, 2026. The transcript of McNamara's monologue and dialogue with Morris, with additional comments, is also available in printed version (Blight, Lang 2005).

7 This would be a massive, fully fledged invasion by regular US troops, unlike the fiasco of the CIA-sponsored landing of ill-trained Cuban emigration irregular paramilitary forces in the Bay of Pigs in April 1961.

8 A comprehensive, well-researched, and unbiased general history of the Vietnam War is provided by a British military historian: Hastings (2019).

proclaimed the Declaration of Independence of the Democratic Republic of Vietnam, announcing the end of French colonial rule and the establishment of a new Vietnamese state. It asserted Vietnam's right to national self-determination and independence. Ho Chi Minh asked the US administration to support Vietnam's independence.[9] However, President Harry S. Truman's administration supported the French recolonisation of Indochina. The days of colonial empires were a thing of the past: the resolve of the Vietnamese political elite and the people for independence was substantial – war for national liberation was inevitable. The subsequent French defeat at Dien Bien Phu was so severe that it proved a decisive battle of the war. The 1954 peace conference left Vietnam divided along the 17th parallel, into North and South Vietnam. French rule was over, and independence had been achieved, but the nation was not unified. The North was supported by China and the Soviet Union; the South was supported by the US. Accordingly, Vietnam became a 'domino' in the Cold War.

It is exactly at that time that the US President Dwight D. Eisenhower publicly described the 'falling domino' hypothesis during a press conference about Indochina.[10] In short, if Vietnam was united under the communist North, if Vietnam 'fell', then communism would spread all over Indochina and Asia. If Vietnam fell, then would Cambodia fall, then Laos would fall, then Burma, then Malaysia, then... The most ardent supporters of the 'falling domino' hypothesis included India, Indonesia and Japan. A cynic might add that, perhaps, with such a communist expansion, the only remaining beacons of liberalism in Asia would be Afghanistan and Pakistan.[11]

The reader ponders that the only reasonable assumption in the falling domino hypothesis was that, if Vietnam is unified, it would be the North that leads the endeavour. The South was religiously fragmented, with weak state authority, corrupt governments, and no political figure commanding authority comparable to Ho Chi Minh. All the other assumptions of the falling domino hypothesis were wrong. First, Ho Chi Minh's primary goal was the unification of the independent nation – not a social revolution; he was a communist, but this was secondary to his nationalistic political aims and

[9] It was not for nothing that the Declaration quoted the 1776 US Declaration of Independence 'All men are created equal...'. Obviously, US support was expected after World War II and the beginning of the decolonisation process.

[10] The hypothesis is sometimes labelled as 'domino principle' or even 'domino theory' in various publications: it is hardly a principle, let alone a theory of any kind.

[11] Langguth (2000) provides details of the US views (including illusions and delusions) of the developments leading to the Vietnam War.

activities. He was interested in Vietnam and Vietnam only, not in spreading communist revolution throughout the region. Second, the unified communist front comprising China and the USSR unravelled soon after, with the Sino-Soviet split in 1960. Third, distrust between the Chinese and the Vietnamese had been long-standing and substantial, for cultural and historical reasons, and no ideology could make up for that. Taking all this into account, it is evident that the crucial assumptions behind the falling domino hypothesis were wrong. With the benefit of hindsight, the eventual proof was the result of the North-led unification of Vietnam in 1975, after the terrible war. Which dominoes?[12]

The authors provide a grim picture of the reasons for the failure of the falling domino hypothesis. 'Had intervention in Vietnam been fully examined, it is far from clear that critical factors would have been considered. The complexities of Vietnam were more daunting than McNamara realized and inadequately appreciated by the Kennedy team, [...] Washington's preoccupation with the Communist threat blinded McNamara, Rusk, Bundy, and others to the pivotal role that nationalism played in Ho Chi Minh's determination to reunite Vietnam. American officials, by and large, failed to appreciate the long history of hostility between Vietnam and China, mistakenly viewing the Communist world as a monolithic threat. The Saigon government was corrupt, authoritarian, and lacked popular support. Opposition to it was multifaceted, not simply an invading army [from the North – remark BB]' (p. 158).

Hence, the crucial question is why McNamara, like all the members of John F. Kennedy's cabinet and all advisers, subscribed to the falling domino hypothesis. The authors point out that the Cold War perspective and obsession with the communist threat were decisive. 'The paradox of Vietnam was that although the Kennedy administration knew almost nothing about the country, the Cold War axioms that underlay its broader foreign policy virtually required that it join the war there' (pp. 153–154). The reader is a bit puzzled. It seems, according to the authors, that the USA was 'required' to join the war in Vietnam. It is understandable that the Cold War perspective was applied in US foreign policy – but that was definitely not the only perspective. Furthermore, the global competition with communism

[12] Laos effectively came under communist control in 1962 and was partly occupied by the North Vietnamese military due to its strategic position in the Vietnam War, especially the lines of communication. Under the Prince Sihanouk regime Cambodia had been a relatively stable monarchy up until the US-backed coup in 1970, after the US bombing of the country had already begun. The coup led to the civil war with the Khmer Rouge (communist) regime, which emerged as the winner. Therefore, the fall of the Vietnam domino in 1975 did not cause any other dominoes to fall.

was undeniably not only a military competition. Even if it is reduced to a military contest – it was global, not focused solely on Indochina. The 1962 Cuban Missile Crisis demonstrated that the Cold War was underway in the US neighbourhood, and the 1961 Berlin Crisis demonstrated that it was escalating in Europe, with US and Soviet troops directly facing each other. The decision to bear one's teeth in Vietnam, of all places, was puzzling, the reader ponders.

The other lesson from the authors' insight is that the US political elite, who 'knew almost nothing about the country', with McNamara in the forefront, did not realise that what was going on in Vietnam was a civil war aimed at unification of the nation, nor did it care about Vietnam as a nation, about the Vietnamese as people, or about their political and personal desires and lives; they regarded the country solely as a Cold War playground. After all, the reader contemplates, you have to know something about a country in order to care about its people.[13] At least to pretend that you care. This was a sad echo of Wilsonian liberal interventionism, the role model of American exceptionalism in international relations – to make people happy with liberal democracy, whether they like it or not, in addition to the Wilsonian right of self-determination, but only for Europeans – those white people enslaved by decadent empires.

According to the authors, one way or the other, it was clear to the Kennedy administration that the South Vietnamese government was not capable of providing basic stability in the country, that the government's opponents were getting stronger, and that the Viet Cong, an autonomous guerrilla movement with support of a substantial chunk of South Vietnamese peasants and the North Vietnamese government, was becoming more effective. Since the domino must not fall, the support for the South Vietnamese government steadily increased, both in terms of military advisers and military hardware. During the Kennedy administration, no US troops were sent to Vietnam, but the number of military advisers substantially escalated. Nonetheless, there was no strategy whatsoever. 'What McNamara did not do, he later confessed, was "insist that we present the president with an exhaustive analysis of the pros and cons of the alternatives we faced and urge him to participate in a full debate on the merits of each of the alternatives before a decision was made."' (pp. 157–158). The master of 'management accounting' remained silent, not providing a single number.

[13] A cynical view could be that you have to know something about a country even if you do not care about it and treat it only as a playground. If you do not, the likelihood of losing the game becomes substantial. Therefore, the outcome of the Vietnam War is hardly surprising.

The authors did not provide an explanation for this silence. McNamara's loyalty to the president (both Kennedy and Johnson) is mentioned several times in the book, but that loyalty alone cannot explain the inactivity of someone who was a certified workaholic. The problem was that 'Kennedy had two incompatible convictions – that it wasn't America's job to save South Vietnam, but that we couldn't afford not to do so – which he continued to hold until he was assassinated' (p. 162). So, the reader concludes that perhaps McNamara's loyalty was essentially to follow the President's path, whichever it may be. Nonetheless, with Kennedy's political schizophrenia regarding Vietnam, there was no clear path. Perhaps he trusted John F. Kennedy's political instincts, which may have inclined him to withdraw from Vietnam, though only after his 1964 re-election campaign. Nonetheless, the re-election never came.

McNamara, though, stayed with the administration as Secretary of Defence in President Lyndon F. Johnson's cabinet. What had been the American involvement in the Vietnam Civil War during the Kennedy Administration was about to become a full-scale military participation. The key moment was the 1964 Tonkin Gulf incident,[14] which enabled Lyndon B. Johnson to secure support from the US Congress, which passed the Gulf of Tonkin Resolution, giving him broad authority to use military force in Southeast Asia without a formal declaration of war. Furthermore, this was an opportunity for Johnson to flex his muscles in the 1964 presidential election campaign against a Republican hawk candidate. In short, the reader concludes, the bombing of North Vietnam started for US domestic political reasons.[15]

[14] On 4 August, there were two ostensible attacks on US Navy ships by North Vietnamese forces. The first (involving USS *Maddox*) was an unintended side effect of their reaction to the South Vietnamese Navy's action. The US Navy ship was fired upon, probably by mistake, and the ship was not hit. The second incident (ostensibly involving USS *Turner Joy*) was neither recorded nor reported by the US Navy. Nonetheless, these developments, although unsubstantiated, were politically convenient. Lyndon B. Johnson lied to the public, including legislators – and McNamara helped him with the lie.

[15] The reader ponders that the US decision to bomb North Vietnam was a hefty gift for the Soviet Union, especially its military. This decision enabled the Soviets to provide hardware (both aircraft and missiles) to North Vietnam and to send their military advisers who reported everything that was important back to Moscow. That made North Vietnam the best imaginable real-war testing ground for hardware, and especially for the tactics of applying it most effectively. Furthermore, the engagement with the US Air Force provided real-war information about all its weaknesses. Last, but not least, the US military engagement in Vietnam necessitated the reallocation of US military resources, especially personnel, away from the main lines of the Cold War confrontation. There must have been many happy faces in Moscow at that time.

It is evident, from many insights in the book, that McNamara was from the beginning deeply torn between wanting to win militarily in Vietnam and wanting to withdraw from it. He was deeply and privately unsure about whether the war was worth fighting in the first place, whether it could ever be won at a cost that Americans would be willing to pay, and whether withdrawing from it would, in fact, 'lose' most of Asia and trigger fatal political consequences at home. The opportunity for McNamara to get off the Vietnam train came with Johnson's 1964 re-election and the offer of a 'second term' as Secretary of Defence. A close friend and, up to this moment, his deputy, told McNamara that he, too, could now leave office, that '[h]e had fought hard for Lyndon' and that he had done his duty. But McNamara responded that he could not leave office now – he had to 'see the Vietnam thing through'. Perhaps the Pentagon's corridors of power still enticed McNamara.

The way he saw the 'Vietnam thing through' was decisive for the US defeat and for the Vietnamese tragedy. Although privately troubled by his doubts, he publicly advocated escalating US military involvement and sending US ground troops, which launched the palpable, boots-on-the-ground Vietnam War for America. According to his own testimony, in mid–1965, or perhaps sometime later that year, he was positive that the US could not win the war militarily. Nonetheless, he fiercely advocated further escalation, both in terms of ground troops and bombing of both Vietcong positions and North Vietnam. It was hundreds of thousands of Americans who were recruited (randomly drafted) and sent to the war, and many of them were killed *after* McNamara had realised that the war was lost, or at least that it was not winnable. Furthermore, his public addresses about the war, also made while he knew the war was unwinnable, were cautiously optimistic ('we stopped losing the war'), stirring public opinion that victory in Vietnam was in sight. He was lying the entire time, for at least two and a half years.[16] And because of his image of a bright, calm, reasonable, businessman type of person, as opposed to some passionate politician or a zealous general, his lies were much more dangerous, much easier for the American public to swallow.[17]

[16] This became apparent to the American public when *The New York Times* and *The Washington Post* published the *Pentagon Papers* in 1971. The source for the document, which was a history of how the United States had gotten involved and managed the war, was Daniel Ellsberg, at the time a defence analyst at the Rand Corporation. The story of the *Pentagon Papers* is dramatized in Steven Spielberg's 2017 movie *The Post*, *https://www.imdb.com/title/tt6294822/*, last visited March 1, 2026.

[17] Contrary to McNamara, after a visit to Vietnam, during which he realised that America could not win the war, CBS anchorman Walter Cronkite shared his thoughts with the American public in a renowned TV commentary. 'To say that we

The reasonable question is: why did he do it? One possible answer mentioned in the book is loyalty to President Lyndon B. Johnson, who invited him to serve in his cabinet. This is the one-word answer McNamara gave his son. The problem with this answer is that, legally, cabinet members are not obliged to be loyal to the president; they do not pledge to honour this when sworn into office.[18] Loyalty to people is undoubtedly a virtue, but it is unclear whether McNamara was loyal to Johnson personally or to the President. Finally, in public office, loyalty to duty is important, far more than loyalty to the person. By lying to everyone, the reader ponders, McNamara was not loyal to his duty: he derelicted his duty and should have resigned the moment he realised that the Vietnam War was unwinnable and that he had failed to convince other decision-makers of that view. By staying in the office after that moment, he only legitimised the government that he disagreed with on the most important issue.

The other potential answer is that McNamara believed his presence was essential to ward off aggressive recommendations, whether from the bellicose top military or hawkish national security advisers like Walt Rostow.[19] The authors provide evidence that in several situations McNamara was a voice opposing military escalation, especially regarding the bombing of North Vietnam. Nevertheless, the authors emphasise '[h]e never told Johnson to

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are closer to victory today is to believe, in the face of the evidence, the optimists who have been wrong in the past. To suggest we are on the edge of defeat is to yield to unreasonable pessimism. To say that we are mired in stalemate seems the only realistic, yet unsatisfactory, conclusion. On the off chance that military and political analysts are right, in the next few months we must test the enemy's intentions, in case this is indeed his last big gasp before negotiations. But it is increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honourable people who lived up to their pledge to defend democracy and did the best they could.' Walter Cronkite, Report from Vietnam, CBS, 27 February 1968, *https://www.youtube.com/watch?v=V2ev-GalTng*, last visited March 1, 2026.

[18] They only accept the obligation to 'support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter' (p. 295).

[19] Walt Rostow was an academic economist and professor of economic history at the Massachusetts Institute of Technology (MIT). He attained academic fame for his book on the stages of economic growth (Rostow 1960). He became the National Security Adviser on 1 April 1966 and, as a senior official, insisted on the huge escalation of the bombing of North Vietnam. Nonetheless, his strategy was wrong because it was based on flawed assumptions that neglected that North Vietnam was not a highly industrialised nation. Weldon (2025, 238–251) dedicated a chapter to Rostow's failures in strategy design. Rostow was not allowed to return to MIT after his stint in the US administration.

cut his losses and get out of Vietnam' (p. 352).[20] So, the question is: what could motivate McNamara to remain active within the political endeavour he did not believe in, just to polish some too-rough solutions, and to accept full responsibility for a project he did not believe in? Perhaps, he still felt very well in the corridors of power, regardless of his beliefs.

One way or another, at the end of the day, McNamara was effectively fired from the cabinet by President Johnson at the end of February 1968 and in turn appointed President of the World Bank. He remained in the corridors of (somewhat different) power and stayed in Washington, DC, for another unprecedented, exceptionally long term of 13 years.

Nonetheless, he was silent about the Vietnam War for almost 30 years. The breach of silence came with his memoirs (McNamara 1995), almost entirely dedicated to the Vietnam War. According to the authors, McNamara was not very happy with the content of his biography published two years earlier (Shapley 1993). Be that as it may, the reader ponders that he waited a long time to give his version of the story and speculates that perhaps he waited until all the people who knew the truth and were important to him were dead, including Jacqueline Kennedy, who died in 1994. One way or the other, the most important revelation in the book was that he spelt out that the McNamara's war was 'wrong, terribly wrong'. What follows is a list of mistakes, wrong assumptions, false causalities, and erroneous reasoning.[21]

What is missing is the judgment on the suitability of applying management accounting to strategic and wartime decisions. The reader ponders whether management accounting is designed solely for running corporations, not

[20] Perhaps that was precisely what his close Kennedy friends, Robert F. Kennedy and Jacqueline Kennedy, hoped for or even expected from McNamara as Secretary of Defence. If he stayed in the office for that hope, to please them, they were both rather disappointed.

[21] The reaction to his memoirs in the American press was overwhelmingly negative. *The New York Times* editorial was harsh. 'His regret cannot be huge enough to balance the books for our dead soldiers. The ghosts of those unlived lives circle close around Mr. McNamara. Surely, he must in every quiet and prosperous moment hear the ceaseless whispers of those poor boys in the infantry, dying in the tall grass, platoon by platoon for no purpose. What he took from them cannot be repaid by primetime apology and stale tears three decades later' (p. 353). *The Los Angeles Times* review was harsher, 'A secretary of defense of his seeming certitude who came forward and said that he had been mistaken in his earlier estimates and that the war could not be won would have been the most powerful of witnesses and would be now a revered American instead of one of our most divided and haunted of men. Sadly, the inner strength to do that, to put loyalty to country and to a larger truth above a narrow bureaucratic loyalty to a President and failed policy, was not within his powers' (p. 353).

for waging war, especially given that the quality of input data is a crucial prerequisite for accurate conclusions. In war, the quality of input data is low. There is a fog of war, and adversaries have no incentive to share accurate information about themselves, so the results of such accounting, whether in management or any other context, are inaccurate. The GIGO principle (Garbage In, Garbage Out) applies.[22]

Nonetheless, two more important things are missing from McNamara's memoirs. First is a full moral reckoning, followed by an apology. A sincere apology for his role in McNamara's war, for 58,220 dead Americans, for more than 3 million people dead in Vietnam and almost 5 million people dead in Indochina. A simple 'I am sorry for all these human lives lost' was missing. The reader is not surprised by that. In an intriguing letter from Jacqueline Kennedy to Robert McNamara, written in October 1967 and comprehensively disclosed in the book, she extensively refers to Carol Reed's 1949 film *The Third Man*, implicitly equating McNamara with Harry Lime, a character from the movie. Harry is a profound cynic. He makes money by stealing penicillin from military hospitals and selling it in diluted form on the black market, leading to the death of many innocent people. When he took his friend Holly Martins (Joseph Cotton) to the Vienna Ferris wheel, he opened the door and referred to the people far below as 'dots down there'. Harry continues. 'Don't be melodramatic. Look down there. Look down there. Would you really feel any pity if one of those dots stop moving – forever?' (p. 289). The reader is convinced that Mrs Kennedy was right. Robert McNamara *was* Harry Lime; he was not melodramatic and did not care about millions of dots that stopped moving forever in Vietnam. Quite reasonable, isn't it? Who would apologise for dots?[23]

Since, according to Harry Lime, governments do not think in terms of human beings, another important notion is missing from McNamara's memoirs. Basically, this is a rhetorical question: what on Earth was America doing in Vietnam in the first place? It was not McNamara who rejected Ho Chi Minh's plea to the Americans to support the Vietnamese declaration of independence; it was Harry S. Truman who refused it. This move, the reader ponders, was the American 'primordial sin' in Vietnam, and every new president and his administration inherited the Vietnam burden: Eisenhower, Kennedy, Johnson, Nixon, effectively ending with Ford. None of them was

[22] GIGO is an academic economist's self-ironic pun about standard accounting protocols of data entry: FIFO (First In, First Out) and LIFO (Last In, First Out).

[23] It is evident from the letter that Robert McNamara had not seen the movie. Mrs Kennedy cordially recommended the movie to him. Whether he had eventually seen it remains unknown.

willing to break the path-dependency that had been created, leading to the wrong insight that America 'must do' something about Vietnam. Nonetheless, it is quite disappointing that McNamara, after his disillusionment regarding the Vietnam War, did not raise this issue in his memoirs. A simple insight, like 'the biggest of all mistakes we made is that we were in Vietnam in the first place, that we intervened in any form', would suffice. McNamara stopped short of it.

This opens the issue of American exceptionalism, something McNamara fully subscribed to, clinging to it even after the Vietnam War, even after admitting that so many mistakes were made in Vietnam in his memoirs. McNamara went one step further: at the age of 85, he published a manifesto on the principles by which the US should pursue its international interventions (McNamara, Blight 2001). The authors provide an overview of this manifesto, with three remarkable pillars. 'Deeming the most likely sources of twenty-first-century carnage to be great power conflict, communal killing, and nuclear catastrophe, they proposed three "imperatives" to reduce the killing. The "moral imperative" would establish as a major goal of US foreign policy, and indeed of foreign policies across the globe, the avoidance of such carnage. The "multilateral imperative" would demand that the United States "will not apply its economic, political or military power unilaterally, other than in the unlikely circumstances of a defense of the continental United States, Hawaii and Alaska." The third was the "empathy imperative."' (p. 362).

The moral imperative, the first pillar of the after-Vietnam elderly McNamara's manifesto, has actually been a cornerstone of American foreign policy exceptionalism from the beginning. It is precisely because of the belief that the US is superior to all other nations, rooted in its founding principles – liberty, democracy, individual rights, and republicanism. The argument goes on that, because it is superior due to these principles, the US has a special global mission, based on the *moral imperative* to intervene to promote freedom (political, civil, and economic) and democracy, and to be involved in conflicts, including open military confrontations, for moral or ideological reasons, not to be constrained by any international rules and institutions.[24] In short, exceptionalism is a universal exculpation for any US foreign policy engagement based only or predominantly on strategic or economic motives. Accordingly, every single American involvement in international relations outside US borders is morally justified. It is about bringing liberty, democracy,

[24] Tyrrell (2022) provides a detailed yet rather concise history of the notion of US exceptionalism, especially considering its abuses in American foreign policy.

and individual rights to the oppressed people who are not fortunate enough to live in the United States. It is *not* about benefits to America, whatever they may be.[25]

With that framework in mind, it is easy for the reader to sarcastically explain the Cold War not as a strategic global domination contest with the Soviet Union, but as a global moral crusade to save people suffering under communism and to bring them liberty, democracy, individual rights, and prosperity in a market economy. If the US Cold War effort is considered a *moral imperative*, then the motive is deeply human, say, saving some poor Bulgarian peasant from communist oppression, whether he likes it or not. This is the ultimate outcome of applying the concept of American foreign policy exceptionalism to the Cold War, whoever buys it.

Taubman & Taubman did a great job convincing the reader that many people in the American political elite found justification for the Vietnam War in American foreign policy exceptionalism. Some of them used it only as a shroud to conceal the US's aggressive war; some of them actually believed, up to a point, in a moral imperative to protect local peasants in South Vietnam from communism, which was ostensibly flooding from the North, regardless of whether these peasants wanted it or not. It seems that McNamara was, up to a point, one of them. Then, step-by-step, he realised that the land of these peasants was scorched, their forest defoliated, their villages incinerated by napalm, their civilian countrymen indiscriminately killed, all in the name of bringing them happiness and liberating them from communist oppression. He was not up to the task of unsubscribing from that policy, quitting the office implementing it, or going public to denounce what America was doing in the name of its exceptionalism. These images from Vietnam haunted him for the rest of his life and created his torments and nightmares,[26] so vividly expressed

[25] The first major champion of American exceptionalism was President Woodrow Wilson, especially in the ideas he brought to the 1919 Paris Peace Conference in the aftermath of the Great War. To what extent he fought for these ideas, and to what extent he was successful in that fight, are a different matter. MacMillan (2001) provides details about these efforts and their results.

[26] Perhaps, the reader ponders, that is the reason why the third pillar of McNamara's 2001 manifesto is 'empathy', whatever that meant for him. Perhaps it is a possible way for redemption. Nonetheless, without an unambiguous apology for what he has done, such a redemption is futile. In the final minute of the *Fog of War* 'Morris presses on: "Do you feel in any way responsible for the war?" "I don't want to go any further with this discussion," is McNamara's nonanswer. Morris asks whether McNamara feels "damned if you do and [damned] if you don't." McNamara replies: "Yeah, that's right. And I'd rather be damned if I don't."' (p. 365). That is hardly apologising. People who are ready to apologise would rather be 'damned if you do'.

in the *Fog of War* documentary,[27] but he was never up to renouncing US exceptionalism, nor did he apologise for its implementation in Vietnam in the way he saw fit.

This is evidenced not only by his 2001 manifesto, with 'moral imperative' as the first pillar, but also by the content of his 1997 Hanoi meeting with his former Vietnamese adversary, Commander-in-Chief General Vo Nguyen Giap. 'McNamara told General Giap in November 1995 [sic], "Hanoi and Washington may each have been mistaken, have misunderstood each other" in the Tonkin Gulf episode. But General Giap responded: "I don't believe we misunderstood you; you were the enemy; you wished to defeat us – to destroy us. So, we were forced to fight you." McNamara pressed on. "Were we – was I, was Kennedy, was Johnson – a 'neo-imperialist' in the sense that you are using the word?" "I would say, *absolutely not*!" To which Giap retorted, "Excuse me, but we *correctly* understood you."' (p. 358, italics in the original). Unlike McNamara's illusions, even in 1997, the seasoned Vietnamese freedom fighter had no second thought whatsoever about US exceptionalism.[28]

One way or the other, US exceptionalism lives on. In the 21st century, it has been vividly demonstrated, for example, in Afghanistan, with war leading to the horrendous failure of nation-building based on American values.[29] As Rhodes (2026, 45) points out: 'Once you allow yourself to play by a set of rules that's different from everyone else's, the rules themselves are made brittle and ultimately break. That is the original sin of American exceptionalism, which should be a story of multiracial democracy within our

[27] Rhodes (2026, 45) made an interesting point that Henry Kissinger, unlike McNamara, had no torment and nightmares regarding his role in Vietnam; on the contrary, perhaps because Kissinger, as a rational *realpolitik* person, never really subscribed to a virtuous American exceptionalism in the first place.

[28] The American historian who witnessed McNamara-Giap meeting observed the differences in the style of the two men with McNamara repeatedly interrupting Giap to ask questions, as if he was a student at the exam, usually related to something numerical, while Giap gave a long leisurely monologue, quoting various Vietnamese cultural figures such as poets, that began with Vietnamese revolts against China during the years 111 BC–938 AD when Vietnam was a Chinese province (Neu, 1997). The reader comments that the loser lacked the patience to listen to the victor. This was the picture of McNamara, a man of data, and Giap, a man of wisdom.

[29] Whitlock (2021) provides a detailed account of that failure, drawing on revelations from people who played a direct role in the war, from leaders in the White House and the Pentagon to soldiers and aid workers on the front lines. It is a blend of deceit, blunders, and hubris among senior military and civilian officials, with a dose of public choice, with segments of the commercial sector benefiting from the endeavour.

borders rather than of boundless power beyond them'. In an ironic twist, the incumbent US President Donald J. Trump created a new version of US exceptionalism. Instead of ideals, instead of bringing happiness to people in other countries, the new US exceptionalism is based on the exceptional contemporary US military prowess and the 'might is right' principle. With the basic premise that America is morally superior to all other nations, it follows that international rules do not apply to it; the way is clear for the US government to internationally do whatever it sees fit. One of those most responsible for clearing that path is Robert S. McNamara..

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/VARIA

УПУТСТВО ЗА АУТОРЕ

Анали Правног факултета у Београду објављују текстове на српском и енглеском језику.

У Аналима се објављују научни чланци, критичке анализе, коментари судских одлука, прилози из међународног научног живота и прикази. Прихватају се искључиво аналитички, а не дескриптивни прикази научних и стручних књига.

Предајом текста, аутор изјављује да текст није ни објављен ни прихваћен за објављивање те да неће бити предат за објављивање било ком другом медију. Аутор такође изјављује да је носилац ауторског права, да је обавештен о правима трећих лица и да је испунио захтеве који произлазе из тих права.

Пријем свих текстова биће потврђен електронском поштом. Редакција ће размотрити подобност свих радова да буду подвргнути поступку рецензирања. Подобни текстови шаљу се на двоструку анонимну рецензију.

Информације о уредничкој политици *Анала Правног факултета у Београду* видети на: *https://anali.rs/eticki-kodeks/*.

Ако желите да предате свој рад *Аналима Правног факултета у Београду*, молимо вас да пратите следећа упутства.

Ако предајете рад на енглеском језику, молимо вас да пратите посебно упутство које је доступно на: *https://anali.rs/uputstvo-za-autore/?lang=en*.

Рукопис треба да буде уређен на следећи начин:

1. насловна страна,
2. апстракт и кључне речи,
3. рукопис и списак литературе,
4. додаци, табеле и слике.

1. НАСЛОВНА СТРАНА

Насловна страна рукописа треба да садржи следеће податке:

- наслов текста,
- име, презиме, годину рођења и афилијацију свих аутора,
- пуну адресу за кореспонденцију и адресу електронске поште.

Ако је текст коауторски, молимо вас да доставите тражене податке за сваког аутора.

2. АПСТРАКТ И КЉУЧНЕ РЕЧИ

Тексту претходи апстракт који је строго ограничен на 150 речи. Апстракт не сме да садржи неодређене скраћенице или референце.

Молимо вас да наведете пет кључних речи које су прикладне за индексирање.

Радови на српском језику треба да садрже апстракт и кључне речи и на српском и на енглеском језику. У том случају, апстракт и кључне речи на енглеском језику треба да се налазе иза списка литературе.

3. РУКОПИС И СПИСАК ЛИТЕРАТУРЕ

Због анонимног рецензирања, имена аутора и њихове институционалне припадности не треба наводити на страницама рукописа.

Текстови морају да буду написани у следећем формату:

- величина странице: A4,
- маргине: 2,5 cm,

- фонт: Times New Roman,
- размак између редова у главном тексту: 1,5,
- размак између редова у фуснотама: Easy,
- величина слова у главном тексту: 12 pt,
- величина слова у фуснотама: 10 pt,
- нумерација страница: арапски број у доњем десном углу странице.

Друге ауторе треба наводити по имену и презимену када се први пут помињу (Петар Петровић), а затим само по презимену (Петровић). Не треба наводити „професор“, „др“, „г.“ нити било какве титуле.

Све слике и табеле морају да буду поменуте у тексту, према редоследу по којем се појављују.

Све акрониме треба објаснити приликом првог коришћења, а затим се наводе великим словима.

Европска унија – ЕУ,

The United Nations Commission on International Trade Law – UNCITRAL

Бројеви од један до девет пишу се словима, већи бројеви пишу се цифрама. Датуми се пишу на следећи начин: 1. јануар 2012; 2011–2012; тридесетих година 20. века.

Фусноте се користе за објашњења, а не за навођење литературе. Просто навођење мора да буде у главном тексту, са изузетком закона и судских одлука.

Поднаслове треба писати на следећи начин:

1. ВЕЛИКА СЛОВА

1.1. Прво слово велико

1.1.1. Прво слово велико курзив

Цитирање

Сви цитати, у тексту и фуснотама, треба да буду написани у следећем формату: (аутор/година/број стране или више страна).

Домаћа имена која се помињу у реченици не треба понављати у заградама:

– Према Милошевићу (2014, 224–234)...

– Римски правници су познавали различите класификације ствари (Милошевић 2014, 224–234)

Страна имена која се помињу у реченици треба да буду транскрибована, а у заградама их треба поновити и оставити у оригиналу. У списку литературе страна имена се не транскрибују:

– Према Коциолу (Koziol 1997, 73–87)...

– О томе је опсежно писао Коциол (Koziol 1997, 73–87).

– Koziol, Helmut. 1997. *Österreichisches Haftpflichtrecht*, Band I: Allgemeiner Teil. Wien: Manzsche Verlags– und Universitätsbuchhandlung.

Пожељно је да у цитатима у тексту буде наведен податак о броју стране на којој се налази део дела које се цитира.

Исто тако и / Исто / Као и Константиновић (1969, 125–127);

Према Бартош (1959, 89 фн. 100) – *тамо где је фуснота 100 на 89. страни*;

Као што је предложио Бартош (1959, 88 и фн. 98) – *тамо где фуснота 98 није на 88. страни*.

Пре броја стране не треба стављати ознаку „стр.“, „p.“, „f.“ или слично.

Изузетно, тамо где је то прикладно, аутори могу да користе цитате у тексту без навођења броја стране дела која се цитира. У том случају аутори могу, али не морају да користе неку од назнака као што су: *видети, посебно видети, видети на пример и др.*

(видети, на пример, Бартош 1959; Симовић 1972)

(видети посебно Бакић 1959)

(Станковић, Орлић 2014)

Један аутор

Цитат у тексту (Т): Као и Илај (Ely 1980, број стране), тврдимо да...

Навођење у списку литературе (Л): Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

Т: Исто као и Аврамовић (2008, број стране), тврдимо да...

Л: Аврамовић, Сима. 2008. *Rhetorike techne – вештина беседништва и јавни наступ.* Београд: Службени гласник – Правни факултет Универзитета у Београду.

Т: Васиљевић (2007, број стране),

Л: Васиљевић, Мирко. 2007. *Корпоративно управљање: правни аспекти*. Београд: Правни факултет Универзитета у Београду.

Два аутора

Т: Као што је указано (Daniels, Martin 1995, број стране),

Л: Daniels, Stephen, Joanne Martin. 1995. *Civil Injuries and the Politics of Reform.* Evanston, Ill.: Northwestern University Press.

Т: Као што је показано (Станковић, Орлић 2014, број стране),

Л: Станковић, Обрен, Миодраг Орлић. 2014. *Стварно право.* Београд: Номос.

Три аутора

Т: Као што су предложили Сесил, Линд и Бермант (Cecil, Lind, Bermant 1987, број стране),

Л: Cecil, Joe S., E. Allan Lind, Gordon Bermant. 1987. *Jury Service in Lengthy Civil Trials.* Washington, D.C.: Federal Judicial Center.

Више од три аутора

Т: Према истраживању које је спровео Тарнер са сарадницима (Turner *et al*. 2002, број стране),

Л: Turner, Charles F., Susan M. Rogers, Heather G. Miller, William C. Miller, James N. Gribble, James R. Chromy, Peter A. Leone, Phillip C. Cooley, Thomas C. Quinn, Jonathan M. Zenilman. 2002. Untreated Gonococcal and Chlamydial Infection in a Probability Sample of Adults. *Journal of the American Medical Association* 287: 726–733.

Т: Поједини аутори сматрају (Варади *et al*. 2012, број стране)...

Л: Варади, Тибор, Бернадет Бордаш, Гашо Кнежевић, Владимир Павић. 2012. *Међународно приватно право*. 14. издање. Београд: Правни факултет Универзитета у Београду.

Институција као аутор

Т: (U.S. Department of Justice 1992, број стране)

Л: U.S. Department of Justice. Office of Justice Programs. Bureau of Justice Statistics. 1992. *Civil Justice Survey of State Courts.* Washington, D.C.: U.S. Government Printing Office.

Т: (Завод за интелектуалну својину Републике Србије 2015, број стране)

Л: Завод за интелектуалну својину Републике Србије. 2015. *95 година заштите интелектуалне својине у Србији*. Београд: Colorgraphx.

Дело без аутора

Т: (*Journal of the Assembly* 1822, број стране)

Л: Journal of the Assembly of the State of New York at Their Forty-Fifth Session, Begun and Held at the Capitol, in the City of Albany, the First Day of January, 1822. 1822. Albany: Cantine & Leake.

Цитирање више дела истог аутора

Клермонт и Ајзенберг сматрају (Clermont, Eisenberg 1992, број стране; 1998, број стране)...

Баста истиче (2001, број стране; 2003, број стране)...

Цитирање више дела истог аутора из исте године

Т: (White 1991a, page)

Л: White, James A. 1991a. Shareholder-Rights Movement Sways a Number of Big Companies. *Wall Street Journal*. April 4.

Истовремено цитирање више аутора и дела

(Grogger 1991, број стране; Witte 1980, број стране; Levitt 1997, број стране)

(Поповић 2017, број стране; Лабус 2014, број стране; Васиљевић 2013, број стране)

Поглавље у књизи

Т: Холмс (Holmes 1988, број стране) тврди...

Л: Holmes, Stephen. 1988. Precommitment and the Paradox of Democracy. 195–240. *Constitutionalism and Democracy*, ed. John Elster, Rune Slagstad. Cambridge: Cambridge University Press.

Поглавље у делу које је издато у више томова

Т: Шварц и Сајкс (Schwartz, Sykes 1998, број стране) тврде супротно.

Л: Schwartz, Warren F., Alan O. Sykes. 1998. Most-Favoured-Nation Obligations in International Trade. 660–664. *The New Palgrave Dictionary of Economics and the Law*, Vol. II, ed. Peter Newman. London: MacMillan.

Књига са више издања

Т: Користећи Гринов метод (Greene 1997), направили смо модел који...

Л: Greene, William H. 1997. *Econometric Analysis.* 3. ed. Upper Saddle River, N.J.: Prentice Hall.

Т: (Поповић 2018, број стране), *Р:* Поповић, Дејан. 2018. *Пореско право*. 16. издање. Београд: Правни факултет Универзитета у Београду.

Навођење броја издања није обавезно.

Поновно издање – репринт

Т: (Angell, Ames [1832] 1972, 24)

Л: Angell, Joseph Kinniaut, Samuel Ames. [1832] 1972. *A Treatise on the Law of Private Corporations Aggregate.* Reprint, New York: Arno Press.

Чланак

У списку литературе наводе се: презиме и име аутора, број и година објављивања свеске, назив чланка, назив часописа, година излажења часописа, странице. При навођењу иностраних часописа који не нумеришу свеске тај податак се изоставља.

Т: Тај модел користио је Левин са сарадницима (Levine *et al*. 1999, број стране)

Л: Levine, Phillip B., Douglas Staiger, Thomas J. Kane, David J. Zimmerman. 1999. *Roe v. Wade* and American Fertility. *American Journal of Public Health* 89: 199–203.

Т: На то је указао Васиљевић (2018, број стране)

Л: Васиљевић, Мирко. 2/2018. Арбитражни уговор и интеркомпанијскоправни спорови. *Анали Правног факултета у Београду* 66: 7–46.

Т: Орлић истиче утицај упоредног права на садржину Скице (Орлић 2010, 815–819).

Л: Орлић, Миодраг. 10/2010. Субјективна деликтна одговорност у српском праву. *Правни живот* 59: 809–840.

Цитирање целог броја часописа

Т: Томе је посвећена једна свеска часописа *Texas Law Review* (1994).

Л: Texas Law Review. 1993–1994. *Symposium: Law of Bad Faith in Contracts and Insurance*, special edition 72: 1203–1702.

Т: Осигурање од грађанске одговорности подробно је анализирано у часопису *Анали Правног факултета у Београду* (1982).

Л: Анали Правног факултета у Београду. 6/1982. *Саветовање: Нека актуелна питања осигурања од грађанске одговорности*, 30: 939–1288.

Коментари

Т: Смит (Smith 1983, број стране) тврди...

Л: Smith, John. 1983. Article 175. Unjust Enrichment. 195–240. *Commentary to the Law on Obligations*, ed. Jane Foster. Cambridge: Cambridge University Press.

Т: Према Шмаленбаху (Schmalenbach 2018, број стране), јасно је да...

Л: Schmalenbach, Kirsten. 2018. Article 2. Use of Terms. 29–*Л:* Томић, Јанко, Саша Павловић. 2018. Упоредноправна анализа прописа у области радног права. Радни документ бр. 7676. Институт за упоредно право, Београд.

Т: (Glaeser, Sacerdote 2000)

Л: Glaeser, Edward L., Bruce Sacerdote. 2000. The Determinants of Punishment: Deterrence, Incapacitation and Vengeance. Working Paper No. 7676. National Bureau of Economic Research, Cambridge, Mass.

Лична кореспонденција/комуникација

Т: Као што тврди Дамњановић (2017),

Л: Дамњановић, Вићентије. 2017. Писмо аутору, 15. јануар.

Т: (Welch 1998)

Л: Welch, Thomas. 1998. Letter to author, 15 January.

Стабилни интернет протокол (URL)

Т: Према Заводу за интелектуалну својину Републике Србије (2018),

Л: Завод за интелектуалну својину Републике Србије. 2018. Годишњи извештај о раду за 2017. годину. *http://www.zis.gov.rs/o-zavodu/godisnji-izvestaji.50.html*, последњи приступ 28. марта 2018.

Т: According to the Intellectual Property Office (2018)

Л: R.S. Intellectual Property Office. 2018. Annual Report for 2017. *http://www.zis.gov.rs/about-us/annual-report.106.html*, last visited 28 February 2019.

У штампи

Т: (Богдановић 2019, број стране)

Л: Богдановић, Лука. 2019. Економске последице уговарања клаузуле најповлашћеније нације у билатералним инвестиционим споразумима. *Номос*, том 11, у штампи.

Т: (Spier 2003, број стране)

Л: Spier, Kathryn E. 2003. The Use of Most-Favored-Nations Clauses in Settlement of Litigation. *RAND Journal of Economics*, vol. 34, in press.

Прихваћено за објављивање

Т: У једном истраживању (Петровић, прихваћено за објављивање) посебно се истиче значај права мањинских акционара за функционисање акционарског друштва.

Л: Петровић, Марко. Прихваћено за објављивање. Права мањинских акционара у контексту функционисања скупштине акционарског друштва. *Правни живот*.

Т: Једна студија (Joyce, прихваћено за објављивање) односи се на Колумбијски дистрикт.

Л: Joyce, Ted. Forthcoming. Did Legalized Abortion Lower Crime? *Journal of Human Resources*.

Судска пракса

***Ф(усноте)**:* Врховни суд Србије, Рев. 1354/06, 6. 9. 2006, Paragraf Lex; Врховни суд Србије, Рев. 2331/96, 3. 7. 1996, *Билтен судске праксе Врховног суда Србије* 4/96, 27; CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16; Opinion of AG Mengozzi to CJEU, case C-20/12, Giersch and Others, ECLI:EU:C:2013:411, пара. 16.

Т: За референце у тексту користити скраћенице (ВСС Рев. 1354/06; CJEU C-20/12 или Giersch and Others; Opinion of AG Mengozzi) конзистентно у целом чланку.

Л: Не треба наводити судску праксу у списку коришћене литературе.

Закони и други прописи

Ф: Законик о кривичном поступку, *Службени гласник РС* 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 и 55/2014, чл. 2, ст. 1, тач. 3; Regulation (EU) No. 1052/2013 establishing the European Border Surveillance System (Eurosur), OJ L 295 of 6/11/2013, Art. 2 (3); Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, 60, Art 6 (3).

Т: За референце у тексту користити скраћенице (ЗКП или ЗКП РС; Regulation No. 1052/2013; Directive 2013/32) конзистентно у целом чланку.

Л: Не треба наводити прописе у списку коришћене литературе.

4. ПРИЛОЗИ, ТАБЕЛЕ И СЛИКЕ

Фусноте у прилозима нумеришу се без прекида као наставак на оне у остатку текста.

Нумерација једначина, табела и слика у прилозима почиње са 1 (једначина А1, табела А1, слика А1 итд., за прилог А; једначина Б1, табела Б1, слика Б1 итд., за прилог Б).

На страни може бити само једна табела. Табела може заузимати више од једне стране.

Табеле имају кратке наслове. Додатна објашњења се наводе у напоменама на дну табеле.

Треба идентификовати све количине, јединице мере и скраћенице за све уносе у табели.

Извори се наводе у целини на дну табеле, без унакрсних референци на фусноте или изворе на другим местима у чланку.

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.

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34(497.11)

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.

ISSN 0003-2565 = Анали Правног факултета у Београду

COBISS.SR-ID 6016514

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ISSN 0003-2565

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