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# PRAVNI ZAPISI

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# Pravni zapisi

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UVODNI ESEJ / GUEST EDITORIAL

*Wolfgang Benedek**

# DIGITAL HUMAN RIGHTS AND ARTIFICIAL INTELLIGENCE

## 1. Introduction

According to the Freedom on the Net Report 2023 "advances in artificial intelligence (AI) are amplifying a crisis for human rights online."[1] In view of the ongoing decline of internet freedom and new threats to democracy and human rights by online disinformation and censorship empowered by generative artificial intelligence, the report asks for strong human rights-based standards for both state and nonstate actors when developing and employing AI tools.[2] Freedom House is only the most recent voice added to a chorus warning of the inherent threats in the new technological possibilities, while also recognizing the beneficial uses of AI. Very unusually, several representatives of companies involved in the competition for the development of ever more capable generative AI tools have asked for a moratorium and the regulation of their own activities.[3] This raises the question why they called an alarm, what are the major challenges at stake for digital human rights in this context, and how those could be identified and protected best in view of ongoing regulation efforts at the European and global levels.

## 2. New Threats to Digital Human Rights

Digital Human Rights are to protect the online dimension of human rights.[4] They mainly relate to existing human and fundamental rights,

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1 Freedom House, 2023, *The Repressive Power of Artificial Intelligence*, Freedom on the Net 2023, (https://freedomhouse.org/report/freedom-net/2023/repressive-power-artificial-intelligence, 23. 10. 2023).

2 *Ibid*.

3 See Future of Life Institute, 2023, Pause Giant AI Experiments: An Open Letter, (https://futureoflife.org/open-letter/pause-giant-ai-experiments/, 23. 10. 2023).

4 Benedek, W., International Organizations and Digital Human Rights, in: Wagner, B., Kettemann, M.C., Veith, K., (eds.), 2019, *Research Handbook on Human Rights*

such as the freedom of expression and information and its limitations in order to protect people from disinformation, discrimination and hate speech.[5] Equally important is the right to privacy and data protection regulated in international conventions and the Generalized Data Protection Regulation (GDPR) of the EU, in force since 2018. Freedom from surveillance is an issue that has produced several judgments of the European Court of Human Rights in recent years.[6] There is also a debate on the need for new digital rights to better protect the digital self-determination of the individual, which has gained momentum with the recent developments of artificial intelligence.

The fears about new threats emanating from the development of ever more capable artificial intelligence tools do not come only from the human rights community but have been nourished by warnings from the technical community, including some developers themselves, who have alerted the public to the fact that they could no longer control the technological development. At the same time, they have been warning against any overregulation that might slow down the creative potential of AI or produce competitive disadvantages. The concerns relate mainly to generative AI or foundational models of AI that can be used for unlimited purposes, while other systems with limited applications are not in the foreground. The hype around ChatGPT, which reached one million users within five days, alerted civil society and political communities. As a matter of fact, developers admit that they cannot fully understand the learning processes of AI, which appears like a black box, sometimes producing unexpected skills and sometimes totally wrong results known as "hallucination".[7] Even Sam Altmann, the head of OpenAI, which produced ChatGPT 3 and 4, called for the establishment of a new agency to license AI companies.[8] This nourishes dystopian fears and undermines the trust in AI systems. Accordingly, trustworthiness is a major condition before an AI system might be launched. Trust could also be promoted by open source-approaches, but this remains the exception as the codes utilized are generally not publicly available.

*and Digital Technology, Global Politics, Law and International Relations*, Cheltenham, Edward Elgar, pp. 364 ff.

5 Benedek, W., Kettemann, M.C., 2020, *Freedom of Expression and the Internet*, 2nd ed., Strasbourg, Council of Europe Publishing.

6 See, in particular ECtHR, *Big Brother Watch v. United Kingdom*, no. 58170/13 and others, Decision of 25 May 2021 [GC].

7 See Weise, K., Metz, C., 2023, When A.I. Chatbots Hallucinate, *New York Times*, 9 May.

8 Clayton, J., 2023, Sam Altman: CEO of OpenAI Calls on US to Regulate Artificial Intelligence, *BBC*, 16 May (https://www.bbc.com/news/world-us-canada-65616866, 23. 10. 2023).

Unfortunately, not all developers have accepted a need to protect users against disinformation or bias. Based on the First Amendment to the US Constitution they argue that the right to freedom of expression also justifies the development of uncensored chatbots. They see the main responsibility with the users. For example, WizzardLM-Uncensored is capable of describing violent scenes. Furthermore, AI chatbots could also be trained to serve particular communities, reflecting their bias.[9]

This raises the question what are the major issues at stake in terms of digital human rights and artificial intelligence. The latter has the potential of benefitting society in many ways (beneficial AI), but also produces new risks of interfering with several basic human rights, such as the freedom from discrimination. If the AI systems are trained with any data available, they also reflect the bias existing in the society when it comes to jobs, credit lines, renting apartments, biases against women or the disabled, migrants, etc. AI systems mirror the society as it is, if care is not taken to eliminate discriminatory biases. Besides discrimination, AI can be easily misused for the amplification of disinformation and hate speech, for example through deep fakes, it can provide new powerful tools that undermine democracy by manipulating large groups of the population and feeding disinformation to voters.[10] Thus a few actors can do great damage to societies. The example of the Cambridge Analytica scandal, which manipulated people in the last US elections, provides a glimpse of what could become possible.[11] AI can be a major threat to election integrity, but it could also be used for fact-checking.

The main fear is of "disruption" of societal processes brought about by AI, as it may have a major impact on societal cohesion. This raises ethical issues that can hardly be addressed by the systems themselves, such as by an "ethical design" of AI systems. The challenge is to ensure that the new capabilities serve society at large and not only certain limited business or political interests.

The objective therefore is the development and deployment of a "responsible AI", which would meet ethical, human rights and safety criteria, to eliminate as much as possible the negative effects, which is also

9 See Thompson, S. A., 2023, Uncensored Chatbots Provoke a Fracas over Free Speech, *New York Times*, 2 July, (https://www.nytimes.com/2023/07/02/technology/ai-chatbots-misinformation-free-speech.html, 23. 10. 2023).

10 See Schaake, M., 2023, When It Comes to AI and Democracy, We Cannot Be Careful Enough, *The Guardian*, 2 October, (https://www.ft.com/content/39b89be7–398a-4167–9eeb-58af97b764f3, 23. 10. 2023).

11 See Kozlowska, I., 2023, Facebook and Data Privacy in Cambridge Analytica, *The Guardian*, (https://www.theguardian.com/news/series/cambridge-analytica-files, 23. 10. 2023).

important in order to gain the trust of the users. As new developments by tech companies usually are ahead of regulation in standard-setting and enforcement, their responsibility is called upon to voluntarily take emerging standards into account. For example, Microsoft published its responsibility standard consisting of accountability, transparency, fairness, reliability and safety, privacy and security, as well as inclusiveness goals for public comments and committed itself to impact assessments to identify significant adverse impacts.[12]

## 3. Regulatory Competition?

However, the issue of regulation of the development and application of AI did not emerge when the developers called alarm, it had already been taken up for some time by various actors, such as civil society and international organizations.[13] This followed from regulatory activities related to the Internet, online platforms or gatekeepers in different international and national forums. With regard to AI in particular, UNESCO and OECD have elaborated recommendations of (ethical) principles. Thus, UNESCO has quasi-unanimously adopted a recommendation on the ethics of artificial intelligence in 2021,[14] while OECD adopted its recommendation on principles of AI already in 2019.[15] Within the Council of Europe, in 2019 the European Commission for the Efficiency of the Justice (CEPEJ) published the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment.[16]

After having studied the human rights issues in much detail, the Council of Europe engaged in the drafting of a convention on human rights and artificial intelligence, and the European Union (EU) has produced a

12 See, for example, Microsoft, 2022, *Microsoft, Responsible AI Standard v2*, June, (https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RE5cmFl, 23. 10. 2023).

13 Benedek, W., International Organizations and Digital Human Rights, in: Wagner, B., Kettemann, M. C., Veith K. (eds.), 2024, *Research Handbook on Human Rights and Digital Technology: Global Politics, Law and International Relations*, 2nd ed., Cheltenham, Edward Elgar, pp. 364 ff.

14 See UNESCO, 2022, Recommendations on the Ethics of Artificial Intelligence, Paris, UNESCO, (https://unesdoc.unesco.org/ark:/48223/pf0000381137, 23. 10. 2023); see also Kirchschlaeger, P. G., 2021, *Digital Transformation and Ethics*, Baden-Baden, Nomos.

15 See OECD, 2019, Recommendation of the Council on Artificial Intelligence, (https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449, 23. 10. 2023).

16 See European Commission for the Efficiency of the Justice (CEPEJ), 2019, European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, Strasbourg, CEPEJ (https://book.coe.int/en/computers-and-law/7842-european-ethical-charter-on-the-use-of-artificial-intelligence-in-judicial-systems-and-their-environment.html).

proposal for an Artificial Intelligence Act (AIA), which is presently being finalized between its main institutions. There is some regulatory competition between international organizations, which calls for closer cooperation. As regional and state regulation takes a lead, issues of regulatory fragmentation may arise, requiring the interoperability of the created legal standards.

There are the questions of whether international oversight should be institutionalized, which form it may take, and what is the role of digital human rights. The World Summit on the Information Society of 2003 and 2005 did only establish the Internet Governance Forum (IGF) with a small secretariat based at the United Nations in Geneva. Since 2006 the IGF has been meeting on an annual basis in a multistakeholder format in varying regions of the world, to discuss all matters of Internet governance.[17] It does not take any decisions nor can it make recommendations, but rather it acts as an open consultation space for everyone interested. Since 2012 the Human Rights Council on a biannual basis adopted a resolution according to which "the same rights people have offline must also be protected online."[18] Since 2021 another biannual resolution of the Human Rights Council deals with "new and emerging digital technologies and human rights". It focuses on the protection of human rights with regard to artificial intelligence systems.[19]

Since about 2018 the United Nations has become more active regarding Internet governance. The Secretary-General established a High-Level Panel on Digital Cooperation[20] and in 2022 a Leadership Panel for the annual Internet Governance Forum (IGF).[21] To improve global digital cooperation he also introduced the Office of the Secretary General's Envoy on Technology in 2022 and presently is preparing a Global Digital Compact, identifying "shared principles for an open, fair and secure digital future for all," to be adopted by UN Global Summit on the Future in 2024. The draft contains many references to human rights.[22] In 2023 the Secretary-General

17 Benedek, W., Bauer, V., Kettemann, M.C., (eds.), 2008, *Internet Governance and the Information Society*, The Hague, Eleven International Publishing.

18 See for the last resolution Human Rights Council, Resolution 47/16 of 13 July 2021 on the promotion, protection and enjoyment of human rights on the Internet.

19 See Human Rights Council Resolution 53/29 of 14 July 2023.

20 See for the Digital Cooperation Panel (https://www.un.org/en/sg-digital-cooperation-panel, 23. 10. 2023).

21 On the establishment of the Leadership Panel of the Internet Governance Forum see UN Secretary-General, 2022, Internet Governance Forum Leadership Panel, (https://www.un.org/sg/en/content/sg/personnel-appointments/2022–08–16/internet-governance-forum-leadership-panel%C2%A0, 23. 10. 2023).

22 United Nations, Office of the Secretary General's Envoy on Technology, Global Digital Compact, (https://www.un.org/techenvoy/global-digital-compact, 23. 10. 2023).

established a multistakeholder High-Level Advisory Body for Artificial Intelligence which is to report back on options for global AI governance. This includes the possibility of a new UN agency being created.[23] At the IGF 2023 in Kyoto the Secretary-General repeated his calls for reinforcing human rights and a human-centered approach to digital cooperation.[24]

What the debate has added is a sense of urgency, as the training of ever more powerful AI tools is moving ahead quickly in a context of fierce competition, which leaves little space for considerations of digital human rights. In general, social media platforms have shown that they give priority to business over user rights. X (formerly Twitter), under the new leadership of Elon Musk, has fired most of its trust and safety teams and now has to explain to the European Commission, acting under the Digital Services Act, why it did not remove illegal content and disinformation spreading terrorism and violent content and hate speech, in order to avoid high fines.[25] YouTube has declared that it is no longer prepared to remove false claims about past elections.[26] This explains why a soft law approach would not be enough to cope with the forces of competition and fundamentalist free speech ideas. Accordingly, the Council of Europe and the EU have set out a hard law approach. But looking at the first drafts of the future convention of the Council of Europe it becomes clear that the enshrined principles need further elaboration in domestic legislation in order to produce an impact. In addition, general hard law regulations will have to be complemented by more specific soft law recommendations.

Therefore, the AIA of the EU, which contains specific obligations and standards, appears better suited to achieve tangible results. The United States, where most of the companies that are part of the race for the future dominance of the market are based, is also working on a regulation, which started with the elaboration of an AI Charter of Fundamental Rights, which is to contain universal guidelines for AI. However, this legislation expressly is to serve the American people first, while having a universal

23 Henshall, W., 2023, How the UN Plans the Future of AI, *Time*, 21 September, (https://time.com/6316503/un-ai-governance-plan-gill/, 23. 10. 2023).

24 See the address of the UN Secretary-General, 2023, Secretary-General's video message to the Internet Governance Forum, 9 October, (https://www.un.org/sg/en/content/sg/statement/2023–10–09/secretary-generals-video-message-the-internet-governance-forum, 23. 10. 2023).

25 See European Commission, 2023, The Commission sends request for information to X under the Digital Services Act, 12 October, (https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4953, 23. 10. 2023).

26 See Reuters, 2023, YouTube to stop removing content making false claims on past elections, *Reuters*, 2 June, (https://www.reuters.com/technology/youtube-stop-removing-content-making-false-claims-past-elections-2023–06–02/, 23. 10. 2023).

appeal.[27] The European Union too is hoping for a "Brussels effect" of its AIA once adopted, which is expected in 2024 at the earliest. This has at least partly been achieved in the case of the GDPR. Like in the case of data protection, it can be expected that the EU will try to impose higher protection standards, while both the US and the EU emphasize that any regulation should not curb the creative and beneficial potential of artificial intelligence. Actually, the call for regulation from the developers themselves shows that regulation is not per se considered as limiting technological progress. But there are also other actors, such as China, which has already adopted its own regulation emphasizing that its content should reflect basic values of socialism and must not interfere with the social and economic order.[28]

## 4. The Contents and Development of Digital Human Rights

What then is the role of digital human rights and how can they be achieved? And is there a need for new digital human rights? There have been numerous proposals by various actors, civil society and international organizations, but also states such as Spain, which adopted a Charter on Digital Rights.[29] Previously, in the context of the Internet Governance Forum, the Association for Progressive Communications (APC) already produced the Internet Rights Charter in 2006, on the basis of which the Dynamic Coalition on Internet Rights and Principles, established at the IGF in Rio in 2007, engaged into the elaboration of the Charter of Human Rights and Principles for the Internet, drafted in a broad process mainly by civil society and academia and presented in 2011. The Charter is based on the Universal Declaration of Human Rights, in order to interpret it and other key UN human rights documents.

In 2016, several proposals for new digital human rights were launched, such as the Charter of Digital Fundamental Rights of the European Union, elaborated by a group of mainly German experts and

27 White House Office for Science and Technology, 2022, *Blueprint for an AI Bill of Rights, Making Automated Systems Work for the American People*, October, (https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf, 23. 10. 2023).

28 See the text of the draft law, Cyberspace Administration of China, 2023, Measures for the Management of Services of Generative AI, April, (http://www.cac.gov.cn/2023–04/11/c_1682854275475410.htm, 23. 10. 2023).

29 See Ministry of Economic Affairs and Digital Transformation, Charter of Digital Rights, (https://derechodigital.pre.red.es/, 23. 10. 2023).

updated in 2018.[30] The idea was to complement the EU Charter on Fundamental Rights, which became binding as part of the Treaty of Lisbon in 2009. For example, it requires that the criteria for automated decisions, such as on digital profiling, must be transparent and taken by natural or legal persons. Every person must have a right to independent review of such decisions by a human being. The rights should apply to the EU, state and non-state actors, such as Internet platforms.

In December 2022 a European Declaration on Digital Rights and Principles for the Digital Decade, which also contains rights related to the use of artificial intelligence, was jointly adopted by the European Commission, the European Parliament, and the Council.[31] It focuses on principles and contains a commitment to access for everyone to high-quality connectivity, the protection of an open and neutral Internet, and to fostering participation in the digital public space.

One basic right is the right to informational self-determination, which puts the human person in command of its interaction with new technology. Accordingly, there should be a digital right to be informed whether a text or picture has been produced by AI and whether one is interacting with a human person or not. In the case of interaction with AI, there should be a right to have the final decision made or at least controlled by a human person ("humans in the loop"). There has to be a right to a remedy against decisions taken with the involvement of AI. Also, the right to be forgotten has gained recognition in academia and, having been recognized by the European Court of Justice, was also included in Article 17 GDPR.[32] A recent Grand Chamber decision of the European Court of Human Rights shows that the right to be forgotten is also recognized by this court.[33]

Regarding the progressive development of digital human rights, in most cases an evolutive interpretation of existing human rights, enlarging them to the online environment, will suffice. For example, the freedom of expression, which also knows certain limitations, can be applied to hate speech and fake news on the Internet; the right to privacy can also cover the right to anonymity on the Internet; the right to data protection can be interpreted to also cover personal data on the Internet, but both the

30 See Charter of Digital Fundamental Rights of the European Union, (https://digital-charta.eu/wp-content/uploads/DigitalCharter-English-2019-Final.pdf, 23. 10. 2023).

31 See at European Commission, 2022, Declaration on European Digital Rights and Principles, 25 January (https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles, 23. 10. 2023).

32 See Pucinelli, O., The Right to Be Forgotten 2.0, in: Arnauld, A. von, Decken, K. von der, Susi, M., (eds.), 2020, *The Cambridge Handbook on New Human Rights, Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press, pp. 300 ff.

33 ECtHR, *Hurbain v. Belgium*, no. 57292/16, Decision of 4 July 2023 [GC].

Council of Europe by its modernized Convention 108+ and the EU by the GDPR have found it necessary to draft new binding provisions.[34]

There are a few needs for protection that could be better addressed by new digital rights, although the distinction between existing and new rights is not always clear. For example, the right of access to the Internet has gained much support at the national and international level.[35] For some, digital human rights might be seen as interpretations of existing rights, while others might already recognize new rights. In any case, for states it will always be easier to accept them as interpretations of existing rights as it is nearly impossible to reach general acceptance of new rights in the international community as it stands, the exception being the right to a clean and healthy environment, adopted in a non-binding resolution of the General Assembly in 2022.[36] Their development through subsequent practice and customary law might be easier to achieve, which requires pertinent state practice.

With regard to the protection or provision of human rights in the context of artificial intelligence, after much preparation the Council of Europe decided to elaborate a convention on the regulation of artificial intelligence and human rights, drafted by its Committee on Artificial Intelligence (CAI) as a common legal instrument which will have a global appeal. A first version has already been made public,[37] mainly containing obligations and principles to respect existing human rights, as applied to the online environment, but it does not formulate new digital human rights.

The draft AIA of the European Union responds to the threats identified by a risk-based approach. Accordingly, unacceptable risks in the development and application are addressed by prohibitions, high-risks by extensive risk management requirements, transparency and the principle of human oversight, while no restrictions apply to low or minimal risks.[38] Violations of fundamental rights, vulnerabilities of specific groups

34 See Pajuste, T., The Protection of Personal Data in the Digital Society: The Role of the GDPR, in: Susi, M., (ed.), 2019, *Human Rights, Digital Society and the Law, A Research Companion*, Abingdon, Routledge, p. 303.

35 See Cali, B., The Right to Meaningful Access to the Internet, in: Arnauld, A. von, Decken, K. von der, Susi, M., (eds.), 2020, *The Cambridge Handbook on New Human Rights, Recognition, Novelty, Rhetoric*, Cambridge, Cambridge University Press 2020, p. 276.

36 See UNGA, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022).

37 See Council of Europe, Committee on Artificial Intelligence, 2023, Revised Zero Draft (Framework) Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, 6 January, (https://rm.coe.int/cai-2023–01-revised-zero-draft-framework-convention-public/1680aa193f, 23. 10. 2023).

38 European Commission, Proposal for an Artificial Intelligence Act (AIA) of 21 April 2021, COM (2021) 206 final.

and the manipulative or exploitative potential of AI are to be taken into account. This resembles the "precautionary principle" in international law, according to which high risks are best addressed by a prohibition or moratorium on the new technology.[39] Social and human rights impact assessments are suggested, in addition to risk management.[40] For example, the Ministerial Committee of the Council of Europe has recommended human rights-impact assessments and produced a set of guidelines.[41] The AIA also provides for new oversight bodies, such as the European Artificial Intelligence Board.

However, Civil Society Organizations (CSOs) have also called for a number of amendments to the AIA, to strengthen its impact on fundamental rights.[42] In addition, some 180 CSOs and experts also requested governments to stop facial recognition by law enforcement and private companies, which also may use AI.[43]

In June 2023, the European Parliament adopted its final position on the draft AIA.[44] While unacceptable risks, such as social scoring, real time and remote biometric systems and cognitive behavioral manipulation of people, should be prohibited, all AI systems that negatively affect safety and fundamental rights are considered as high-risk, for which purpose eight specific areas – ranging from biometric identification to asylum, migration and border management – are identified, which have to be registered in an EU database.[45] Presently, the trialogue between the EU institutions is taking place, with the aim of producing a final draft that could

39 See Botes, M., 2023, Regulating Scientific and Technological Uncertainty: The Precautionary Principle in the Context of Human Genomics and AI, *South African Journal of Science*, Vol. 119, No. 5/6, pp. 81–86.

40 Mantelero, A., 2022, *Beyond Data. Human Rights, Ethical and Social Impact Assessment in AI*, Berlin, Springer.

41 Recommendation CM/Rec(2020)1 of the Committee of Ministers to Member States on the human rights impacts of algorithmic systems of 8 April 2020, (https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809e1154, 23. 10. 2023).

42 See An EU Artificial Intelligence Act for Fundamental Human Rights: A Civil Society Statement, (23. 10. 2023).

43 See Edri, 2023, Global civil society and experts statement: Stop facial recognition surveillance now, 26 September, (https://edri.org/our-work/global-civil-society-and-experts-statement-stop-facial-recognition-surveillance-now/, 23. 10. 2023).

44 European Parliament, 2023, AI Act: a step closer to the first rules on Artificial Intelligence, 11 May, (https://www.europarl.europa.eu/news/en/press-room/20230505IPR84904/ai-act-a-step-closer-to-the-first-rules-on-artificial-intelligence, 23. 10. 2023); see also the Amendments adopted by the European Parliament of 14 June 2023, (https://www.europarl.europa.eu/doceo/document/TA-9–2023–0236_EN.html, 23. 10. 2023).

45 See European Parliament, 2023, EU AI Act: first regulation on artificial intelligence, 14 June, (https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence, 23. 10. 2023).

enter into force in 2024 or 2025, which is somewhat late in view of the urgency of the matter.

## 5. Conclusion

In conclusion, there is no point in refusing further development of generative artificial intelligence, just like there was no point in stopping the Internet. However, given the level of potential threats, there is a need for robust action to protect the digital human rights of users subjected to AI. In this effort the digital human rights might be further specified mainly through the interpretation of existing human rights, but new digital human rights may also evolve in the process. Regarding the digital transformation that we are facing, the questions is whether it will follow a business rationale or the human needs rationale to be protected by digital human rights. Recent debates have increased public and political awareness and confirmed that a soft-law approach or self-regulation by companies is insufficient to regulate the dynamics of the development and application of ever more powerful generative AI systems. Accordingly, hard law approaches are presently prevailing, while soft law approaches, such as codes of ethics, remain relevant. However, there is danger of the fragmentation of international regulation as a situation may evolve in which different competing regulations are claiming to apply globally. However, only the Council of Europe convention allows for outside participation in its development. This raises the question of international cooperation in the otherwise competitive regulation efforts.

In this context, digital human rights can serve as a common standard as much as they are derived from universal human rights or the result of universal cooperation. Alternatively, the European region may go ahead as it has done in the past and hope for a "Brussels effect" of its approach. However, with regard to artificial intelligence systems, this is rather unlikely as major developments take place outside Europe, in the private sphere, which is anyway difficult to control. Therefore, the efforts of the United Nations merit more attention and support as it appears to be the only forum where the international community can meet and seek agreements on common principles and standards of regulation based on digital human rights.

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ORIGINAL SCIENTIFIC ARTICLE

ČLANCI / ARTICLES

*Tibor Tajti (Thaythy)**

# A NEW FRONTIER: THE CHALLENGES SURROUNDING THE DEEPENING IMPACT OF DATA PROTECTION REGULATIONS ON BANKRUPTCY LAW

> *"Admittedly, neither customer databases nor privacy concerns are new. What is new is the greatly expanded scope of data collection and an e-commerce environment where customer information is regarded as core asset. These new dynamics, combined with increasing public awareness of online privacy issues, have created new privacy concerns for bankruptcy. There is no satisfactory answer to be found in the current law."*
>
> **Michael Geist****

***Abstract:*** *Notwithstanding the unprecedented and global prestige that data privacy (or data protection, in Europe) law has gained in the 21st century, comparative analyses of the effects flowing from the intensifying impact of data protection law on bankruptcy (insolvency) law remain unexplored. In addition to canvassing the history and contours of the data protection–bankruptcy law interface, through an empirical comparison of available court and data protection agency (authority) cases in multiple jurisdictions, this article fills this gap by identifying and exemplifying various modalities through which data protection law interferes with the bankruptcy process or creates tensions between the two branches of law, based on the comparison of available court and data protection authority (agency) cases in Europe (including the United Kingdom), the United States, as well as Canada and China, as middle-ground systems.*

**Key words:** Bankruptcy (Insolvency) Law, Data Protection (Privacy), Recast EU Insolvency Regulation 2015/848, European e-Justice Portal, Interconnected Insolvency Registries, Red Tape, Middle-Ground Systems.

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** Geist, M., 2020, When Dot-Coms Die: The E-Commerce Challenge to Canada's Bankruptcy Law, *Canadian Business Law Journal*, 37, p. 70.

## 1. Introduction

Notwithstanding the unprecedented and global prestige that data privacy (or data protection, in Europe) law has gained in the 21st century, comparative analyses of the effects stemming from the increasing impact of data protection law on bankruptcy law remain unexplored. Consequently, this article's central aim is to show that the various forms in which data protection law is impacting bankruptcy law are intensifying, in the sense that these branches of law are colliding in more and more instances, either because of the irreconcilable policy goals or because of the amount of red tape that data protection regulations are imposing. The intensity of changes has reached the point where the problems that this generates require regulatory reactions in lieu of the hereinbefore ad hoc solutions of courts and governmental agencies (authorities).

The multiplying amount of reported, and the increase in the number of commented cases touching upon this interface, suggests that growing attention is being devoted to the central issue that is the focus here. Notwithstanding this, while in the US some modest regulatory efforts have already been made to enhance privacy right protections in the context of bankruptcy proceedings, in Europe, the General Data Protection Regulation (GDPR) – the most comprehensive data protection regulation globally – contains no bankruptcy-specific provisions whatsoever. What Europe has, however, are hard cases justifying the legitimacy of this paper and the claims made herein. It will suffice to mention the United Kingdom (UK) 2013 *Southern Pacific* case,[1] where the application of data privacy laws burdened insolvency practitioners with expensive red tape or an Italian one where creditors saw their insolvency recovery plans frustrated due to the indisposability of genetic data as a particular class of property in insolvency proceedings (the Italian *Ogliastra* region case).[2]

As the comprehension of the myriad of questions regarding the data protection–bankruptcy interface requires in-depth knowledge of both areas, canvassing both areas is inevitable. Moreover, as data protection is based on constitutional and partly also on human rights law on both sides of the Atlantic, it is necessary to briefly reflect also on the known and potential impacts of these branches of law on bankruptcy law. As will be

1 *Re Southern Pacific Personal Loans Ltd.,* [2013] EWHC 2485 (Ch).

2 The synopsis of the case is based on Piciocchi, C. *et al*., 2018, Legal Issue in Governing Genetic Biobanks: The Italian Framework as a Case Study for the Implications for Citizen's Health through Public-Private Initiatives, *Journal of Community Genetics*, Vol. 9, Issue 2, pp. 177, 181.

seen, while in Europe there are already a few relatively recent vintage cases implicating the interface adjudicated based on the constitutional law of the European Union (EU), or Council of Europe human rights law, such cases have almost routinely been decided upon based on free speech rights in the United States (US) for decades.

The US caseload is informative not only because of the heightened emphasis on free speech concerns (as a rule that creates a balance benefitting the needs of bankruptcy law more than in Europe), but also because problems common with Europe and the rest of the globe also emerge increasingly, the sale of bulk personal data in bankruptcy proceedings being the best example. This does prove that each of these jurisdictions has what to offer for better understanding of the interface, as corroborated also by the recent experiences of middle-ground systems such as Canada and China – which is touched upon briefly as well.

Considering the above, following an introduction on the differing nomenclatures of EU and the US, and the connected philosophical underpinnings, comes an outline of their bankruptcy and data privacy laws, before the case analyses. The pivotal importance attributed to case law is justified not only with their empirical value, its capability to unearth real problems often previously unseen, but also because of a desire to forge a seminal catalogue of the modalities, whereby data protection impacts bankruptcy law – ranging from "happy co-existence" to colliding cases, as well as cases requiring courts to balance the priorities of the two branches of law.

## 2. The Differing Nomenclatures and Underlying Philosophies on the Two Sides of the Atlantic

Lee Bygrave, a leading authority on contemporary data protection law, warned that although "[t]he issue of nomenclature might be dismissed as trivial since it primarily relates to 'packaging' ... the packaging sends important signals about the law's remit, particularly to newcomers."[3] This applies *a fortiori* in emerging areas such as the interface between data protection and bankruptcy law, especially if this area is considered comparatively. The terminology-related intermezzo below is intended to act as a compass for the ensuing multi-disciplinary discussion, which touches on bankruptcy, data protection (privacy), and tenets from constitutional and human rights law.

3 Bygrave, L., 2014, *Data Privacy Law*, Oxford, OUP, p. 23.

### 2.1. BANKRUPTCY OR INSOLVENCY LAW? – DIFFERING NOMENCLATURES ON THE TWO SIDES OF THE ATLANTIC

For our purposes, the radically different breadth of the cardinal terms "bankruptcy" and "insolvency", on the two sides of the Atlantic, ought to be demarcated. To wit, while *bankruptcy* for US lawyers extends to all known types of statutory proceedings enshrined in the Bankruptcy Code and other linked sources of law, *insolvency* is used solely in reference to "[t]he condition of being unable to pay debts as they fall due or in the usual course of business."[4] Today, in the US, insolvency is a precondition for filing a petition to open bankruptcy proceedings with a bankruptcy court solely under Chapter 9 of the US Bankruptcy Code, which governs municipal bankruptcy cases.[5] It is worth mentioning that according to US legal historians, "insolvency law ... was [initially] conceived as a debtor relief law, and could be commenced by the impoverished *individual* debtor".[6]

In the UK, on the other hand, *insolvency law* is "a distinct regime"[7] applicable only to companies "when a company is within formal insolvency proceedings."[8] Roy Goode, the doyen of English commercial law, therefore speaks of "corporate insolvency law."[9] While *insolvency* therefore has broader meaning in the UK (and in other jurisdictions which have adopted the British nomenclature, including the EU) than in the US, the term *bankruptcy* is much narrower, as it applies only to formal statutory proceedings against individuals.[10] As UK bankruptcy law's ultimate objective is to "discharge the bankrupt [individual] from his liabilities,"[11] it is equivalent to US Chapter 7 bankruptcies.[12]

4 Garner, B. A. (ed.), 2009, *Black's Law Dictionary*, Deluxe 9th ed. Eagan, West.

5 See § 109(c)(3) of the Bankruptcy Code. Other additional requirements apply to municipalities which are defined as a "political subdivision or public agency or instrumentality of state", such as cities under § 101(40) because "the special sovereignty interests of the state." Tabb, J. C., 2020, *The Law of Bankruptcy*, 5th ed., St. Paul, West Academic, § 2.2, p. 124.

6 Noel, R. F., 1919, *History of Bankruptcy Law*, Washington, D. C., Chas. H. Potter & Co, pp. 10–11. Cited in Tabb, J. C., 2020, p. 2, note 7, (emphasis by author).

7 Goode, R., McKendrick, E., 2020, *Goode and McKendrick on Commercial Law*, 6th ed., London, Penguin, pp. 923 ff.

8 Gullifer, L., Payne, J., 2020, *Corporate Finance Law – Principles and Policy*, 3rd ed., Oxford, Hart, p. 98.

9 Goode, R., McKendrick, E., 2020, p. 924.

10 See Insolvency Act 1986, UK Public General Acts, 1986 c. 45, Part IX, Chapter I, Section 264(1), reading that bankruptcy proceedings start with the filing of "[a] petition for a bankruptcy order ... against an individual."

11 Goode, R., McKendrick, E., 2020, p. 927.

12 Similarly, Part 7A on 'Debt relief orders' and Part VIII ('Individual voluntary arrangements') of the UK Insolvency Act 1986 may be taken as the UK counterpart to Chapter 13 of the US Bankruptcy Code.

This terminological disparity between the two sides of the Atlantic is of relevance for us here because EU law is primarily influenced by English nomenclature, though the exact connotation of the nomenclature in relevant EU legislation is fixed by the legislation itself. For example, the Recast Insolvency Regulation 2015/848[13] – the regulation at the very center of our observations – applies to companies, self-employed persons, and even to consumer-debtors,[14] demonstrating that EU law's usage of the term "bankruptcy law" is not exactly coextensive with the US's nor with the UK's.

US terminology is favored herein, save when topics from the EU, UK or other jurisdictions utilizing a differing nomenclature are being referred to. In the case of the latter, the local nomenclature is used. In English language publications and in official and unofficial translations of the national bankruptcy acts of EU member states that do not use English as their official language, EU and English nomenclature seems to be dominant, though often the selection of terms depends on the background and preferences of the translators.

One last related point must be made. Namely, the distinctions drawn above between proceedings against individuals (consumers) and legal entities (companies) may give the mistaken impression that data protection laws protect only bankrupt *individual debtors* in "bankruptcy proceedings" and that this article deals exclusively with such scenarios. On the contrary, although the protection of EU data protection laws is, indeed, limited to "natural persons", there is also a need to protect the data concerning natural persons appearing in various roles in insolvency proceedings conducted against juridical entities. Namely, individuals whom European data protection law is designed to protect may appear as individual debtors not exercising an independent business or professional activity, individual-debtors exercising such activities, individual-creditors, and individuals serving as insolvency practitioners,[15] or ancillary service-providers like US examiners.[16]

13 European Insolvency Regulation (EIR), Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

14 Recast European Insolvency Regulation, recitals 9–10, the first of which states that "[t]he scope of this Regulation should apply to insolvency proceedings which meet the conditions set out in it, *irrespective of whether the debtor is a natural person or a legal person, a trader or an individual*," (emphasis by author).

15 EIR Art. 2(5) defines insolvency practitioners as "any person or body."

16 Examiners may be appointed by bankruptcy courts pursuant to §1104(c) of the US Bankruptcy Code to investigate the debtor's affairs "including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of by current or former

## 2.2. DATA PROTECTION VERSUS DATA PRIVACY LAW

In Europe, the expression "data protection law" has become the dominant term for this burgeoning area of law. This designation is a calque of the German term *Datenschutz.*[17] Some European scholars nonetheless prefer the term "data privacy", which is the established designation in the US. While both terms may be used interchangeably, the latter has a broader semantic scope. This difference stems primarily from the fact that EU *data protection* law has been consolidated into a distinct, clearly identifiable branch of law with the General Data Protection Regulation (GDPR) as the heart of the entire regime. What is covered by the GDPR, in other words, is European data protection law.

As opposed to the EU, US privacy laws are scattered across different areas of the legal system, sometimes dressed as constitutional doctrine and elsewhere as narrow, sector-specific statutes, ranging from the broader Privacy Act 1974 introducing the Code of Fair Information Practices[18] for federal agencies, to the sector-specific Children's Online Private Protection Act of 1998. Although criticized for its myopic approach, the US practice of introducing narrow and tailormade sector-specific solutions piecemeal may prove capable of tackling the idiosyncratic data protection problems of the sector(s) regulated by the statute in question and simultaneously avoiding unintended systemic consequences better than generalist systems, like the GDPR, could realistically hope to.

There is, however, a much more fundamental difference between the two sides of the Atlantic; namely, they traditionally hold "widely differing views on data privacy",[19] which have been characterized by some as no

management of the debtor." See also the case *Maxwell Communication Corp. v. Sociètè Gènèrale* 93 F.3d 1036 (US Court of Appeals, 2nd Cir., 1996).

17 Bygrave, L., 2014, p. 58.

18 See the succinct reference to the 1974 Privacy Act on the website of the Office of Privacy and Civil Liberties of the U.S. Department of Justice (https://www.justice.gov/opcl/privacy-act-1974, 6 September 2023).

19 Bennett, S. C., 2012, The "Right to Be Forgotten": Reconciling EU and US Perspectives, *Berkeley Journal of International Law*, Vol. 30, Issue 1, p. 161, p. 168, n. 25 citing also Levin, A., Nicholson, J. M., 2005, Privacy Law in the United States, the EU, and Canada: The Allure of the Middle Ground, *University of Ottawa Law & Technology Journal*, Vol. 2, No. 2, p. 357, (characterizing the Canadian model as a conceptual middle ground between the EU and the US); Baumer, D. L., Earp, J. B., Poindexter, J.C., 2004, Internet Privacy Law: A Comparison between the United States and the European Union, *Computers & Security*, Vol. 23, Issue 5, pp. 400, 411, (stating the "Compared with the EU ... there is far less legal protection of online privacy in the US."); Salbu, S. R., 2002, The European Union Data Privacy Directive and International Relations, *Vanderbilt Journal of Transnational Law*, Vol. 35, Issue 2, p. 655, (describing first generation EU data protection law as 'aggressive' protector of its values).

less than a "trans-Atlantic privacy clash."[20] Although initially both sides followed an "internationally agreed-upon set of principles"[21] as embodied in the 1980 Privacy Guidelines of the Organization for Economic Co-operation and Development (OECD),[22] subsequent development gradually[23] led to significant divergence between the two. In particular, the Council of Europe's Convention 108[24] (last amended in 2018)[25] introduced standards that were not only more stringent than the OECD Guidelines but whose application was mandatory. No such steps were taken in the US. These European protections were further strengthened when the EU Commission requested that Member States ratify Convention 108, a step that eventually led to data protection becoming a fundamental right.[26] The outcome of this long process is that today, the EU Charter of Fundamental Rights (which gained binding legal force in 2009) and the general principles of EU law ("a body of legal principles, including human rights") rank as primary EU legal norms, coequal with the ones in EU's founding Treaties.[27]

Data privacy law is therefore also a constitutional rights issue in both Europe and the US, though cast in different conceptual forms with given different degrees of protection. In the US, privacy rights in general are somewhat deprioritized due to a traditional "[emphasis on] freedom of ex-

20 Reidenberg, J. R., 2001, E-Commerce and Trans-Atlantic Privacy, *Houston Law Review*, 38, pp. 717, 718.

21 OECD, Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, OECD/LEGAL/0188 (2022), p. 3. For further details see Pernot-Leplay, E., 2020, China's Approach on Data Privacy Law: A Third Way between the U.S. and the EU? *Penn State Journal of Law & International Affairs*, Vol. 8, No. 1, pp. 49, 56 ff.

22 OECD, Guideline Governing the Protection of Privacy and Transborder Flows of Personal Data (1980), as updated in 2013.

23 In particular, "the underlying substantive ideology of privacy protection," as enshrined in the 1973 US Code of Fair Information Practices, was similar to the EU's fundamental principles because the US had adopted the OECD Guidelines (signed in 1980, ratified in 1998 at the Ottawa OECD Conference). See Boyd, V., 2006, Financial Privacy in the United States and the European Union: A Path to Transatlantic Regulatory Harmonization, *Berkeley Journal of International Law*, Vol. 24, Issue 3, p. 939, pp. 943–944. Further, the US Federal Trade Commission formulated a set of "core principles" in 1998, with "notice" having been identified as the "most fundamental principle". *Ibid.*, p. 944.

24 Council of Europe Convention 108: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1981, E.T.S. 108.

25 CETS No. 223, Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 10 October 2018).

26 Charter of Fundamental Rights of the European Union, 2012/C 326/02, Article 8, Title II Freedoms ("everyone has the right to the protection of personal data").

27 Craig, P., Búrca, G. de, 2020, *EU Law – Text, Cases, and Materials*, 7th UK ed., Oxford, OUP.

pression over privacy, as a fundamental value."[28] Indeed, numerous cases in which the protection of data privacy was sought by litigants have been overruled on the basis of First Amendment concerns.[29] A shorthand yet apposite description of the differences between the core philosophies of data privacy law in the EU and US, written by James Q. Whitman in 2004, remains basically valid today: while in the US "anxieties and ideals focus principally on the police and other officials, and around the ambition 'to secure the blessings of liberty,' ... on the Continent they focus on the ambition to guarantee everyone's position in society, to guarantee everyone's 'honor'."[30]

Similarities between the two systems exist, nonetheless. The US Fair Credit Reporting Act (1970), for example, imposes the duty on credit reporting agencies to make their records available to the subjects of said records and introduces procedures for correcting such data. Identical responsibilities for data processors are enshrined into the GDPR, although as basic principles.

Some US scholars have been quite critical of the US's sectoral regulatory system. For example, Priscilla M. Regan claimed that "[a]lmost all analyses of privacy protection in the United States conclude that privacy protection is weak, proceeds on a sector-by-sector basis, and consists of a patchwork of protections."[31] Data privacy laws were thus rightly depicted as consisting of a "'reactive' array of state and federal statutes and common law doctrines."

To avoid being accused of not seeing the forest for the trees, the hectic history of EU–US relations concerning the flow of personal data from Europe to the US should not be forgotten either, and in particular, the position of US social-media companies, such as Facebook and Google. This rather non-reciprocal process has also shaped the unequal attitude to data privacy and the differing policy responses of the US and EU. On a macro level, this inevitably leaves imprints on the area, but it does not necessarily affect the concrete outcomes of court and DPA cases. In other words, while the economic and political dimensions of data protection systems radically differ on the opposite sides of the Atlantic, at the micro-level of the novel issues touched upon by the cases discussed below, commonalities can easily be found, and these broader geopolitical issues might be of

28 Bennett, S. C., 2012, p. 168.

29 *Ibid.*, p. 168, notes 36, 37.

30 Whitman, J. Q., 2004, The Two Western Cultures of Privacy: Dignity versus Liberty, *Yale Law Journal*, Vol. 113, No. 6, pp. 1151–1222.

31 Regan, P. M., The United States, in: Rule, J. B., Greenleaf, G. (eds.), 2008, *Global Privacy Protection*, Cheltenham, Elgar, p. 52.

lesser relevance. One may thus legitimately wonder, facing a freshly discovered issue, whether differing answers should be given to the tracking of individual internet activity even after users have switched to "incognito mode" on Google?

## 3. The European Perspectives

### 3.1. THE "SINGLE MOST IMPACTFUL DATA PRIVACY LAW WORLDWIDE"

For the EU, both insolvency and data protection laws are of high importance.[32] Yet it is fair to claim that the importance of the latter has skyrocketed in Europe due to the increasing impact of new technologies on both consumers and businesses. New technologies make data subjects increasingly "vulnerable" due to the expanded geographical reach of data and the ease with which their personal data can be accessed, processed, and thus also abused. A number of European cases have demonstrated this priority, and indeed, the comprehensive data protection regulatory system enjoys widespread legitimacy, with the GDPR being hailed at the time of its passage as "the single most impactful data privacy law worldwide."[33] The validity of this statement has persisted up until today, although the emergence of middle-ground systems readily proves not only that not all building blocks of the European model are transplantable without often significant adaptations, but also that one should increasingly reckon with the presence of rival models, too.[34]

32 See, in particular, Recitals 3–5 of the EIR, which stresses that the regulation of cross-border insolvencies is a precondition for the proper functioning of the EU's internal market. Recitals 83 and 84, on the other hand, proclaim the goal of promoting the protection of personal data.

33 Cunningham, M., 2013, Diminishing Sovereignty: How European Privacy Law Became International Norm, *Santa Clara Journal of International Law*, 11, p. 430, referring to Shaffer, G., 2000, Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards, *Yale Journal of International Law,* Vol. 25, pp. 55–88, and Moshell, R., 2005, ... And Then There Was One: The Outlook for a Self-Regulatory United States Amidst a Global Trend toward Comprehensive Data Protection, *Texas Tech Law Review,* 37, pp. 357, 384.

34 See Greenleaf, G., Cottier, B., 2020, 2020 Ends a Decade of 62 New Data Privacy Laws, *Privacy Laws & Business International Report*, 163, pp. 24–26. In Africa, new laws of Kenya and Uganda have been influenced by the GDPR, but only to a limited extent. Interestingly, the three Central Asian countries that passed data privacy laws most recently (specifically, Tajikistan, Uzbekistan and Turkmenistan) did not follow the GDPR model. *Ibid.*, p. 5.

### 3.2. EUROPEAN INSOLVENCY LAW: MAIN MILESTONES

Unlike the data protection law, EU insolvency law's domain has always been limited, since consensus was only reached on two major programmatic agenda items. These are the coordination of and fostering of cooperation in cross-border insolvency proceedings, and the domestication of the second chance (or fresh start) bankruptcy philosophy. While the first policy was materialized in the European Insolvency Regulation of 29 May 2000 (as recast in 2015),[35] the second culminated recently in the enactment of the 2019 Preventive Restructuring Directive,[36] which was preceded by soft law instruments containing similar content.[37]

Political considerations prevented the EU from advancing further on this front by passing a common European insolvency code containing "substantive" bankruptcy law. Different European countries therefore uphold insolvency law policies and rules that diverge significantly, which remains a concern for the internal market, especially insofar as these divergent approaches concern politically sensitive issues such as the priority and protections afforded to labor (employees) and those afforded to financiers (secured creditors). The 2022 "Proposal for harmonising certain aspects of insolvency law" illustrates these inherent tensions, which are an obstacle to the development of EU capital markets.[38] Notably, this proposal stresses the need to ensure "enhanced transparency for creditors on the

35 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, recast by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

36 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), *Official Journal Legislation (OJ L)* 172, 26 June 2019, pp. 18–55. The Directive was influenced by US Chapter 11 (Reorganizations) and the rich repository of reorganizations and out-of-court workouts related to US experiences.

37 A Commission communication of 1 October 2004, Community guidelines on State aid for rescuing and restructuring firms in difficulty (*Official Journal* 244, 1 October 2004, pp. 2–17); Commission communication of 5 October 2007, Overcoming the stigma of business failure – for a second chance policy – Implementing the Lisbon Partnership for Growth and Jobs (COM/2007/0584 final); Commission Communication of 25 June 2008, "Think Small First" – A Small Business Act for Europe (COM, 2008, 394 final), and Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (L 74/65).

38 Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, Brussels, 7 December 2022 COM(2022) 702 final 2022/0408 (COD).

key features of national insolvency regimes, including on the rules governing insolvency triggers and the ranking of claims,"[39] objectives which directly contradict those of data protection law policies.

Given the coordination mandate, the first European Insolvency Regulation of 29 May 2000,[40] just like the 2015 Recast in force today,[41] are consequently full of conflict of laws type provisions. Their ultimate effect is thus limited to ensuring that bankruptcy proceedings against the same debtor, opened simultaneously in several member states, can be coordinated efficiently[42] by ensuring that cross-border cases are resolved "in a single set of proceedings, opened in one Member State but effective in others."[43] This objective is achieved through a hierarchical system[44] whereby the main and secondary (ancillary) proceedings use the concept of Centre of Main Interest (COMI)[45] as a tool for deciding which jurisdiction's insolvency proceedings is given priority and thus plays the decisive role – a formula known also to the provisions of US Bankruptcy Code Chapter 15.[46]

### 3.3. EUROPEAN DATA PROTECTION LAW: MAIN MILESTONES

The short history of Europe data protection began (one could say "modestly") with the passage of the generally applicable Data Protection Directive 95/46/EU (DPD),[47] and somewhat later with its "twin", Regula-

39 Quoted from the European Commission's 2022 Proposal for a Directive harmonising certain aspects of insolvency law (https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/civil-and-commercial-law/insolvency-proceedings_en, 5. 1. 2023).

40 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ L* 160/1, 30 June 2000.

41 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings *OJ L* 141, 5 June 2015, pp. 19–72.

42 The coordination of secondary proceedings presumes the requirement for insolvency practitioners to cooperate and communicate with each other in these proceedings (Art. 41 Recast EIR). Bork, R., Zwieten, K. van, 2022, *Commentary on the European Insolvency Regulation*, 2nd ed., Oxford, OUP, para 0.43, p. 38.

43 *Ibid.*, para 0.01, p. 1.

44 This hierarchy is limited in the sense that secondary proceedings are subordinated to main proceedings only in some circumstances: "principally by enabling the insolvency practitioner, in main proceedings, to secure a stay of the realization of assets in secondary proceedings [Art. 33 Recast EIR]." *Ibid.*, para 0.43, p. 38.

45 Compare Section 1502(4) of the US Bankruptcy Code and the more detailed Article 3 of the EU Recast Insolvency Regulation.

46 Section 1502(4) of the US Bankruptcy Code speaks of "foreign main proceeding" and 1502(5) of "foreign non-main proceeding".

47 Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regards to the processing of personal data and on the free movement of such data.

tion 45/2001, which was of limited application, governing only personal data processing by the EU Commission.[48] The latter mimicked the former, and is thus of limited importance to this discussion.

This was followed by a rapid expansion of data protection law through several major cases, which unearthed newer problems and revamped parts of the legal framework within an unprecedentedly short period of time, all with the aim of strengthening the protection of privacy. No better examples can be mentioned than the *Google Spain* case,[49] which led to the birth of the *right to be forgotten* – or the right to erasure, in Article 17 of GDPR. The 2014 *Schrems I*[50] and the 2020 *Schrems II*[51] decisions of the CJEU successfully attacked and dismantled the regulatory regimes that purported to ensure the protection of personal data streams flowing from Europe to the US. These and other milestone cases paved the way for the expanded and consolidated regime that was enshrined in the General Data Protection Regulation 2016/679 (GDPR),[52] in force since 25 May 2018, which repealed and replaced its predecessor – unlike the EIR, which "built upon, rather than dismantled, the regulatory framework established by [its predecessor]."[53]

As far as the most recent developments are concerned, the work on the e-Privacy Regulation proposal should be noted. If enacted, this Regulation will replace e-Privacy Directive 2002/58/EC,[54] which regulates electronic communications services (e.g., Skype, WhatsApp, SMS services, fixed and mobile telephone services, cookies, etc.).[55]

48 Regulation (EU) 45/2001 was repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC, *OJ L* 295, 21 November 2018.

49 *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos [es], Mario Costeja González* (C 131/12) ECLI:EU:C:2014:317.

50 Schrems I CJEU Case C-362/14.

51 Schrems II CJEU Case C-311/18 (as of 16 July 2020).

52 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) *OJ L* 119, 4 May 2016, pp. 1–88.

53 Bork, R., Zwieten, K. van, 2022, p. 2.

54 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2002 *OJ* (L 201) 37 (E-Privacy Directive), as amended by the EU telecoms reform package from November 2009.

55 See the related data on the EU's Legislative Train Schedule (https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-jd-e-privacy-reform, 7. 9. 2023).

Lastly, another subtle point of distinction should be pointed out. Namely, while the first EU insolvency-related piece of legislation took the form of a regulation, data protection law was set out "only" as a directive in the first phase of development. This is telling of the initial perception of the risks of data protection, because regulations are by definition directly applicable in all Member States,[56] while directives "do not have to be addressed to all Member States, and they are binding as to the end to be achieved while leaving some choice as to form and method to the Member States."[57] In other words, the consensus that data protection concerns require not only strict but also common European responses was reached with a delay of more than a decade.

However, given the pressing risks to personal data posed by new technologies, the EU's stance on data protection law has changed within an unprecedentedly short period of time because data protection law also became directly applicable with the GDPR's entrance into force on 15 May 2018. In short, today the Member States' maneuvering room in the data protection domain has shrunk significantly. Counterintuitively, the interpretative powers of Data Protection Authorities (DPAs) – which are national-level bodies – have increased at the same pace, partially due to the plethora of new issues requiring fast answers that have popped up during the GDPR rollout. A US litigant entangled in European (national or cross-border) insolvency proceedings or in a dispute involving data protection laws should therefore not be surprised that clarificatory answers may be provided by the office of a DPA and – irrespective of the GDPR's direct applicability – that these answers may differ from state to state.

### 3.4. THE NEW ERA: A PARTIAL ACKNOWLEDGEMENT OF THE IMPORTANCE OF THE BANKRUPTCY–DATA PROTECTION INTERFACE

Many of the milestone cases that will be discussed below were also a step that signaled an end to the era of the happy co-existence of the insolvency and data protection laws. In other words, the period when data protection did not interfere in the administration of insolvency proceed-

56 Note that although regulations "are part of national legal systems, without the need for transformation or adoption by national legal measures ... Member States may nonetheless need to modify their law in order to comply with a regulation, or they may need to pass consequential legal measures in order to give full effect to ... the regulation." (Craig, P., Búrca, G. de, 2020, p. 105). There is also no formal hierarchy between regulations, directives, and decisions, i.e., the mandatory sources of EU law. Thus, "[r]egulations are not 'superior' to directives." *Ibid.*, p. 143.

57 *Ibid.*, p. 145.

ings and did not cause major new problems came to an abrupt end at some point around the end of the first decade of the 21st century. This was due primarily to the technological advancements that drastically increased the exposure of personal data to new types of threats and the parallel expansion of data protection laws. For example, the abovementioned *Google Spain* case contained several elements familiar to bankruptcy lawyers, i.e., the forced sale of a once bankrupt debtor's assets and related internet postings, which had become obsolete but nonetheless remained online.

Part of the story is that practice had already proven that offline methods for informing creditors, other stakeholders, and the public at large about the opening, closure, and other important steps in insolvency proceedings did not work satisfactorily in the cross-border context.[58] While the European Insolvency Regulation (EIR) 2000 still had to grapple with classical offline methods of publicizing various data (e.g., "notices in newspapers and official government gazettes, the posting of notices on court bulletin boards, the sending of individual notices to known creditors"),[59] in the intervening period, notification through online insolvency registers has become the dominant notification method throughout Europe due to technological advancements. Insolvency lawyers have welcomed new technologies as tools for solving these problems. So much so that by the time work began on the 2015 Recast EIR, online publication was widely – though not ubiquitously – accepted[60] throughout Europe. This progressive transformation elicited reactions from both data protection and insolvency lawyers in Europe. As will be detailed in the following pages, the result is a new chapter in the recast EIR devoted to data protection and the myriad new questions demanding answers.[61] Thanks to these, the data

58 Veder, M., Article 24 – Establishment of insolvency registers, in: Bork, R., Zwieten, K. van, (eds.), 2022, *Commentary on the European Insolvency Regulation*, Oxford, OUP, p. 385.

59 *Ibid*.

60 According to a 2012 Report by the EU Commission, at that time, only 14 Member States published decisions made in insolvency proceedings online for access by the public, 9 other Member States had some information on insolvency available in electronic databases, and 4 Member States had no information on insolvency proceedings whatsoever available in electronic form. See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (COM[2012] 743 final), para 8, cited also in Veder, M., 2022, p. 387 n. 5.

61 As stated in the Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings (COM(2012) 744 final), para 1.2: "There are problems relating to the rules on publicity of insolvency proceedings and the lodging of claims. There is currently no

protection–insolvency interface ought now be considered a distinct agenda item for both data protection and insolvency law.

### 3.5. DATA PROTECTION-RELATED NOVELTIES INTRODUCED BY THE 2015 RECAST EIR

The new provisions of the Recast EIR that attracted the most ire from data protection activists aimed to exploit new technologies to make the administration of cross-border insolvency cases more efficient by making it easier to access such data. The underlying policy presumption was and remains that "it is vital that publicity is given to the opening of insolvency proceedings, important steps to be taken during the proceedings, and the closure of the proceedings."[62] This is the interest of creditors, third-party debtors, banks, and the public at large, though for different reasons.[63]

Consequently, the Recast EIR required Member States to establish and maintain one or more electronic insolvency registers in their respective territories[64] and to make ten classes of insolvency-related information publicly available ("mandatory information") as soon as possible following the opening of such proceedings,[65] though the task of interpreting the scope of the "as soon as possible" standard was left to the courts. Unfortunately, there are still Member States in which there are no insolvency register through which insolvency-related information could easily be checked via the Internet; accessibility in other than the local language(s) is especially an issue. Moreover, the features of the insolvency registries also differ. For example, while in some of the Member States there are registers specifically dedicated to insolvency, in others insolvency-related data is in registers devoted also to other types of data and there are also differences in the nature of data and information made accessible.[66]

mandatory publication or registration of the decisions in the Member States where a proceeding is opened, nor in Member States where there is an establishment. There is also no European Insolvency Register which would permit searches in several national registers. However, the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of the relevant decisions relating to an insolvency procedure. Judges need to be aware whether proceedings have already been opened in another Member State; creditors or potential creditors need to be aware that proceedings have commenced" (according to Veder, M., 2022, p. 387).

62 *Ibid.,* para 24.01, p. 385.

63 *Ibid.*

64 Recast EIR, Art. 24(1).

65 *Ibid.*, second sentence.

66 See the European e-Justice Portal, page with general information on insolvency law and insolvency registers of the Member States (https://e-justice.europa.eu/110/EN/bankruptcy_and_insolvency_registers, 7. 9. 2023).

In addition to mandatory publicizable information, two other express provisions enhance access to data, and thus may affect data protection lawyers. One allows Member States to require the recording of additional personal data by or the filing of documents containing such data with their national insolvency register. A good example is the insolvency-related disqualification of directors.[67]

The other gives Member States the freedom to either include information on individuals not exercising any independent business or professional activity into the insolvency registers, or to make such information publicly available through a system of interconnected insolvency registers.[68] The latter choice was added in order to "[tackle] the disparities that [existed and continue to exist] in the laws of the Member States on the extent to which the overindebtedness of consumers is dealt with in insolvency law and seeks to protect the privacy of such individuals."[69] As a counter-balancing measure aimed to protect foreign creditors, it is also prescribed that in cases where no such individual-related information is included in insolvency registers, known foreign creditors are to be informed about the opening of insolvency proceedings immediately, either by the court having jurisdiction or by the insolvency practitioner they appoint.[70] Although no sanctions are foreseen for non-compliance, foreign creditors not informed on the opening of insolvency proceedings cannot suffer negative consequences thereby.[71] Obviously, it remains to be seen whether these provisions can work efficiently in practice.

The more important novelty, however, is that a new decentralized system connects the aforementioned national insolvency registers through a so-called e-Justice Portal, "a central public electronic access point to information in the system."[72] This system, established by the EU Commission,[73] provides a search service in all official languages of the institutions

67 Recast EIR, Art. 24(3).

68 *Ibid.*, Art. 24(4).

69 Veder, M., 2022, p. 388, n. 60.

70 Recast EIR, Art. 54(1).

71 *Ibid.*, Art. 24(4), second sentence.

72 *Ibid.*, Art. 25(1).

73 The EIR contains detailed rules on the role of the EU Commission, basically the [executive] government of the EU, that is to play a central role in the maintenance of the new system. To wit, the Recast EIR's new Chapter VI on data protection establishes the decentralized system (Art. 25(1)) and regulating its technical aspects (Art. 25(2)), as well as empowering the Commission as the *controller* for processing personal data (Art. 80(1) Recast EIR). Put simply, the EU Commission plays the key role with respect to the new e-Justice Portal's insolvency prong, including defining the necessary policies (Art. 80(2)), implementing the various technical measures necessary for fulfilling its responsibilities as controller (Art. 80(2)), and ensuring the confidentiality

of the Union, thereby making both mandatory and any optional information from national insolvency registers available to the public, alongside other publicly accessible documents.[74] To make the new system more user-friendly, the Recast EIR requires the envisaged search facilities and services to be free of charge,[75] and the system is to operate fully electronically in order to ensure easy access from any point of Europe (and beyond) through a single "central electronic access point."[76]

### 3.6. "TECHNOLOGIZED" CROSS-BORDER INSOLVENCY LAW AND THE CONCOMITANT INCREASED DATA PROTECTION RISKS

As one may expect, the abovementioned and other such technological advancements that enhance ease-of-access to sensitive personal data are also factors that increase risk and raise unresolved questions corollary to the data protection–insolvency law interface, as will be demonstrated by some of the milestone cases discussed below. For data protection scholars, policy-makers, and human rights activists, the envisaged pan-European electronic system was not seen merely as an efficiency-enhancing tool for cross-border insolvency proceedings, but also as a measure that would drastically increase the risk of personal data being exposed. As the European Data Protection Supervisor (EDPS) put it in its 2013 Opinion on the Commission proposal for a Regulation amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, European data protection legislation must be applied here because "[a]mongst the measures proposed that will impact data protection, the [new insolvency regulation] Proposal provides for a mandatory publication of the decisions opening or closing a proceeding and encourages and organises cross-boarder [*sic*] exchanges of information between stakeholders. ... Information thus published and/or exchanged may identify (either directly or indirectly) debtors, creditors, and liquidators involved in the proceeding."

Furthermore, the EDPS found that there are "shortcomings and inconsistencies in the way the proposed [insolvency] Regulation [i.e., the then prospective Recast EIR 2015] deals with issues related to/concerning

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and integrity of any transmission from the European e-Justice Portal (Art. 80(3)). Analogous responsibilities concerning the processing of personal data in the insolvency registers themselves are allocated to the Member States (Art. 79).

74 Recast EIR, Art. 25(1), second sentence.

75 *Ibid.*, Art. 27(2). The Member States may, however, charge a reasonable fee for access to the documents or additional information even if via the system of interconnected insolvency registers as per Recast EIR Art. 27(2).

76 Veder, M., 2022, p. 391, n. 60.

personal data."[77] These concerns, and related consultations involving the two sides (i.e., protagonists of insolvency transparency versus data protection positions), eventually led to the addition of Chapter VI on data protection to the Recast EIR. The new Chapter VI – a rather short one[78] – divides competences and responsibilities for the implementation of the chapter among Member State bodies and the European Commission, and invokes the generally applicable data protection legislation. Thus, despite the importance of the data protection–insolvency law interface to insolvency practitioners, Chapter VI's text provides neither them nor others unfamiliar with the ins-and-outs of EU data protection law with much in the way of guidance on the said interface.

### 3.7. THE REMOTE RISKS: THE IMPACT OF DECISIONS BASED ON EUROPEAN CONSTITUTIONAL AND HUMAN RIGHTS LAW

There is a remote – yet real – possibility that future decisions based on European constitutional[79] and human rights law may also affect insolvency law. The fact that Europe has evolved a branch of data protection law distinct from privacy law does not mean that the interaction between data protection law and constitutional/human rights law will cease. As a consequence, future developments in these overlapping domains may also affect insolvency lawyers.

This deserves greater attention because of the fact that Europe possesses two partially overlapping and partially competing "constitutional" and/or "human rights" systems, each with a highly influential court at its pinnacle. These are, of course, the European Court of Justice, the supreme court of the European Union, seated in Luxembourg, and the European Court of Human Rights, headquartered in Strasbourg, France. Although their missions differ, today either court could rule on cases concerning data protection issues that might also impact insolvency law. New issues and new solutions thereto should also be expected, especially due to the

77 Executive summary of the Opinion of the European Data Protection Supervisor on the Commission proposal for a Regulation amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, *OJ* C 358, Section 1.3.(9), 7 December 2013, pp. 15–16.

78 Recast EIR Chapter VI, devoted to data protection in the context of cross-border insolvencies, has altogether six articles (Arts. 78–83).

79 For a review of protection of human rights in the EU see Beširević, V., The Constitution in the European Union: The State of Affairs, in: Dupeyrix, A., Raulet, G. (eds.), 2014, *European Constitutionalism. Historical and Contemporary Perspectives*, Brussels, Peter Lang, coll. Euroclio, pp. 15–35.

unprecedented dynamics and prestige that data protection has acquired in Europe over the past several decades.

Any discussion on the genesis of, characteristics of, and relationships between the Luxembourg and Strasbourg courts and the associated systems is unfortunately inherently complex, because their relationship is presently in a state of limbo. A rough outline is hopefully nonetheless sufficient for the purposes of casting light on why this relationship matters for insolvency lawyers. At present the judgments, neither of the Luxembourg, nor of the Strasbourg Courts give any particular cause for concern, but the unresolved relationship between the two does bring the topic into the limelight. Let us take a closer look at these, to better assess what is at stake.

### 3.7.1. The Stance of the European Court of Justice: Exclusive Autonomy in Lieu of a Discursive One

Let us start by quoting Craig and de Búrca, the authors of the top textbook on EU law, according to whom "[p]rior to the enactment of the Charter of Fundamental Rights [in 2009], the main international instrument for the protection of human rights drawn upon by the ECJ as a *'special source of inspiration'* was the European Convention on Human Rights."[80] After ECJ Opinion 2/13, however, this seemingly happy co-existence has morphed into the opposite, with the practical effect being that there is now basically no certainty whatsoever regarding whether, when, and in what form the Luxembourg court would draw on the decisions of the Strasbourg Court. The main milestones of the road that led to this state of affairs are as follows.

The predecessor of today's European Union, the European Economic Community, was formed in 1957 and focused on economic cooperation. Human rights were not part of its initial framework, despite the fact that one of the key motivations behind the Community's creation was the desire to prevent a third World War by enhancing cooperation between France and Germany. Indirectly, therefore, it was done in response to the horrors and human rights violations of WWII. It was gradually realized, however, that "ever closer economic cooperation could equally affect human rights standards."[81] Thus, in this first phase, human rights-related considerations appeared only in some of the judgments of the Court.

80 Craig, P., Búrca, G. de, 2020, p. 435, (emphasis by author).

81 Kuijer, M., 2020, The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession, *The International Journal of Human Rights*, Vol. 24, Issue 7, pp. 998–1010, p. 1000.

This stance changed with the 1992 Maastricht Treaty, which contained nothing less than a declaration enshrining European law's human rights dimension,[82] but there was at that point no clear path forward with regards to how this declaration should to be implemented. Some suggested that the EU should have its own instrument of human rights, and others that the EU ought to accede to the ECHR. Rather than choosing one option, both were pursued simultaneously, and thus the route proceeded along two separate and meandering paths.

The next milestone was the Constitution for Europe (TCE), which foresaw the possibility of the EU acceding to the ECHR,[83] but this proposed Constitution was rejected in France and the Netherlands. Probably out of political caution in the aftermath, the Lisbon Treaty was not enacted until 2009.[84]

The Lisbon Treaty led to the adaptation of the EU Charter of Fundamental Rights,[85] an instrument similar to – and to a significant extent overlapping with – the Council of Europe's ECHR.

As far as the question of accession to the ECHR was concerned, the Treaty stipulated that the EU Commission would ask the ECJ to give an opinion on the EU's competence to conclude an agreement on accession.[86] ECJ Opinion 2/13, which prevented accession, "raised eyebrows" and provoked rather fierce critique; some critics went as far as to claim that the Opinion was intent on killing off accession, thereby making external oversight impossible. While opinions are considered a form of "soft law" in EU law (i.e., they lack binding force and direct effect),[87] they matter nonetheless, as Opinion 2/13 amply demonstrated that in practice; as just described.

### 3.7.2. The Possible Impact of the Decisions of the European Court of Human Rights

Today, while the privacy and data protection-related decisions of the European Court of Human Rights (ECtHR) certainly have the potential to impact insolvency law, the nature of this impact is too uncertain for it to be worth the attention of insolvency practitioners, at least for the

82 *Ibid.,* p. 1000.

83 Article I-7 §2 states: "The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

84 *OJ* C 306, 17 July 2009. Entry into force on 1 December 2009.

85 Charter of the Fundamental Rights of the European Union, *OJ* C 83, Vol. 53, EU, 2010, p. 380.

86 Based on Article 218(11) TFEU.

87 Craig, P., Búrca, G. de, 2020, p. 146.

time being. This, however, does not mean that this potential impact is unlikely to occur. *A fortiori*, the more intense the interplay of bankruptcy and data protection law becomes, the higher the chances that decisions by both the Luxembourg and Strasbourg courts will impact insolvency proceedings across Europe, as well as extra-judicial workouts (i.e., out-of-court restructuring agreements between the creditors and the insolvent, or near-insolvent debtor) and preventive restructuring equivalents. For one, the Council of Europe system, the pan-European protector of human rights, has its own instrument in the domain: the 1981 Convention for the Protection of Individuals with Regard to the Processing of Personal Data, also known also as Convention 108. Strasbourg has always attempted to keep pace with the drastically increasing importance of data protection, primarily under the influence of EU developments in the area,[88] but also as a result of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), promulgated in 2018[89] and resulting in a "modernized" Convention.[90] Mention could also be made of the Council of Europe Convention on Access to Official Documents (CETS No. 205), referred to also as Tromsø Convention.[91]

These factors suggest that a day will come in the not-too-distant future when the Strasbourg court will make a decision affecting bankruptcy

88 As the Explanatory Report for Convention 108+ expressed: "With regard to the EU data protection reform package in particular, the works ran in parallel and utmost care was taken to ensure consistency between both legal frameworks. *The EU data protection framework gives substance and amplifies the principles of Convention 108* and takes into account accession to Convention 108, notably with regard to international transfer," (emphasis by author). See Council of Europe, 2018, Convention 108+: Convention for the Protection of Individuals with Regard to the Processing of Personal Data, Explanatory Report para. 4, p. 15 (https://edoc.coe.int/en/international-law/7729-convention-108-convention-for-the-protection-of-individuals-with-regard-to-the-processing-of-personal-data.html#, 21. 10. 2023). See also Zeitzmann, S., 2021, The Council of Europe's Tromsø Convention on Access to Official Documents, *European Data Protection Law Review*, 7, p. 232.

89 Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), CM(2018) 2-final, (https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168089ff4e, 7. 9. 2023).

90 CM/Inf(2018)15–final, consolidated text of the modernized Convention 108+ (https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf, 7. 9. 2023). As of August 2022, 55 states were parties to the Convention, (https://www.coe.int/en/web/data-protection/convention108-and-protocol, 7. 9. 2023).

91 Council of Europe, 2020, Council of Europe Convention on Access to Official Documents (CETS No. 205). See Ukrow, J., 2018, Practitioner's Corner – Data Protection without Frontiers? On the Relationship between EU GDPR and Amended CoE Convention 108, *European Data Protection Law Review*, Vol. 4, Issue 2, pp. 239–247, cited in Zeitzmann, S., 2021, p. 232, n. 5.

law for data privacy reasons, on the basis of the 1950 ECHR. Let us add to this that the ECtHR has already made decisions touching upon bankruptcy-related matters.[92] The effect of those decisions on insolvency practitioners in Europe depends, however, on whether the cooperative atmosphere between the two courts, which existed prior to 2009, will ever be restored. Understanding the history of this falling-out is of utmost relevance for insolvency lawyers, and so requires a brief canvassing of the constitutional dimensions of the link that has existed and continues to exist today.

Namely, the EU's 2009 Lisbon Treaty[93] took the fundamental step toward making the EU Charter legally binding, and with a status co-equal with the Treaties themselves. This acted as a catalyst that brought to the surface the fundamental constitutional issues concerning the relationship between the Luxembourg and Strasbourg courts.[94] One of the consequences of the consolidation of fundamental rights in the treaty was the exacerbation of the trend that pre-dated the 2009 Opinion 2/13; the CJEU's demonstrably stronger and more frequent reliance on the EU's own Charter of Fundamental Rights,[95] a shift that could not but be paralleled with a subtle decrease in the ECtHR's influence.

Yet the textual basis for a divergence of Europe's two supranational human rights systems, which itself increased the chances of potentially differing interpretations, radically changed shortly afterwards, through CJEU Opinion 2/13,[96] which proclaimed that the Draft Agreement on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms was not com-

92 See, in particular, the Moldovan cases of *Banca VIAS* 32760/04 (judgment delivered on 6 November 2007) and *Oferta Plus SRL* (14385/04 judgment delivered on 12 February 2008). For facts and a concise elaboration of the cases see Svetlicinii, A., Enforcement of Contracts in the Republic of Moldova: The Impact of a Slow Transition, in: Messmann, S., Tajti, T. (eds.), 2009, *The Case Law of Central and Eastern Europe – Enforcement of Contracts*, Vol. 1, Bochum, European University Press, para 1.6., pp. 449–456.

93 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (*OJ* C 306, 17 December 2007). It entered into force on 1 December 2009.

94 Kuijer, M., 2020, p. 1001.

95 See Kuijer, M., 2020, pp. 1001–1002, citing Búrca. As per Kuijer, according to the relevant research conducted, the CJEU referred to ECHR 7,5 times more than to all other human rights instruments (including the Charter), during the period from 1998 to 2005 (when the EU Charter was not binding), but that has radically changed since 2009: the CJEU has referred to the Charter in 122 cases but has only invoked the ECHR on 20 occasions. See Búrca, G. de, 2013, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 20, p. 168.

96 Opinion 2/13, EU:C:2014:2454 (18 December 2014).

patible with EU law for a number of reasons. In particular, the CJEU has exclusive jurisdiction to decide all issues of EU law, while the Agreement by contrast allows the ECtHR to decide on EU law matters.[97] The 43-page Opinion raised numerous complex constitutional issues and was criticized rather than praised by the vast majority of scholars in the field,[98] and was viewed with "a combination of shock, disbelief and protest,"[99] and as "a legal bombshell".[100]

The practical effects of the Opinion, the significance of which can be grasped even by those unfamiliar with EU constitutional law,[101] however, are not just of importance for the future of the bankruptcy-data protection interface and to this article: the Opinion simply prevented the EU's accession to the Convention. Practically, this means that until negotiations result in a formula capable of changing this state of affairs, the CJEU will remain the exclusive interpreter of EU constitutional and human rights law, and therefore also of the EU's privacy and data protection law. Still, it would be a mistake to completely exclude the possibility that the ECtHR's past or future decisions will continue to serve as a source of inspiration, though admittedly – and to stress again – this seems to be a very remote risk for insolvency lawyers at present.

In other words, as there is already a *real* and *an already existent risk* that national data protection authorities will knock on the doors of insolvency practitioners in concrete insolvency proceedings (as illustrated by the Hungarian case below), the chances of the appearance of CJEU decisions directly affecting insolvency law could be assessed as *remote*, and the possibilities of the surfacing of ones of the Strasbourg Court – the *remotest*. Nonetheless, whether these risks are academic matters that should not worry insolvency practitioners and others coping with the myriad challenges corollary to bankruptcy law, should perhaps be assessed in a year or two.

97 Kuijer, M., 2020, p. 112.

98 For an elaborate analysis, supporting some aspects of CJEU's reasoning, see Halberstam, D., 2015, It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, *German Law Journal*, Vol. 16, Issue 1, p. 105.

99 Scheinin, M., 2014, CJEU Opinion 2/13 – Three Mitigating Circumstances, *VerfBlog,* December 26, (http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances, 7. 9. 2023).

100 Buyse, A., 2014, CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law, *ECHR Blog*, December 20, cited in Kuijer, M., 2020, n. 29 (blog text no longer available online, as of 15 August 2022).

101 From a US perspective, the opinions of the CJEU are a peculiar source of law because the CJEU – essentially the Supreme Court of the EU – is empowered to pass them even if there is no "case or controversy", a prerequisite for Supreme Court jurisdiction in the US. See also Kuijer, M., 2020, pp. 1004 ff.

### 3.8. THE INSOLVENCY–DATA PROTECTION INTERFACE IN THE UNITED KINGDOM AFTER BREXIT

Since the expiry of the Brexit[102] transitory period (i.e., withdrawal of the UK from the European Union) on 1 January 2020, the Data Protection Act 2018[103] has been the UK's governing data privacy law, though the UK government's website states: "[t]he Data Protection Act 2018 is the UK's implementation of the General Data Protection Regulation (GDPR)."[104] Even the UK's best industrial publications make plain that UK data protection law rests on identical foundations as that of the EU, and these foundations have remained of crucial importance in the Isles, in particular to reducing complex and expensive compliance burdens on companies with affiliates on the Continent or who are doing business there. As emphasized by the European Data Protect Office (EDPO), in most circumstances, not one but two Data Protection Representatives need to be appointed in cross-border cases implicating business in both the EU and the UK, due to the requirement to comply with both the EU GDPR and the new UK equivalent.[105]

## 4. What European Case Law Can Tell Us About the Interface: European Court and Data Protection Authority Decisions

The extreme dynamics of European data protection law outlined above will likely intensify rather than subside in the near future, and this cannot but create novel privacy concerns for bankruptcy, similarly to what has been the case in both Canada and the US. The slowly emerging jurisprudence – be it in the form of decisions by various national Data Protection Authorities (DPAs) or by courts adjudicating unforeseen legal issues in the bankruptcy–data protection interface shows that in Europe, just like Geist noted with regards to Canada, "there is [often] no satisfactory answer to be found in the current law."[106] The following examples are intended to illustrate the sorts of difficulties Europeans

102 For a review of Brexit see, e.g., Beširević, V., A Short History of Brexit, in: Ilić, T., Božić, M. (eds.), 2020, *NOMOPHYLAX: Collection of Papers in Honor of Srđan Šarkić*, Belgrade, PFUUB – Službeni glasnik, pp. 621–645.

103 The Data Protection Act, UK Public General Acts 2018 c. 12.

104 See https://www.gov.uk/data-protection, 7. 9. 2023.

105 EDPO, Brexit and the Data Protection Representative – What Is the Impact for Your Company?, (https://edpo.com/uk-representative, 7. 9. 2023).

106 Geist, M., 2002, p. 70.

have faced and presumably will continue to face, probably with greater frequency, in the future.

As a preliminary caveat, it should be noted that unlike Canada and the US, which were exposed to the challenges attendant to the bankruptcy–data privacy interface over the same period as the Europeans (in some respects even earlier), fewer relevant cases are reported on the Old Continent and thus the amount of case law material available for researchers is less, especially if only English-language material is considered. This is so not only because of the language barrier and the dominant civil law tradition's tendency to report a comparatively modest percentage of total court and agency cases, but because in Europe bankruptcy stigma remains fairly strong, even in countries like Germany – the economic engine of Europe. As a result, there is less willingness in Europe to participate in various bankruptcy-related processes, and the number of companies abandoned rather than liquidated – let alone reorganized – is staggeringly high,[107] especially in some post-socialist (communist) states in Central and Eastern Europe (CEE), including *inter alia* the west-Balkan countries of Serbia, Montenegro, and Bosnia and Hercegovina.[108]

A behavioral factor inevitably also impacts research in the data protection domain. In the author's experience, many national DPAs are not keen to respond to queries from interested scholars. Moreover, their stance may change over time, due to staff changes or even political factors. These technical hardships require mention because it is difficult to even come close to getting an accurate picture of Europe's data protection–bankruptcy law interface when it is the aggregate confluence of such diverse and often intangible or unmeasurable factors.

The identified cases involving the bankruptcy-data protection interface can tentatively be divided into three major groups, each illustrated by one or two cases below. The first group includes straightforward cases where data protection law is simply applied in the bankruptcy context, as illustrated by the Hungarian DPA[109] case in the next sub-section. Here there is no need for balancing, though courts or authorities obviously have discretionary and interpretative powers available to them when necessary. By contrast, in the second group of cases, the decisions

107 See, e.g., Tajti (Thaythy), T., 2019. Unprotected Consumers in the Digital Age: The Consumer-creditors of Bankrupt, Abandoned, Defunct and of Zombie Companies, *Tilburg Law Review*, Vol. 24, Issue 1, p. 3.

108 For further insight see, e.g., Tajti (Thaythy), T., 2017, Leasing in the Western Balkans and the Fall of the Austrian Hypo-Alpe-Adria Bank, *Pravni Zapisi*, Vol. VII, No. 2, pp. 155–221.

109 Case NAIH-2087–5/2012/H (March 2012) (in Hungarian language).

were made by balancing and prioritizing the policies and rules of bankruptcy and data protection laws. The German case concerning the unpaid honorariums of a psychotherapist exemplifies this group of cases.

The third and most complex group of cases (at least in the author's opinion) showcase the different modalities and effects of *conflicts* between insolvency and data protection law. While in the Italian case below, data protection law frustrated the sale of genetic data collected in the Sardinian Ogliastra region during insolvency proceedings, the UK pre-Brexit insolvency case of *Re Southern Pacific Personal Loans Ltd.*[110] goes further still because it demonstrates that at least two systemic antagonisms exist between these two branches of law. The details follow.

### 4.1. THE "HEALTHY CO-EXISTENCE" GROUP OF CASES

Although it is presumably not the only such case in Europe, the Hungarian DPA's decision to impose fines on a liquidator is nonetheless paradigmatic of the implementation of data protection law in the domain of bankruptcy law – something that may happen to any bankruptcy practitioner that fails to either educate him– or herself in (or to correctly apply data protection regulations when) handling bankruptcy cases. In the case, a penalty amounting to five million forints (HUF) (EUR 16,000 at the time) was imposed because the liquidator kept insolvency case files in an unguarded doorless stable, and these were therefore accessible by the public. Data protection regulations applied as the documents in question contained sensitive personal information, and the applicable data protection regulations protected medical reports, personal identification documents, along with driving licenses, as well as employment-related documents and social security cards.

The lesson to be learned from this case is simple: insolvency practitioners must educate themselves in data protection law, keep track of pertinent changes, and comply with the law in their practice; the alternative is facing increasingly high penalties. In cases involving big-ticket international corporations, especially under the new GDPR, the penalties imposable have become enormous.[111]

The story unfortunately does not end here because insolvency practitioners may also be held liable as tortfeasors for the harm and damages

110 *Re Southern Pacific Personal Loans Ltd.,* [2013] EWHC 2485 (Ch).

111 As per GDPR Article 83(5), the imposable penalty can go up to €20m or 4% of an undertaking's total global turnover of the preceding fiscal year. GDPR Art. 58 (Powers), Art. 70 (Tasks of the European Data Protection Board), Art. 83 (General conditions for imposing administrative fines), and Art. 84 (Penalties) are also of relevance.

caused by infringing data protection laws in some cases, in addition to being fined. This possibility has already been discussed by some courts.[112]

### 4.2. CASES PREMISED ON BALANCING AND PRIORITIZING

In this section, the 2009 German Supreme Court (*Bundesgerichtshof*) judgment[113] is given short shrift in order to get to the main point without further ado. The factual background was simple: insolvency proceedings were opened against a psychotherapist who had outstanding claims for his clients' unpaid fees. When the bankruptcy practitioner (trustee) asked the debtor to transfer the documents containing his client-obligors' personal data, he refused to do so, invoked the doctor-patient confidentiality rule, and was generally uncooperative. To break this impasse, the court had to balance applicable policies. Eventually it ruled that "the need for revealing data on patients to the insolvency practitioner enjoys priority over the claim of the patients for protection of their data ... Should the contrary position of the debtor applied, the conduct of insolvency proceedings would not be possible in case the debtor is a medical doctor working exclusively with private patients."[114]

In the 2016 case, decided by the District Court of Rockenhausen (Germany),[115] however, the balance tilted in favor of data protection law. At stake was a cell-phone insolvency application that gave users access to the insolvency-related data of more than a million German companies and individuals, accounting for roughly 98% of all the debtors in Germany.[116] Individual data could be located not only by searching the names of debtors, but also by searching for their places of residence, in case of several individuals place of residence shown also on a map of Germany. What made the case peculiar is that the data was based on publicly accessible entries from insolvency registers. Yet – at least according to the opinion of the court – due to the simplified search possibilities, the otherwise public data acquired a different quality, and therefore the app infringed data protection laws, especially due to its "shaming effects" (*Prangerwirkung*) on debtors.[117]

112 See, e.g., *London Oil and Gas Ltd (In Administration*), [2019] EWHC 3675 discussed below. According to the court, as they are agents of the company in administration, they are also potential tortfeasors. *Ibid.,* para. 2.

113 BGH IX ZB 85/08 (5 February 2009).

114 *Ibid.,* point 5. Translation by the author.

115 *AG Rockenhausen*, Urt. V. 09 August 2016 Az 2C 341/16.

116 *Ibid*., description of facts.

117 *Ibid.*

## 4.3. CONFLICT CASES

### 4.3.1. Frustration of Bankruptcy Goals: The Italian *Shardna* Case

Another case with an unexpected turn, which precluded the realization of one of insolvency law's key goals – i.e., the sale of the debtor company's valuable assets – concerned the insolvency of an Italian limited liability company named Shardna, whose most valuable asset was genetic data collected in the Sardinian Ogliastra region, which is famous for being home to an extraordinary number of centenarians.[118] After a change in Shardna's top governance structure, it became the subject of a controversial insolvency proceeding, whereby it was sold to a UK biotechnology company's Italian subsidiary (Tiziana Life Sciences). This purchase was motivated by the possibility of commercially exploiting the estate, which most importantly possessed "the right to use the biological samples, the declaration of consent by participants, the equipment and the content of the biobank as well as the database comprising the medical histories of the donors."[119]

The plans of the acquiror, however, could not be realized due to a specific legal regime preventing the disposal of this class of assets.[120] Moreover, the EU Commission subsequently confirmed, in response to a related question raised in the European Parliament, that biological samples are "able to reveal information which [refer] to an identified or identifiable person," and as a result are protected as personal data.[121]

### 4.3.2. *Re Southern Pacific Personal Loans Ltd:* Data Protection Law as Red-Tape

All regulations create red tape. Today, in the age of the regulatory state, this should be common knowledge. Data protection law is no exception. The forms in which red-tape appears and its onerousness range from simple to complex, and while some forms of data protection red tape are relatively easy to deal with, others generate complex systemic issues.

Moving forward, bankruptcy courts should be prepared to pay special regard to personal data, as well as ensure they are in a position to provide guidance for various insolvency practitioners (and others who potentially have access to personal data in various documents or electronic databases)

118 The synopsis of the case is based on Piciocchi, C. *et al.*, 2018, p. 181.

119 *Ibid*., p. 182. Cited also in Bork, R., Zwieten, K. van, 2022, para. 78.13.

120 The conditions that applied to them were regulated by Italian Legislative Decree 196/2003. See Piciocchi, C. *et al.* 2018, p. 182.

121 Piciocchi, C. *et al.* 2018, p. 182.

in order to guarantee the proper implementation of data protection laws. No simple, generally-applicable formula seems to exist because the cases involving this interface are so fact-sensitive. Moreover, personal data protected by European data protection laws may be in documents or electronic databases (e.g. email exchanges) alongside confidential and/or privileged information normally not protected by data protection but by other laws, as it was in the 2019 UK case *London Oil and Gas Ltd (In Administration)*.[122] Numerous related dilemmas can emerge – as the case demonstrates – such as how to conceive a method to determine to which documents insolvency practitioners should have access to and which they should not, who should bear the costs of such a search, and what is the best method of ensuring that related processes do not unnecessarily disrupt the administration of bankruptcy cases. The hinted-at selection is a task that can be performed if the court is capable of formulating appropriate search-terms to limit the number of accessible documents.[123]

What *Southern Pacific* (a case that unearthed two systemic problems) showed was of crucial relevance to the bankruptcy–data privacy interface and was related to two essential questions that both fundamentally affect the "bankruptcy mathematics" (namely, the expected returns of creditors calculated based on average recoveries) and the underlying core principles. The first is that it showed how prohibitively expensive the implementation of the European data protection system could be in the specific context of insolvency proceedings. The second consequence was the realization that the enforcement of data protection regulations directly affects the rights of creditors and equity holders in insolvency proceedings, and the administration of bankruptcy cases more broadly. In short, data protection red tape has the potential to "eat up" a substantial part of the estate from which creditors and the costs of insolvency proceedings should be financed. This must have been a rude awakening for insolvency practitioners and others in the industry, both in the UK and elsewhere. The reactions seem to have remained conspicuously modest in Europe, though foreign creditors doing business with European partners, or having affiliates in the Old Continent, should heed to the lessons of *Southern Pacific* and hone their insolvency tactics accordingly.

The concrete and self-explanatory facts and quantitative data that the liquidators were faced with in the case, in brief terms, were the following. The debtor company provided personal loans to individuals in the UK, secured by way of a second mortgage on their homes, before it became insolvent. Although these were transferred to various Special Purpose

122 *London Oil and Gas Ltd (In Administration),* [2019] EWHC 3675, 2019 WL 08112165.
123 *Ibid.*

Vehicles (SPVs) in securitization projects, the title on the mortgages and the data remained with the debtor. Because of this, even after the debtor company went into voluntary liquidation, former clients aimed their requests for provision of related data (Data Subject Access Requests – DSARs) at the appointed joint liquidators. These requests, moreover, were typically blanket requests for a complete set of statements.[124]

The numbers were as follows. The cost of satisfying a DSAR was £455 exclusive of Value Added Tax (VAT) plus the fees payable to an outside loan servicing company (Acenden) for storing the data and providing related services.[125] According to the calculations of the joint liquidators, as 88 DSARs were filed per month, which cost £40,000 in total monthly, the yearly cost of satisfying DSARs could have foreseeably amounted to £589,000. As this amount had to be deducted from the estate, the continued implementation of data protection laws would have further reduced payments to creditors because according to estimations, only about £3m was available for distribution while liabilities totaled £10,297,000.[126] Per data protection law, the joint liquidators were deemed to be "data controllers" responsible for the proper implementation of relevant regulations and the provision of data to those who submit DSARs within 14 days.[127] Cognizant of the absurdity of the situation, the joint liquidators applied to the court, requesting clarification on the following question: may they refuse to comply with the DSARs, or alternatively, may they dispose of the data under their control?[128]

Although the court eventually allowed the joint liquidators to dispose of the data,[129] this was done based on a line of reasoning with which the Information Commissioner disagreed.

There is one last point that should be noted. Namely, the exorbitant red tape surfacing amidst liquidation proceedings in DSAR form concerned redeemed loans, documents, and data, "[n]one of [which was] any longer required for any business of the company or for any purposes of the liquidation, such as the realisation of assets."[130] This was the crucial factor that caused the court to direct the liquidators to dispose of this data in accordance with UK data protection law,[131] a move they justified by

124 *Southern Pacific,* para. 9.
125 *Ibid.*, para. 7.
126 *Ibid.*, para. 10.
127 *Ibid.*, para. 14.
128 *Ibid.*, p. 427.
129 *Ibid.*, para. 41.
130 *Ibid.*, para. 39.
131 *Ibid.*, para. 41.

invoking one of data protection law's basic principles, according to which "personal data shall not be kept for longer than is necessary for the purpose or purposes for which it was processed."[132] Before this case, however, it had not been unequivocally clear whether liquidators and other insolvency practitioners had a right to do so. Moreover, *who* determines which data remains necessary and *when* it ceases to be necessary remains contestable.

Let us now take a look at the other problematic aspect of the case that concern the status of the joint liquidators under data protection law.

### 4.3.3. *Re Southern Pacific Personal Loans Ltd:* Can the Insolvent Debtor Company Be the Data Controller in Insolvency Proceedings?

The status – and therefore the powers, rights, and liabilities – of liquidators under data protection law was yet another fundamental but contested issue in the case. The way this issue was resolved affects not only the disposability of data, but also the potential administrative and criminal liability of liquidators.

The fact that there was a "tension" between the decision and reasoning of the court and the policies of data protection laws can be concluded already from the fact that while the Commissioner considered both the joint liquidators and the debtor company to be data controllers,[133] the court disagreed and held that they were not the controllers of data processed by the company prior to liquidation.[134] The consequence of this position was that the joint liquidators could not be held personally liable for non-compliance with data protection laws, such as – but not limited to – not responding to DSARs.[135] The essence of this case's long, somewhat artificial, yet complex reasoning, though supported by authoritative precedents, revolved around the question whether the liquidators were acting in the capacity of liquidators, or as agents of the debtor company. The court eventually opted for the latter. As was concluded in the related 2013 *Oakley Smith v. Information Officer* case,[136] "joint liquida-

132 *Ibid.*, para. 39.

133 *Ibid.*, para. 29.

134 *Ibid.*, para. 35.

135 *Ibid.*, para. 38.

136 *Oakley Smith v. Information Officer,* EWHC 2485 (Ch), 2013 WL 3994837 (2013). The case was initiated by the joint liquidators of Southern Pacific Personal Loans Limited. There was no respondent named and the "Information Commissioner (the Commissioner) was notified of the application and provided with the application notice and supporting evidence." *Ibid.*, para. 2.

tors are not data controllers for the purposes of the [Data Protection Act] as regards the data processed by or on behalf of the company in respect of the redeemed loans."[137]

Similar issues were adjudicated by the High Court in the post-GDPR case of *Dawson-Damer v. Taylor Wessing,*[138] which involved private trust litigation. The claimants were beneficiaries of a number of unfavorably restructured trusts, which eventually sued the trustees in the Bahamas and filed requests for access to personal data (DSARs). Three issues arose.[139] First, the solicitors (i.e., Taylor Wessing) objected with the argument that the claimants were exploiting data protection law as a discovery tool, as the so-acquired personal data was to be used in the Bahamian litigation. Contrary to old precedents, such as *Durant v. Financial Services Authority* 2003, where such data requests were rejected by courts on the basis that data protection law should not be used "as a proxy for third party discovery with a view to litigation,"[140] because access to personal data had been elevated to the level of a European fundamental right and further strengthened by the GDPR, the stance of UK courts had thus changed accordingly. Second, as in the aforementioned German case, Taylor Wessing here also unsuccessfully invoked the legal professional privilege (LPP) objection to justify its refusal to provide data.

The third issue was related to whether the request amounted to *disproportionate effort,* which as such could be rejected by Taylor Wessing, especially as old paper-form trust files were at stake. The court was of the opinion that the files were held in a "relevant filing system", and notwithstanding that some were organized in a chronological order and some not, the solicitors had to search these files for the claimants' personal data.[141] This detail is of relevance to us herein because the discovery–litigation–data protection interplay raises concerns similar to those raised by the data protection–insolvency law interface.

The 2019 *Green v. SCL Group*[142] case should also be mentioned, not only because it related to the 2018 Facebook–Cambridge Analytica

137 *Ibid.,* para. 51.

138 *Dawson-Damer v. Taylor Wessing* [2019] EWHC 1258 (Ch).

139 *Dawson-Damer v. Taylore Wessing LLP,* [2020] EWCA Civ 352, 2020 WL 01158643, para. 6.

140 Quoted and discussed in Brimsted, K., Evans, T., 2019, Data subject access requests – Three Illuminating UK Cases, *Privacy & D.P.,* Vol. 19, No. 7, p. 6.

141 Brimsted, K., Evans, T., 2019, p. 7.

142 *Green v. SCL Group Ltd* [2019] EWHC 954 (Ch); [2019] B.P.I.R. 833; [2019] 4 WLUK 301 (Ch D). Vincent John Green and Mark Newman were the joint Administrators of each of the companies involved in the Cambridge Analytica scandal, which acquired commercial data from multiple vendors, aggregated and analyzed the so-acquired

scandal,[143] but rather because the court agreed with the *Southern Pacific* case's holding that administrators are not data protection controllers.[144] Moreover, it further specified that consequently they are not required to respond to DSARs, nor is there any obligation on them to investigate data protection breaches by insolvent companies.[145] Instead, investigations are within the competence of the Information Commissioner's Office.[146] However, even here, the court admitted that "the implications of the Southern Pacific decision remain to be worked through;"[147] a comment that presumably refers to the ongoing and unresolved tensions inherent in the current state of the data protection–bankruptcy interface.

## 5. United States Perspectives

### 5.1. THE PRESENT STATE OF AFFAIRS: TOWARDS A COMPREHENSIVE DATA PRIVACY LAW?

As described briefly above, US data protection (or privacy law) is scattered across many pieces of legislation with no general statute akin to the European GDPR, leading to the very term "privacy law" often being apostrophized and compartmentalized into various sub-categories. This era of compartmentalized consumer data privacy law, however, has begun to gradually give way to a comprehensive one, a process that picked up pace post-COVID 19, primarily at the State-level, though in 2020 alone eleven comprehensive privacy bills were introduced in the Congress.[148] Following California, Virginia, Colorado, and Utah, Connecticut[149] was the fifth state to pass general data privacy regulations as of the time of writing.

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data, and eventually used it for "micro-targeting", i.e., targeting individuals. Political parties and campaign groups also used their services to influence voting behavior. *Ibid.*, para 1. Part of the story was that the ICO raided the premises of Analytica, seized servers and substantial amounts of additional evidence, thereby making the work of Administrators impossible.

143 See Anonim., 2019 'Facebook to pay $5bn fine to settle Cambridge Analytica claim' – Case Comment, *Comp. & Risk*, Vol. 8, No. 4, pp. 1, 15.

144 *Green v. SCL Group Ltd*, para. 75.

145 Brimsted, K., Evans, T., 2019, p. 8.

146 *Ibid*.

147 *Green v SCL Group Ltd*, para. 72.

148 For the list see Chander, A., Kaminski, M. E., McGeveran, W., 2021, Catalyzing Privacy Law, *Minnesota Law Review*, 105, p. 1733, p. 1735, n. 7.

149 Substitute Senate Bill 6 (Public Act 22–15), signed into law on 10 May 2022, to step into force on 1 July 2023. See the blog of Rosenkotter, E., Wutscher, M., 2022, Fifth

The California statute – the California Consumer Privacy Act of 2018[150] (CCPA) – seems to have gone the farthest by introducing a "sweeping set of reforms" with "litany of protections" to consumers,[151] which is of major importance because much of the US technology industry is located in this state. In addition to the local kin of the European "right to be forgotten",[152] what is more important for our discussion is that according to this act consumers may prohibit sale of their data to third parties.[153] No wonder then that Schwartz attributed this to the impact of the GDPR.[154] Still, the Californian act – yet to be tested whether it has "teeth" or it is merely a "paper tiger" – represents a "sectoral model, narrower than the [European] GDPR,"[155] and it operates in a predominantly ex-post fashion, as opposed to the GDPR's ex-ante regulatory approach.

Irrespective of these recent vintage changes at the state level to some extent representing rapprochement with European data protection laws, the basic difference aptly canvassed by Schwartz and Solove in 2014 essentially still stands. As they put it, related to and through the central category of "personally identifiable information" (PII), "[t]he U.S. approach involves multiple and inconsistent definitions of PII that are often particularly narrow. The EU approach defines PII to encompass all information identifiable to a person, a definition that can be quite broad and vague."[156] Although the US legal category of PII is not equal to Europe's "personal data", they can be perceived as kins, the juxtaposition of which properly expresses the opposing fundamental philosophies on the two sides of the Atlantic that subsists to this day.

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State in the Union Becomes Fifth State to Enact Data Private Legislation, *InsideARM,* 17 May, (9. 9. 2023).

150 California Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798. 100–199 (West 2021) (came into force January 2020).

151 Akselrad, M. R., 2021, The Liquidation of Data Privacy: How and Outdated Bankruptcy Code Threatens Consumer Information, *Boston College Intellectual Property & Technology Forum*, 1, p. 8.

152 CCPA §§ 1798.100, 1798.105.

153 CCPA § 1798.120 ("A consumer shall have the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information.")

154 Schwartz, P. M., 2019, Global Data Privacy: The EU Way, *New York University Law Review*, 94, pp. 771, 810.

155 Nicola, F. G., Pollicino, O., 2020, The Balkanization of Data Privacy Regulation, *West Virginia Law Review*, Vol. 123, Issue 1, p. 63.

156 Schwartz, P. M., Solove, D. J., 2014, Reconciling Personal Information in the United States and European Union, *California Law Review*, 102, abstract p. 877.

## 5.2. THE KEY TOOLS FOR PROTECTING INDIVIDUALS' PRIVACY RIGHTS IN US BANKRUPTCY LAW

Heightened concern for privacy issues in US bankruptcy law was expressed quite early on, before such concern had been articulated in Europe or most other countries around the globe. First and foremost, concern about privacy issues is directly visible in very few provisions of the US Bankruptcy Code itself.[157] Section 363 is undoubtedly the most relevant here, which imposes restrictions on the use, sale, or lease of personally identifiable information on individuals. The issue is rather that these restrictions offer very limited protection to consumers, as illustrated by various cases, some of which are mentioned in this paper. Hence, it was properly noted by Akselrad that "[t]he heightened protections for customer privacy built into §363(b) of the Bankruptcy Code, aimed at remedying precisely these ills, seem poorly suited to handle the type of data in which social media and technology companies traffic today, putting almost nothing between those trying to acquire data and creditors who would benefit from its sale."[158]

Even though it is only remotely of any relevance, one should also not disregard Bankruptcy Rule 2004 on "examination" of an entity (including individuals, partnerships and corporations),[159] which essentially delineates the specific issues that may be examined by the court and which of them must remain protected as confidential matters. Specified circumstances that potentially impact bankruptcy proceedings may also be examined.[160] Although appearing as "confidentiality" and not as "privacy" matters, they should not be circumvented as their interplay may come up as an issue.

One should also mention less "visible" sources of law, such as the Policy on Privacy and Public Access to Electronic Case Files of the US Judicial Conference approved in March 2008, which initially protected

157 See in particular Bankruptcy Code sections 101(41A) and 363(b)(1).

158 Akselrad, M. R., 2021, p. 22.

159 Based on Bankruptcy Rule 2004, section (b), "entities" and the debtor may be examined with relation to the acts, conduct, property of the debtor, including liabilities and the debtor's financial condition. Entity, on the other hand, is defined under Section 101(15) of the Bankruptcy Code to include also "person", defined by Section 101(41) including – in addition to partnerships, corporations, and some governmental units – also individuals, which is the focus of our observations.

160 Rule 2004, section (b) of which reads that the examination of an entity or a debtor may relate "*only* to the acts, conduct, or property or to the liabilities and financial condition of the debtor" (emphasis by author), though also to "any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge."

only debtors' social security numbers from public disclosure,[161] but later expanded this protection through amendments.[162] The EU GDPR lacks rules tailored specifically to insolvency, suggesting the conclusion that these are still awaiting the European courts and the drafters of bankruptcy laws of the Member States, given that substantive bankruptcy law remains national law.

The US's comparatively rich case law touching upon privacy matters in a bankruptcy context also merit mention. The practice shows, namely, that while the European data protection infrastructure has the advantage of being comprehensive, somewhat counter-intuitively, the US's narrower special legal regime for bankruptcy–data privacy offers more material for comparative scholarship.

### 5.3. THE 2005 AMENDMENTS OF THE BANKRUPTCY CODE: HEIGHTENED ATTENTION TO "PERSONALLY IDENTIFIABLE INFORMATION"

The central policy goal of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act[163] was to combat abuse of the bankruptcy system by individuals capable of paying their debts but nonetheless turning to bankruptcy courts to discharge them and "to keep a minimally necessary amount of [their] property."[164] What is less known is that this amendment to the Bankruptcy Code, which included the adoption of Chapter 15 for cross-border cases and the "means test" as a "trigger for a presumption of ... abuse"[165] by individual debtors, also made an important advancement in the protection of consumer privacy information, mainly in response to lessons learned from the 2000 *Toysmart.com* bankruptcy case.[166] This

161 Rhodes, S. W., 2003, Bankruptcy Decisions on Privacy Issues, prepared for American Bankruptcy Institute 2003 Annual Spring Meeting, April 10–13, ABI 557, paras. 7–8.

162 The text of the policy is available at https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files, (1. 3. 2023).

163 Pub. L. No. 109–8, 119 Stat. 23 (2005).

164 Tabb, J. C., 2020, §1.1., p. 4.

165 *Ibid.*, §2.6, p. 149.

166 See *In re Toysmart.com Inc. LLC*, No. 00–13995 (Bankr. D. Mass., 17 August 2000), in which the court rejected the FTC – Toysmart settlement that placed several restrictions on the sale of the private consumer information in Toysmart's possession notwithstanding the existence of a policy in which the debtor (Toysmart) promised not to share such information with third parties ever, and the preceding *Federal Trade Commission v. Toysmart.com Inc.,* No. 00–11341-RGS, in which the settlement was announced and the complaint filed (D. Mass., 21 July 2000). See, Baxter, M. St. P., 2018, The Sale of Personally Identifiable Information in Bankruptcy, *American Bank-*

early regulatory reaction shows that the US began tackling the bankruptcy–data privacy nexus earlier than the Europeans – and presumably the rest of the globe.

As a reminder, the basic rule is that one of the responsibilities of the trustee (or of the Debtor-in-Possession in reorganization cases) is to sell or lease the estate's assets. Applying this basic rule in data protection cases means that the trustee is required to sell any data and information if there is a market demand for them. The task of the lawmaker was thus "to strike an efficient and just balance between the needs of the bankruptcy estate and the rights of all interested parties,"[167] with the latter including consumers and individuals whose personal privacy rights are at stake. The response of the US lawmaker was partial only: safeguards were introduced only with respect to liquidation (Chapter 7) proceedings, but not for Chapter 11 reorganizations. Because of this, some commentators see in the crucial section 1129 (which concerns confirmation of the reorganization plan) as "a dormant threat to consumer information" because "the immutable progression of technology aimed at cultivating user data necessitates a more comprehensive approach than merely relying on judicial discretion."[168]

The newly balanced 2005 formula aimed "[t]o protect consumers when a debtor proposes to sell their personal information."[169] The category of private information that the amendment aimed to protect was named Personally Identifiable Information (PII),[170] which was defined to include personal data such as first and last names, geographical or electronic addresses, telephone numbers, social security account numbers, or the account numbers of credit cards issued to individuals that provided data to the debtor subject to bankruptcy proceedings "in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes."[171]

A three-pronged protection formula was introduced, to be resorted to in case the debtor, on the date of the commencement of the case, has express privacy policies that prohibit the sale or lease of private consumer information. Alternatively, as some authors suggest, prohibition of sales in certain situations might be implied as well if the debtor "fails to disclose

*ruptcy Institute BI Law Review*, Vol. 27, p. 7, also 1 Andrews Electronic Privacy Litig. Rep. 3, 1 NO. 3.

167 Tabb, J. C., 2020, p. 446.

168 Akselrad, M. R., 2021, p. 14.

169 Baxter, M. St. P., 2018, p. 3.

170 Bankruptcy Code section 101(41A).

171 Bankruptcy Code section 41(A)(A).

that the debtor may sell [private consumer information] to third parties."[172] The first prong of the test will only consider the sale of consumer privacy information to third parties if doing so is consistent with the debtor's data policies.[173] If such a policy exists or can be implied, then the second prong requires the appointment of a consumer privacy ombudsman[174] "to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale of PII,"[175] and to provide the court with pertinent information (usually by filing a report).[176] The third control mechanism is the bankruptcy court itself, which is entrusted with the responsibility to ensure that any sale would not violate "applicable nonbankruptcy law."[177]

The US's reliance on an ombudsman in the bankruptcy context is in and of itself interesting because "ombudsmanship" as a governmental institution was "invented" in Sweden after the deposition of their King in 1809, for tasks far removed from bankruptcy. In any event, the ombudsman approach described above may be useful for other countries pondering possible solutions to the mounting data privacy challenges cropping up in the context of insolvency law. Though, at least as the pertinent data from 2023 shows, the system has rarely been resorted to by consumers in the US, and "the law applies only to a subset of bankruptcy cases, and while the work of the ombuds may affect the sale of consumer data in those cases, legal protection is less than most would assume."[178]

The additional caveat, perhaps best demonstrated by the *UK Pacific Railway* case discussed above, is that the ombudsman is in itself additional red tape, and "because of the administrative costs to the bankruptcy estate of a consumer privacy ombudsman, debtors and creditors may not view

172 Baxter, M. St. P., 2018, p. 4.

173 Bankruptcy Code section 363(b)(1).

174 See Bankruptcy Code section 332, according to which a 'disinterested' third party is to be appointed as ombudsman by the United States trustee, upon order of the court, within 7 days "before the commencement of the hearing", at which the court will decide on sale or lease of consumer privacy information (as per section 363(b)(1)(B).

175 Baxter, M. St. P., 2018, p. 4.

176 *Ibid*. For illustration of such reports, see Baxter, M. St. P., 2018, notes 22–24, who himself has served in the capacity of a consumer privacy ombudsman. See, e.g., Second Report of Michael St. Patrick Baxter Consumer Privacy Ombudsman, p. 49, *In re Old BPS US Holdings, Inc.,* No. 16–12373 (Bankr. D. Del. 1. February 2017) in which the ombudsman was of the opinion that the sale proposed by the debtor was consistent with the existent privacy policy, if consumers were provided with notice on the transfer. *Ibid.*, Baxter, M. St. P., 2018, p. 5, note 23.

177 Bankruptcy Code section 363(b)(1)(ii).

178 Bradley, G. C., 2023, Privacy Theater in the Bankruptcy Courts, *Hastings Law Journal*, Vol. 74, Issue 3, p. 607.

the ombudsman's appointment to be in their interests and may have little incentive to favor such an appointment."[179] Even the scarce data on ombuds fees corroborate this,[180] notwithstanding that discounts in the fees or caps on the total fees seem to be quite common.[181] The average fees, expenses, and hourly fees of an ombudsman do also show that resorting to them is not cheap.[182]

### 5.4. US BANKRUPTCY–DATA PRIVACY CASES: CAPITA SELECTA

Although a detailed canvassing of what the US case law has to offer on the bankruptcy–data privacy interplay is beyond the scope of this article, a snapshot of a few cases is more than justified. While some US court cases resemble their European counterparts to various degrees, many revolve around quite different kinds of fact patterns and conclude with judgements founded upon distinct policies and legal positions. For example, the cases involving companies that gathered consumer "big data" seem to bring to the surface problems that have a lot in common with European ones, including major systemic questions, as was the case in the aforementioned *Toysmart* case.

Instances involving single individuals (as opposed to organizations) in possession of private data and in seemingly simpler fact scenarios have also been reported in greater numbers in the US compared to Europe (at least in English language). These US individual cases seem to have escaped the attention of comparative scholars, but both cases involving individuals and those involving organizations share a valuable characteristic: they both illustrate new challenges that bankruptcy law faces in all sorts of niches across the globe where modern bankruptcy laws are in place. A hopefully instructive selection ensues, though a systematized in-depth analysis thereof will be left for a later piece.

179 Baxter, M. St. P., 2018, p. 15.

180 According to Bradley's dataset, the largest ombuds fees – above $305,000. – were paid in the large case *In Re Borders Group, Inc.* [453 B.R. 477, Bankr. S.D.N.Y. 2011]. See Bradley, G. C., 2023, p. 643.

181 *Ibid.*, p. 643.

182 As Bradley put it, after the ombuds collect data, "[t]hey file a report and sometimes appear in court to answer questions. Then they file their fee application, obtain payment, and go about their business." In the dataset with 141 cases, the median total fees were $13,876.04, the median hourly rate was $474, the median hours spent by ombud 29.55 hours, as the median expenses amounted to $133.70 (Bradley, G. C., 2023, p. 643).

### 5.4.1. Big Data Cases

As well as the oft-cited 2000 *Toysmart* case, it is worth mentioning the more recent "big caliber" *Caesar's Entertainment* case,[183] which revolved almost exclusively around a "collection of aggregated personal and behavioral data on over forty-five million individuals."[184] The debtor was part of a corporate group running casinos that had amassed a debt load it could not handle, which led to another conglomerate acquiring it in a leveraged buyout in the aftermath of the 2008 Credit Crunch.

Big data entered the picture in the case because the group had launched the Total Rewards Program in 1998 whereby "Caesars would give away free meals, tickets, and other amenities to returning customers while receiving information on the customers, including their identity, preferences, travel history, and gambling patterns, all in the name of providing greater customer service."[185] By January 2015, when the largest unit of the group filed for Chapter 11 reorganization, proceedings with $18bn liabilities, their most valuable asset turned out to be the data collected through the Total Rewards Program. A dispute arose between the debtor's creditors and the group's parent company (which remained solvent) because the collected data (valued by creditors at $1bn) was transferred to the parent company before the bankruptcy was filed.[186]

More nuanced personal rights (biometric data)[187] were exposed in the bankruptcy case of the Illinois *Pay by Touch* company, which used to supply "the largest fingerprint scan system in Illinois," its finger-scan payment technology having been sold to about 400 supermarkets in the US, during the period from 2002 to the company's demise in 2008.[188] Although a considerable number of consumers was unwilling to pay and let the price be deducted from their checking accounts by merely placing their index-finger on the finger-scan at the POS (point-of-service),

183 *In re Ceasars*, 2015 U.S. Dist. LEXIS 137235, p. 10.

184 Akselrad, M. R., 2021, p. 17.

185 *Ibid*.

186 Zimmerman, A., 2016, Caesars Bankruptcy Examiner: Fraudulent Conveyance Damages Could Reach $5.1B, *Forbes,* 16 March, (https://www.forbes.com/sites/spleverage/2016/03/16/ceasars-bankruptcy-examiner-fraudulentconveyance-damages-could-reach-5–1b/#3b0fb3a143f9, 16. 10. 2023). Cited in M. R., 2018, note 104.

187 The Illinois Biometric Information Privacy Act defines biometric data to include "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." See 74 ILCS 14/10.

188 Garry, M., 2008, Biometric Payment Ends after Vendor Files Bankruptcy, in: *Supermarket News*, 31 March (https://www.supermarketnews.com/technology/biometric-payment-ends-after-vendor-files-bankruptcy, 7. 9. 2023).

thousands of consumers' biometric data became exposed during the *Pay by Touch*'s bankruptcy.[189] In fact, the threat that such data could be "sold, distributed, or otherwise shared through bankruptcy proceedings without adequate protections for Illinois citizens"[190] has led to the enactment of Illinois' Biometric Information Privacy Act.[191] The act imposes duties similar to those contained in the European GDPR on private entities in possession of biometric data.[192]

### 5.4.2. Cases Tackling Individuals' Privacy Rights in the Bankruptcy Context

The bankruptcy cases involving individuals also provide valuable insights into the complexities of the bankruptcy–data privacy interface. One line of cases that tackled the possibility of "expunging" otherwise public bankruptcy information (the US variant of the European "right to be forgotten") is illustrative of the myriad variations in which this seemingly simple issue may appear, some of which may not yet have even surfaced in Europe. As according to the Fair Credit Reporting Act[193] bankruptcy filings can be reported for no more than ten years on an individual's credit file, US discretion-based court decisions demonstrate how innovative courts can be, and it also shows that the degree of protection afforded to individuals can vary greatly. It should be noted here that according to some US scholars, the right to be forgotten is "un-American and in constant conflict with [US] constitutional principles,"[194] and US bankruptcy law does not nor is it intended to offer individuals "an opportunity to *restore* their financial reputation" in a manner analogous to the way in which the European right to be forgotten allows individuals to "repair" their reputation.[195]

The factual background of each case is also instructive. Thus, in the 2021 case *In Re Chapman*,[196] the expungement or sealing of bankruptcy

189 The case has become a complex bankruptcy case implicating the whole group that Pay by Touch was part of. See *In Re Solidus Network WL* 8462968 (2008).

190 *Heard v. Becton* 440 F.Supp. 3d 960 (2020).

191 74 ILCS 14, P.A. 95–994, eff. 10–3–08.

192 See, e.g., section 15 on retention, collection, and destruction of biometric data, making disclosure of a written policy on these duties.

193 Fair Credit Reporting Act, 15 U.S.C. Section 1681c(a)(1).

194 George, E. J., 2018, The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S., *Georgetown Law Journal*, Vol. 106, No. 3, pp. 905-[iii]t 923, p. 923.

195 *Ibid.*, p. 923.

196 *In Re Chapman* 2021 WL 1346046, 6+, Bkrtcy.E.D.Wis. Note that more grounds were advanced by the debtor in the case than the one highlighted above, though each was rejected.

data was requested by a mother whose daughter made three consecutive bankruptcy filings against her without informing her and without having received any "durable" power of attorney from her mother for the purposes of managing her finances. The mother learned about her bankruptcy case only when a social worker visited to inform her about the sheriff's pending sale of her house. The court did not find the records, which were open to the public, to be "scandalous or defamatory",[197] and thus rejected both requests.

In the recent case *In Re Ploetz*,[198] the debtor's requests to reopen his case, vacate his discharge, and expunge his records were rejected by the court "[b]ecause there [was] no indication in the record that his case was filed without his authorization or the filings were untrue."

Somewhat more nuanced responses were given by the courts in two earlier cases that found middle-ground solutions instead of decisively rejecting expungement outright. The solutions in those cases were arrived at without any statutory basis.[199] The fact patterns of the two cases were simple: in the 2001 case *In Re Buppelmann*,[200] the debtor's lawyer filed for bankruptcy by forging the client's signature, while in the 2009 case *In Re Joyce*,[201] the debtor asked for expungement (worded in the petition as a request "to vacate") because the public bankruptcy records were "damaging his ability to obtain credit and 'move along with his life,'" and also claiming losses arising from a "bogus loan", but otherwise accepting his listed debts. While in the latter case the court rejected the request because none of the losses were caused by fraud, in *Buppelmann*, the court ruled that the claimant "was entitled to relief, but not in nature of expungement of records of this fraudulent filing."[202] The remedy afforded to the debtor was a note on the bankruptcy records which was thought sufficient to alert those checking the docket and thereby to prevent negative consequences, with the note stating that "the dismissed case was the result of fraud committed by a party other than the debtor."[203]

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197 As per §107(b)(2) regulating "public access to papers", "the bankruptcy court may ... (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title."

198 *In Re Ploetz* 2022 WL 190429 (Bkrtcy.E.D.Wis.).

199 Sections 105 (equitable powers of the bankruptcy court) and 107(b) might have come into sight. See *In Re Buppelmann* 269 B.R. 341 (Bkrtcy.M.D.Pa. 2001), p. 341.

200 *In Re Buppelmann* 269 B.R. 341 (Bkrtcy.M.D.Pa. 2001).

201 *In Re Joyce* 399 B.R. 382 (Bkrtcy.D.Del. 2009), p. 385.

202 *In Re Buppelmann*, p. 341.

203 *In Re Chapman*, para 3, p. 9.

### 5.4.3. Providers of Privacy Rights-Related Services in Bankruptcy Proceedings

Another class of cases relates to the potential abuse of private data when various services are provided by external companies or agents in bankruptcy proceedings, i.e., in situations similar to the aforementioned 2016 German *Rockenhausen* case. The facts of the recent *In re Madison Square Boys & Girls Club, Inc.* case[204] are telling in that respect, because they foreshadow new scenarios in which third-parties provide various services in bankruptcy proceedings, a process in which personal data might end up being mishandled or abused.

The case concerned the work of *claims agents* who may be retained to assist court clerks for claims-processing in bankruptcy proceedings,[205] and who may be remunerated for those services. Problems can arise because claims agents may engage private third parties operating on a for-profit basis, in this case for the facilitation of claims-trading. In the case, the for-profit third party operated a claims-trading website and charged a commission under an agreement with the claims agent. Part of the agreement involved the synchronization of their platform's data with the court's, which resulted in the court data on bankruptcy being handed over to private parties. Although the contract was duly revealed to the court, the engagement of the claims agent under those terms was denied as that would have violated the Code of Conduct for Judicial Employees.[206]

What matters here, however, is that such engagements of private parties may generate similar concerns as the sale bulk data. Or worse, myriad abuses of "known unknowns" type: to wit, "risks which have not been resolved, but which we know are risks and which we know have yet to be resolved."[207]

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204 Case # 22–10910, Southern District of New York. In the jurisdiction, retention of a claims agent is a requirement if the number of creditors or equity holders in a bankruptcy case is 250 or above. See also Jonathan Randles, Bankruptcy-Service Providers are Questioned over Deals with a Claims-Trading Startup, WSJ 25 Aug. 2022.

205 Claims agents may be retained based on 28 U.S.C. §156(c).

206 As claims-agents are the 'extended hands' of court clerks, the canon that a judicial employee should avoid impropriety and the appearance of impropriety in all activities applies also to them. The same applies to the canon that a clerk may collect only fees prescribed by law.

207 This epistemological digression on the classification of risks, allegedly stems from US Defense Secretary Donald Rumsfeld, according to Alastair Hudson, who used it together with the less problematic expression of 'known knowns' and the most 'dangerous' 'unknown unknowns' to describe financial risks related to the theme of the Banking Crisis of 2008. (Hudson, A., 2009, *The Law of Finance*, Mytholmroyd, Sweet & Maxwell, para. 32–02, p. 457).

#### 5.4.4. European Data Protection Law Versus US-Style Discovery

US cases reveal yet another type of data protection–bankruptcy law interface: use of European data protection laws as a defense against the charge of failing to supply documents following a discovery order of a US court. In the illustrative civil case of *United States v. Pivaroff,*[208] launched to enforce federal tax liens and a related judgment against the defendants (Ivan and Gwendolyn and two entities controlled by them), the Blenheim Trust Company Ltd. seated in Guernsey, Channel Islands – which served as a trustee for Pivaroff – was ordered to produce certain documents by a US court. Blenheim, however, refused to do so by invoking European data protection regulations and the liability that may ensue for the failure to abide by the regulations. This claim was not accepted by the US court as the harm or prejudice to Blenheim Trust was not particularized as is required by US Federal Rules of Civil Procedure.[209]

Bankruptcy law came into the picture in the case because the counsel for Blenheim supplied documents on some relevant third parties in a redacted format – contrary to the request of the plaintiff. These third parties have "filed for bankruptcy protection" and were thus protected by the automatic stay provisions of the Bankruptcy Code.[210] The court held that "the discovery requests were not directed to stayed entities, and the fact that the documents contain factual information about stayed entities is not grounds to prevent discovery of information relevant and discoverable within the meaning of Fed. R. Civ P. 26(b)(1)."[211]

## 6. Middle Ground Jurisdictions

### 6.1. MIDDLE GROUND DATA PRIVACY LAWS AS NEW GLOBAL MODELS?

A quick glance at the data evidencing the heightened importance that data privacy law has gained globally within the past several decades reveals that there are now more models of data protection, and therefore no account of models of data protection is complete unless it sketches at least a brief account of all the major models. These models differ in many ways,

208 *United States v. Pivaroff*, No. 2:13-cv-01498-APG-PAL (26 August 2015, U.S. Dist.C. Nevada).

209 Fed. R. Civ. P. 26(c).

210 *US v. Pivaroff* – Order-and-Report and Recommendation for Contempt Proceedings, p. 3.

211 *Ibid.* The court held the Trust and its director in civil contempt and fined them $ 1,000.00 per day until the required documents were submitted to the judge *in camera.*

and not only in their approach to the bankruptcy–data protection interface. China, for example, although influenced by EU data protection law (lately by the GDPR), eventually opted for its own route, which in some respects constitutes a new version of the European solution better suited to the Chinese legal environment.

Besides China, Canada is another middle ground system,[212] differing from both the US and Europe but sharing some core features from both, though perhaps more its southern neighbor. In particular, while the EU law's aim is to "centrally supervise the private sector's use of personal data" in order to protect "dignity", "[i]n Canada, privacy protection is focused on individual autonomy through personal control of information."[213] As we know already, in the US, "privacy protection is essentially liberty protection, i.e., protection from government."[214]

From the perspective of the bankruptcy–data privacy interface, however, the crucial point is that the middle ground systems could equally come forward with telling cases that have not yet surfaced elsewhere, and both these fact patterns and the legal responses given thereto could also end up being instructive to others. Surveying the cautious yet unorthodox evolution of data protection law in China and its idiosyncratic interplay with their first-ever individual bankruptcy proceedings in the testing phase, and then contrasting that with the mature Canadian system, is an invaluable tool for grasping the complexities of the bankruptcy–data privacy interface.

### 6.2. CANADIAN PERSPECTIVES

The modern history of Canadian privacy law can be dated to the passage of the 1983 federal Privacy Act establishing the office of the Privacy Commissioner of Canada. Initially, however, the Commissioner's mandate was limited to overseeing the work of about 250 federal departments, agencies, and Crown corporations.[215] The Office's duties were extended to the private sector only with the Personal Information Protection and Electronic Documents Act (PIPEDA),[216] which was brought into force in several stages over the period from 2001 to 2004. Despite being a generally

212 See, e.g., Levin, A., Nicholson, M. J., 2005, Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground, *University of Ottawa Law & Technology Journal*, Vol. 2, No. 2, pp. 357–395.

213 *Ibid.*, abstract.

214 *Ibid.*

215 Office of the Privacy Commissioner Canada, A Guide for Individuals – Protecting your Privacy (2015), p. 4, (https://www.priv.gc.ca/media/2036/guide_ind_e.pdf, 7. 9. 2023).

216 S.C. 2000, c. 5.

applicable statute, PIPEDA is of importance for our discussion here because the federal Bankruptcy and Insolvency Act (BIA) "[gave] very little direction on the privacy rights of third party information on bankruptcy."[217] Back then, a Canadian author writing about PIPEDA referred to Canada's southern neighbor as a jurisdiction in which there was "significant legislative activity ... dealing with online privacy in general and the protection of personal information on bankruptcy in particular," triggered by a few cases in which problems were caused by the sale of customer databases in bankruptcy.[218]

The dynamics of data privacy law in Canada are also unprecedented. In particular, as Bill C-11 aimed to introduce significant changes to the domain but was ultimately not passed into law, it was swiftly substituted by Bill C-27 which introduced the texts of three act-proposals,[219] the fate of which remains undetermined as of the time of writing.[220]

The Canadian experiences are equally instructive and may be used as supplementary sources that could help predict other issues that may emerge on the interface between bankruptcy and data privacy in the future. For example, the issue that came up in the 2021 case *Holdings Co-Operative (Re)*[221] was whether the majority of members of a national cooperative had the right to obtain a list of the members accumulated over the years (along with their addresses, possibly also including their email addresses and telephone numbers) in order to assist in the process of successfully restructuring the cooperative and thereby ensuring its survival. Similarly, many of the scenarios in the case law mentioned throughout this article have also appeared North of the 48th parallel, often in differing guises.

### 6.3. CHINESE PERSPECTIVES

At the present, China has no law dealing specifically with the insolvency of individuals (in Europe: consumers), though its introduction is being debated by scholars and the policy is being studied by government-appointed reform commissions. China has major problems with the growing

217 Geist, M., 2002, p. 66.

218 *Ibid.*, p. 64.

219 The proposed acts are titled the Consumer Privacy Protection Act (CPPA), the Artificial Intelligence and Data Act (AIDA), and the Personal Information and Data Protection Tribunal Act. (https://www.parl.ca/Content/Bills/441/Government/C-27/C-27_1/C-27_1.PDF, 7 September 2023). The legislative process can be followed at: https://www.parl.ca/legisinfo/en/bill/44–1/c-27 (7 September 2023).

220 See LegisInfo webpage of the Parliament of Canada (https://www.parl.ca/legisinfo/en/bill/44–1/c-27, 9. 9. 2023).

221 *1077 Holdings Co-Operative (Re),* 2021 BCSC 42, 2021 CarswellBC 895 (2021). The court held that the request was premature. *Ibid.,* para. 102.

number of insolvent individuals[222] and a high number of no-asset cases. The corollary burning issue is data protection in the context of bankruptcy law, though data protection in general has become a matter of high priority in China only as of late. In their search for suitable models, Chinese lawmakers have relied heavily on the European compact data protection regulations. As noted in a recent publication, "the recently adopted Data Security Law, is quite similar to the GDPR and shows that the EU was arguably successful in its hope that the norms in the GDPR would become widely adopted around the world."[223] Nonetheless, it makes increasingly more sense to speak of a distinct Chinese model.

The heightened importance of privacy and data protection – which surfaced not only in the bankruptcy context but also in the online world – has been afforded recognition by the Chinese state in various forms. The new Chinese Civil Code of 28 May 2020,[224] for example, devotes six quite detailed provisions to it (Arts. 1034–1039), in Chapter VI entitled "Rights of Privacy and Protection of Personal Information",[225] which has led to more sector-specific regulations, in particular, the 2021 Data Security Law (promulgated on 10 June 2021),[226] applicable from 1 September 2021, and the Personal Information Protection Act (PIPL) (promulgated on 20 August 2021), which came into force on 1 November 2021. The first focused on data handling policies in general (e.g., data categorization, data risk controls, export controls with a view of creating an environment that does not thwart development of connected industries), and the latter on

222 Various regional courts have developed trial rules to deal with the mounting debts of a growing number of insolvent individuals, a crisis that has been exacerbated by the COVID-19 pandemic, such as the Implementation Opinions on the Liquidation of Personal Debt of the Dongying Intermediate People's Court of Shandong Province of 3 December 2020, or the Zhejiang Provincial Higher People's Court's "Guidelines for the Centralized Liquidation of Personal Debts of Zhejiang Courts". These *sui generis* court-made rules are applied by the affected courts notwithstanding that they are, strictly speaking, not primary sources of law. On these and other regional initiatives see Parry, R., Zhang, H., Fu, J., 2021, Personal Insolvency in China: Necessities, Difficulties, and Possibilities, *Brooklyn Journal of International Law*, Vol. 46, No. 2, pp. 517–571.

223 Tobin, O., 2021, Data Protection and the Growing Political Dimension, *Privacy & Data Protection* 22(1), pp. 7–8.

224 The English text of the Civil Code (http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf, 1. 3. 2023).

225 Yu, L., Ahl, B., 2021, China's Evolving Data Protection Law and the Financial Credit Information System: Court Practice and Suggestions for Legislative Reform, *Hong Kong Law Journal*, Vol. 51, p. 293.

226 The unofficial English translation of the act is available at: https://www.chinalawtranslate.com/en/datasecuritylaw/ (8. 9. 2023).

protection of personal data.[227] China has made significant advancements in the sphere of general data protection with unprecedented speed.

Data protection in the context of bankruptcy, however, has remained an unresolved problem, the severity of which is evidenced by the fact that some regional courts have been forced to venture as far as introducing pilot programs, curiously not based on statutory law but by coining regionally-applicable "rules", to tackle the issue.[228] The forerunner was the Shenzhen Zone, an economic success story rivalling that of Hong Kong's, which passed an instrument entitled "Shenzhen Zone Interim Rules for the Registration and Disclosure of Personal Insolvency Information" on 21 February 2022[229] and established a register as required by said Rules.

Otherwise, the problems that emerge in China are similar to those that have arisen in Europe and the US. Due to the increase in the importance of bankruptcy in China within a short period of time, these include also data protection concerns in the bankruptcy context, as well from big data concerns to proliferation of various software applications extending also to bankruptcy data of individuals. In Hong Kong, for example, the Do No Evil App, developed by a company called the Glorious Destiny, similarly to the abovementioned 2016 German case decided by the court in Rockenhausen, the company provided access to bankruptcy data of insolvency individuals (as well as to data related to linked litigation, criminal offenses and some company data). Furthermore, the investigation[230] showed that the individuals that the data concerned were not aware that data concerning them was public, and the data was often inaccurate and outdated.

Less is known about the handling of personal data in the bankruptcy of the first Chinese bike-sharing company (Yueqi Information Technology Company), which had collected some personal data of the system's users and thus the need to sell the data in the context of bankruptcy proceedings.

227 See, for example, One Trust Data Guidance (https://www.dataguidance.com/notes/china-data-protection-overview, 9. 9. 2023).

228 Kilborn, J. J., (2023, forthcoming) Law in Books versus Law in Action in the Landmark Shenzhen, China, Personal Bankruptcy Regime, *Emory Bankruptcy Developments Journal*, Vol. 40, No. 1. The article details the reasons, based on a few recent cases, why the new system fails to produce the proclaimed outcomes "standardized relief consistent with international best practices".

229 Shenzhen Zone Justice Bureau, Shenzhen Zone Interim Rules for the Registration and Disclosure of Personal Insolvency Information, (http://sf.sz.gov.cn/szsgrpcxxgkpt/xgzy/content/post_9528625.html, Chinese language, 7. 9. 2023).

230 See the Report of the Hong Kong Privacy Commissioner No. R13–9744, 13 August 2013, (https://www.pcpd.org.hk/english/enforcement/commissioners_findings/investigation_reports/files/R13_9744_e.pdf,7. 9. 2023). See also Gunasekara, G., 2021, Enforcement Design for Data Privacy: A Comparative Study, *Singapore Journal of Legal Studies*, No. 1, p. 32.

The case does show that the handling of and possible sale of personal data in bankruptcy proceedings had undoubtedly become an issue in China as well, moreover as early as in 2018.[231]

## 7. What Follows?

What the above elaboration shows is that bankruptcy law is increasingly being impacted by data protection law. The teething problems attendant to this interface seem to be more visible in Europe, as suggested by the cases discussed in this article. This, however, should not lead to the conclusion that the article's findings are of little or no relevance elsewhere. The sequitur is rather that insolvency practitioners have no other choice but to master and apply data protection laws, and courts ought to learn how to balance the competing – if not colliding – policies of bankruptcy and data protection laws while adjudicating disputes on this interface. The ultimate question concerns the reconcilability of the core policies and functions of bankruptcy and data protection laws. Satisfactory answers from policy makers, scholars, and other stakeholders are still lacking with regards to many of the issues unearthed, inter alia, in this paper.

Consequently, the question asked by Geist (is there a satisfactory answer to be found in the current law on the myriad burgeoning technology-driven questions and on the bankruptcy–data protection interface itself?) should be answered in the negative. This disappointing response applies even with regards to Europe's supposedly comprehensive model, which has proven to be the most influential model for a growing number of countries worldwide.

The reasons for this are twofold. On the one hand, the GDPR as the embodiment of Europe's comprehensive data protection regulation is a general code that does not contain provisions specifically targeting insolvency law, notwithstanding the quite intensive consultations that preceded the enactment of the 2015 Recast EIR. As one commentator stated, the GDPR risks becoming the "law of everything" because as new technologies emerge soon everything might contain personal data, triggering the application of the GDPR due to the open-ended reach of the key concept of "personal data".[232]

231 Zheng, C., 2018, Xiaoming court-ordered to refund bike deposits, *China Daily*, 23 March (https://global.chinadaily.com.cn/a/201803/23/WS5ab474bda3105cdcf6513d22.html, 9. 9. 2023).

232 Purtova, N., 2018, The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law, *Law, Innovation and Technology*, Vol. 10, No. 1, pp. 40–81.

On the other hand, the Recast EIR's short new data protection chapter, together with a few provisions scattered around the rest of the EIR, could be perceived only as a rudimentary first step towards a general response for tackling the challenges that the bankruptcy–data protection interplay generates. Thus, it would be desirable for the next version of the EIR to be drafted with greater attention not only to more precise rules on the rights and limitations of data subjects and other parties involved in bankruptcy proceedings, but also to the delicate public interest in obtaining valuable data in the course of bankruptcy proceedings.

It can also be concluded that European data protection and US data privacy laws are on partially divergent developmental trajectories. While this constellation inevitably leads to differing positions in many but not all situations, and the traditionally more restrictive European approaches tend to differ from less stringent US solutions, this observation applies across the board, i.e., not just with respect to the ill-fated history of the EU-US Data Protection Framework[233] (EU Privacy Shield) or the yet-to-be seen prospects of the enforceability of the GDPR's extraterritorial reach.[234] With a dose of simplification, it can be said that the EU seems to prioritize data protection law (though not expressly), while US law is "more understanding" of the need to ensure the efficiency of the bankruptcy law.

Notwithstanding the above, there is obviously room for further cross-fertilization of the developmental approaches on both sides of the Atlantic (and those applied elsewhere, too) as far as our topic is concerned, first and foremost because – as the above covered cases amply prove – the same problems crop up everywhere, albeit in different guises. Moreover, pertinent lines of jurisprudence slowly emerging from courts and data protection authorities in Europe have shown not only that the interface remains poorly understood, but also that the future development of the interplay between these two domains should not be left to sheer inertia, considering the very real conflicts that exist between these two

233 As the earlier EU-US frameworks have been demolished, the birth of a new one was announced by the EU in 2022 as follows: "On 25 March 2022, President von der Leyen and President Biden announced that they had reached an agreement in principle on a new EU-U.S. Data Privacy Framework. The framework will foster trans-Atlantic data flows and address the concerns raised by the Court of Justice of the European Union in the *Schrems II* decision of July 2020. Following that, the EU and US teams worked for many months to finalise the details of this agreement and translate it into a legal framework" (https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_6045, 7. 9. 2023).

234 Houser, K. A., Voss, G. W., 2018, GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy? *Richmond Journal of Law and Technology*, Vol. 25, No. 1.

prestigious branches of law, a conflict perhaps best-illustrated by the *UK Pacific Railways* case above.

The ultimate lesson, however, should be clear: a willingness to confront the challenges corollary to the data privacy–insolvency interface should replace the previous habit of eschewing this (only seemingly) simple set of issues.

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## NOVA GRANICA: IZAZOVI RASTUĆEG UTICAJA PRAVA O ZAŠTITI LIČNIH PODATAKA NA STEČAJNO PRAVO

Tibor Tajti

APSTRAKT

Kako, na koji način i sa kojim posledicama pravo zaštite ličnih podataka (u Evropi: *data protection* – u SAD: *data privacy*) utiče na stečajno pravo pitanja su koja su ostala neobrađena i pored besprimernog značaja koji je pravo zaštite ličnih podataka dobilo u poslednje dve decenije kako u Evropi, tako i globalno. Pored opisa istorije i glavnih karakteristika regulative i problema između dveju grana prava, članak pokušava da nadopuni ovaj vakuum putem analize jednog broja sudskih odluka i odluka agencija za zaštitu ličnih podataka koje se bave pitanjima uticaja prava zaštite ličnih podataka na stečajno pravo. Analizirani slučajevi su prvenstveno iz Evrope, Sjedinjenih Država, kao i iz Kanade i Kine, kao primeri pravnih sistema koji su našli svoj specifičan model zaštite ličnih podataka.

**Ključne reči:** stečajno pravo, pravo zaštite ličnih podataka, Uredba Evropske unije o stečajnom postupku (prerađena verzija), e-Justice portal Evropske unije, spojeni stečajni registri, birokratija (red tape), pravni sistemi središnje orijentacije.

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ORIGINAL SCIENTIFIC ARTICLE

*Samir Aličić**

# A NEW POSSIBLE INTERPRETATION OF DIGEST OF JUSTINIAN D.9.2.27.14: A CONTRIBUTION TO THE STUDY OF PRECURSORS OF ENVIRONMENTAL LAW IN ROMAN LAW

***Abstract:*** *The paper addresses the meaning of the Digest of Justinian 9.2.27.14, which deals with the case of damage caused by contamination of the soil by weeds. The author of this paper concludes that neither Celsus nor Ulpian had any doubt that in the case of the contamination of soil an interdictum quod vi aut clam could be brought, but only within a period of one year following the damage. This interdict is granted to either the owner, and, if the land was subject of the contract of lease, to the tenant (lessee), but only to one of them. Furthermore, an Aquilian action could also be brought, but only one of these two legal instruments could be used. The lawsuit could be brought both by the owner or by the tenant. The actio is granted to both the the owner and the lessee, not as an actio directa, but as an actio in factum ex lege Aquilia. The reason for this cannot be established with certainty.*

**Key words:** *lex Aquilia, damnum iniuria datum*, damage, extracontractual liability, *interdictum quod vi aut clam*, contamination, law of obligations, environmental law, Roman law.

## 1. Introduction

D.9.2.27.14 Ulpianus libro octavo decimo ad edictum. *Et ideo Celsus quaerit, si lolium aut avenam in segetem alienam inieceris, quo eam tu inquinares, non solum quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum, sed et in factum agendum, et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet: nam alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit.*

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This interesting text has long attracted the attention of the experts,[1] but its meaning has not yet been established with certainty. Without the ambition to offer a conclusive solution, it is our intention to offer in this paper a short overview of the existing theories, and to offer one more possible reading of the D.9.2.27.14 text.

## 2. An Overview of Existing Theories

There is a consensus in the modern literature about the following conclusions.

The text of D.9.2.27.14 examines the case in which a person contaminated a portion of soil belonging to other by sowing seeds of weeds.

The legal question, not expressly stated but implicitly clearly visible from the answer, is: could some procedural remedy be used against the person who contaminated the soil, and if so, which type of procedural remedy should be brought, and by whom?

From the answer we can also conclude that the owner can bring an interdict *quod vi aut clam*, as can the lessee, if the land is leased. The owner can also use a lawsuit *in factum*. Also not clearly stated, but apparent from the context in which the text is found in the Digest, is that under the term *actio in factum* the ancient legislator implied *actio in factum ex lege Aquilia*, also called *actio damni iniuriae in factum*. If a lessee used this lawsuit, he would offer a guarantee that the land owner would not have additional later[2] requests for compensation of damages. It is also stated that one type of loss (*damnum*) is to corrupt a thing (*corrumpere*), in which case an Aquilian action could be brought, and another was when the thing itself had not been corrupted, but mixed with others, so that the separation of mixed things would be difficult (*molesta separatio*).

But in essence everything else regarding this text is doubtful. Different interpretations of the text have been offered in modern literature. We will provide an overview of them. They can mainly be grouped in four groups:

1 Including the author of this paper, see for example Aličić, S., 2016, *Imovinska šteta u rimskom klasičnom pravu – Osnove koncepta štete u savremenom pravu*, Sarajevo, University Press, pp. 162–163; Aličić, S., 2011, Ulpijan, Celz i zagađenje zemljišta korovom (D.9.2.27.4), *Zbornik radova Pravnog fakulteta u Novom Sadu*, 45/3, pp. 613–633.

2 The term *amplius*, which has multiple meanings, here means *afterwards*. See Guizzi, F., 1961, In tema di origini della "cautio de rato", *Labeo*, 7, pp. 340–341.

## 2.1. THE FRAGMENT IS INTERPOLATED, AND THE AQUILIAN ACTION IS NOT GRANTED TO THE TENANT IN CLASSICAL LAW. IN THE ORIGINAL TEXT, AQUILIAN ACTION, AND MAYBE EVEN INTERDICT, HAS BEEN DENIED TO THE LESSEE

There are numerous sources that testify that classical Roman law denied not only direct Aquilian action to the *detentor*, but also *actio in factum ex lege Aquilia*. A direct lawsuit can be granted only by a person who has a real right over the damaged thing.[3] Because of this, in older literature D.9.2.27.14 has often been marked as interpolated.[4] Although some authors defended its authenticity,[5] it remained under suspicion long after the interpolationist critique had been mainly abandoned, predominantly on the basis of the linguistic incoherency of the text.[6] Some of the authors who in recent times indicated possible interpolations are the following ones.

On the basis of earlier opinions of Pampaloni and Besseler, Albanese believes that the text is heavily interpolated in the part from *non solum* to *inquietet*. Convinced that classical Roman law would not allow Aquilian action *in factum* in this case, he proposes the following reconstruction of the text: *an legi Aquiliae actione tenearis? et ait in factum agendum*. Moreover, he suggests that the text was interpolated twice: the part regarding the lessee has been interpolated in the postclassical period, while the interdict *quod vim aut clam* was added by Justinian's compilers.[7]

Lübtow believes that the reason why in the original text a lawsuit *in factum*, instead a direct lawsuit, has been granted was not because of the lack of physical damage (*rumpere*), but because of directly inflicted damage (*corpore*).[8]

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3 D.9.2.11.9; 9.2.27.34; 9.2.57.

4 See, for example, Thayer, J. B., 1929, *Lex Aquilia (Digest IX, 2, Ad Legem Aquiliam): Text, Translation and Commentary)*, Cambridge, Harvard University Press, pp. 91–92.

5 *Ibid.*

6 Even those who defend the originality of the text acknowledge that it has some strange characteristics: it looks incomplete (MacCormack, G.,1973, Celsus quaerit: D.9.2.27.14, *RIDA*, 20, p. 341; Tellegen-Couperus, O. E., 1995, The Tenant, the Borrower and the *lex Aquilia*, *RIDA*, 42, p. 417); the language is somewhat strange (MacCormack, G., 1973, p. 341); the form of the verb *agere* in the words *non solum ... posse agere* does not correspond to that in *sed et in factum agendum* (Tellegen-Couperus, O. E., 1995, p. 417).

7 Albanese, B., 1950, Studi sulla legge Aquilia*, Annali del Seminario giuridico della Università di Palermo*, 21, pp. 332–333.

8 Lübtow, U. von, 1971, *Untersuchungen zur lex Aquilia de damno iniuria dato*, Berlin, Duncker & Humbolt, pp. 165 ff.

Valino does not exclude a possibility of an alteration of the text even in Antiquity. Using the positions previously taken by Ferrini as a starting point, he says that it is impossible the an *actio damni iniuriae* could have been granted to a tenant in classical Roman law, because the damage was not inflicted *corpore*, and because he was not the owner of the thing.[9]

The interpolationist critique of the D.9.2.27.14 text is today completely abandoned and its arguments refuted.[10] The linguistic issues and lack of internal consistency of the text are currently mostly attributed to the abbreviation and summation of the text rather than interpolation, either by members of Tribonian's commission, by postclassical jurists, or by Ulpian.[11] In regard to the latter, it is sometimes stated that the second part of the text possibly does not derive from Celsus, but represent a comment by Ulpian.[12]

## 2.2. THE OWNER AND THE LESSEE CAN SEEK COMPENSATION OF DAMAGES INDEPENDENTLY. THE LAWSUIT *IN FACTUM* IS GRANTED ONLY BY THE LESSEE AS THE PROCEDURAL REPRESENTATIVE OF THE OWNER, FOR THE DAMAGE BOTH TO THE SOIL AND TO THE FRUITS. THIS IS WHY A PROCEDURAL GUARANTEE IS REQUIRED IN THIS CASE, WHILE IT IS NOT NECESSARY IF AN INTERDICT IS BROUGHT. DIRECT AQUILIAN ACTION IS NOT GRANTED, BECAUSE THE LESSEE IS NOT OWNER OF THE LAND.

In the first scientific paper explicitly dedicated to the analysis of the D.9.2.27.14 source,[13] MacCormack concludes, on the basis of comparison with other texts, that lessee could bring an interdict (D.43.24.11.12; 43.24.11.13) for loss of fruits (D.43.24.12; 43.24.19), while the owner could

9 Valino, E., 1973, *Acciones pretorias complementarias de la accion civil de la ley Aquilia*, Pamplona, Universidad de Navarra, pp. 81–84.

10 Porto, A. di, 1988, La tutela della "salubritas" fra editto e giurisprudenza, Il ruolo di Labeone. I – Acque., *BIDR*, 91; Tellegen-Couperus, O. E., 1995, p. 417.

11 MacCormack believes that the text might be abbreviated by Justinian's compilers (MacCormack, G., 1973, p. 342), while Tellegen-Couperus believes that it might have happened even earlier, in the postclassical period (Tellegen-Couperus, O. E., 1995, p. 417). Capogrossi Colognesi also speaks in favor of abbreviation rather than interpolation (Capogrossi Colognesi, L.,1993, *L'interdetto "quod vi aut clam" e il suo ambito di applicazione*, Index, 21, pp. 277–278).

12 Guizzi, F., 1961, pp. 331–332; Cerami, P., 1985, La concezione celsina del "ius". Presupposti culturali e implicazioni metodologiche, Palermo, Palumbo, pp. 125 ff; Porto, A. di, 1988; against: Guarino, A., 1986, La concezione celsina del "ius". (Lettura); *Labeo*, 32, p. 76; Winiger, B., 1997, *La responsabilité aquilienne romaine: damnum iniuria datum*, Bâle et Francfort-sur-le-Main, p. 39.

13 MacCormack, G., 1973, pp. 341–348.

bring one for the value of the land (D.43.24.12).[14] He remarks that one of the conditions for use of the interdict *quod vi aut clam* is the existence of some physical or material change on land (*opus in solo*),[15] in which he sees also the element of *corrumpere* in the sense of *lex Aquilia*. Celsus discussed whether an interdict could be brought in this case, and for some reason he concluded that it could not, with the reason having disappeared in the process of abbreviation of the text.[16]

Celsus concluded that the owner could bring either an interdict or Aquilian action, i.e., only one of this two procedural remedies (D.43.24.15.12).[17] Aquilian action was *in factum* because the soil had not changed in its nature (*corruptum*). This lawsuit could also be granted to the lessee.

As of the question why the procedural guarantee was needed when a lessee brought an *actio in factum*, but not when he brought an interdict[18] (although not excluding the possibility that the reference to the interdict was lost in the process of abbreviation of the text), the author concludes that, based on the contract of lease, the lessee had the right to act as a representative (*procurator*) of the owner of the land. Therefore, he brought the lawsuit *in factum* not only for the damage to fruits, but also for the damage to the land itself. Because of that, he was required to provide a guarantee that the owner would not bring the same lawsuit.[19]

This interesting and original theory by MacCormack had was accepted by some authors.[20] However, it has two flaws: first, contrary to what the author states, the analogy with interdict suggests that Aquilian action should have been granted to both the lessee and the owner, and second, it did not provide a plausible answer to the question which must be put if we accept this theory – if in this case Aquilian protection is actually granted to the *detentor*, why did this not happen in any other known case?

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14 *Ibid.*, p. 346.

15 It could be cutting down trees (D.43.24.7.5), dumping manure or garbage (D.43.24.7.6), dumping polluting substances in a well (D.43.24.11pr), moving stones (D.43.24.15.1), but also gathering fruits (D.43.24.7.5), burning hay (D.43.24.9.3), or transporting manure across land belonging to another (D.43.24.22.3) (MacCormack, G., 1973, p. 344).

16 *Ibid.*, p. 345.

17 *Ibid.*, pp. 345–346.

18 Regarding this question (interesting in itself but irrelevant for our research), what kind of *cautio* exactly, see Thayer, J. B., 1929, pp. 92–93, and Guizzi, F., 1961, pp. 331–341.

19 MacCormack, G., 1973, pp. 347–348. See also Thayer, J. B., 1929, pp. 91–92.

20 See Llanos Pitarch, J. M., 1995, *La restitución en la posesión: El interdicto quod vi aut clam*, Castellón 1995, pp. 152, 154–163, 166–167; Ziliotto, P., 2000, *L'imputazione del danno aquiliano: tra iniuria e damnum corpore datum*, pp. 182–183.

## 2.3. BOTH THROUGH AQUILIAN ACTION AND INTERDICT, THE OWNER OF THE LAND SEEKS COMPENSATION FOR CONTAMINATION OF THE SOIL, AND THE LESSEE FOR THE FRUITS, AS THEIR OWNER. DIRECT AQUILIAN ACTION IS NOT GRANTED BECAUSE THE CONTAMINATION OF THE SOIL CANNOT BE INTERPRETED AS *CORRUMPERE* IN THE SENSE OF *LEX AQUILIA*.

An explanation appeared quiet early, as a response to the interpolationist critique, stating that the lawsuit is granted to the tenant not because his quality of a party to a contract of lease, but as the owner of the fruits.[21] The only reason why in this case the direct lawsuit was not granted, was that the damage was not inflicted *corpore*.[22] Of course, the owner of the land had an independent lawsuit for the degradation of the soil.

In the second paper (after MacCormack's) explicitly dedicated to the analysis of the D.9.2.27.14 text, Tellegen-Couperus reinforced this theory with new arguments.[23]

She dismissed MacCormack conclusion that physical change of the soil was a condition for bringing an interdict, and believes that Celsus had no doubt whether the interdict should be given.[24] She also remarks, that *cautio amplius non peti* applied in situations other than when someone acted as the *procurator*.[25]

According to Tellegen-Couperus, the lessee could claim the value of the fruits both by Aquilian action and interdict. The owner did not claim the value of the land, because the soil was not permanently destroyed but only temporarily made useless. He instead claimed the value of the lost harvests for the period after the contract of lease expired. The reason why a procedural guarantee was not needed if interdict was being brought was that it could be brought only for a period of one year after the damage was inflicted, i.e., only for one harvest. Therefore, if the land is leased, only the lessee could bring the interdict, while the Aquilian action could be brought also by owner, because further bad harvests could follow after the contract of lease had expired. The interdict was applied if physical change (*corruptio*) of soil occurred, and if it had not, an Aquilian action was granted. The lawsuit in this case was *in factum*, because the existence

21 Thayer, J. B., 1929, p. 91; Natali, N., 1896, *La legge Aquilia ossia il damnum iniuria datum: Studio sul lib. IX, tit. II del Digesto*, Roma, Tipografia dell'Unione cooperativa editrice, pp. 120–122.

22 Natali, N., 1896, p. 78.

23 Tellegen-Couperus, O. E., 1995, pp. 415–436.

24 *Ibid.*, pp. 422–423.

25 *Ibid.*

of physical damage was also a condition for the application of direct Aquilian action.[26] Furthermore, the author adds that no person could bring an Aquilian lawsuit solely on the basis of being the *detentor*, and the lessee brought a lawsuit not as a tenant of the land, but as the owner of the fruits.[27] It is true that prior to the harvest the tenant was not the owner of the fruits; but in this case he probably could not notice the contamination nor bring a lawsuit prior to the harvest.[28]

The conclusions of Tellegen-Couperus conclusions can be summarized as follows:

> If the soil is damaged, the owner can bring *quod vi aut clam*, while the *detentor* can bring an interdict as the owner of the fruits. If the soil is not permanently damaged, the owner can bring Aquilian action, but only *in factum*, because such damage is not considered *corrumpere*, while the lessee can bring, again, a lawsuit as the owner of the fruits.[29]

This theory seems to have the best argumentation of all. On the plus side, it does not contradict any known sources, and offers a plausible explanation to why the Aquilian action is granted to the lessee, although in other cases it is generally not granted to the *detentor*. However, even this theory has some weak points. The text of paragraph D.9.2.27.14 contains no hint of an indication that the interdict is not granted to the owner of the land. Furthermore, the explanation that the tenant is regarded as the owner of the fruits because he would not notice the contamination before the harvest does not seem plausible, and there is no definitive proof that the lawsuit is *in factum* because of the lack of physical damage. It could also be for some other reason.

### 2.4. IN THE CASE OF CONTAMINATION OF SOIL, BOTH INTERDICT AND LAWSUIT BELONGS TO THE OWNER, AND IN THE CASE OF THE CONTAMINATION OF HARVEST, CELSUS WOULD GRANT EITHER INTERDICT OR LAWSUIT TO THE TENANT, BUT ULPIAN WOULD NOT.

Del Porto proposed a new and original reading of D.9.2.27.14. He believes that the second part, in which an explanation is given (from *nam* to the end), derives from Ulpian, who had in mind two different situations. The first one is the mixing of grain seed with weeds, the other is contamination of the soil. Ulpian would allow interdict only in the latter case,

26 *Ibid.*, pp. 423–427.
27 *Ibid.*, pp. 427–436.
28 *Ibid.*, p. 418.
29 *Ibid.*, pp. 423–427.

and as a proof, Del Porto mentions that in the case of the mixing of the grain with sand or other material Ulpian does not mention interdict but only Aquilian action (D.9.2.27.20).[30] Celsus had a more liberal position on the matter of application of the interdict. Ulpian, on the other hand, strictly respects the principle that *opus* must be *in solo*, while for Celsus, it is acceptable even if it is done to the plants (for example by cutting young trees, D.43.24.18pr), and in a similar case of damage to the plants Ulpian would consider that there is no *opus in solo*, and hence no interdict could take place (D.43.24.7.5).[31]

According to Del Porto, we are confronted with two situations, and interdict or Aquilian action can belongs either to the lessee, or to the owner, i.e., only to one of them.

This bold and innovative theory has had some influence on other authors,[32] but can also be attacked from many directions. There is no proof that Ulpian's opinion is different from Celsus's, although it is plausible that Ulpian used the text of Celsus out of the original context. Further, both classical jurisprudents talk about the seeding of weeds, not about the mixing of the seeds of weeds with the grain,[33] so the parallel with the Ulpian's D.9.2.27.20 text, which deals with mixing sand and wheat, is out of place. Ulpian's silence on interdict in D.9.2.27.20 can be explained simply by the fact that the text specifically discusses Aquilian liability. It is true that in D.43.24.7.5 Ulpian does not allow bringing interdict in the case of removing the fruits, but at the end of the same text he says explicitly that an *opus in solo* exists if someone does something to the trees, but not if he does something to the fruits (*in solo fieri accipimus et si quid circa arbores fiat, non si quid circa fructum arborum*). So, his opinion does not differ substantially from the one expressed by Celsus in D.43.24.18pr. Finally, whole the discussion about *corrumpere* in D.9.2.27.14 has nothing to do with the interdict. It is clear that it refers to the application of the *lex Aquilia* (*ut lex Aquilia locum habeat*).

## 3. A Critical Survey of the Existing Theories and a Possible New Reading of the D.9.2.27.14 Text

The theories based on the interpolationist critique are today mostly abandoned, while all the others have to be seriously taken into consideration. Del Porto's theory is very bold and interesting, but thus the easiest

30 Porto, A. di, 1988, pp. 495–496.

31 *Ibid.*, pp. 494–497.

32 For example, Corbino, A., 2008, *Il danno qualificato e la lex Aquilia: Corso di diritto romano*, Padova, Cedam, p. 162.

33 Capogrossi Colognesi, L., 1993, p. 278.

to criticize. MacCormack's theory has good argumentation and is convincing, but not entirely. Tellegen-Couper's interpretation seems to have the best argumentation and is the only one that does not contradict other sources, so in this paper, we will accept this latter interpretation, trying to add some more arguments in its favor, but also to propose a revision of this theory in some aspects.

Our goal is to prove the following: that the Aquilian action is granted to the lessee on the basis of his ownership of the fruits, and not on the basis of him being a tenant, while to the owner of the land it is granted based on his ownership of the land; that the lawsuit is granted because the owner could not bring the interdict for the losses that he suffered within one year from the moment when the damage was caused, while Aquilian action can also be used later; that Ulpian and Celsus had no doubt that interdict could be applied, and that they did not even consider that to be in question; that the lessee could bring the lawsuit from the moment of contamination, as a future owner of fruits, and not only after becoming an owner by the separation of the fruits during the harvest; that the reason why the Aquilian action was not granted as a direct one was not necessarily the consequence of the absence of physical damage (*corrumpere*), and that the wrong impression in that regard could be derived from the fact that Ulpian used the text of Celsus out of the original context.

Of course, everything presented here is an assumption. Some of them may be convincing, but must be taken with caution, because, as we will see, a definitive and certain interpretation of this text is apparently impossible.

### 3.1. THE ISSUE OF ACTIVE LEGITIMATION AND CONCURRENCE OF DIFFERENT LEGAL REMEDIES

Celsus says that if someone threw the seeds of weeds on the land seeded with wheat belonging to someone else, the owner could use an interdict against him, as could the lessee (*quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum*). Let us see first whether Celsus could have doubts about the possibility of application of interdict in this case at all. The conditions are that a deed (*opus*) has been committed on the land, or connected to the land, that it provoked material loss, and that it was committed by force or in secret.[34]

34 Llanos Pitarch, J. M., 1995, pp. 73–108; Capogrossi Colognesi, L., 1993, p. 232. See also Longo, G., 1962, Voce: Interdictum quod vi aut clam, *Novissimo digesto italiano*, VIII, pp. 808–809.

Does *opus* on land exist?[35] As it appears, it does. It exists even in the case of mere ploughing of the land.[36] However, especially interesting in that regard is the next text:

> D.43.24.11pr. Ulpianus libro septuagensimo primo ad edictum. *Is qui in puteum vicini aliquid effuderit, ut hoc facto aquam corrumperet, ait Labeo interdicto quod vi aut clam eum teneri: portio enim agri videtur aqua viva, quemadmodum si quid operis in aqua fecisset.*

The contamination of a water source, i.e., of a well that is part of the landed property, is without any doubt an *opus*, and interdict can be brought in this case, why would the spoiling of the land itself not be considered *opus in solo*? As it appears, neither Ulpian nor Celsus had reason to have any doubt about it.

Was it committed *vi aut clam*? Probably yes, first because there is no mention of a possible contractual liability of a person who, for example, sold the contamination seeds.[37] If the idea that someone would make the effort to gather seeds of weeds only to cause damage to a neighbor seems strange, it is enough to recall the famous passage, often cited together with D.9.2.27.14, from the Gospel of Matthew:

> Vulgata, Mt 13:24. *Aliam parabolam proposuit illis, dicens: Simile factum est regnum caelorum homini, qui seminavit bonum semen in agro suo.* 25. *cum autem dormirent homines, venit inimicus eius, et superseminavit zizania in medio tritici, et abiit.* 26. *Cum autem crevisset herba, et fructum fecisset, tunc apparuerunt et zizania.* 27. *Accedentes autem servi paterfamilias, dixerunt ei: Domine, nonne bonum semen seminasti in agro tuo? Unde ergo habet zizania?* 28. *Et ait illis: Inimucus homo hoc fecit.*

In his stories (parables), Jesus generally used examples from everyday life that everyone could understand.[38] So, seeding weeds was probably a common way at this time to cause damage to another, out of pure malice.

The financial loss clearly exists. There is no consensus in science on whether the interdict could be brought by a *possessor,* or only by a person having some right.[39] However, it is certain that this does not necessarily

35 In other texts, Ulpian underlines that interdict *quod vi aut clam* can be applied only if *opus in solo* was committed by force or in secret (*ad ea sola opera quaecumque in solo vi aut clam fiunt* – D.43.24.1.4).

36 Capogrossi Colognesi, L., 1993, p. 278.

37 For example, a merchant who sells an infected animal, which infects other animals in a heard, could be liable for the damage because of improper execution of the contract of sale (D.19.1.13pr).

38 *E.g.* that of the lost sheep, (Mt 18.12–14; Lk 15.3–7), lost coin (Lk 15.8–10), and prodigal son (Lk 15.11–32).

39 Llanos Pitarch, J. M., 1995, p. 111.

have to be a real right. It can be also right based on a contract,[40] as testified in this source:

> D.43.24.12 *Venuleius* libro secundo interdictorum *Quamquam autem colonus et fructuarius fructuum nomine in hoc interdictum admittantur, tamen et domino id competet, si quid praeterea eius intersit.*

So, the interdict can generally be granted to the lessee, for damage of fruits. It also includes damage caused by weeds, because that type of damage is otherwise considered a *vis maior* and losses caused by it are on the lessee.

> D.19.2.15.2 Ulpianus libro trigesimo secundo ad edictum *Si vis tempestatis calamitosae contigerit, an locator conductori aliquid praestare debeat, videamus. Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait, ut puta fluminum graculorum sturnorum et si quid simile acciderit, aut si incursus hostium fiat: si qua tamen vitia ex ipsa re oriantur, haec damno coloni esse, veluti si vinum coacuerit, si raucis aut herbis segetes corruptae sint.*

Therefore, D.9.2.27.14 contains all the conditions for the application of interdict *quod vi aut clam*. The idea that Celsus grants Aquilian action only when there is no possibility to bring an interdict because there is no *opus in solo*[41] makes no sense. A lawsuit *in factum* is granted to both the owner and the lessee (*non solum quod vi aut clam ... sed et in factum agendum*), in addition to the interdict. They can choose one of the two procedural remedies for compensation of damages.[42]

The reason why the Aquilian action *in factum* is granted should be found, as already stated in the literature,[43] in the fact that the interdict can be brought only for a period of one year after the damage was inflicted. There is no such a limitation for Aquilian action, which can be used multiple times in the case of multiple successive bad harvests. This is also the reason why no procedural guarantee is required if interdict is used: it can be used only once.[44]

As for the damages, the lessee could claim *lucrum cessans* because of the bad harvests before the expiration of contract of lease, and the owner for the losses suffered subsequently. It is clear that the owner cannot claim

40 Llanos Pitarch, J. M., 1995, pp. 119–120. See also Fargnoli, I., 1998, *Studi sulla legittimazione attiva all'interdetto quod vi aut clam*, Milano, Giuffre.

41 Tellegen-Couperus, O. E., 1995, pp. 423–427.

42 A person against whom an interdict *quod vi aut clam* has been passed must return the thing to pristine condition, or, if that is not possible, must pay the estimated value of the damages. Llanos Pitarch, J. M., 1995, pp. 108–110.

43 Tellegen-Couperus, O. E., 1995, pp. 423–427.

44 *Ibid.*

the worth of the entire landed property as a compensation for damages. Ryegrass (*lolium*) is a type of weed physically similar to grain and difficult to separate, and it is also toxic. Wild oat (*avena*) is a harmless but resistant weed and it takes up to six years to remove it from the soil.[45] None of the mentioned weeds would make the soil permanently less fertile.

Therefore, in the case of contamination of soil, the interdict depended on the owner. If the land had been leased, only the lessee could bring an interdict (*quod vi aut clam dominum posse agere vel, si locatus fundus sit, colonum*), because such a contract could not last less than a year, therefore the owner had no interest in bringing it. However, the owner could also bring a lawsuit *in factum* (*sed et in factum agendum*), and if the land had been leased, this was the only procedural remedy that he could use. It could also be used by lessee, but in that case he would have to offer a guarantee that the owner would not seek compensation of the same damage (*et si colonus eam exercuit, cavere eum debere amplius non agi, scilicet ne dominus amplius inquietet*).

### 3.2. THE NATURE OF AQUILIAN ACTION *IN FACTUM*

What is the basis for the use of Aquilian action by a lessee, and why is it *in factum*[46] and not direct?

A *detentor* could bring an Aquilian lawsuit only as the owner of the fruits, however, according to the *superficies solo cedit* principle, they are the property of the land owner until the harvest. As previously stated, Tellegen-Couperus tried to solve the problem by sustaining that the tenant would not notice the contamination prior to the harvest, and then he would notice that the harvested was in vain, because it is impossible to separate the weeds from the grain. But must it actually be so? Let us remind of the ending of the biblical parable:

> Vulgata, Mt 13:28. *Servi autem dixerunt ei, Vis, imus, et colligimus ea?* 29. *Et ait: Non: ne forte colligentes zizania, eradicetis simul cum eis et triticum.* 30. *Sinite utraque crescere usque ad messem, et in tempore messis dicam messoribus: Colligite primum zizania, et alligate ea in fasciculos ad comburendum, triticum autem congregate in horreum meum.*

In the biblical story, the slaves noted the weeds before the harvest. They did not pluck them out, so as not to damage the grain. After the harvest, they would separate the grain from the weeds. It is important to note that D.9.2.27.14 does not state that *separatio* would be *impossibilis*,

45 *Ibid.*, p. 418.

46 On the nature of the Aquilian *actio in factum*, see, for example, Ziliotto, P., 2000, p. 60.

only difficult, *molesta*. So, two things come in mind. First, that the loss suffered is not necessarily the value of the wheat, but the costs of its separation from the weeds after harvest. Second, if the existence of the damage is noted before the harvest, could the tenant bring the lawsuit before the harvest? On the basis of the analogy with stealing (*furtum*) of the fruits, we have no reason to doubt that he could, because the lessee could bring an *actio furti* even for the fruits that he had not yet gathered.

> D.47.2.26.1 Paulus libro nono ad Sabinum *Item constat colonum, qui nummis colat, cum eo, qui fructus stantes subripuerit, acturum furti, quia, ut primum decerptus esset, eius esse coepisset.*

Why is the lawsuit not direct but *in factum*? Most Romanists believe that the reason is the absence of the physical damage (*corrumpere*). Had there been physical damage to either the fruits or the land, a direct Aquilian action would be granted. Even the authors whose interpretation of the D.9.2.27.14 text completely differs in other respects agree on this matter.[47]

This theory is well supported by sources. Our text is part of Ulpian's long fragment from Book 18 On the Edict, included in the chapter of the Digest D.9.2 – *Ad legem Aquiliam*. It is a part of the discussion on the meaning of the word *rumpere* in the third chapter of the *lex Aquilia,* as one of the conditions for application of this law, which means that the damage is inflicted by burning, breaking or otherwise damaging or destroying an object (D.9.2.27.5). After several cases of damage made by fire (27.6–12), Ulpian says:

> D.9.2.27.13 *Inquit lex "ruperit". rupisse verbum fere omnes veteres sic intellexerunt "corruperit".*

This is followed by the D.9.2.27.14 text, as an illustration[48] of what was said above: almost every corruption of a thing can be considered *rumpere* in the sense of the *lex Aquilia*. After that, another example of damage without physical change of a thing follows:

> D.9.2.27.15 *Cum eo plane, qui vinum spurcavit vel effudit vel acetum fecit vel alio modo vitiavit, agi posse Aquilia Celsus ait, quia etiam effusum et acetum factum corrupti appellatione continentur.*

Then, several other examples follow. So, our passage is part of Ulpian's discussion about the significance of the term *rumpere*.

However, it is by no means certain that the Celsus's opinion that Ulpain cites was originally in a similar context. It was likely taken either

47 MacCormack, G., 1973, pp. 343–344.; Ziliotto, P., 2000, pp. 183–184; Tellegen-Couperus, O. E., 1995, pp. 417–418.

48 Ziliotto, P., 2000, p. 182.

from his book *questionum* or from *digestorum*,[49] works of a scientific and didactical character. Celsus probably discussed the case, real or fictitious, from various perspectives, while Ulpian used it only to illustrate one aspect: the interpretation of the term *corrumpere*.

It is possible that in the original text by Celsus some other reason was given for why the Aquilian action was not granted as direct. Some authors believe that it could be because the damage was not inflicted *corpore*,[50] a matter that Celsus believed to be of great importance (*multum interesse dicit*):

> D.9.2.7.6 Ulpianus libro octavo decimo ad edictum *Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actione teneatur. unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.*

It is worth emphasizing the fact that Celsus seems to be the only known jurisprudent not to be convinced that a direct action should be brought in the case when the damage is inflicted by the spread of uncontrolled fire:

> CO.12.7.5 ULP. 18 ED. *sed plerisque aquilia lex locum habere non videtur, et ita celsus libro XXXVII digestorum scribit. ait enim "si stipulam incendentis ignis effugit, aquilia lege eum non teneri, sed in factum agendum, quia non principaliter hic exussit, sed dum aliud egit, sic ignis processit".*

In similar situations, Ulpian (D.9.2.27.8) and Paul (D.9.2.30.3) do not even mention the question whether the lawsuit is *in factum* or not, nor do they mention the question whether the damage is inflicted by direct human action or not, but only discuss the issue of fault.

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49 In his books *Ad Sabinum* and *Ad edictum* there are several quotes by Celsus (D.12.1.1.1; 28.5.9.2; 34.2.19.3; 7.1.2.7; 12.6.26.13; 34.2.19.3; 47.2.43.10; 47.12.2; CO.12.7.5), usually with indication, from which Celsus's work the quote was taken: *ut libro primo quaestionum Celsus ait* – D.12.1.1.1; *Celsus libro duodecimo quaestionum, digestorum undecimo posse defendi ait* – D.28.5.9.2; *Idem Celsus libro nono decimo quaestionum quaerit* – D.34.2.19.3; *scribit Celsus libro octavo decimo digestorum* – D.7.1.2.7; *ut Celsus libro sexto et Marcellus libro vicensimo digestorum scripsit* – D.12.6.26.13; *Idem Celsus libro nono decimo quaestionum quaerit* – D.34.2.19.3; *Celsus libro duodecimo digestorum quaerit* – D.47.2.43.10; *Celsus libro XXXVII digestorum scribit* – CO.12.7.5. Beside paragraphs 9.2.27.14–15, there is only one other case, D.47.12.2, where Celsus's quote by Ulpian is without an indication of Celsus's book from which the quote was taken.

50 Llanos Pitarch, J. M., 1995, p. 152; Valino, E., 1973, p. 84; Winiger, B., 1997, pp. 159–164; Lübtow, U. von, 1971, pp. 165 ff.

The last sentence of the D.9.2.27.14 text, *alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit*, from stylistic point of view does not fit the text. It introduces the following paragraph, about adulterated wine, and it is not certain that it is Celsus's: it could be entirely Ulpian's comment, at least in the part *ut lex Aquilia locum habeat*, which sounds as a later addition. So, if the damage has not been inflicted *corpore*, for Celsus this would be absolutely sufficient reason to grant an *actio in factum*, instead of an *actio directa*, and the whole discussion about *corrumpere* could have nothing to do with the character of the lawsuit.

## 4. Conclusion

It is most likely that neither Celsus nor Ulpian had doubts that in the D.9.2.27.14 text, in the case of weed contamination of soil, an interdict *quod vi aut clam* could be brought, because all the conditions for its application are fulfilled. An interdict can be claimed only for the loss suffered up to one year after the damage had been inflicted. For this reason, this procedural remedy depends either on the owner or, if the land is leased, on the lessee of the land – but only on one of them. Because losses can be suffered even after one year, an Aquilian action is granted. It depends both on the owner and on the lessee: on the lessee for the losses suffered before, on the owner for the losses suffered after the termination of the contract of lease. This is the reason why the lessee had to offer a procedural guarantee in the form of stipulation that the owner would not seek reimbursement of the same damages in the future, while this was not necessary in the case when an interdict was being brought. The lawsuit is granted to the tenant as the future owner of the fruits, and not on the basis of being the *detentor* of the land. The lawsuit was granted to both owner and tenant not as an *actio directa*, but an *actio in factum ex lege Aquilia*. It is not possible to establish the reason with certainty. It could be the lack of physical change of a thing (*corrumpere*), or some other reason, such as the fact that the damage was not made directly (*corpore*) or that the tenant had not yet become the owner of the fruits. Both the owner and the tenant could use either an interdict or an Aquilian action, but only one of two procedural remedies could be applied.

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# NOVO MOGUĆE TUMAČENJE PARAGRAFA JUSTINIJANOVIH DIGESTA D.9.2.27.14: PRILOG IZUČAVANJU ZAČETAKA PRAVA ZAŠTITE ŽIVOTNE SREDINE U RIMSKOM PRAVU

Samir Aličić

APSTRAKT

Predmet rada je analiza značenja pasusa Justinijanovih Digesta D.9.2.27.14. Autor na osnovu uporedne analize izvora izvodi sledeće zaključke. Izvesno je da ni Celz ni Ulpijan u tekstu D.9.2.27.14 nisu sumnjali da se u slučaju zagađenja zemljišta korovom može dati interdikt *quod vi aut clam*, jer su ispunjeni svi uslovi za njegovu primenu. Interdiktom može da se zahteva samo šteta koja će nastati u roku od godinu dana. Iz tog razloga ovo procesno sredstvo pripada ili vlasniku zemlje ili, ako je zemljište dato u zakup, zakupcu. Iz istog razloga daje se pored interdikta i akvilijanska tužba, s tim što se može upotrebiti samo jedno od ta dva procesna sredstva. Ona pripada kako vlasniku zemlje, tako i zakupcu. Zakupcu se daje za onu štetu koja nastane pre isteka zakupa, a vlasniku za onu koja nastane kasnije. Tužba se i vlasniku i zakupcu ne daje kao direktna, nego kao *actio in factum ex lege Aquilia*. Razlog za to ne može se sa sigurnošću utvrditi.

**Ključne reči:** *lex Aquilia*, *damnum iniuria datum*, šteta, vanugovorna odgovornost, *interdictum quod vi aut clam*, zagađenje, obligacije, pravo zaštite životne sredine, rimsko pravo.

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ORIGINAL SCIENTIFIC ARTICLE

*Paolo Zicchittu**

# THE ENACTMENT OF ARTICLE 11 OF THE ITALIAN CONSTITUTION: BETWEEN DOMESTIC AND INTERNATIONAL LAW

***Abstract:*** *Starting from the recent invasion of Ukraine by the Russian army, this essay reflects on the meaning, scope, and application of Article 11 of the Italian Constitution. In particular, the paper analyzes, from a diachronic perspective, the rejection of war by examining its practical implications and focusing on the interrelationships between constitutional law and international law in defining the concept of war and collective self-defense.*

**Key words:** Article 11 of Italian Constitution, War in Ukraine, Self-defense, Pacifist principle, Internationalist principle, Principle of solidarity

## 1. Introduction

Article 11 of the Italian Constitution (hereinafter: Article 11) has always been at the core of an extensive and multifaceted doctrinal debate. This discussion has evolved alongside a range of interpretive proposals put forward by both the political system and civil society, spanning the different historical phases since the establishment of the Italian Republic in 1948.

The ongoing analysis surrounding Article 11 reflects its significance as a fundamental constitutional provision. This norm encompasses key principles related to Italy's role in the international community and its commitment to promoting peace and justice among Nations.[1] Since the end of the Cold War, Italy has increasingly engaged in several military

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1 For a short comment during the different phases of the Italian Republic, see for example Carlassare, L., 2013, L'art. 11 Cost. nella visione dei Costituenti, *Costituzionalismo.it*, 1, p. 3; Fiores, C. de, 2002, *"L'Italia ripudia la guerra"? La Costituzione di fronte al nuovo ordine globale*, Rome, Ediesse, p. 15; Benvenuti, M., 2010, Ripudio della guerra e Costituzione italiana, *Studi in onore di Vincenzo Atripaldi*, Naples, Jovene, p. 3; Allegretti, U., 1991, Guerra del Golfo e Costituzione, *Foro italiano*, 2, pp. 381–382; Vergottini, G. de, 2004, *Guerra e costituzione*, Bologna, il Mulino, pp. 35–36.

operations, often carried out under the aegis of international institutions. However, such participation has cyclically raised doubts from the standpoint of consistency with Article 11.[2]

More recently, the "special military operation" conducted by the Russian army on Ukrainian territory prompted reflections on Italy's position in the international arena, in light of the constitutional parameter of Article 11. In this dramatic situation, the Italian Government's decision to support the Ukrainian resistance by providing defensive weaponry has faced strong criticism from some commentators, who argue that this decision may be unconstitutional.[3]

To adequately address this issue, it is useful to revisit the steps that led to the adoption of Article 11, accurately reconstructing the practical regulatory scope of this provision and its normative limits. From a methodological standpoint, this topic will be tackled by simultaneously examining both the regulatory aspect and the application of Article 11 itself.

Starting with a doctrinal interpretation, the essay will explore the original intent of this provision, by analyzing the work of the constituent assembly. The paper will then focus on the practical implementation of the constitutional precept, in light of the various wartime events involving the Italian Republic since 1948.

This set of paradigmatic cases will be examined from a primarily domestic perspective, assessing case-by-case the compatibility of those military interventions with the content of the provision under discussion. Such an approach will be intended to illustrate the developments and gradual adaptations of Article 11 throughout the history of the Italian Republic, aiming to gauge the changes that the pacifist principle has undergone in practice and under the influence of international law.

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2 See Satta, V., 2011, Guerra e Costituzione, *Appunti di cultura e politica*, 3, pp. 29–32; Onida, V., 1995, Guerra, diritto, Costituzione, *il Mulino*, 5, pp. 958–962; Lupo, N., 2020, L'influenza dell'Alleanza atlantica nell'interpretazione della Costituzione economica: ovvero, sulla centralità dei principi dell'art. 11 Cost., *Rivista trimestrale di diritto dell'economia*, 3, p. 425; Allegretti, U., 2010, La guerra, la Costituzione e le Nazioni Unite, *Rivista dell'Associazione Incontri*, 3, p. 1000; Azzariti, G., 2016, Multiculturalismo e Costituzione, *Politica del diritto*, 2, pp. 8–10.

3 For a preliminary overview, see Vergottini, G. de, 2022, La Costituzione e il ritorno della guerra, *Osservatorio costituzionale*, 3, p. 71; Algostino, A., Pacifismo e movimenti fra militarizzazione della democrazia e Costituzione, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 67; Cavino, M., 2022, Il governo della guerra, *Quaderni costituzionali*, 4, p. 753; Lupo, N., 2022, L'art. 11 della Costituzione e l'appartenenza dell'Italia all'Alleanza atlantica, *Il Filangieri*, 1, p. 19; Apostoli, A., L'Italia è una Repubblica democratica fondata anche sul principio pacifista, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 141.

This will provide an understanding of the relationships between the Italian Constitution and other legal systems, marked by the aim of constantly opening the Italian legal order to the notions and categories of international law.

## 2. Article 11 and the Constituent Assembly

In order to investigate the content of Article 11, it is essential to acknowledge an unquestionable historical fact: the Italian Constitution was adopted only two years after the end of the Second World War and the establishment of the United Nations. For the "Constituent Fathers", war represented an immediate historical reference, firmly ingrained in the collective memory of the men and women responsible for drafting the Italian fundamental Charter. The brutality of that conflict had underscored the need for a stable and enduring peace as an essential condition – almost mandatory – for the future development of the Italian legal order and the restoration of peaceful and productive international relations.[4]

More than the mere confrontation between opposing ideologies, the Italian Constitution was forged by a universal spirit in which the collective experience of war served as a crucial element in establishing political consensus. This marked a profound departure from the past and a decisive rejection of totalitarianism, which relied on violence and the glorification of force.[5] As stated by Togliatti, the Constitution should expressly reject war as an instrument of offensive and conquest policy for two reasons: firstly, from an internal perspective, to stigmatize a conflict that had ravaged the Nation; secondly, from an external perspective, to clarify the position of the Italian Republic in relation to the global political movement striving to outlaw war altogether.[6]

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4 See Carlassare, L., Costituzione italiana e partecipazione a operazioni militari, in: Ronzitti, N., (ed.), 2000, *NATO, Conflitto in Kosovo e Costituzione italiana*, Milan, Giuffrè, pp. 162 ff; Chieffi, L., 1990, *Il valore costituzionale della pace. Tra decisioni dell'apparato e partecipazione popolare*, Naples, Liguori, pp. 61 ff; Bon Valsassina, M., 1955, *Il ripudio della guerra nella Costituzione italiana*, Padua, Cedam, pp. 18 ff; Benvenuti, M., 2010, *Il principio del ripudio della guerra nell'ordinamento costituzionale italiano*, Naples, Jovene, pp. 55–57; Negri, G., La direzione e il controllo democratico della politica estera, in: Bonanni, M., (ed.), 1967, *La politica estera della Repubblica italiana*, Rome, Edizioni di Comunità, p. 763.

5 Losano, M., 2020, *Le tre costituzioni pacifiste. Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania*, Heidelberg, Max Planck Institute for European Legal History, pp. 193 ff; Paladin, L., 2004, *Per una storia costituzionale della Repubblica*, Bologna, il Mulino, pp. 204 ff; Bonanate, L., 2018, *Art. 11*, Rome, Carocci, pp. 23–25.

6 Against this background, see Togliatti, P. 1946 Speech at the session of the 1st Subcommittee, 3 December, (https://www.nascitacostituzione.it/01principi/011/index.htm,

Article 11 is a provision that, more than any other, places the Italian Constitution in a context of shared values and pushes for the adoption of a broader perspective going beyond national borders and historical events linked to anti-fascism.[7] The violence and devastations caused by the second world conflict had generated common reactions and aspirations among Western States, all yearning for a new world order. In the words of President Franklin D. Roosevelt, these States sought not only to reaffirm traditional rights, but also freedom from fear and from misery.[8] The memory of war events was still too fresh in the collective consciousness, superseding partisan conceptions and pushing newly reborn political parties to find a common agreement that transcended narrow interests or strategies.[9]

Such was the consensus that, during the deliberations of the Constituent Assembly, only two Deputies opposed the current wording of Article 11, and not for substantial reasons. The arguments presented by Francesco Saverio Nitti and Guido Russo-Perez, indeed, primarily centered around the difficulty of distinguishing *sic et simpliciter* between "just wars" and "unjust wars". Moreover, they considered it redundant to include a similar assertion in the Constitution of a country now disarmed and under the guidance of the Allies.[10]

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16. 10. 2023). These two topics intersect and recur: the repudiation of war serves both to mark the break from the past, and to unite Italy with other countries in the common aspiration for a world of peace.

7 See Allegretti, U., 1986, Una ricerca su Costituzione e nuove armi, *Democrazia e Diritto*, 2, p. 108; Cartabia, M., Art. 11, in: Bifulco, R., Celotto, A., Olivetti, M., (eds.), 2006, *Commentario alla Costituzione*, Turin, UTET, p. 277; Lugato, M., L'articolo 11 della Costituzione e le Nazioni Unite, in: Ronzitti, N., (eds.), 2013, *L'articolo 11 della Costituzione. Baluardo della vocazione internazionale dell'Italia*, Naples, ESI, p. 137.

8 Roosevelt, F. D., 1941, Annual Message to Congress, January 6, (http://docs.fdrlibrary.marist.edu/od4frees.html, 16. 10. 2023). Within this framework see also Damiani, U., 1947, Speech at the session of the 1st Subcommittee, 8 March, (https://www.nascitacostituzione.it/01principi/011/index.htm, 16. 10. 2023). By recalling the four fundamental freedoms proclaimed in the Atlantic Charter, the author underlines that Article 11 represents, realizes, and conforms to the principle of "freedom from fear".

9 From this standpoint, see Cassese, A., Art. 10–11, in: Branca, G., Pizzorusso, A., (eds.), 1975, *Commentario della Costituzione*, Bologna – Rome, Zanichelli, p. 462. See also Paladin, L., 1997, I principi fondamentali della Costituzione repubblicana: una prospettiva storica, *Giurisprudenza costituzionale*, 4, p. 3056; Dossetti, G., 1996, *La Costituzione. Le radici, i valori, le riforme*, Milan, Edizioni Lavoro, pp. 24–25.

10 To this end, see especially Russo-Perez, G., 1947, Speech at the session of the 1st Subcommittee, 14 March, (https://www.nascitacostituzione.it/01principi/011/index.htm, 16. 10. 2023); Nitti, F. S., 1947, Speech at the session of the 1st Subcommittee, 14 March, (https://www.nascitacostituzione.it/01principi/011/index.htm, 16. 10. 2023).

However, all the Constituents converged on the need to build a shared system of values firmly opposed to the warlike concepts of the authoritarian State and designed to avert future wars, in accordance with the provisions of the Atlantic Charter. Within this cultural context, the rejection of the use of force represented a prerequisite for creating a new global order based on the principles of collective security and self-determination.[11]

Hence, all the constitutional provisions relating to war embraced a collective pacifist stand as a "supreme principle" endowed with a strong normative value.[12] As Bobbio acutely observed, the Constitution embodies a system of values in which the concept of "peace" is so closely intertwined to that of "war"; the two terms must therefore be understood as antithetical. The Italian Constituent employs this sematic dyad in an axiological-prescriptive and not merely descriptive or classificatory manner, with the clear intent of promoting peace and condemning the use of war.[13]

In this regard, the binding nature of the constitutional precept is apparent. Political forces with different orientations and backgrounds agreed, almost unanimously, to introduce and uphold the fundamental "pacifist principle", articulating it in the clearest way possible.[14] The wording of article 11 leaves no room for ambiguity of any kind: "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."[15]

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11 See, for example, Fiorillo, M., 2009, *Guerra e diritto*, Rome – Bari, Laterza, p. 100; Ronzitti, N., 1984, Politica di difesa, Costituzione e norme internazionali, *Politica internazionale*, 1, p. 75; Andò, S., 2000, Ripudio della guerra e neutralità nel mondo del dopoguerra, *Una facoltà nel Mediterraneo. Studi in occasione dei trent'anni della Facoltà di scienze politiche dell'Università di Catania*, Milan, Giuffrè, p. 33.

12 See Chieffi, L., Art. 11, in: Bifulco, R., Celotto, A., Olivetti, M., (eds.), 2006, *Commentario alla Costituzione*, Turin, UTET, pp. 268–269; Labriola, S., 1979, Difesa nazionale e sicurezza dello stato nel diritto pubblico italiano, *Rivista trimestrale di diritto pubblico*, 3, p. 904; Rigano, F., La guerra: profili di diritto costituzionale, in: Aa. Vv., 2002, *La guerra profili di diritto internazionale e diritto interno*, Naples, ESI, pp. 19–60.

13 Bobbio, N., voce Pace, in: Vv.Aa., 1989, *Enciclopedia del Novecento,* I Supplemento, Rome, Treccani.

14 See Vergottini, G. de, 2017, Guerra, difesa e sicurezza nella costituzione e nella prassi, *Rivista AIC*, 2, pp. 4–5; Bin, R., Art. 11, in: Crisafulli, V., Paladin, L., (eds.), 1990, *Commentario breve alla Costituzione*, Padua, Cedam, p. 69; Severini, G., 2004, Realtà internazionale e articolo 11 della Costituzione italiana, *Rassegna Parlamentare*, 1, p. 65.

15 Parliamentary Information, Archives and Publications Office, Constitution of the Italian Republic, Official translation (https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, 16. 10. 2023).

The principle of catholic universalism, rooted in Christian-democratic traditions, was flanked by the internationalist goals of communists and socialists; these shared values found correspondence in the federalist ideals espoused by the republican and actionist parties.[16]

## 3. The Systematic Interpretation of Article 11 and Its Preceptive Scope

On exegetic grounds, Article 11 is an organic provision characterized by logical unity and internal coherence. Its formal construction, with precise punctuation, requires a unitary and systematic interpretation and not partial or separate readings of each single proposition.[17]

Hence, Article 11 must be read in light of its *ratio* and the significance attributed to the unequivocal rejection of war within the framework of the 1948 Constitution. Since these are strictly functional requirements, each individual part of Article 11 must be understood both as intimately linked to and as an indispensable precondition for the others. Each part thus mutually complements and reinforces the normative significant of the provision.[18]

### 3.1. THE "REJECTION" OF WAR

From this standpoint, the absolute rejection of war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes represents the inspiring principle

16 Bonini, F., Tra partiti e blocchi contrapposti: il biennio 1947–49, in: La Porta, S., (ed.), 2020, *NATO e Costituzione*, Milan, Giuffrè, pp. 1 ff; Cortesi, L., Introduzione, in: Cortesi, L., Liberti, A., 1989, *1949: il trauma della NATO. Il dibattito alla Camera sull'adesione dell'Italia al Patto atlantico*, Florence, Edizioni Cultura della Pace; Sorrentino, F., 2004, Riflessioni su guerra e pace tra diritto internazionale e diritto interno, *Rivista di Diritto Costituzionale*, 1, p. 153.

17 Above all see Carlassare, L., Costituzione italiana e guerra umanitaria, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza*, Turin, Giappichelli, p. 23; Barone, A., 1987, La difesa nazionale e la Costituzione, *Diritto e società*, 2, p. 643; Mazzarese, T., 2003, Guerra e diritto. Note a margine di una tesi kelseniana, *Teoria politica*, 1, pp. 25–26.

18 See Pezzini, B., 2022, Per un ordine della sovranità disarmata, *Osservatorio AIC*, 3, p. 67; Fiorillo, M., 2009, p. 11; De Fiores, C., 2019, Le radici della nazione repubblicana. Fondamenti teorici e profili costituzionali, *Costituzionalismo.it*, 1, pp. 77–78; Zolo, D., 2000, *Chi dice umanità. Guerra, diritto e ordine globale*, Turin, Einaudi, p. 61; Scagliarini, S., 2002, Il ripudio della guerra nella Costituzione italiana. Brevi note sull'art. 11 della Carta costituzionale', *Revue internationale de langues juridiques et de droit comparé*, 1, pp. 61–62.

of the entire provision. This principle reflects a shared political project, which serves as a guide in the interpretation of Article 11.

The first line of Article 11 establishes a preceptive scope. Primary, it prohibits the use of military force with the exclusive or prevalent aim of violating the freedom of other peoples (the so-called "war of aggression").[19] Secondly, it unequivocally condemns any attempt to resolve international disputes through anything other than peaceful economic or diplomatic means.[20] The regulatory scope of Article 11 also prevents the Italian legal system from adopting attitudes that, while not military in nature, threaten the independence of other States. This includes the supplying of weapons or the harboring in ports and airports of the armed forces of a State engaged in a war of aggression.[21]

Yet, the repudiation of war is not expressed in absolute terms.[22] Since its first drafting, the Constitution acknowledges that any dispute – however severe and harsh – may always be resolved through peaceful means. At the same time, the Constitution allows the use of armed force in order to safeguard the territorial integrity of a State suffering "unjust aggression".[23] Hence, the constitutional rejection of war prevents any type

19 *Ex multis* Fiores, C. de, 2003, Costituzione e guerre di globalizzazione. Interpretazione evolutiva o violazione dell'art. 11 Costituzione?, *Questione giustizia*, 1, pp. 1004–1005; Cecchetti, M., 1993, Il ripudio della guerra contenuto nella carta costituzionale alla luce del diritto e della prassi internazionale, *Comunità internazionale*, 1, p. 284; Carnevale, P., L'Italia, l'attuale vicenda della guerra irachena e l'art. 11 della Costituzione, in: Carnevale, P., (ed.), 2013, *La Costituzione va alla guerra?*, Naples, ESI, p. 142.

20 Motzo, G., 1999, Costituzione e guerra giusta alla periferia dell'impero, *Quaderni costituzionali*, 3, p. 373.

21 Cf. Bobbio, N., 1997, *Il problema della guerra e le vie della pace*, Bologna, il Mulino, pp. 2–3; Dogliani, M., 2003, Il divieto costituzionale della guerra, *Costituzionalismo.it*, 1; Bettinelli, E., 1991, Guerre e operazioni di polizia internazionale', *Foro italiano*, 5, pp. 377–378; Rescigno, G.U., 1999, Riflessioni di un giurista sulla guerra e sulla pace, *Quaderni costituzionali*, 2, p. 376; Ferrara, G., 2003, Ripudio della guerra, rapporti internazionali dell'Italia e responsabilità del Presidente della Repubblica, *Costituzionalismo.it*, 1.

22 From a comparative perspective see, for example, Article 9 of the Constitution of Japan, which came into effect on 3 May 1947. In its text, Japan outlaws war as a means to settle international disputes involving the state and formally renounces the sovereign right of belligerency and aims at an international peace based on justice and order. According to this provision: "1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. 2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

23 Portinaro, P. P., Introduzione. Diritto internazionale, guerra giusta e nemico ingiusto, in: Eberl, O., Niesen, P., (eds.), 2014, *Nessuna pace col "nemico ingiusto"? Se sia lecito*

of oppression, but it is not entirely pacifist, in the sense that it recognizes the right and duty to defend the independence of one's territory, freedom, and Constitution.[24]

In this sense, the content of Article 11 is strictly linked to Articles 52, 78 and 87, para 9, of the Italian Constitution. Article 78 indeed provides that "Parliament has the authority to declare a state of war and vest the necessary powers into the Government." Similarly, Article 87, para 9, establishes that the President of the Republic "shall make declarations of war as have been agreed by Parliament." These two provisions are qualified by Article 52, according to which the military defense of the Country is "a sacred duty for every citizen." Therefore, it is to be presumed that the "state of war" deliberated by Parliament and formally declared by the President of the Republic must have eminently defensive characteristics.[25]

The only constitutionally permitted war is the one aiming to protect the fundamental rights of citizens and safeguarding the integrity of the democratic institutions through the controlled and measured use of military force, in compliance with the principle of self-defense enshrined in the Charter of the United Nations and the inalienable right of each State to defend its political community from any external aggression.[26] From this perspective, Article 11 clarifies the regulatory meaning of all remaining provisions of the Constitution that, in various ways, mention war.

During the discussions in the Constituent Assembly, a cautious approach prevailed, aiming to maintain an efficient military apparatus to be used solely in response to unjustified armed aggression against the

*imporgli la democrazia dopo averlo sconfitto*, Turin, Edizioni Trauben, p. 7; Allegretti, U., 2001, La pace e il suo statuto, *Forum di Quaderni Costituzionali*, 6, p. 1.

24 See, for example, Benvenuti, M., 2011, L'Italia, la Costituzione e la (seconda) guerra di Libia, *Costituzionalismo.it*, 1, p. 1; Vergottini, G. de, 1999, La Costituzione e l'intervento NATO nella ex-Yugoslavia, *Quaderni costituzionali*, 1, p. 122; Franchini, M., 2003, Brevissime note a proposito dei nuovi impegni militari italiani in Afghanistan, *Studi per Giovanni Motzo*, Milan, Giuffrè, pp. 207–208.

25 See Carnevale, P., 2019, Guerra, Costituzione e legge: qualche riflessione sul trattamento costituzionale della guerra anche alla luce della recente legge sulle missioni internazionali, *Diritto e società*, 1, p. 149; Giardina, A., Art. 78, in: Branca, G., Pizzorusso, A., (eds.), 1978, *Commentario della Costituzione*, Bologna – Rome, Zanichelli, pp. 99–100; Modugno, F., Nocilla, D., 1988, Problemi vecchi e nuovi sugli stati di emergenza nell'ordinamento italiano, *Scritti in onore di Massimo Severo Giannini*, Milan, Giuffrè, p. 538.

26 See Vedaschi, A., 2022, Guerra e Costituzione: spunti dalla comparazione, *Osservatorio costituzionale*, 3, p. 6; Fiores, C. de, 2003, Una guerra contro la Costituzione, *Costituzionalismo.it*, 1, pp. 7–8: Podetta, M., Uso della forza nella comunità internazionale e Costituzione, in: Onida, V., (ed.), 2019, *Idee in cammino: il dialogo con i costituzionalisti bresciani*, Bari, Cacucci, p. 256.

independence and territorial integrity of the State. War remained the last resort, to be used only after all the necessary attempts at a peaceful resolution of the dispute were exhausted.[27] The use of military force was justified only when a "just cause" existed, arising from a real "state of necessity". In this case, the attacked State – and potentially other States willing to assist it in pursuant of mutual agreements for international cooperation – would respond proportionately to the aggression suffered. The armed response would be consequently limited to "strict defensive needs".[28]

In compliance with Article 51 of the Charter of the United Nations, the Italian Constitution excludes, however, that the threat against the territorial integrity of a State by a potential enemy (for example through progressive rearmament or with movements of troops on the border) can justify preventive defense actions. In such circumstances, at most, only non-coercive measures such as embargoes, the freezing of economic resources or a block of funding, would be allowed.[29] The defensive intervention – individual or collective – must therefore be limited to restoring the violated right by rejecting the aggression. The total destruction of the enemy or the replacement of the Government responsible for the armed attack fall outside the scope of the provision. These would indeed turn a legitimate war into an unlawful action of retaliation, contrary to the intentions of the Constituent Fathers.[30]

According to Article 11, therefore, security means protection from external invasions, such as armed attacks coming from third States, international organizations, or terrorist groups. In this respect, the notion of security must guarantee protection from aggressions, including predominantly armed actions, and may imply the defense of territorial integrity through intelligence and military activities.[31] The Italian

27 Carlassare, L., 2013, p. 3.

28 See Apostoli, A., Preservare la democrazia senza ricorrere alla guerra, in: Brunelli, G., Pugiotto, A., Veronesi, P., (eds.), 2009, *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Naples, ESI, p. 1749; Zanghì, C., 1999, Il Kossovo fra Nazioni Unite e diritto internazionale, *Quaderni costituzionali*, 2, p. 379; Vergottini, G. de, Difesa nazionale e guerre ripudiate, in: Labriola, S., (ed.), 2006, *Valori e principi del regime repubblicano. Sovranità e democrazia*, Rome – Bari, Laterza, p. 403.

29 See, for example, Rigano, F., 2002, p. 19.

30 Benvenuti, M., 2010, pp. 55–57.

31 Vergottini, G. de, 2001, Profili costituzionali della gestione delle emergenze, *Rassegna parlamentare*, 2, p. 291; Frau, M., La guerra difensiva e il contrasto al terrorismo internazionale alla luce dell'articolo 11 della Costituzione italiana, in: Frau, M., Tira, E., (eds.), 2022, *Il contrasto al terrorismo negli ordinamenti democratici*, Bologna, BUP, p. 93.

Constitutional Court has clearly endorsed the lawfulness and the dutifulness of this interpretation. In a number of cases, by providing a combined interpretation of Article 11 and Article 52 of the Constitution, the Italian Court has established that the security of the Country is presumed to axiologically prevail over other values.[32]

### 3.2. THE "OPENING" CLAUSE AND THE ISSUE OF SOVEREIGNTY

Having firmly abandoned fascist nationalism and imperialism, and embracing a predominantly irenic perspective, the Republican Constitution recognizes transnational solidarity as an essential precondition for establishing a new coexistence between peoples, based on positive friendships and not on bloody oppositions.[33] With this renewed approach, the Italian Constitution identifies a set of fundamental values that take priority over State sovereignty. It also accepts, on conditions of equality with other States, all the limitations of sovereignty, to ensure peace and justice among the Nations. Accordingly, it promotes and encourages international organizations furthering such ends.[34]

The text of the Constitution neither mentions the European Union nor refers to the United Nations. Nonetheless, references to the aspiration to take part in the UN and to comply with the provisions of its Charter were implicit in the Constituent Assembly. Similarly, the Constituent Fathers also took into account the European perspective, and the fact that the text of the provision does not explicitly mention it is because, especially after the war events, the link of solidarity between European States was taken to be widely accepted and considered implicit in the drafting of Article 11. It is no coincidence that the Italian Constitutional Court, with the decision No. 14 of 1964 and with the decision

32 See, for example, the reasoning developed in Constitutional Court of Italy, Judgment No. 110/1998. From a similar perspective, see also Constitutional Court of Italy, Judgment Nos. 24/2014, 106/2009, 86/1977, 82/1976 and Constitutional Court of Italy order 86/1977.

33 See Ferrajoli, L., 2021, *Perché una Costituzione della Terra?*, Turin, Giappichelli; Andrea, A. d', 2008, Solidarietà e Costituzione, *Jus: Rivista di scienze giuridiche*, 1, p. 1827; Golia, A., Il principio di solidarietà nell'ordinamento costituzionale italiano, in: Bifulco, R., Benvenuti, M., (eds.), 2022, *I diritti e i doveri costituzionali*, Turin, Giappichelli, p. 268; Ross, M., 2009, Solidarietà: un nuovo paradigma costituzionale per l'Unione europea?', *Rivista del diritto della sicurezza sociale*, 2, p. 239; Teubner, G., 2014, Il costituzionalismo della società transnazionale, *Quaderni costituzionali*, 1, p. 191.

34 For a comparison see above all Losano, M., 2020, p. 193.

No. 183 of 1973 has grounded the legitimacy of Italy's accession to the EU on Article 11.[35]

To the extent that peace and justice between Nations are priority values, State sovereignty must be self-limited in order to guarantee such values. As emphasized by Guiseppe Dossetti's speech in the Constituent Assembly at the end of the session of 3 December 1946, the ruins caused by war were largely the result of States arrogantly asserting their sovereignty in absolute and unlimited ways.[36] In order to ensure a long and lasting period of peace among peoples, modern States must instead be willing to submit to international rules. This would be the only way to build modern Constitutions, breaking the cycle of pride and nationalism, accepting limitations in the interest of peace, and recognizing a higher authority to resolve disputes.[37]

As the Constitutional Court underlined in its judgment No. 170 of 1984, not all Treaties justify a limitation of sovereignty. Self-limitation of sovereignty is essential only to ensure the rejection of war and to contribute to the creation of a system of solidarity among peoples. As a result, international Treaties promoting peace and justice among Nations justify limitations of State sovereignty. Conversely, Treaties that do not pursue the objectives enshrined in Article 11 may not be enforced in the domestic legal system. The issue of statehood also comes as a direct corollary of the repudiation of war.[38]

Accordingly, sovereignty undergoes a genetic transformation; it is no longer invoked as a justification for absolute power but as a limit to the ar-

35 See, above all, Cartabia, M., 2006, p. 277. See also Mastroianni, R., 2018, L'art. 11 Cost. preso sul serio, *Diritto pubblico comparato ed europeo*, 3, p. 5; Lupo, N., 2021, L'art. 11 come "chiave di volta" della Costituzione vigente, *Rassegna parlamentare*, 3, p. 379.

36 From this point of view, see Dossetti, G., 1946, Speech at the session of the 1st Subcommittee, 3 December, (https://www.nascitacostituzione.it/01principi/011/index.htm, 16. 10. 2023).

37 Ferrajoli, L., 2016, Diritti fondamentali e democrazia costituzionale, *Revista do Instituto Brasileiro de Direitos Humanos*, 2, p. 367; Allegretti, U., 2010, p. 1000; Cacciari, P., L'articolo 11 della nostra Costituzione dice che la guerra va bandita, in: Genovese, A., (ed.), 2008, *Intercultura e nonviolenza: possibili strade di pace*, Bologna, CLUEB, pp. 4–5; Fiores, C. de, 2003, pp. 1004–1005; Carlassare, L., 2012, *Nel segno della Costituzione*, Milan, Feltrinelli.

38 See Italian Constitutional Court, judgment No. 170 of 1984, especially para. 5 conclusions on point of law. Among scholars, from a more general perspective see Calamo Specchia, M., 2021, Un prisma costituzionale, la protezione della Costituzione: dalla democrazia "militante" all'autodifesa costituzionale, *Diritto pubblico comparato ed europeo*, 1, p. 91; Cassese, S., 2010, Ordine giuridico europeo e ordine nazionale, *Giornale di diritto amministrativo*, 4, p. 419; Tega, D., 2020, La Corte nel contesto, *Questione giustizia,* 4, pp. 5–6.

bitrary exercise of political authority.[39] The idea is that these values reflect the identity, legal culture, and self-understanding of society, thus preserving them he very identity of the *polis*, rooted in the historical experience of a people as articulated in the Constitution.[40]

It is within this legal framework that the relationship between the domestic legal order and the international legal system is established. International legal institutions complement and uphold constitutional stability. Indeed, the Italian Constitution clearly limits State sovereignty through the creation of a transnational order that mutually protects such principles. Furthermore, the "opening" that the Italian fundamental Charter accords to the rules of international law goes beyond the institutional dimension and is content-related. Such opening allows for the understanding of the very scope of the clauses contained in the Constitution.

## 4. The Internationalist Principle as a "Supreme Principle"

The Constitution does not provide a definition of the term "war", leaving room for international law to clarify its notion and understanding. This highlights the dynamic interaction between the domestic legal order and the international legal framework. The constitutional reference to war acquires a distinct semantic value since the notion of "war" under international law shapes the interpretation of the Italian Constitution.[41]

Treaties, the case-law of international courts, and State practices have indeed gradually changed the classical meaning of "war", replacing it with the notion of "armed conflict", which presents different nuances and intensities. Especially in the last three decades, the concept of "war", understood essentially as an interstate conflict aimed at the *debellatio* of another State, has often proved insufficient to describe a diversified range of

39 Vergottini, G. de, 2004, pp. 35–36.

40 Guazzarotti, A., 2017, Sovranità e integrazione europea, *Rivista AIC*, 3, p. 1; Palombella, G., 1997, *Costituzione e sovranità: il senso della democrazia costituzionale*, Bari, Edizioni Dedalo, pp. 64–65; Valia, I., 2016, Sovranità e diritti umani, *Rivista di scienze della comunicazione e di argomentazione giuridica*, 1, p. 83; Ferrajoli, L., 2003, p. 331; Fioravanti, M., 2014, *Costituzionalismo: percorsi della storia e tendenze attuali*, Rome – Bari, Laterza, pp. 161 ff.

41 See, for example, Vergottini, G. de, 2001, p. 275. According to the author, if the relevant definition under international law changes, even the concept adopted by State law changes at the same time. See also Azzariti, G., 2011, La guerra in Libia e la Costituzione', *Costituzionalismo.it*, 3, p. 1; Armao, F., voce Guerra, in: Armao, F., Parsi, V. E., (eds.), 1997, *Enciclopedia tematica aperta della Società internazionale*, Milan, Jaca Book.

conflicts. Against this background, war, in its traditional meaning, is only an option and not even the most frequent one.[42]

In sum, the concepts and terms of Article 11 must not be considered fixed at the time that the Constituent Fathers adopted them. They are undergoing continuous adjustments in light of evolving legal and political relationships established at the international level.[43] Institutional, parliamentary and governmental practices have adapted domestic regulation to the concepts established in international law, integrating them into the interpretation of constitutional provisions. In other words, the Italian Constitution no longer embraces the merely defensive logic that emerged immediately after the end of the Second World War and was aimed at preventing possible aggressions (at that time expected mostly from the so-called "communist bloc"), but it is open to the developments of international conflicts. Hence, the Constitution provides only indirect legal protection to the currently most used method of employing armed force, such as military missions operating outside the national territory under international authority.[44]

In conclusion, even the constitutional provision establishing the repudiation of war must be consistently re-interpreted in an evolutionary manner, by considering the role played by international Treaties and Institutions. Article 11 indeed provides that "Italy agrees [...] to the limitations of sovereignty that may be necessary to a world order ensuring peace and

42 *Ex plurimis*, see Battaglini, G., Fioravanti, C., 1999, Nazioni Unite e NATO negli interventi armati, *Politica del diritto*, 1, pp. 259 ff; Cannizzaro, E., La nuova dottrina strategica della NATO e l'evoluzione della disciplina internazionale sull'uso della forza, in: Ronzitti, N., (ed.), 2000, *Nato, conflitto in Kosovo e Costituzione italiana*, Milan, Giuffrè, p. 43; Barbera, A., 1999, Le vicende del Trattato del Nord Atlantico: revisione de facto o interpretazione evolutiva?, *Rassegna parlamentare*, 4, p. 815.

43 Saulle, M. R., 1999, I cinquant'anni della NATO, *Affari Esteri*, 3, p. 605; Fulci, F. P., 1992, Il permanente ruolo della NATO nel nuovo quadro geo-strategico mondiale, *La comunità internazionale*, 1, p. 128; Mortellaro, D., 1999, *I Signori della guerra. La NATO verso il XXI secolo*, Rome, Manifestolibri.

44 See, for example, Ferrajoli, L., 2009, I crimini di sistema e il futuro dell'ordine internazionale, *Teoria politica*, 9, p. 402; Gaja, G., L'organizzazione internazionale, in: Amato, G., Barbera, A., (eds.), 1984, *Manuale di diritto pubblico*, Bologna, il Mulino, p. 1093: Mancini, M., 2009, *Stato di guerra e conflitto armato nel diritto internazionale*, Turin, Giappichelli, p. 243. Additional evidence that the Italian domestic legal system integrates and applies the hermeneutic principles related to Article 11 – and in particular the clauses concerning war – as they are expressed in International law, can be also observed in a statement made by the Supreme Court stated that armed conflicts are classified as such by international law, even if they involve internal civil wars. See Italian Court of Cassation, Judgment No. 1072, 11 October 2006 – 17 January 2007, para. 2.

justice among the Nations."[45] The interpretation of this provision should therefore balance two fundamental principles, the repudiation of war and the participation in international organizations that guarantee peace and security. As mentioned above, the Constituents wished to prevent Italy from venturing into future wars, while at the same time guaranteeing its inclusion in international organizations responsible for collective security, mainly the United Nations.[46]

The decision not to include the principle of neutrality in the Constitution was largely perceived by the majority of the Italian legal scholars as an attempt to avoid isolation at the international level after the Second World War.[47] If the repudiation of war had a truly absolute meaning, it would have been inconsistent to include in the Italian Constitution a statement that was both ideologically strong yet lacking in normative significance. To definitively prevent Italy from being involved in military conflicts, the most suitable option would have been the inclusion of a permanent neutrality clause. Such neutrality would have ensured that the Italian Republic would not participate in any wars except those of a purely defensive nature. This way, the Constitution could have more directly advanced the ideal of promoting peace.

If this did not happen, it is precisely because the Constituents were determined to place Italy among the active participants of international politics. The Constituents left room for involvement in armed conflict situations with the view of enforcing the principles enshrined in the Charter of the United Nations.[48] This means that a derogation from the manda-

45 Fiores, C. de, Il principio internazionalista, in: Morte, M. della, Martino, F. R. de, Ronchetti, L., (eds.), 2020, *L'attualità dei principi fondamentali della Costituzione dopo settant'anni*, Bologna, il Mulino, pp. 229 ff; Villani, U., Guerre giuste, difesa preventiva e interventi umanitari alla luce della Carta delle Nazioni unite, in: Possenti, V., (ed.), 2006, *Pace e guerra tra le Nazioni*, Milan, Guerini e associati, p. 147; Carnevale, P., Il ruolo del Parlamento e l'assetto dei rapporti tra Camere e Governo nella gestione dei conflitti armati. Riflessione alla luce della prassi seguita in occasione delle crisi internazionali del Golfo Persico, Kosovo e Afghanistan, in: Carnevale, P., (ed.), 2004, *Guerra e Costituzione*, Turin, Giappichelli, p. 94.

46 See Iovane, M., 2022, Il conflitto ucraino e il diritto internazionale: prime osservazioni', *Osservatorio costituzionale*, 3, p. 14; Mortati, C., 1975, *Istituzioni di diritto pubblico*, Padua, Cedam, p. 158; Battaglini, G., Fioravanti, C., 1999, p. 264.

47 See especially Fiores, C. de, Il principio costituzionale pacifista, gli obblighi internazionali e l'invio di armi a Paesi in guerra, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 29; Battaglini, 1999, p. 12; Cremonesi, L., 2022, *Guerra infinita. Quarant'anni di conflitti rimossi, dal Medio Oriente all'Ucraina*, Rome, Solferino.

48 Cannizzaro, E., 1995, NATO, *Digesto delle discipline pubblicistiche*; Ronzitti, N., 2006, *Diritto internazionale dei conflitti armati*, Turin, Giappichelli, p. 101; Canto, F. dal, 2003, Il cammino del sacro dovere di difesa della patria, dalla guerra contro l'aggres-

tory principle of "rejection of war" is possible in two scenarios. First, the case where it is necessary to defend the State from external aggressions. Second, the circumstance where the domestic legal system must conform to a decision made by UN, NATO, or EU allowing for the use of force in accordance with the terms and conditions provided by the Charter or the Treaties establishing the European Union, i.e., in a solidaristic perspective.

In any case, the admissibility of possible armed interventions will be assessed against all the clauses that compose Article 11. Therefore, it is entirely possible that a conflict may arise between the rejection of war, included in the first part of the provision, and a decision of a military interventions of international bodies or allied States, which may not be inspired by clear defensive needs or be in line with the values protected by the UN Charter or the Italian Constitution.[49]

## 5. Article 11 in Action: A Brief Interpretative Overview

The pacifist foundation of the Italian constitutional framework is therefore built upon two fundamental principles outlined in Article 11. Firstly, the Constitution rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Secondly, it calls for the establishment of an international legal order ensuring peace and justice among the Nations, on conditions of equality with other States.[50]

However, the idealistic attempt made by the Constituent Assembly to keep war at a distance from the republican experience faced an immediate challenge due to the geopolitical landscape emerging after the Second World War. The conflict between the United States and the Soviet Union, the delicate institutional balances of the Cold War, and the nuclear tensions between the blocs, soon tested the resilience of the pacifist principle. Within this context, the domestic legal provisions and even the UN Charter proved insufficient in securing the goals expressed in the Constitution.[51]

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sione alla solidarietà sociale, *Rivista di diritto costituzionale*, 1, p. 295; Ferrari, G., 1970, Guerra – Stato di guerra (diritto costituzionale), *Enciclopedia del diritto*, Milan, Giuffré; De Sena, F., Neutralità, in: Vv.Aa., 2006, *Enciclopedia filosofica*, Milan, Bompiani.

49 Vergottini, G. de, 2022, p. 71.

50 Cf. *passim* Bon Valsassina, M., 1955, pp. 18 ff.

51 Canfora, L., Il mito della Costituzione mista, in: Urso, G., (ed.), 2009, *Ordine e sovversione nel mondo greco e romano*, Pisa, ETS, p. 113; Calchi-Novati, G., 1963, *Neutralismo e "guerra fredda"*, Rome, Edizioni di Comunità; De Fiores, C., 2003, La "guerra fredda": Dall'istituzione della NATO agli euromissili, *Costituzionalismo.it*, 2, p. 1.

### 5.1. THE ACCESSION TO NATO AND THE TENSIONS OF THE COLD WAR

As early as 1949, some Western governments considered it necessary to create a new and more impactful defense mechanism to solidify the hard-won balances achieved through pacification.[52] The Italian government's decision to join the North Atlantic Pact was thus motivated by the aspiration to pursue the political objectives outlined in Article 11 effectively. This entailed endorsing the shared values upheld by Western liberal democracies and employing exclusively defensive military strategies. [53]

Yet, the practical organization and functioning of NATO soon revealed structural anomalies from the United States' hegemonic position and the implementation of common directives, which actually entrusted defense political decisions to military leaders.[54] In order to reconcile the contradictions between the accession to the North Atlantic Treaty and the provisions of Article 11, a new interpretive approach was adopted in the mid-1970s. This allowed for justifiable disparities in treatment among NATO member States, as long as such disparities were deemed essential to ensuring peace and justice among Nations.[55]

Consequently, a pragmatic attitude towards the Constitution emerged in order to assess the legitimacy of military operations involving Italy against the principles outlined in Article 11. This hermeneutic approach considered the specific circumstances surrounding each military operation and aimed to balance geopolitical stability – including defensive military actions – and the constitutional commitment to pacifism.[56]

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52 See Brunelli, G., Scelta atlantica e centralità del Parlamento nella politica costituzionale degasperiana, in: La Porta, S., (ed.), 2022, *NATO e Costituzione. La rinascita dell'Italia tra difesa e sviluppo economico*, Milan, Giuffré; Onida, V., 1995, pp. 958–962; Forlati Picchio, L., Rapporti NATO-Nazioni Unite e Costituzione italiana: profili giuridici, in: Barié, O., (ed.), 1998, *L'alleanza occidentale. Nascita e sviluppi di un sistema di sicurezza collettivo*, Bologna, il Mulino, p. 501.

53 Di Nolfo, E., 2010, *La guerra fredda e l'Italia, 1941–1989*, Florence, Polistampa; Leisner, W., 1960, La funzione governativa di politica estera e la separazione dei poteri, *Rivista trimestrale di diritto pubblico*, 1, p. 334; Bongiovanni, B., 2021, *Storia della guerra fredda*, Rome – Bari, Laterza.

54 Vergottini, G. de, 1974, Le modificazioni delle competenze costituzionali in materia di difesa, *Rivista trimestrale di diritto pubblico*, 2, p. 446; Barbera, A., 1984, Gli accordi internazionali: tra Governo, Parlamento e corpo elettorale, *Quaderni costituzionali*, 2, p. 493; Treves, G., 1973, Le limitazioni di sovranità e i trattati internazionali, *Rivista trimestrale di diritto pubblico*, 2, p. 561.

55 Cassese, A., 1975, pp. 461 ff.

56 Grassi, S., 1986, Le garanzie giuridiche in tema di pace, *Democrazia e diritto*, 1, p. 79; Nolfo, E. di, 2015, *Storia delle relazioni internazionali. II. Gli anni della guerra fredda 1946–1990*, Rome – Bari, Laterza; Morelli, E., 1976, Il Trattato contro la proliferazione

From this standpoint, during the 1980s, a significant doctrinal debate revolved around installing long-range Euromissiles (Cruise and Pershing II) on Italian territory. Several commentators criticized the Italian government's decision to deploy these "first-strike" missiles, which went beyond purely defensive measures, this way contradicting the objectives stated in Article 11.[57] In the same period, there were extensive discussions regarding Italy's active involvement in various peacekeeping missions abroad. These military expeditions in the Red Sea, Sinai, and Lebanon were coordinated with other NATO countries, even though they lacked specific mandates from the UN.[58]

Regrettably, the involvement of Parliament was often secondary, and irregular procedures were employed, which did not adequately consider accountability measures. In some instances, Treaties were provisionally executed before ratification, openly contravening the combined provisions of Articles 11 and 80 of the Constitution.[59]

### 5.2. THE WAR OF THE GULF: COLLECTIVE SELF-DEFENSE AND THE UN

In the early 1990s, the overall stability of the system established by Article 11 was again tested against Italy's participation in the first Gulf War.[60] This conflict was peculiar as it no longer fell under the category of "humanitarian intervention" or an "international policing operation", but took on the nature of a military action aimed at "collective self-defense" triggered by Iraq's invasion of Kuwait.[61]

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delle armi nucleari e l'articolo 11 della Costituzione, *Rivista di diritto internazionale*, 1, p. 57.

57 Ronzitti, N., 1984, p. 179; Allegretti, U., 1986, p. 108; Barbera, A., 1984, p. 493.

58 Whitin this framework, the unilateral deployment of military ships to the Persian Gulf in 1987, decided by the Italian government, without prior agreement with other States, has particular significance. For a critical reconstruction, please refer to Barrera, P., 1987, Parlamento e politiche di sicurezza: tendenze e prospettive, *Quaderni costituzionali*, 1, p. 281.

59 See, for example, Motzo, G., 1988, Politica estera di difesa e comando delle Forze Armate, *Quaderni costituzionali*, 1, p. 297; Chieffi, L., 1990, pp. 61 ff; Massai, A., Il controllo parlamentare e le operazioni delle forze di pace, in: Migliazza, A., (ed.), 1988, *Le forze multinazionali nel Libano e nel Sinai*, Milan, Giuffrè, pp. 342 ff.

60 See *ex plurimis* Micheletta, L., 2022, Il Quirinale e la guerra del Golfo del 1990–1991: Francesco Cossiga, l'art. 11 della Costituzione e le prerogative del Presidente della Repubblica, *Scienza e Politica*, 34, p. 161; Grosso, C. F., 1990, L'intervento italiano nella guerra del Golfo e il diritto interno, *Questione giustizia*, 4, p. 1 and Santomassimo, G., 2021, Guerra e legittimazione storica, *Passato e presente: Rivista di storia contemporanea*, 1, p. 4.

61 On the distinctive traits of this conflict, see especially Zolo, D., 2009, *Terrorismo umanitario: dalla guerra del golfo alla strage di Gaza*, Parma, Diabasis; Bilancia, F.,

During that period, the United Nations Security Council, following Article 41 of the Charter, authorized member States to use "all necessary means" to compel the aggressor Country to comply with previous UN resolutions.[62] In practice, this measure was interpreted by individual States as an implicit authorization to intervene militarily against Iraq, which had fraudulently occupied Kuwait's territories.[63]

However, Article 51 of the Charter – stating that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" – does not appear to provide any justification for the use of force by national entities, especially after the Security Council has already taken the necessary measures to maintain peace.[64]

The defensive action taken by the international community was therefore based on an overly broad interpretation of State powers, which relied on an additional Security Council resolution bypassing in practice the Charter's normative limits.[65] In this regard, several Italian constitutional scholars criticized such an application of the "right to use force", highlighting the clear violations of international norms and the principle of pacifism. They attributed responsibility to the allied forces and Parliament, the Government, and the national Army.[66]

More specifically, the Italian intervention in the Persian Gulf was unequivocally deemed to contravene with the provisions of Article 11. This was because, once the initial phase of Kuwait's sudden occupation had ended, the subsequent defense orchestrated by the UN not only lacked sufficient justification but also appeared disproportionate to the actual attack carried out by Iraq. This was an international dispute that the Italian Constitution explicitly prohibited from being settled by resorting to war.[67]

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2003, La guerra del Golfo, *Costituzionalismo.it*, 2, p. 1; Onorato, P., 1990, La guerra del Golfo tra diritto e politica, *Questione giustizia*, 4, p. 1; Angioni, F., 2009, *La guerra del Golfo: 17 gennaio – 28 marzo 1991*, Pisa, Pisa University Press.

62 Security Council, Resolution 678 (1990), 29 November 1990.

63 Mazzarese, T., 2003, pp. 25–26.

64 Conforti, B., 1992, *Diritto internazionale*, Naples, ESI, pp. 385 ff.

65 Cecchetti, M., 1993, p. 284.

66 Allegretti, U., 1991, pp. 381–382.

67 Cabras, D., 2006, Il "ripudio della guerra" e l'evoluzione del diritto internazionale, *Quaderni costituzionali*, 2, p. 297; Bettinelli, E., 1991, p. 375; Vedaschi, A., 2007, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Turin, Giappichelli.

### 5.3. THE "UN-JUST" KOSOVO WAR

A few years later, in March 1999, the debate surrounding the application of Article 11 was reignited with Italy's involvement in the NATO intervention in Kosovo and Serbia. The doctrinal debate primarily focused on the concept of "just war" and the consequential evolution of the Atlantic Alliance from a purely defensive organization to an entity with substantially different tasks, beyond collective self-defense.[68]

The military operation was conducted without a specific UN resolution legitimizing the use of force by NATO militaries. Its geopolitical justification was based on the alleged systematic violation of human rights by Serbian forces against the Kosovan minorities.[69]

This approach faced strong criticism from Italian scholars, who argued that the intervention took the North Atlantic Pact beyond its original purpose, surpassing the limits set by the UN Charter.[70] Furthermore, Italy's participation in such action would blatantly violate the principles explicitly enshrined in Articles 11 and 78 of the Constitution.[71]

Many scholars emphasized that rejecting war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes is a fundamental principle, not be derogated even by an alleged international customary law allowing armed

68 Guiglia, G., 1994, Il comando delle forze armate e il ruolo del Consiglio supremo della difesa alla luce della nuova legge sui vertici militari, *Rassegna parlamentare*, 4, p. 878; Picone, P., 2000, La guerra del Kosovo e il diritto internazionale generale, *Rivista di diritto internazionale*, 2, p. 309; Scotto, G., Arielli, E., 1999, *La guerra del Kosovo: anatomia di un'escalation*, Rome, Editori Riuniti; Cartocci, V., 2017, La politica estera italiana nella seconda repubblica: il caso Kosovo, *Nuova antologia*, 1, p. 618; Benvenuti, P., Forze multinazionali e diritto internazionale umanitario, in: Ronzitti, N., (ed.), 1999, *Comando e controllo nelle forze di pace e nelle coalizioni militari*, Milan, Franco Angeli, p. 241.

69 Bucarelli, M., L'Italia e le crisi jugoslave di fine secolo (1991–1999), in: Botta, F., Garzia, L., (eds.), 2004, *Europa adriatica. Storia, relazioni, economia*, Rome – Bari, Laterza, p. 73; Dogliani, M., I diritti dell'uomo: principi universali o ideologia?, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza*, Turin, Giappichelli, p. 43; Orteca, P., 2001, *La guerra del Kosovo e la questione balcanica*, Soveria Mannelli, Rubbettino.

70 Ignazi, P., 2004, Al di là dell'Atlantico, al di qua dell'Europa. Dove va la politica estera italiana, *il Mulino*, 2, p. 267; Romeo, F., 2018, La politica estera dell'Italia dopo la guerra fredda: vincoli e opportunità, *Italia contemporanea*, 3, p. 288; Cantaro, A., 2003, Costituzione europea e partito americano, *Democrazia e diritto*, 2, p. 61.

71 See Caccamo, D., 1999, Kosovo: vincitori e vinti, *Rivista di studi politici internazionali*, 3, p. 361; Pinelli, C., Losano, M., 2021, Le tre Costituzioni pacifiste. Il rifiuto della guerra nelle costituzioni di Giappone, Italia e Germania, *Diritto pubblico*, 1, p. 362; Villani, U., 1999, La guerra del Kosovo: una guerra umanitaria o un crimine internazionale?, *Volontari e terzo mondo*, 1, p. 262.

interventions in defense of human rights.[72] Thus, there was an attempt to correct the practical application of Article 11, by excluding the pacifist principle from the internationalist openings made by the Constitution and reinterpreting the provision in a purely domestic sense.[73]

According to this approach, some commentators criticized the lack of factual and legal elements that would support the formation of a new customary rule, which would legitimize the individual State's recourse to the use of force in response to serious violations of international law in the absence of a UN Security Council action.[74] Moreover, some scholars argued that the situation in Kosovo had unprecedented characteristics. They contended that it was inappropriate to refer to an established customary rule, suggesting that – at most – there may have been a customary rule in the process of formation, or even just mere practice.[75] Furthermore, the previous peacekeeping actions to address similar humanitarian needs in Kurdistan or Chechnya could not be considered precedents. In those cases, despite the UN's inaction, neither the involved States nor the regional organizations actually resorted to armed intervention.[76]

The opposition to any attempt to legally justify armed humanitarian actions was primarily based on substantial reasons. Critics argued that such attempts contradicted the combined provisions of Articles 10 and 11

72 Vergottini, G. de, 2006, p. 403.

73 Lanchester, F., Il ripudio della guerra nella Costituzione italiana, in: Amorosino, S., Morbidelli, G., Morisi, M., (eds.), 2001, *Istituzioni, mercato e democrazia, Liber amicorum per gli ottanta anni di Alberto Predieri*, Turin, Giappichelli, p. 345; Vari, F., La vecchia Costituzione e la "nuova" guerra: breve analisi della crisi del Kosovo, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della* forza, Turin, Giappichelli, p. 134; Pinelli, C., Argomenti e posizioni nel dibattito dei costituzionalisti sulla guerra in Kosovo, in: Ronzitti, N., (ed.), 2000, *Nato, conflitto in Kosovo e Costituzione italiana*, Milan, Giuffrè, p. 194.

74 See, for example, Cabras, D., Il controllo parlamentare nazionale nell'impiego delle truppe impegnate in missioni di pace, in: Ronzitti, N., (ed.), 1999, *Comando e controllo nelle forze di pace e nelle coalizioni militari*, Milan, Franco Angeli, p. 67; Costa Bona, E., Tosi, L., 2007, *Italia e la sicurezza collettiva: dalla Società delle nazioni alle Nazioni Unite*, Perugia, Morlacchi, pp. 46 ff.; Rusconi, G. E., 1999, Obiettivi e risultati della guerra del Kosovo, *il Mulino*, 3, p. 407.

75 Ferrara, G., 2000, *Gli atti costituzionali*, Turin, Giappichelli, p. 251; Marchisio, S., L'intervento in Kosovo e la teoria dei due cerchi, in: Sciso, E., (ed.), 2001, *L'intervento in Kosovo. Aspetti internazionalistici e interni*, Milan, Giuffrè, p. 21; Vari, F., 2000, Dopo il Kosovo, Timor Est, *Quaderni* costituzionali, 1, p. 118.

76 Nolfo, E. di, 2006, La fine della guerra fredda e l'Italia: politica interna e problemi internazionali, *Mondo contemporaneo*, 1, pp. 5–6; Vari, F., Decreto-legge e gestione della politica estera militare, in: Simoncini, A., (ed.), 2001, *L'emergenza infinita. La decretazione d'urgenza in Italia*, Macerata, CEUM; Cevolin, G., 1999, Inquadramento costituzionale, fonti utilizzate e codeterminazione Governo-Parlamento nell'impiego delle forze armate all'estero, *Archivio giuridico*, 1, p. 202.

of the Constitution, which created a significant obstacle to automatically adapting Italian law to new alleged international law rules that contradicted the pacifist principle.[77]

### 5.4. THE ATTACK ON THE TWIN TOWERS AND THE WAR IN AFGHANISTAN

From the very outset, the US government explicitly identified the tragedy of the Twin Towers as a direct attack on the integrity of its Nation.[78] In this context, the events of 11 September 2001 were promptly classified as "armed acts" against a NATO Country, leading the North Atlantic Council to invoke – for the first time in its history – the clause outlined in Article 5 of the Treaty.[79]

The unique aspect of this new war scenario was primarily rooted in the hidden nature of the enemies and the uncertainty surrounding their geographical location. Thus, the war was waged against transnational terrorist groups with tangible support from certain national governments.[80]

Following the US government's identification of the States responsible for harboring or defending "the enemy", the decision was made to unilaterally undertake military operations in Afghanistan. Initially, troops were deployed in neighboring areas, eventually leading to the military occupation of Kabul. This action was framed as a "combat mission" rather than

77 Dickmann, R., 2001, L'approvazione parlamentare dell'impiego dello strumento militare. L'esperienza delle operazioni internazionali di pace, *Rivista trimestrale di diritto pubblico*, 1, p. 26; Groppi, T., 1999, La crisi del Kosovo e il diritto costituzionale, *Gazzetta giuridica*, 21, p. 5; Bonetti P., 2000, *Ordinamento della difesa nazionale e Costituzione italiana*, Milan, Giuffrè, pp. 139 ff.

78 See Public Law 107–40, 107th Congress, Joint Resolution, 18 September 2001.

79 The North Atlantic Treaty, Article 5: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

80 Cf. *ex multis* Franchini, M., 2002, Le risoluzioni parlamentari sulla lotta al terrorismo internazionale, *Giornale di diritto amministrativo*, 3, p. 321; Angioni, F., 2009, *Servire la pace: possibilità e vincoli*, Pisa, Pisa University Press, p. 183; Fiores, C. de, 2002, L'intervento militare in Afganistan. Profili di diritto costituzionale interno e internazionale, *Politica del diritto*, 1, p. 79.

a "peacekeeping operation". Taliban members and militants captured were promptly deported to the Guantanamo Bay detention camp and ultimately subjected to the US criminal system.

The UN Security Council swiftly intervened to support the American administration once Al-Qaeda's direct involvement was confirmed. It condemned the New York attacks as violations of human rights, reiterating the right to self-defense and calling for full cooperation against terrorism from all member States.[81] Once the external origin of the attack was established, it became incumbent upon NATO member States to provide solidarity and assistance to the USA through any means necessary, including the use of force.[82] Such solidarity consisted of deploying their armed forces, offering military bases, or sending armed contingents to the war zones. Italy's commitments under Operation Enduring Freedom involved supporting actions, including military intervention of the United States and the international community against terrorism, and deploying troops to Afghanistan under US command.[83]

Italian legal doctrine promptly highlighted the apparent contradiction between Italy's participation in war operations and the provisions of Article 11. The criticism was rooted in the absence of explicit aggression by another state or the direct involvement of Italy in a severe international crisis.[84] Some commentators openly criticized the flexible interpretation of Article 11 – which had become routine – denouncing the idea that Italy's commitments to international Treaties automatically required its armed forces to intervene in military operations involving allies, with no parliamentary debate and insufficient regard for the peaceful principles enshrined in the Constitution.[85]

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81 See, in particular, UN Security Council, Resolution 1368 (2001), 12 September 2001; Security Council, Resolution 1373 (2001) 28 September 2001. For a commentary see Zolo, D., 2002, Violenza e non-violenza dopo l'11 settembre, *Iride. Filosofia e discussione pubblica*, 1, pp. 11 ff.

82 Bartolini, G., 2002, Le modifiche al codice penale militare di guerra a seguito della missione italiana in Afghanistan, *La comunità internazionale*, 2, p. 171; Coticchia, F., 2013, *Qualcosa è cambiato? L'evoluzione della politica di difesa italiana dall'Iraq alla Libia,* Pisa, Pisa University Press, p. 213.

83 Carnevale, P., 2004, p. 94.

84 De Fiores, C. de, 2002, p. 15; Greco, F. M., 2003, *Grande crisi e ordine internazionale: l'Italia fra Europa e Stati Uniti*, Naples, ESI; Vergottini, G. de, 2002, Guerra e Costituzione, *Quaderni costituzionali*, 1, p. 24.

85 Cf. Chiaruzzi, M., 2020, Legittimità e sicurezza. Il ciclo di guerra della Seconda Repubblica, *Quaderni di scienza politica*, 2–3, p. 285; Andreatta, F., 2002, Tre visioni sulla guerra. Unilateralismo, istituzionalismo, pacifismo, *il Mulino*, 6, p. 1183; Dottori, G., Ma non chiamatela guerra perché l'Italia combatte senza dirlo, in: Bressan, M., Cuzzelli, G., (eds.), 2022, *Da Clausewitz a Putin: la guerra nel XXI secolo. Riflessioni sui conflitti nel mondo contemporaneo*, Milan, Ledizioni, p. 103.

According to this approach, Italian military intervention would be deemed acceptable for the protection of fundamental rights – as long as it received authorization from an international organization. However, this automatic approval process does not seem consistent with the pacifist principle, which, instead, calls for a thorough parliamentary debate to assess the objectives and specific methods of any action involving Italian armed forces, on a case-by-case basis.[86]

The example of the conflict in Afghanistan demonstrates that the crucial issue concerning the application of Article 11 essentially shifted from the total rejection of war to the pursuit of concrete proportionality between the aggression suffered and the defensive response. This interpretation, however, effectively endorses the legitimacy of war at the international level, sparked by humanitarian reasons or aimed at combating terrorism.[87]

## 5.5. THE SECOND IRAQI CRISIS: THE DECEPTIVE TENSION BETWEEN PACIFISM AND THE INTERNATIONALIST PRINCIPLE

The ideological-argumentative framework, which progressively enriched the interpretation and enactment of Article 11 on globalization wars, was also extensively used in the second Iraq conflict, especially by invoking the military intervention as a "just war".[88]

Italian constitutional doctrine identified a renewed tendency to reinterpret the pacifist principle based on internal criteria and the categories of international law. This involved expanding existing classifications and devising specific instruments to support the use of legitimate defense and armed interventions within the UN legal system.[89] According to some

86 Marsocci, P., 2003, La guerra in Afghanistan, *Costituzionalismo.it*, 2, p. 4; Tosi, L., 2010, *Sulla scena del mondo. L'Italia all'Assemblea generale delle Nazioni Unite*, Naples, ESI; Ferrajoli, L., 1999, Guerra etica e diritto, *Ragion pratica*, 7, p. 13; Zanghi, C., 1999, p. 382.

87 Carlassare, L., 1999, p. 23.

88 See *ex plurimis* Conforti, B., 2003, Guerra giusta e diritto internazionale contemporaneo, *Rassegna parlamentare*, 1, p. 11; Picone, P., 2000, La guerra del Kosovo e il diritto internazionale generale, *Rivista di diritto internazionale*, 2, p. 309; Leo, R. di, 2003, Il grande freddo tra America e Europa. L'Italia tra le due sponde, *Democrazia e diritto*, No. 1, p. 69.

89 Ceci, G., Ciglioni, L., Gli italiani, le guerre e la pace: dalla crisi degli euro-missili alla seconda guerra in Iraq, in: Pons, S., Roccucci, A., Romero, F., (eds.), 2014, *L'Italia contemporanea dagli anni Ottanta a oggi*, Rome, Carocci, pp. 281–283; Sicardi, S., I mille volti della guerra, la Costituzione e il diritto internazionale, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza*, Turin, Giappichelli, p. 99; Ferrara, G., 2003.

influential commentators, the primary – if not exclusive – justification for war should be found in the position taken by the United Nations Security Council. This endorsement would make irrelevant any debate about the limits imposed by the UN Charter or Article 11; the use of force becomes indeed permissible when aimed to defend the integrity of a people and implement the procedures of international law.[90] Accordingly, a conviction is emerging that, due to the openness brought by the internationalist principle, the Italian legal system should consider admissible defensive wars and armed conflicts authorized by the UN Security Council.[91]

In this case, the Security Council, through Resolution 1441, implemented inspection and sanction measures against Iraq.[92] Nevertheless, the US decision to undertake a unilateral war, despite the opposition from some member States, directly contradicted the domestically and internationally outlined pacifist principle.[93] Consequently, the decision to attack Iraq without pursuing UN deliberations would render the war constitutionally illegitimate. Even when considering an interpretative adaptation of a defensive war and Article 11 in light of evolving technological-geopolitical scenarios that have altered international relations, the constitutional rejection of war still maintains its normative strength by imposing constraints on content and procedure.[94]

This approach has faced substantial criticism from another part of the doctrine, which argues that the interpretative adaptation of Article 11, to reflect ongoing transformations in international relations, would inevitably undermine the normative scope of the constitutional provision. Ultimately, such an adaptation would endorse choices incompatible with the

90 Cf. Rossi, E., Casamassima, V., 2007, Il percorso storico dell'idea di difesa nell'ordinamento giuridico italiano, *Difendere, difendersi: rapporto 2005*, Pisa, Pisa University Press, p. 39; Picone, P., 2003, La guerra contro l'Iraq e le degenerazioni dell'unilateralismo, *Rivista di diritto internazionale*, 2, p. 351; Ruggeri, A., 2022, La politica estera italiana, tra vincoli e scelte, *il Mulino*, 2, p. 85.

91 Dogliani, M., Il valore costituzionale della pace e il divieto della guerra, in: Carnevale, P., (ed.), 2003, *Guerra e* Costituzione, Turin, Giappichelli, pp. 37–38; Viola, F., 2003, Pace giusta e guerra giusta, luci e ombre nel diritto internazionale contemporaneo, *Rivista di diritto costituzionale*, No. 1, p. 232; Cassese, A., Diritto internazionale, in: Gaeta, P., (ed.), 2004, *Problemi della comunità internazionale*, Bologna, il Mulino, pp. 53–54; Sciso, E., 2004, La risoluzione 1511 del Consiglio di sicurezza, *Rivista di diritto internazionale*, 1, p. 175.

92 Ronchetti, L., 2003, La crisi irachena, *Costituzionalismo.it*, 2, p. 7.

93 See, for example, Cassese, A., 2005, *International Law*, Oxford, Oxford University Press, pp. 368 ff; Gianformaggio, L., Diritti umani e guerra, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza*, Turin, Giappichelli, pp. 61–62; Picone, P., 2005, Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale, *Rivista di diritto internazionale*, 1, p. 18.

94 Ronzitti, N., 2006, p. 101.

principles of peaceful resolution.[95] In line with this trend, the conflict in Iraq should be deemed illegitimate for two fundamental reasons. Firstly, in a system where preemptive war has repeatedly been declared unlawful, there was no clear and immediate threat to peace from the Iraqi side, while the US forces systematically violated the prohibition on the use of force. Secondly, there was a deliberate use of disproportionate force, resorting to an uncontrolled armed intervention.[96]

## 5.6. THE CASE OF LIBYA AND THE REDUCTIONIST APPROACH

Within this same interpretative framework, the justifications advanced in support of Italy's participation in the NATO military mission in Libya, undertaken since March 2011, also fall into place.[97] According to the prevailing reductionist approach at the institutional and doctrinal levels, the use of military force by the Italian Army in Libya cannot be considered a war, contrary to the first proposition of Article 11.[98]

The Italian military intervention is justified by its integration into a broader operation authorized by the UN Security Council, aimed at restoring peace in that area. This kind of action does not fall under the classical notion of "war" as semantically understood by the Constituent Assembly in 1948.[99] War, being a multifaceted and heterogeneous concept, is subject to different interpretations. Thus, the constitutional framework leaves room for an indeterminate scope that must be given meaning based on the evolving international law.[100]

95 Allegretti, U., Profili problematici dell'intervento a tutela dei diritti umani e compiti della dottrina giuridica, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza,* Turin, Giappichelli, p. 21; Colombo, A., La guerra contro l'Iraq e il momento unipolare, in: Colombo, A., Ronzitti, N., (eds.), 2004, *L'Italia e la politica internazionale*, Bologna, il Mulino, pp. 23–24; Vergottini, G. de, 2017, pp. 4–5.

96 Cannizzaro, E., 2003, La dottrina della guerra preventiva e la disciplina internazionale sull'uso della forza, *Rivista di diritto internazionale*, 1, p. 172; Dell'Acqua, C., 2002, Il diritto alla sicurezza nel nuovo ordine internazionale, *Quaderni costituzionali*, 2, p. 356; Ronzitti, N., L'intervento in Iraq ed il diritto internazionale, in: Colombo, A., Ronzitti, N., (eds.), 2004, *L'Italia e la politica internazionale*, Bologna, il Mulino, p. 268.

97 See, for example, Ronzitti, N., 2011, Intervento in Libia, cosa è permesso e cosa no, *Affari internazionali*, 20 March 2011; Carnevale, P., 2013, p. 142; Chiaruzzi, M., 2020, p. 285.

98 Benvenuti, M., 2011, p. 1.

99 More generally cf. Andò, S., 2000, p. 33; Bucarelli, M., 2004, p. 73; Vergottini, G. de, 2017, pp. 4–5.

100 See Zagrebelsky, G., L'Italia ripudia la guerra: davvero?, in: Ioli, G., (ed.), 2016, *Guerra e pace nel Novecento e oltre: Atti del convegno internazionale, San Salvatore Monferrato, 25–26 settembre 2015*, Novara, Interlinea, p. 23; Dogliani, M., 2003,

This approach seeks to establish a perfect concordance between domestic and international law. It contends that determining what constitutes "war" should refer to external categories beyond the boundaries of the Constitution.[101] In this way, the pacifist and internationalist principles mutually influence and limit each other, defining the legitimacy of armed actions, particularly under resolutions passed by the United Nations.[102]

Therefore, the arguments put forward to justify Italy's military intervention in Libya follow a derogatory logic.[103] It suggests that active support for peacekeeping missions, as mandated by the United Nations, falls within the constitutional framework established under the second proposition of Article 11, by asserting that the approval of Resolution 1973/2011 serves as the sole and necessary authorization required by the Constitution for military action.[104]

However, in this particular case, the text of the resolution proves elusive, lacking sufficient precision to determine constitutionally permissible conduct. The provisions for a no-fly zone and the authority to protect civilian populations or intervene in threatened areas appear surprisingly broad and grant States discretion to evaluate the legitimacy and proportionality of international military interventions.[105]

This approach is rooted in a hyperrealist argument that seeks to relativize the rejection of war to justify using military force. It derives from Italy's undeniable participation in numerous military missions outside its national borders and the progressive paradigm shift in how war is conceptualized within the legal framework.[106] Given these circumstances, it is now evident that Italy's involvement extends beyond peacekeeping missions, increasingly entangling the Country in conflict situations that necessitate the use of armed force. Such actions are primarily driven by political decisions and directions that surpass internal considerations. This reality calls for a reevaluation of the pacifist principle, accepting Italian participation not only in defensive wars.[107]

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pp. 377–378; Battaglini, G., Usi della forza e diritti umani nel sistema delle Nazioni unite, in: Dogliani, M., Sicardi, S., (eds.), 1999, *Diritti umani e uso della forza*, Turin, Giappichelli, p. 12.

101 Cf. Carnevale, P., 2013, p. 142; Fiores, C. de, 2022, p. 29; Azzariti, G., 2011, p. 1.

102 Benvenuti, M., 2010, pp. 55–57.

103 Coticchia, F., 2013; Ferrara, G., 2011, Attuare lo Statuto delle Nazioni Unite, *Costituzionalismo.it*, 3, p. 1; Carlassare, L., 2000, pp. 162 ff.

104 Security Council, Resolution 1973 (2011), 17 March 2011.

105 *Ibid.*

106 Cremonesi, L., 2022.

107 Frau, M., 2022, p. 93.

Nevertheless, while this relativization of the first part Article 11 proves useful in understanding the historical stance of Italian institutions towards military interventions, it lacks persuasive force on an interpretative level. Such relativization undermines the normative value of the pacifist principle, which can only serve its purpose if it becomes the benchmark for assessing the legitimacy of military interventions, even those justifiable under international law.[108]

## 6. The Specificities of the Ukrainian Case

Since war is repudiated as an "instrument of aggression" and as "a means for the settlement of international disputes", a problem may arise when war is invoked in defense of others States. To this end, Article 11 suggests a case-by-case approach inspired by the principles of solidarity and international cooperation.

First of all, the "special military operation" undertaken by the Russian Federation against Ukraine has been considered a genuine "war of aggression". The term "war" in its classical meaning is entirely appropriate, because from the very beginning of the conflict the intention of the invading army to achieve the *debellatio* of the invaded country has been clear.[109] According to the plans of the Russian High Command, the military intervention in Ukraine is aimed at conquering the predominantly Russian-speaking territories of Donbass – with the consequent destruction of population and economy – and denazifying Ukraine, with related regime change in Kiev. In this context, the legal institution of "war" is not affected in its essence, while the objective circumstances in which it is placed and the motivations at the core of the conflict appear largely changed.[110]

108 Ruggeri, A., 2022, p. 85.

109 On the term 'war of aggression', see *ex multis* Blank, L. R., Noone, G. P., 2018, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*, Boston, Aspen Publishing; Dinstein, Y., 2017, *War, Aggression and Self-Defence*, Oxford, Oxford University Press, pp. 117 ff; Greenwood, C., 1987, The Concept of War in Modern International Law, *ICLQ*, 36, p. 283; Lootsteen, Y. M., 2000, The Concept of Belligerency in International Law, *Military Law Review*, 166, p. 109; Byers, M., 2007, *War Law: Understanding International Law and Armed Conflict*, New York, Grove Press.

110 See Dogliani, M., 2022, La guerra in Ucraina tra tabù nucleare e oltranzismo politico-mediatico, *Democrazia e diritto*, 1, p. 7; Benvenuti, M., 2022, Le conseguenze costituzionali della guerra russo-ucraina. Prime considerazioni, *Osservatorio costituzionale*, 3, p. 7; Azzariti, G., 2022, La Costituzione rimossa, *Costituzionalismo.it*, 1, p. 2; Sandri, L., 2022, La guerra in Ucraina: cronaca di un conflitto (anche) religioso, *Quaderni di diritto e politica ecclesiastica*, 2, p. 281; Coralluzzo, V., 2022, L'aggressione russa all'Ucraina: genesi di una guerra annunciata, *Rivista di politica*, 2, p. 10.

Secondly, the invasion of Ukraine, which began on 24 February 2022, not only was a case of clear non-compliance with customary international law on the use of force and self-defense, but also openly violated the Russian Federations Treaty obligations; in particular, the violation of Article 2 of the UN Charter is evident. Correlatively, the victim State, Ukraine, is legitimately entitled to armed self-defense under Article 51, which reaffirms "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations," at least until the Security Council has taken measures necessary to maintain international peace and security.[111]

In this sense, the reading of Article 11 of the Italian Constitution must be linked to the Charter of the United Nations. The interpretative categories of international law allow us to understand more clearly what is meant by the term "defensive war", since the *ius consuetudinis* recognizes the right to "collective self-defense", thus justifying armed intervention by third States in aid of an attacked country.[112] Therefore, generally recognized principles of international law legitimize such aid. These principles hold a constitutional rank, according to the automatic modifier mentioned in Article 10, para 1, of the Italian Constitution. A combined reading of Article 2, para 2, which states that "the Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled," and Article 11 indicates that military intervention for assisting an attacked State reacting to a foreign invasion is permissible.[113]

*A fortiori*, insofar as the military support limited to sending weapons to the attacked State is seen as a legitimate act of collective self-defense under international law, it should not be considered contrary to the provisions of the Constitution. In other words, sending weapons or providing

111 Volpi, M., 2022, La guerra in Ucraina e il costituzionalismo democratico, *Costituzionalismo.it*, 1, p. 13; Ambos, K., 2022, Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?, *EJIL: Talk!*, 2 March; Dogliani, M., 2022, Amica Ucraina, sed magis amica veritas, *Costituzionalismo.it*, 1, p. 8; Bucci, G., Ragione del diritto e follia del potere di guerra, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 175; Diodato, E., 2022, La guerra russo-ucraina e la politica estera e di difesa dell'Italia, *Rivista di politica*, 2, p. 34.

112 Cf. Cavino, M., 2022, p. 753; Riondato, S., 2017, Missioni militari internazionali italiane c.d. di pace all'estero. Novità giuspenalistiche nella legge di riforma 21 luglio 2016, n. 145, *Diritto penale contemporaneo*, 5, p. 287; Brunelli, G., 2022, pp. 958–962; Iovane, M., 2022, p. 14.

113 For example, see Marazzita, G., 2022, Guerra vietata, legittima e necessaria, *Federalismi.it*, 12, pp. 52 ff.; Cansacchi, G., 1963, *Nozioni di diritto internazionale bellico*, Turin, Giappichelli; Vergottini, G. de, 1999, La Costituzione e l'intervento NATO nella ex-Jugoslavia, *Quaderni costituzionali*, 1, p. 122; Cabras, D., 1999, p. 67.

logistical support to a regular army, which operates exclusively within its territory, would not qualify as an unlawful use of force. It should be construed as an effective support for the legitimate exercise of individual self-defense by the attacked State. Thus, constitutional law matches with international law. In the case of Ukrainian, the UN General Assembly has confirmed that an unlawful aggression from the point of view of international law is underway, therefore Ukraine is reacting in self-defense.[114]

Lastly, Article 11 includes a general directive to the Italian political and institutional bodies in their international relations, requiring them to actively pursue a pacifist policy and absolutely prohibiting any involvement in wars of an offensive nature or as means for the settlement of international disputes.[115] Yet, this does not exclude participation in wars waged to defend the homeland and the territory of another State. The Constitution does not explicitly clarify whether or not it is allowed to participate in wars for defending other States, thus opening up the space for the identification of an implicit authorization through international law.[116]

In the silence of the Constitution, the concept of "defensive warfare" should be defined in the light of the international rules governing the use of force and those provisions regulating the exercise of individual or collective self-defense. The "opening" of the Constitution to international law in fact allows for an integrative interpretation of its provisions, like the recognition of the "natural right" to self-defense or defensive support in certain circumstances.[117] What is more, in the present geopolitical situation, defense of the Homeland, referred in Article 52 of the Constitution as a sacred duty for every citizen, cannot but include defensive alliances

114 Ventura, L., Pupo, V., 2022, Osservazioni sui problemi internazionali e interni conseguenti alla guerra in Ucraina, *Forum di Quaderni Costituzionali*, 3, p. 1; Massa Pinto, I., La solidarietà conflittuale come dovere di comprendere le ragioni dell'Altro, anche nella guerra Nato-Russia in Ucraina, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 257; Chiaruzzi, M., 2022, Ucraina, guerra d'Europa, *Rivista di politica*, 2, p. 6.

115 Ciervo, A., Critica delle armi. L'articolo 11 della Costituzione, la legge n. 185/1990 e l'invasione dell'Ucraina da parte della Federazione Russa, in: Azzariti, G., (ed.), 2022, *Il costituzionalismo democratico moderno può sopravvivere alla guerra?*, Naples, ESI, p. 195; Fiores, C. de, 2022, Il principio pacifista, la ratifica dei Trattati internazionali e la questione della NATO, *Democrazia e diritto*, 2, p. 66; Ruggeri, A., 2022, La pace come bene assoluto, indisponibile e non bilanciabile, il diritto fondamentale a goderne e il dovere di preservarla ad ogni costo, *Consulta online*, 27 February.

116 See Benvenuti, M., 2017, Luci ed ombre della l. n. 145/2016 in tema di partecipazione dell'Italia alle missioni internazionali, *Rivista AIC*, 1, pp. 50 ff; Cantaro, A., 1999, Interpretazioni della guerra, *I quaderni. Trimestrale dell'Istituto Gramsci*, 33–34, p. 31; Guazzarotti, A., 2021, Articolo 11, in: Clementi, F., *et al.*, (eds.), 2021, *La Costituzione italiana*, Bologna, il Mulino, p. 87.

117 Iovane, M., 2022, p. 14.

between States, with all the related consequences in terms of mutual assistance in the event of an invasion by a third country.[118]

## 7. Some Concluding Remarks

The way in which the debate about Article 11 unfolded during the Constituent Assembly offers important insights for understanding its normative meaning. By examining the historical context and the discussions leading to the adoption of Article 11, we can reach a more nuanced and complete understanding of its implications. Rather than interpreting this provision in a limited or narrow way, a thorough analysis of its origins suggests a comprehensive approach that takes into account three key principles: the principle of peaceful coexistence, the principle of internationalism, and the principle of solidarity.

When it comes to applying this provision, it is important to carefully balance all of its different components in each specific case and assess the constitutionality of any military intervention directly or indirectly involving Italy. This means that none of the different principles outlined in Article 11 can simply and unequivocally override the others, and that the norm must be applied on a case-by-case basis, taking into account the specific circumstances of each individual conflict. By doing so, we can ensure that the constitutional legitimacy of any military intervention is evaluated in a context-specific way.

Within this context, the categories of constitutional law and international law intersect and complement each other, enriching the Italian domestic legal system with the requirements of geopolitical cooperation brought about by Italy's involvement in supranational organizations promoting peace and justice among Nations.

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118 See Bascherini, G., 2017, *Il dovere di difesa nell'esperienza costituzionale italiana*, Naples, Jovene, pp. 100 ff; Cecchinato, P., 2022, La Costituzione, la guerra e le Patrie degli altri, *lacostituzione.info*, 8 April; Bocchini, F., 2014, Contributo allo studio della difesa civile della Patria, *Giurisprudenza costituzionale*, 3, p. 776; Celotto, A., 2022, L'Italia, l'art. 11 della Costituzione e la guerra, *Giustizia* insieme, 8 March.

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# ČLAN 11. ITALIJANSKOG USTAVA: IZMEĐU DOMAĆEG I MEĐUNARODNOG PRAVA

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APSTRAKT

Imajući u vidu nedavnu invaziju ruske vojske na Ukrajinu, ovaj esej se bavi razmišljanjima o značenju, obimu i primeni člana 11. italijanskog ustava. U članku se posebno, iz dijahronijske perspektive, analizira odbacivanje rata i ispituju njegove praktične posledice stavljanjem u središte interesovanja odnos između ustavnog prava i međunarodnog prava u definisanju pojmova rata i kolektivne samoodbrane.

**Ključne reči:** član 11. italijanskog ustava, rat u Ukrajini, samoodbrana, pacifistički princip, internacionalistički princip, princip solidarnosti.

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ORIGINAL SCIENTIFIC ARTICLE

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# THE EFFECTS OF MODERN TECHNOLOGY ON LEGAL CERTAINTY IN TAX LAW: THE NEW FRONTIER

***Abstract:*** *The speedy reforms of Serbia's tax legislation, often introduced on the basis of comparative sources, has created a significant body of dormant legislation, due to the lack of knowledge and experience to implement them. The article explores some aspects of legitimacy of Serbian tax legislation, namely the consequences of the misalignment of tax law provisions with taxpayers behavior, using the example of unregistered freelancer taxation. The authors address fundamental legal certainty issues arising from the clash between changes brought on by innovation and imposition of static tax legislation to circumstances unimaginable at the time the legislation was enacted. Analysis has shown that Serbian legislation and caselaw do not provide an effective remedy for these cases, since the principle of legitimate expectations, as developed elsewhere in Europe, is still distant. The authors propose a specific institutional mechanism for overcoming uncertainty in similar situations.*

**Key words:** legal certainty, legitimate expectations, right to good administration, tax administration, tax law, dormant legislation, public hearing.

## 1. Introduction

Legal certainty is considered a general principle of law and, as such is self-evident to any lawyer, as well as others interpreting legislation. It is often described as a component of the notion of *Rechtstaat* and includes no less than the prohibition of retroactivity and the protection of legitimate expectations.[1] The gist is that those who the law affects should be able to understand what the law is, in order to adapt their actions accordingly.

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1 For example, Koopmans, T., 2003, *Courts and Political Institutions: A Comparative View*, Cambridge, Cambridge University Press, pp. 213–214.

On the other hand, the administration is bound by the principle of legality, obligated to respect and apply the law and, if in breach, its acts can be reviewed by the courts.

However, in the absence of this perfect automation, which would provide all those involved with the necessary predictability, a more nuanced understanding of legal certainty is needed, and other principles have to come into play, as a corrective. As Popelier correctly explains, the above described simplified understanding of legal certainty is obsolete and relies on the 19th-century idea of a rational lawmaker that makes perfect laws, which the administration and the courts then execute and apply.[2] Explaining legal certainty as a dynamic concept, she begins by stressing the reason and aim of the principle of legal certainty, which is essentially the protection from arbitrariness, allowing people to make decisions, inter alia, based on their legal options and the entailed legal consequences, or "to help [them] deal with the inevitable uncertainty".[3] In caselaw of both national constitutional and European courts (e.g., in the established caselaw of the European Court of Human Rights),[4] legal certainty is often tied to the characteristics of the law, requiring its accessibility, clarity, and

2 Popelier, P., 2008. Five Paradoxes on Legal Certainty and the Lawmaker, *Legisprudence*, Vol. 2, No. 1, pp. 47–66.

3 *Ibid*.

4 ECtHR, *The Sunday Times v. United Kingdom*, Case 6538/74, 26 April 1979, para. 49: "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." In a more recent tax case (ECtHR, *Shchokin v. Ukraine*, 23759/03 and 37943/06 14 October 2010) the ECtHR concluded that it was not satisfied with the overall state of domestic tax law on the matter in question, at the relevant time. It noted that the relevant legal acts had been manifestly inconsistent with each other. As a result, the domestic authorities applied, at their own discretion, opposite approaches to the correlation of those legal acts. In the Court's opinion, the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the "quality of law" under the Convention and did not provide adequate protection against arbitrary interference by public authorities with the applicant's property rights.

predictability. In that vein, the principle of legal certainty is sometimes referred to as the principle of proper lawmaking.[5]

Traditionally, the accessibility of legislation is secured by the obligation to publish legislation in official gazettes and, in recent years, by the obligation for these to be freely accessible online. However, in the modern world covered by a sea of regulations, this might not suffice, and this has already been recognized by some. In 2007, the Belgian Constitutional Court recognized that access to the official gazette "does not acknowledge sociological research stating that persons become acquainted with the law through personal, formal and informal networks and imitation, not through lecture of the law as published in the Official Gazette" and upheld the law charging the government with extra efforts in the form of a telephonic helpdesk.[6] For the time being, this seems unimaginable in Serbian caselaw.

Moreover, the requirements of good administration demand that not only the law be accessible and predictable, but that it is applied in a manner that recognizes and respects the legitimate expectations of those to whom the law applies. For some authors, legal certainty has an objective aspect, which relates to the legal framework, while there is also a subjective aspect to it, leading to the protection of legitimate expectations.[7]

The issue of legal certainty in tax law has long been present. Various issues have been debated in Serbian legal scholarship, with particular attention given to retroactive application of laws[8] and their retrospective interpretation.[9]

Furthermore, a significant regarding the legitimacy of tax legislation has been noted, stemming from the inadequacies of the parliamentary procedure by which it is enacted and in particular the evident lack of awareness of members of Parliament of even the basic implications of the tax laws they are voting for.[10] The speed at which certain reforms have been implemented in Serbia has led to the existence of so-called *dormant legislation*. Namely, the Serbian legislator would introduce (in most cases

5 Popelier, P., 2008.

6 *Ibid.*, p. 58.

7 *Ibid.*, p. 64.

8 See Popović, D., Ilić-Popov, G., 2015, Retroaktivnost zakona u poreskom pravu, *Anali Pravnog fakulteta u Beogradu*, Vol. 63, No. 1, pp. 5–22.

9 See Popović, D., Kostić, S., 2018, Legal Certainty and Taxation: The Problem of Retroactive Interpretation, *Annals of the Faculty of Law in Belgrade*, Vol. 66, No. 4, pp. 38–55.

10 See Kostić, S., Vuković, D., 2019, The Perfect Silence: An Empirical Study on How Ignorance and Lack of Critical Debate Effect the Process of Enacting Tax Legislation in Serbia, *Annals of the Faculty of Law in Belgrade*, Vol. 67, No. 1, pp. 67–92.

on the basis of comparative sources)[11] certain provisions, for which the domestic system was absolutely unprepared, due to the lack of knowledge and experience related to their application. However, despite the evident need to prepare the tax authorities, the judiciary, as well as the taxpayers for the application of the newly introduced measures, such efforts would not be undertaken, leading to the practice of simply ignoring the existence of such norms or at the very best paying them lip service in terms of minimum compliance. After several years, or sometimes even decades, application would commence, often with notable conflicts between the taxpayers and the tax authorities.[12]

For some time now, we have become aware of a growing disparity, in various aspects of Serbian tax law, between the wording of the norms and the circumstances to which they apply. In essence, the increasing number of solutions no longer provides adequate or even logical results as they are simply not aligned with reality, in most part due to the impact of modern technology. We are forced to take rules tailored to an economy of steam engines, huge factory compounds and coal, and apply them to one based on digitalization and the Internet.[13] A decade ago the leaders of the G 20 stated the following:

> *"International tax rules, which date back to the 1920's, have not kept pace with the changing business environment, including the growing importance of intangibles and the digital economy."*[14]

The COVID-19 pandemic in 2020 and 2021 only accelerated the need to come to grips with the problem that the tax legislation faced, as it has led to an exponential growth in the platform economy, remote work

11 Barak-Erez noted that "[t]he most dramatic uses of comparative law in legislation concern transitional phases of national history. At such times, legal systems undergo transformation and the most effective tool for general change is legislation." See Barak-Erez, D., 2008, The Institutional Aspects of Comparative Law, *Columbia Journal of European Law*, Vol. 15, No. 3, p. 481. Serbian society has been in transition, both economic and political, since the beginning of the century, while also endeavoring on the path toward European Union membership. Such circumstances lead to a very high degree of reliance on and adoption of comparative law.

12 The best example of "dormant" legislation in Serbian tax law can probably be found in its transfer pricing provisions, which were introduced in 1991 but saw their first effective application in 2009. See Kostić, S., 2017, Transfer Pricing in Serbia: Facing a Sobering Reality, *Annals of the Faculty of Law in Belgrade*, Vol. 65, No. 4, pp. 76–77.

13 See Szczepanski, M., 2021, Taxing the Digital Economy: New Developments and the Way Forward, European Parliament Briefing (https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698761), pp. 2–3.

14 G20, 2013, Tax Annex to the Saint Petersburg G20 Leaders Declaration, Saint Petersburg, September, (https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf, 18. 11. 2023).

and dependance on the ability to communicate from and with any point on the planet, as well as the more mundane aspects of our everyday lives, such as online shopping and reliance on delivery services.

Usually, the consequence of the misalignment between tax law provisions and the way in which taxpayers behave (e.g., perform their business activities) lies in the lowering of fiscal revenues, i.e., in the failure of some jurisdictions to tax income that they feel is strongly connected to them and over which they should have taxation rights, but are prevented by their own tax laws to collect that which is felt is economically due. The crucial problem is that this failure to tax does not arise from the taxpayer's evasive actions but is the result of the application of tax legislation as it stands at the moment. For example, the basic principle in international taxation is that a country may tax the profits generated by nonresident enterprises only if they have a relevant physical presence in its territory.[15] The existence of such a rule prohibits countries from taxing the income of digital businesses (such as Google, YouTube, Netflix, Facebook), as they do not need a physical presence in order to generate revenue from clients/users located in their respective territories. Furthermore, their business presence is virtual and not physical, although they are deeply immersed in the economic life of almost every society on the planet.[16] Taxation prerogatives are left solely to the state where the relevant digital company is resident.

Such a state of affairs does not raise notable issues of legal certainty, apart from those related to overly aggressive interpretations of existing provisions by the tax authorities. It primarily places significant pressure on policy makers to come up with more appropriate solutions and invites taxpayers to lobby for their interest within the legislative process.

However, the COVID-19 epidemic demonstrated notable contrary examples in Serbia (but not only in Serbia). Namely, the matter of taxing the income of the so called "*freelancers*" or, to be more precise in line with Serbian legal definition, are individuals not registered as entrepreneurs but who generated income by providing independent professional services to foreign clients) brought to light the issue where changes to the taxpayers' business model of taxpayers, made possible by digital transformation, lead to them being exposed to the application of tax rules that were never intended for

15 See OECD, 2017, Model Tax Convention on Income and on Capital, Art. 7; United Nations, 2021, UN Model Double Taxation Convention between Developed and Developing Countries, Art. 7.

16 See Brauner, Y., 2014, BEPS: An Interim Evaluation, *World Tax Journal*, Vol. 6, No. 1, sec. 1; Avi-Yonah, R., Haiyan, X., 2017, Evaluating BEPS, *Erasmus Law Review*, 1, pp. 3–4; Baez Moreno, A., Brauner, Y., 2018, Policy Options Regarding Tax Challenges of the Digitalized Economy: Making a Case for Withholding Taxes, pp. 3–8 (https://ssrn.com/abstract=3167124, 18. 11. 2023).

such purposes. In other words, modern technology changed the way in which individuals worked and engaged with their clients, but this did not lead to the underpayment of taxes, but rather enabled the imposition of tax obligations that were not envisaged for such use. Thus, in this paper we intend to, based on the empirical example (case study) of "freelancer" taxation in Serbia, deal with the fundamental legal certainty issues that arise in the aforementioned collision between changes brought about by innovation and the unexpected imposition of rather static tax legislation on circumstances unimaginable at the time the respective legislation was drafted and enacted.

## 2. The "Freelancer" Conundrum in the Time of the Covid 19 Pandemic

On 13 October 2020 the Serbian Tax Administration published a Communique on the taxation of income generated by individuals not registered as entrepreneurs from foreign clients, in which it stated:

> *The Serbian Tax Administration has, on the basis of available information regarding inbound financial transactions and comparing them with tax returns on the self-assessed and paid tax on employment/other income and corresponding compulsory social security contributions by natural persons as taxpayers, determined a high prevalence of disregard of tax obligations and has identified those natural persons.*
>
> *These types of income are generated on the basis of the provision of various services, most commonly those of software development, translation, foreign language tutoring, promotion, graphic design, etc. A disregard of tax obligations has been determined also in relation to natural persons who generate income via social networks ("YouTubers", "influencers"), online gambling, and similar activities, as well as those who rented their real estate for periods of under 30 days (short-term rental).*
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> *The Serbian Tax Administration invites all natural persons who have so far failed to submit tax returns on their own initiative, i.e., to self-asses the tax and compulsory social security contributions, increased for the penalty interest, and settle their legal obligations,, prior to the commencement of any action by the tax authority pertaining to the performed action or infringement, i.e., prior to the initiation of the audit proceedings or the filling of the submission for the commencement of misdemeanor proceedings, so as to avoid misdemeanor liability.*
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> *The Serbian Tax Administration will continue to conduct audits of natural persons.*[17]

17 Tax Administration of the Republic of Serbia, 2020, Samoinicijativno prijavljivanje prihoda ostvarenog iz inostranstva, 13 October, translated by authors (https://www.purs.gov.rs/sr/biro-za-informisanje/novosti/6640/samoinicijativno-prijavljivanje-prihoda-ostvarenog-iz-inostranstva-.html, 18. 11. 2023).

In addition to the Communique, the Serbian Tax Administration provided basic guidance on how to self-asses due tax and compulsory social security contributions, as well as on how to complete and file the appropriate tax return.

Despite the fact that the Communique and supporting guidance simply stated the provisions that had been present in the Serbian Personal Income Tax Law[18] for nearly two decades, it caused public outcry, which resulted in street demonstrations several months later. One must raise the question how is it possible that legislation that was absolutely not new (it had been introduced in 2001,[19] while its origins can be traced back to 1991[20]) could have such an effect?

The Communique and its timing showed that during the COVID-19 pandemic the Serbian Tax Administration, similarly to tax administrations across the globe,[21] began to notice that a very large number of individuals were generating considerable revenue from abroad while never reporting or paying any tax on such income. The sources of the transfers of funds clearly showed that they were not witnessing the rather common remittances from abroad, which usually take place between family members and are thus difficult to tax,[22] but that numerous Serbian individuals were providing services to foreign clients. The COVID-19 pandemic led to an exponential increase in remote work and the provision of services online, including those to cross-border clients.[23] At the same time, tax

18 *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02, 80/02, 135/04, 62/06, 65/06, 31/09, 44/09, 18/10, 50/11, 91/11, 93/12, 114/12, 47/13, 48/13, 108/13, 57/14, 68/14, 112/15, 113/17, 95/18, 86/19, 153/20, 44/21, 118/21, 138/22.

19 See Art. 85, para. 1 of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 24/01.

20 See Art. 87, para. 1 of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 76/91.

21 See *e.g.* CEO Times, 2021, *FBR Targeting Payoneer, Freelancers More Than Billions of Rupees Transferred From Abroad*, 11 March, (https://ceotimes.net/2021/03/11/fbr-targeting-payoneer-freelancers-more-than-billions-of-rupees-transferred-from-abroad/, 18. 11. 2023).

22 These remittances made by Serbians living and working abroad to their family members, who still reside in the country, do not represent income but can only be classified as charitable gifts, as they are intended to help and improve the economic status of the relatives of the individual making the transfer (remittance). While such remittances would in principle fall under the provisions of the Serbian gift and inheritance tax, the broad nature of exemptions provided from the payment of this tax, as well as the extremely politically sensitive nature of taxing such intrafamily assistance, makes the notion of applying taxation to them in essence theoretical in Serbia.

23 Eurofound, 2020, *Living, Working and COVID-19*, Luxembourg, Publications Office of the European Union, (https://www.eurofound.europa.eu/en/publications/2020/living-working-and-covid-19, 18. 11. 2023).

authorities worldwide were hard-pressed to find new sources of revenue, not only to meet the drop in the public revenues usually relied on (e.g., the fall in VAT due to lower consumption), but also to fund the various crisis measures introduced by most governments around the world.[24]

Although the matter at hand may appear as a simple case of rather widespread tax evasion, the situation is far more complicated and rather clearly illustrates the impact that the pace of technological development has on our everyday lives and the inability of the legislator to keep up with the change.

The Serbian personal income tax system is based on a dichotomy wherein active income of individuals is classified as either employment income or as entrepreneurial income. In other words, the tax system relies on the premise that an individual who works for a living will either be in an employment relationship, or will be an entrepreneur/farmer.[25] However, at this point we come to a rather peculiar trait of the Serbian tax administrative culture, which is (to put it mildly) overly formalistic, and which in the case of taxing entrepreneurial income, i.e., income from performing professional activities in an independent capacity, was introduced into legislation. Namely, the Serbian Tax Administration has always been reluctant to independently assess the taxpayer's circumstances in case they may lead to them having certain rights or obligations relevant for taxation, and has preferred that some other public body, competent in the respective circumstances, verify their existence.[26] In the case of taxation of entrepreneurial income, such an attitude lead to the specific tax

24 Collier, R., Pirlot, A., Vella, J., 2020, Tax Policy and the COVID-19 Crisis, *Intertax*, Vol. 48, Nos. 8–9, pp. 794–795.

25 Kostić, S., 2022, Tax Treatment of Flexible Forms of Work in Serbia in Light of the COVID-19 Global Pandemic, *Annals of the Faculty of Law in Belgrade*, Vol. 70, No. 4, pp. 1156–1157.

26 The described attitude sometimes leads to even comical situations. For example, under Serbian corporate income tax legislation, as well as Serbia's double taxation treaties, Serbia is entitled to tax the profits of nonresidents generated through a qualified level of business presence in its territory. The technical term for the qualified level of business presence (i.e., the threshold for Serbia's claim taxation rights over the nonresident's profits) is the permanent establishment. Under the law, a permanent establishment of a nonresident taxpayer exists when their level of presence meets certain criteria. Despite these criteria not being related to any formal legal requirement, the Serbian Tax Administration refused to recognize the existence of permanent establishments that are not officially registered and recognized for corporate law purposes. Prior to 2005 the Serbian corporate legislation did not provide the possibility for the registration of the business presence of nonresidents in Serbia (as of 2005 it allowed the registration of branches of foreign companies), the Serbian Tax Administration simply refused to recognize the taxable presence of nonresidents and did not impose tax on them, despite the clear statutory authority to do so. The Serbian tax community

on income from independent (professional) activities being applied to the income of only those individuals who are duly registered as entrepreneurs, in accordance with the relevant corporate legislation.[27]

The reason for the described approach to interpretation and, in the case of the tax on income from independent (professional) activities, to drafting tax legislation lies primarily in the rather limited capacities of the Serbian Tax Administration. The most recent data provided by the Serbian Fiscal Council shows that the Serbian Tax Administration does not have the cannot afford to devote too much time to sophisticated and nuanced interpretation. For example, the number of full-time employees of the Serbian Tax Administration is bellow 4,000, while in order to reach the European average in terms of the number of tax administration employees in relation to its population, this institution would have to almost double its staff.[28] Furthermore, the age demographics of the Serbian Tax administration are quite extreme, with it being the oldest tax authority in Europe in terms of the average age of its employes. More than half of all Serbian Tax Administration employees are over the age of 55, while less than 2% are below 35. Furthermore, even within such a depleted structure, the Serbian Tax Administration is able to fill just over half of the required field tax inspector positions.[29]

The Personal Income Tax Law provides a specific tax category for all individuals who do generate income from independent professional activities, but are not registered as entrepreneurs: tax on other income, a tax form intended for the types of income that do not fall within one of the explicitly enumerated categories of income to whom a specific tax form is assigned.[30]

Historically, the application of the tax on other income to the income of individuals generated from independent professional activities provided

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responded to such an attitude by paraphrasing the slogan of the American Revolution of "no taxation without representation" into "no taxation without registration".

27 See Art. 32, para. 2 of the Personal Income Tax Law. The formalistic approach under which only the income of registered entrepreneurs is subject to the tax on independent professional activities, dates back to 1996. See Art. 15 of the Law and the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 54/96.

28 For example, Bulgaria, which has an almost identical population and is at a similar level of economic development as Serbia, has almost double the number of employees in its tax administration. Croatia, which has a notably smaller population than Serbia, has an almost equal number of employees in its tax administration.

29 See Fiscal Council of Serbia, 2023, Mišljenje na nacrt Fiskalne strategije za 2024. sa projekcijama za 2025. i 2026. godinu, 31 May, pp. 39–43, (https://www.fiskalnisavet.rs/doc/FS_%20Misljenje-na-Nacrt-Fiskalne-strategije-2024–2026_090623.pdf, 18. 11. 2023).

30 See Art. 85 of the Personal Income Tax Law.

to other private persons was a rare occurrence. Such a type of income was seen as an incidental or complementary source of income for in the vast majority of cases already employed individuals, as well as income which was in most cases effectively impossible to tax. A typical example of other income would be the income of a teacher employed at a public school who in their spare time gives private lessons to students in need of additional tutoring, or of a janitor who outside of working hours privately provides plumbing services to clients. Customarily, such individuals would be renumerated by their clients in cash and would never report or pay tax on such income. As they would have social security insurance through their employment, there was nothing forcing them to register their entrepreneurial activity. Only those individuals who provided services to legal entities and entrepreneurs would suffer taxation, as the law imposed withholding tax obligations when they were the payers of the income.

Cross-border aspects of the tax on other income were not common and were mostly limited to consultancy fees generated by experts, as well as to foreign source income of expatriates who had moved to Serbia.

In more recent times modern technology enabled the creation of a global market for many types of services wherein clients and service providers could interact despite being located in different countries or even different continents. Thousands of Serbian residents grasped the opportunities provided by this global market. The one crucial aspect of their business model, which enabled the Serbian Tax Administration to notice them, is the fact that payments must be made through easily traceable bank transfers.

However, within this stratum of society (often referred to as the workers in the gig economy)[31] we can see the impact of societal developments that were not taken into account by the Serbian legislator when drafting the provisions on the taxation of other income and, perhaps more importantly, those regulating compulsory social security contributions obligations related to the generation of such income. Namely, one of the reasons that drove the legislator to think of other income as an incidental category may lie in the way in which healthcare coverage is understood in Serbia. In the 1990s, as well as in the early 2000s, healthcare in Serbia was almost exclusively within the public sector domain. Private healthcare was rare,

31 See Dokko, J., Mumford, M., Schanzenbach, D. W., 2015, *Workers and the Online Gig Economy*, Hamilton Project, December, pp. 1–3, (https://www.hamiltonproject.org/wp-content/uploads/2023/01/workers_and_the_online_gig_economy.pdf, 18. 11. 2023); Vallas, S., Schor, B. J., 2020, What Do Platforms Do? Understanding the Gig Economy, *Annual Review of Sociology*, Vol. 46, pp. 274–275.

expensive and usually limited to specific medical areas.[32] Thus, it was difficult to imagine how an individual would exist in society, at least in the long term, unless covered by public healthcare insurance. Incidental generation of other income did not lead to public healthcare coverage (despite leading to an obligation to pay compulsory social security contributions) which may have strengthened the dichotomous view of active income for the purposes of taxation – in terms of categories that did give rise to public healthcare coverage (employment income/income from independent professional services). On the other hand, in more recent years, private healthcare in Serbia has become widespread and relatively affordable, which has led a number of individuals, particularly those from the younger segments of society, to be able to fully function without being a part of the public healthcare insurance system. Together with the decrease in the trust in Serbia's public pension system, such a state of affairs made it quite acceptable for numerous individuals to choose a lifestyle outside of the public social security insurance system – at least for a significant period of their productive years.

We will not dwell into the technical aspect of the tax on other income and material issues that arise in relation to it, as they are not crucially relevant for the topic of legal certainty. What we will focus on are several related issues. Firstly, the issuance of the Communique quickly led to the realization that thousands of Serbian taxpayers never reported or paid tax on their foreign sourced income from the provision of independent professional services as unregistered entrepreneurs. Formally speaking, the Serbian Tax Administration was entirely within its rights to go after all these taxpayers as they were in clear violation of the law. Actually, the Communique could be seen as an example of good administrative practice as it gave advance notice to taxpayers to avoid penalties by settling the unpaid amounts on their own. However, the Serbian Tax Administration failed to address the issue of how it is possible that so many taxpayers – a vast majority of all those who generated the respective type of income from foreign sources – never paid tax. It appeared that a good number of them were genuinely unaware of the existence of the obligation to do so. Furthermore, many taxpayers publicly stated that they sought advice on what to do from their local Tax Administration offices and that they were given oral instructions that they had no obligations stemming from the income in question.[33] Again, in the absence of written evidence, such

32 Adžić, S., Adžić, J., 2009, The Public Healthcare System in the Transition Countries: The Case Study of Serbia, *Interdisciplinary Management Research*, 5, pp. 517–521.

33 In 2023 the Serbian Tax Administration also launched a designated portal https://frilenseri.purs.gov.rs/ (18. 11. 2023), which includes a tax calculator and a guidebook

statements do not have any effect on the taxpayer's situation, but their number does testify to the existence of a fundamental lack of knowledge and awareness at the level of the Serbian Tax Administration regarding the taxation of income from independent professional activities. Such a state of affairs can easily be explained by the previously described environment in Serbia, for which the tax on other income was envisaged. While the application of decades-long standing provisions, within the statute of limitations, by the Serbian Tax Administration cannot be recognized as retroactive application of legislation, one cannot ignore the fact that the reason why it waited for so long to commence the first audits does lie in the fact that its own inspectors were unaware of the full implications of the relevant legal norms.

This raises the question of the appropriate response to a situation where technological development allows for the rapid spread of a business model that, for taxation purposes, falls under the provisions the legislator never imagined possible for performing business activity (the basic concept of the tax on other income was initially conceived in the early 1990s), which thus inadequate for reasonable tax liabilities for many taxpayers. Due to such circumstances even the tax authorities failed to notice the existence of tax obligations at the time the taxable events took place. In situations where rapid modernization and digitalization enable taxpayers to legally avoid taxation, on account of the relevant legislation not prescribing the existence of tax liabilities in the case of their business models, the primary burden is on the legislator to provide an adequate response. As a rule, such situations arise in relation to the rights of taxation of the income of nonresidents. In the case of resident taxpayers, whose tax liability in their state of residence is unlimited, the question is rarely (if ever) does the state have the right to tax, but rather how it should to tax.

The "freelancer" conundrum in Serbia also clearly illustrated the need for the introduction of systemic, institutional solutions to such problems. Namely, the mandate of the Serbian Tax Administration is quite clear and it has no right to waiver from its primary obligation to collect taxes due by taxpayers in Serbia. It must strictly abide by the Latin maxim *dura lex sed lex* and is not authorized to question the policy rationale behind the legislation enacted by Parliament or the bylaws issued by the executive branch of the government on the basis of statutory authorization. The Serbian Government Ministry of Finance got involved only once the association of "freelancers" staged vociferous street demonstrations and attracted significant sympathetic publicity. In other words, the issue was addressed only

for freelancers, to help them calculate and report their taxes and compulsory social security contributions.

once vested political interests were sufficiently affected, while the adopted solutions can only be seen as intermediary measures, with the primary purpose of pacifying the rebellious taxpayers and public opinion, and not as a comprehensive solution to a problem that has broader importance.

Our current legal culture and practices do not provide us with guidance on how to address similar situations which are bound to become increasingly common due to the unstoppable pace of technological development. Therefore, the task before us is to determine which legal principles (whose application we may not yet be fully accustomed to, but which have seen border employment in comparative legal systems) should we rely on and then ascertain the proper procedural and institutional path(s) for prospective measures. Finally, we will provide a proposal for the basic outline of such measures.

## 3. Legal Certainty and Legitimate Expectations

As explained in the introduction, the contemporary view of legal certainty, adhering to the requirements of good administration, require not only that the law is accessible and predictable, but that it is applied in a manner that recognizes and respects the parties' legitimate expectations.

In many spheres of our daily lives, the administration acts as the link between the law, as passed by legislators, and the citizens subject to it, creating a space in which legal certainty can either be upheld or shaken. This creates expectations regarding what the law actually is, how it will be interpreted and applied, and whether it will be applied at all.

The protection of legitimate expectations, as an element of legal certainty, is a topic that has been widely debated in European administrative law literature for decades and it is accepted in the caselaw of most national[34] and European courts, yet it is still a novel and elusive concept

34 Its origins are usually in the German jurisprudence, but it has spread to other jurisdictions as well. For example, Dutch courts recognized it as a general principle of law as early as the end of the Second World War, see Widdershoven, R., Remac, M., 2012, General Principles of Law in Administrative Law Under European Influence, *European Review of Private Law*, Vol. 20, No. 2, pp. 383–384. In Germany it was recognized in 1959 by the Federal Administrative Court and was later introduced through legislation on administrative procedure (Kunnecke, M., 2006. *Tradition and Change in Administrative Law: An Anglo–German Comparison.* Berlin, Springer, pp. 125–126). It first appeared in British caselaw in 1969 as "something less than a right which may nevertheless be protected by the principles of natural justice" (Parpworth, N., 2008. *Constitutional and Administrative Law.* 5th ed. Oxford, Oxford University Press, p. 319), while the Belgian State Council included it into the principle of legal certainty in the late 1980s (Popelier, P., 2000. Legal Certainty and Principles of Proper Law

for Serbian lawmakers and practitioners.[35] Even though scholars have presented varying arguments to justify this principle,[36] there is a belief that administrative authorities should, where possible, fulfill the legitimate expectations that they themselves have created.[37]

In this sense, legitimate expectations can be seen as a corrective to the classical understanding of the bare principle of legality of administration. Public authorities are obliged to take action in the public interest, but in doing so cannot cause harm to individuals, which has formed a reliance, based on the previous conduct and practice of the authority, making them believe it "to be a real possibility."[38] From this flows the obligation of the authority to respect such an expectation or to compensate those affected by the reliance on it. Moreover, in recent literature, this has been strengthened by the idea that citizens need to be able to trust authorities.[39]

The principle of legitimate expectations has a procedural and a substantive aspect. Initially, it was seen exclusively as a procedural guarantee (e.g., in the context of natural justice or the right to a hearing),[40] but it later developed as an obligation for the authorities to act in a certain direction (substantial protection of legitimate expectations) or even toward compensational protection in case of expenses incurred due to expectations that the administration created.[41] In some jurisdictions we have even seen the *contra legem* effect of this principle, emerging from the so-called principle of good faith.[42]

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Making, *European Journal of Law Reform*, Vol. 2, No. 3, p. 327). On the other hand, Tomlinson states that "doctrine of legitimate expectations has been consistently rejected by French courts, as it is understood to be incompatible with French law's absolute insistence on the *principe de sécurité des situations juridiques*." (Tomlinson, J., 2020, Do We Need a Theory of Legitimate Expectations? *Legal Studies*, Vol. 40, No. 2, p. 293).

35 Jerinic, J., 2021, When the Administration Promises: Protection of Legitimate Expectations in Serbian Administrative Procedure, *Regional Law Review*, pp. 117–129.

36 Craig, P., 2015, *UK, EU and Global Administrative Law: Foundations and Challenges*, Cambridge, Cambridge University Press, p. 142.

37 Berge, G., Widdershoven, R., 1998. *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law,* The Hague, Intersentia, pp. 423–424.

38 Schønberg, S., 2000, *Legitimate Expectations in Administrative Law*, Oxford, Oxford University Press, p. 10.

39 Tomlinson, 2020, pp. 295–297; Forsyth, C., 2011, Legitimate Expectations Revisited, *Judicial Review*, Vol. 16, No. 4, pp. 429–439.

40 Forsyth, C. F., 1988. The Provenance and Protection of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 47, No. 2, p. 240.

41 Šikić, M., Ofak, L., 2011. Nova načela upravnog postupka (s posebnim naglaskom na razmjernost, legitimna očekivanja i stečena prava), *Zbornik Pravnog fakulteta u Rijeci*, Vol. 32, No. 1, p. 140.

42 This was accepted by Dutch courts, see Widdershoven, R., Remac, M., 2012, p. 386. Similar was identified by Belgian commentators, e.g., Lust, S., Administrative Law in

The need to respect legitimate expectations has found its way into the European Code of Good Administrative Behavior,[43] which largely inspired the inclusion of the right to good administration in the Charter of Fundamental Rights of the European Union.[44]

Still, not all expectations are protected and there is a need to weigh the interests involved, which was the reason why in some countries, the principle is not rigidly defined in legislation, but remains a caselaw principle or is regulated only in some legal matters.[45]

Both national and European courts have delved into the issue of the sources of legitimate expectations. For example, during the 1990s for Dutch courts these were laws, decisions, publication of policy rules and guidelines, provision of information on the application of the law or promises, contracts, court judgements,[46] while during the same period the European Court of Justice (now the CJEU) recognized that they can be raised even by soft-law, policy instruments, such as guidelines and notices, as well as by a course of conduct or assurances given by the administration.[47]

In 1979 the Dutch administrative courts found that reliance on information given over the phone by the tax authorities, in a case in which tax authorities later decided to the detriment of the party, can constitute legitimate expectation. The Dutch Supreme Court found that the risk of misinformation should as a rule be borne by the taxpayer, because the opposite approach would hinder the government in its duty to provide information, but that in special cases, the tax authorities may be bound by the information provided.[48] This is possible in cases when the information is not clearly contrary to the law and if the interested party suffers

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Belgium, in: Seerden, R., Stroink, F., (eds.), 2002, *Administrative Law of the European Union, Its Member States and the United States. A Comparative Analysis*, Antwerpen–Groningen, Intersentia, pp. 31–32. Also, see Perry, A., Ahmed, F., 2014. The Coherence of the Doctrine of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 73, No. 1, pp. 61–85.

43 Art. 10 of the Code. The Code subdivides the principle into three aspects: the necessity of consistency in administrative behavior; the respect of "legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past"; and the duty to advise the public on how to pursue a particular administrative matter.

44 Although it is still mainly applied by the European Ombudsman. See Clement, M., 2018, Breach of the Right to Good Administration: So What? *ELTE LJ*, 1, p. 19.

45 This is the case of the Dutch GALA, see Berge, G., Widdershoven, R., 1998, It appears only in relation to subsidies (Division 4.2.6, Art. 4:51 GALA).

46 Berge, G., Widdershoven, R., 1998.

47 Craig, P., Burca, G. de, 2003, *EU Law – Texts, Cases and Materials,* 3rd ed., Oxford, Oxford University Press, pp. 380–387.

48 Berge, G., Widdershoven, R., 1998, p. 446.

damage. Furthermore, it is easier to bind the tax authorities by the given information if it is phrased as a promise. The condition is that the taxpayer has provided accurate information to obtain such a promise, as well as that the promise is not manifestly contrary to law.

In Serbia, the principle of legitimate expectations does not exist in the described form, nor in literature or in the reasoning of legislators, administrators or the judiciary. Even though the broader administrative sphere saw rare but express recognition of legitimate expectations in the decisions of the Ombudsman (as early as 2011) and later on the Constitutional Court, this did not have a significant effect on the drafting of the legislation on administrative procedure (passed in 2016), or the jurisprudence of the Administrative Court.

In the 2011 annual report the Serbian Ombudsman found that the breach of legitimate expectations was one of the most common violations of the right to good administration. The Ombudsman singled out the case of the Tax Administration, which by changing its interpretation of the tax laws, wronged a number of individual farmers who took maternity leave. The Tax Administration refused to act upon the Ombudsman's recommendation and annul its decisions, after which the Government stepped in and covered the costs of taxes of the farmers who had not previously paid the taxes levied according to the controversial interpretation, but those who had paid the taxes were not compensated.[49] The following year, the law was amended, as a demonstration of the indisputable primacy of the principle of legality in the eyes of the Serbian tax administration. In four cases, decided between 2013 and 2019, the Constitutional Court found a breach of legitimate expectations in final administrative acts, which concerned land usage and construction and development.[50]

The Serbian Law on General Administrative Procedure (LGAP)[51] contains the principle of predictability, but in its substance, it does not

49 Protector of Citizens, 2012, *2011 Annual Report*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 133–134. In the later years, the Ombudsman found more examples of legitimate expectations created by administration or the legislature, e.g., in 2014 in connection with replacement of driving licenses (Protector of Citizens, 2015, *Regular Annual Report of the Protector of Citizens for 2014*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 161–162); in 2019 in connection with the untimely decisions and erroneous interpretation of laws by the Real Estate Cadastre (Protector of Citizens, 2020, *Regular Annual Report of the Protector of Citizens for 2019*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 94–95); in 2020 concerning a water supply failure in Belgrade (Protector of Citizens, 2021. *Regular Annual Report of the Protector of Citizens for 2020*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 114–115).

50 Jerinić, J., 2021, p. 125.

51 *Official Gazette of the Republic of Serbia*, Nos. 18/16, 95/18, 2/23.

guarantee the protection of legitimate expectations in the wide sense seen in other European jurisdictions, but settles for the need to have a unified administrative practice. By tying predictability to the principle of legality, the LGAP requires administrative authorities to take into account earlier decisions in the same or similar administrative matters.[52] Being a general principle of administrative procedure, this connects all administrative authorities, even those whose procedural law heavily departs from rules of general administrative procedure – the Tax Administration being the most prominent example, with its own procedural law.[53] Furthermore, the LGAP states that when an authority departs from its previous practice, it is required to justify that in the rationale of its decision.[54] Available caselaw and existing Serbian scholarly literature, unfortunately, do not provide any trace of actual application of the predictability principle, as defined in the 2016 LGAP.

Even in this rudimentary form, this principle could be transformed and expanded, to eventually extend to the principle of legitimate expectations, in its procedural and substantial form. This would require an activist approach by the Administrative Court, as well as the Ombudsman and the Constitutional Court.

Notwithstanding the lack of express recognition of the principle in Serbian legislation or caselaw, if one was to promote the idea that a solution for the "freelancers" case at hand could be sought in the protection of their legitimate expectations, it should first be examined whether the expectations could have been created by the lack of activity on the part of the Tax Administration prior to 2020; do the expectations deserve legal protection, and do they deserve it even if being *contra legem*.

## 4. A Way Forward?

The previous analysis clearly shows that the current Serbian legislation, as well as the existing administrative practice and jurisprudence, does not provide us with much of a foundation for an effective remedy for the issue before us.

The relevant legislation in our case study is clear. Although the results of its application in certain cases may lead to unjust and even potentially

52 Art. 5, para. 3. LGAP.

53 Law on Tax Procedure and Tax Administration, *Official Gazette of the Republic of Serbia*, Nos. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21, 138/22.

54 Art. 141, para. 4. LGAP.

unconstitutional outcomes,[55] the Serbian Tax Administration is not authorized to challenge the policy rationale or even the constitutionality of the legislation it is supposed to apply to individual cases. In the case of the tax on other income and the corresponding social security contributions, the procedure for meeting the tax obligations is that of self-assessment, with a small number of taxpayers duly complying with the statute in the past decades. Furthermore, in some rare instances the Serbian Tax Administration did performs audits and impose the unpaid tax as well as penalties on taxpayers who failed to do so on their own for incidental service income generated from abroad. In other words, it would be very difficult to argue that the principle of predictability from the LGAP has been infringed. True, practice has been rare, but where it exists – it has been uniform. Even if we rely on Dutch jurisprudence and the implication that oral guidance given by certain officials of the Serbian Tax Administration to some taxpayers, that they did not have any tax obligations with respect to their foreign sourced income, did result in the existence of legitimate expectations, it would be only theoretically possible to prevail even before a sympathetic court. Again, we might have a costly, time-consuming solution for some rare cases, but certainly not for the vast majority of them.

Both the principle of legitimate expectations and of predictability leave us with a fundamental unresolved dilemma. Namely, if the imposition of tax is ultimately in accordance with the law, can it completely nullify the existence of the tax obligation, or does it just lead to a potential claim that the taxpayer may have against the Serbian Tax Administration. If we adopt the second option which would seem to be more in line with the general purpose of taxation, then we would have to determine what would be the correct legal procedure to pursue such a claim. Again, more litigation, more costs, and more uncertain results for all parties involved. In addition to the existence of the tax obligation proper, we must also address the issue of the potential penalties. Namely, if we choose the option that the tax obligation does not disappear, it would be unacceptable for the taxpayer to continue to be liable for the infringement of rules on which improper guidance was given by the authorities themselves.[56]

The commonsense solution would be to strive for an institutional mechanism that would provide adequate protection for at least the most

55 Kostić, S., 2022, Tax Treatment of Flexible Forms of Work in Serbia in Light of the COVID-19 Global Pandemic, *Annals of the Faculty of Law in Belgrade*, Vol. 70, No. 4, pp. 1158–1159.

56 Comparative legislation contains examples of explicit provisions stipulating the existence of a tax obligation without the violation of tax law due to non-reporting caused by following the instructions of the authorities (cf. Entrepreneurial Code of Kazakhstan, Art. 14(3), Tax Code of Russia, Art. 111(1)(3)).

obvious cases where legal certainty has been infringed due to the disparity between real-life dynamics and the mostly static tax legislation. Such a mechanism must be effective enough to force the Serbian Tax Administration to abide by it, as clearly shown in the existing experiences of the credence given by this institution to the Serbian Ombudsman in the case of farmers' maternity leaves. Experience has shown that the Serbian Tax Administration is not against clemency towards taxpayers, but that in its institutional wisdom it refuses to carry the risk of such clemency unless clear legislative authority is provided for it.

The existing Serbian institutional framework did contain examples of good practice, albeit usually in cases involving sufficient vested political and economic interests. For example, the issue of the widespread abuse of the lump sum mechanism for taxing registered entrepreneurs, wherein individuals who were in substance employees were engaged by their effective employers as independent service providers registered as entrepreneurs, with the primary purpose of lowering the fiscal burden on their incomes, was resolved in a way that may provide notable guidance.

Namely, in 2017 and 2018, during audits the Serbian Tax Administration noticed widespread abuses of the employee/independent service provider relationship and started to initiate proceedings against numerous taxpayers. The issue was that unofficial evidence showed that this abuse was so widespread that thoroughly pursuing all those implicated could potentially lead to the collapse of the IT sector, one of the most vibrant sectors of the Serbian economy, and to the accelerated emigration of irreplaceable professionals. Many taxpayers did not feel they were in breach of the law as formally they were fully compliant with relevant legislation, provided one accepted that the individuals in question were independent service providers and not employees. Furthermore, while in some cases there could be no dispute as to the true nature of the relationship, in others the circumstances were not so clear.[57]

Due to the relevance of the potential consequences of the initiated proceedings, the Serbian Tax Administration essentially paused its work, allowing for all interested parties to jointly come to an acceptable solution. The discussions involved independent experts, representatives of the Ministry of Finance and the Serbian Tax Administration, as well as of the relevant business community, predominantly affected by the issue. As a result, the Serbian Personal Income Tax Law and the Law on Compulsory Social Security Contributions were amended in late 2019,[58] providing a

57 *Ibid*., pp. 1152–1153.

58 See Art. 10 of the Law on Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 86/19 and Art. 6 of the Law on the Amendments to

clear regulatory framework for taxing dependent and independent service providing, while the legislation also provided effective amnesty for the previous period as it prohibited the Serbian Tax Administration from challenging the nature of the formally contracted relationships between independent service providers and their clients during the period prior to the introduction of the new rules.[59]

In this particular case taxpayers were provided with legal certainty for the future, by virtue of the introduction of specifically tailored legislation, as well as for the past, due to the granted amnesty for the period where no such clear legislation existed. In our case study involving "freelancers", the Serbian Tax Administration did not pause, while the Serbian Ministry of Finance reacted only once the they took to the streets and the general public started showing sympathies for their cause. In other instances, where the taxpayers did not have sufficient influence or were unable to generate politically relevant attention, there was no remedy to be found. As the speed of the digital transformation of society will inevitably lead to an increase in the number of similar situations, it would be in line with the essential principle of equality before the law that we introduce procedures that will not limit *special treatment* only to those who can afford it or to whom we cannot afford to refuse it.

Our proposal is to introduce specific provisions to the Serbian Law on Tax Procedure and Tax Administration, under which if the Tax Administration encounters a situation wherein, based on the information it is privy to, the number of uncompliant taxpayers, looking at a period of time that covers the statute of limitations (5 years),[60] is greater than the number of compliant taxpayers, it would postpone the issuance of decisions[61] in audited cases until the completion of a specific proceedings, whose duration would not be counted for the purposes of the statute of limitations in initiated proceedings. However, the penalty interest for late payment would not be incurred for the duration of these proceedings.

This procedure would require the Tax Administration to prepare a report for the Ministry of Finance and ask for guidance in the case at hand. Based on the submitted report the Ministry of Finance would promptly

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the Compulsory Social Security Insurance Contributions Law, *Official Gazette of the Republic of Serbia*, No. 86/19.

59 See Art. 24 of the Law on Amendments to the Personal Income Tax Law.

60 This timeframe ensures that the special procedure will deal only with genuine cases and not those where, e.g., taxpayers would intentionally orchestrate a campaign of non-compliance in order to meet this condition.

61 The Serbian Tax Administration would be allowed to initiate proceedings so as not to allow uncompliant taxpayers to benefit from the expiry of the statute of limitations.

organize a public hearing, to which all interested parties would be invited – representatives of the professional tax advisory, tax and public finance academics, representatives of the business community and taxpayers, as well as other relevant participants, depending on the specifics of the case. Following the public hearing, the Ministry of Finance would appoint a committee of experts, wherein civil servants, as well as taxpayer representatives, would have to be in the minority, and who would be given a reasonable timeframe and resources to prepare and publish an advisory report and recommend steps on how to deal with the situation at hand. If the Ministry of Finance chooses to reject the recommendations provide by the committee of experts, it would have to publish its answer and hold a public hearing in order to discuss the points of conflict.

Taxpayer associations (groups of 10 or more taxpayers, legal entities as well as individuals) would be entitled to initiate the same proceedings, and in that case the Ministry of Finance would require the Tax Administration to confirm that there is a discrepancy between the number of compliant and uncompliant taxpayers, over the period of the statute of limitations. If such a discrepancy is confirmed, the process would continue in the identical way as if the Tax Administration had initiated it.

If the resolution of the issue warrants legislative action, the dormancy of the proceedings initiated by the Ministry of Finance would continue until the necessary provisions are enacted. If no new legislation was deemed necessary, the Minister of Finance would be required to issue a binding instruction[62] explaining in detail the application of the law deemed appropriate.

Such a mechanism would not only resolve issues such as the one found in the "freelancers" case, but also many which could be classified as retrospective interpretation.

## 5. Conclusions

Previous analyses have shown that Serbian legislation – both legislation on general administrative procedure, as well as the *lex specialis* on tax procedure – do not provide an adequate remedy for situations in which static tax legislation and the understaffed tax administration are unable to provide certainty and predictability.

Legal certainty in administrative law goes hand in hand with the principles of predictability and legal certainty. In European jurisdictions, these

62 Binding for the Serbian Tax Administration, as per Art. 11, para 3 of the Law on Tax Procedure and Tax Administration.

have largely been developed in caselaw and, in some cases, later included in codifications of administrative procedure. Nowadays, they are seen as constituent parts of the right to good administration. Predictability was introduced into Serbian administrative procedure in 2016, with the effects of the principle yet to be seen. On the other hand, protection of legitimate expectations appears before the Constitutional Court and the national ombudsman only in rare cases.

However, even if Serbia had elaborate experience regarding the protection of legitimate expectations, in all likelihood, the case at hand still would not be resolved by its application. Firstly, this would require its application in a large number of individual cases. Furthermore, since the imposition of tax is in accordance with the formal law, it is very difficult to advocate the *contra legem* effect of the principle of legitimate expectations or to find an adequate remedy for compensation claims. One should also bear in mind that, even though extremely rare, there were cases in which taxes were paid and the ignorance of tax obligations in the other cases would inevitably lead to discrimination.

All of the above leads to the conclusion that a solution must be general measure, an institutional mechanism that would provide adequate protection in cases where legal certainty has been infringed as a result of misalignment of tax legislation and contemporary life. We expect that the "freelancer" case will not be the only one and that similar situations will arise due to the inevitability and pace of technological development.

The mechanism should compel the Serbian Tax Administration to abide by it in order to be effective and would therefore have to be included in the Law on Tax Procedure and Tax Administration. In cases involving a significant number of uncompliant taxpayers, the Tax Administration would be obliged to postpone the issuance of tax decisions until a specific procedure involving meaningful public consultation is carried out, under the auspices of the Ministry of Finance. The process could lead to possible legislative changes.

If the resolution of the issue warrants legislative action, the dormancy of the proceedings initiated by the Ministry of Finance would continue until the necessary provisions are enacted. If no new legislation is deemed necessary, the Minister of Finance will be obliged to issue a binding instruction[63] explaining in detail the application of the law deemed appropriate.

63 Binding for the Serbian Tax Administration, as per Art. 11, para 3 of the Law on Tax Procedure and Tax Administration.

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# UTICAJ MODERNIH TEHNOLOGIJA NA PRAVNU SIGURNOST U PORESKOM PRAVU: NOVI HORIZONT

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APSTRAKT

Ubrzane reforme srpskog poreskog prava, najčešće zasnovane na komparativnim uzorima, dovele su do značajnog obima takozvanog zakona u mirovanju budući da zbog nedostatka znanja i iskustva sistem nije bio spreman za njegovu primenu. Članak istražuje neke aspekte legitimnosti srpskog poreskog zakonodavstva, na prvom mestu posledice neusaglašenosti između propisa i načina na koji se poreski obveznici ponašaju, pri čemu su se autori oslanjali na slučaj oporezivanja takozvanih frilensera. Pažnja je usmerena na ključna pitanja pravne sigurnosti koja nastaju iz sudara promena koje su posledica savremenog doba i primene statičnih poreskih normi na okolnosti koje su bile nezamislive u vreme njihovog usvajanja. Istraživanje pokazuje da srpski propisi i relevantna praksa ne pružaju efikasnu zaštitu u ovakvim slučajevima, između ostalog jer princip legitimnih očekivanja kod nas još uvek nije naišao na značajniji odjek. Predlaže se institucionalni mehanizam koji uključuje izmene i dopune Zakona o poreskom postupku i poreskoj administraciji i barem jedan krug javnih konsultacija u cilju otklanjanja pravne nesigurnosti prouzrokovane neadekvatnom primenom poreskih zakona.

**Ključne reči:** pravna sigurnost, legitimna očekivanja, pravo na dobru upravu, poreska uprava, poresko pravo, zakonodavstvo u mirovanju, javna rasprava.

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ORIGINAL SCIENTIFIC ARTICLE

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# DISSENTERS AND DISSIDENTS: RELIGIOUS CONSCIENTIOUS OBJECTORS UNDER YUGOSLAV MILITARY CRIMINAL LAW 1945–1991

***Abstract:*** *The paper presents results of a research focusing on a four decades' struggle for legal recognition of the right to conscientious objection in Socialist Yugoslavia. Without a pretense to evaluate it, the paper aspires to describe and explain the evolution of Yugoslav Military Criminal Law by examining its distinctive historical causes and inner logic. Methodologically, the study relies on normative analysis of relevant legal sources that have been either understudied or simply disregarded. It analyzes especially the 1989 Amendment to the Military Service Obligation Act that introduced the right to conscientious objection into the Yugoslav socialist legal system, as well as related archival materials, newspaper reports and other written accounts depicting the political background of the 1989 legal reform. The study sheds light on socialist secularism and questions the common perception of the Yugoslav People's Army as a conservative institution unwilling to compromise. It also contributes to a broader theoretical discussion on the ambiguous nature of conscientious objection as a right and/or a privilege.*

**Key words:** Right to conscientious objection, Socialist Yugoslavia, Yugoslav People's Army, religious conscientious objector, Protestant dissenting groups, Slovenian Peace Movement.

## 1. Introduction

During the recent COVID-19 pandemic, many governments introduced quarantine, lockdown and mandatory isolation in order to contain the spread of the disease, challenging in such a way religious freedoms, primarily the right to collective worship. All over the globe, such controversial legal measures provoked a public backlash ranging from acts of civil disobedience to more cautious calls for religious accommodation.

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Individual right to be exempt from generally applied rules that contradict one's personal beliefs became a hot topic once again. Boosted by the ongoing debate over mandatory vaccination, the pandemic emergency brought an old dilemma up for discussion, that whether conscientious objection was another fundamental right or just a privilege compromising the egalitarian core of democracy. "*Rebellious and anarchic*"[1] conscience as an autonomous source of obligation requires either that an exception be made to positive law or that a positive law be modified. Either way the rule of law is called in question, as it is the democracy itself.

There is, however, a thin red line of compromise: contemporary liberal democracies recognize their citizens' right to conscientious objection to military service obligation. Sparked by the Reformation that advocated liberation of individual conscience from ecclesiastical authorities,[2] the concept was further developed by liberal political thought holding humans had inalienable rights *vis-à-vis* the government authority. Considering such a view seriously, it is difficult to comprehend the duty of compulsory military service obligation since it transfers the fundamental right to life and liberty over to the state.[3] Fostered by liberals' fear of standing armies as an instrument of tyranny,[4] conscientious objection on religious basis was especially welcome in Anglo-American political theory and practice,[5] while the European, continental one was less enthusiastic about it.

1 Schlink, B., Conscientious Objection, in: Mancini, S., Rosenfeld, M. (eds.), 2018, *The Conscience Wars, Rethinking the Balance between Religion, Identity, and Equality*, Cambridge, Cambridge University Press, p. 103.

2 In Catholic theology, "*conscience was given a central role in an economy of salvation, in particular by way of the practices of confession, inquisition, and excommunication. Because these practices accomplished both the discovery and absolution of sins, the preeminent power belonged to the institution of the Church, which was conceived as alone able to carry and transmit dogmatic truths, and to guide fallible consciences. [...] One of the important critiques the Protestant Reformation addressed to Catholicism concerned its system of penances and its practice of the 'terrorization of conscience'*." Saada, J., Antaki M., Conscience and Its Claims. A Philosophical History of Conscientious Objection, in: Mancini, S., Rosenfeld, M., (eds.), 2018, *The Conscience Wars, Rethinking the Balance between Religion, Identity, and Equality*, Cambridge, Cambridge University Press, pp. 31–32.

3 Fiala, A., 2010, *Public Wars, Private Conscience*, *the Ethics of Political Violence*, London – New York, Continuum International Publishing Group, p. 145.

4 Carter, A., 1998, Liberalism and the Obligation to Military Service, *Political Studies*, Vol. 46, No. 1, pp. 72–74.

5 Although not recognized as a legal right neither by the United States nor Great Britain before World War I, it traces all the way back to colonial experience and the American Revolution (Fiala, A., 2010, p. 146). Further secularization of the principle, culminating during the Vietnam War, led to a transition from a compulsory military draft to an all-voluntary and professional army (*Ibid.,* pp. 148–149).

Commonly associated with republicanism, the latter tradition shifted focus from individual interests to political participation, subordination of private interest to the public good, civic virtue and, especially, to the idea that citizens' rights also imply duties such as military service obligation. Still influential in France, such perception of citizenship, "*derived from classical Greece and republican Rome,* [implies that] *the political status of the citizen was automatically linked to the duty to fight for the polity*".[6] It was believed that these citizens' rights and duties taken together raise patriotism as an individual awareness of belonging to a nation.

Closer to the continental and republican tradition, the idea of compulsory military service in Eastern European people's democracies followed its own logic, though. A nation was worth of individual sacrifice only as an ideologically correctly organized community (*i.e.*, as a socialist republic). Therefore, no socialist army represented barely national defense forces, but a revolutionary tool as well. Mandatory and universal military service obligation was considered an honorable duty of each and every male citizen called to fight against national and class enemies. This was precisely the case of the Yugoslav People's Army (henceforth: JNA)[7] emerging from the World War II partisan resistance movement led by the Yugoslav communists combating the Axis powers, but also making a revolution by fighting against local monarchist and nationalist militias as well. Consequently, the post-war JNA was assigned to protect the two major outcomes of the 1945 Partisans' war triumph: both the national independence from all external threats, as well as the socialist constitution and government from even more menacing internal ideological enemies. Under no civilian control, having its own Communist Party Organization reporting directly only to Tito as its Commander in Chief, JNA was completely autonomous in acting and achieving its goals.[8]

As a highly ideologized institution, JNA had no tolerance to reactionary practices such as religion. Hence, rough handling and heavy punishments for conscientious objectors, mostly members of small Protestant dissenting groups,[9] who had been challenging the army silently but steadily, was an expected and common response. As such, the case of socialist Yugoslavia was not a solitary one. With a single exception of the German

6 Carter, A., 1998, pp. 70–71.

7 In Serbo-Croatian: Jugoslovenska Narodna Armija or JNA.

8 Because of its exclusive legal and political status, JNA also used to be referred to as the Seventh Yugoslav Republic.

9 Dissent is a term commonly used for all those Protestants who refused to conform to Anglican Church. In this paper, however, it designates all small Protestant dominations with no deeper roots in Yugoslav society regardless of their relations with The Church of England.

Democratic Republic,[10] none of the Eastern European people's democracies had ever recognized conscientious objection as a legal right,[11] such a right "*never being officially admitted or publicly discussed*" as a socially important issue in those states.[12] Therefore, it came as no surprise when the right to conscientious objection became the first-rated topic of dissidents' movement during the late 1980s that announced the close and final end of the political system and the state that was standing upon it. That was why and how the Yugoslav army and its military criminal law became a puzzle piece of importance for a due understanding of religious freedom under socialism. Important but understudied, this topic gained only marginal attention in specialized volumes on religious freedom under the Yugoslav socialist regime[13] and, for the time being, had only a few lines dealing with it in studies treating the JNA and its ideological function.[14] The present study is about to tread on this *terra incognita* and

10 GDR officially recognized the right to conscientious objection on religious and "*similar*" (aka non-religious basis) in 1964, only three years after the Berlin wall had been built. It entails serving in distinctive uniforms, without arms and provides no punitive extension of military-duty terms. The right was introduced by a decree of National Defense Council and did not have any constitutional basis, nor foundation in law. Bebler, A., 1991, Conscientious Objection in Socialist States: A Comparative Perspective, *Studies in Comparative Communism*, Vol. 24, No. 1, p. 106. Later on, some other Eastern European socialist countries were ready to make certain concessions, with no foundation in law, *i.e.*, on arbitrary basis. *E.g.,* in 1977, Hungary started applying exemptions from regular military service to faithful of some minor Protestant dominations such as Nazarenes, Jehovah's Witnesses and Reformed Seventh Day Adventists, who could serve army unarmed and without any punitive extension. Since 1980, the Polish government has been allowing alternative civilian service without weapons. *Ibid.*, p. 108.

11 In the early period of the USSR, religious conscientious objectors were exempted from conscription duty based on Lenin's decrees of 1918 and 1919. Later on, the 1925 Soviet Statute on Military Service Obligation recognized conscientious objection as a legal right that was abolished at the dawn of World War II, *Ibid.*, p. 106. This early Soviet politics relied on certain Tsarist Russian law traditions. For more on this see Klippenstein, L., 2016, *Peace and War. Mennonite Conscientious Objectors in Tsarist Russia and the Soviet Union Before WW II, and Other COs in Eastern Europe*, Winnipeg, Mennonite Heritage Centre.

12 Bebler, A., 1991, p. 104.

13 See Radić, R., 2002, *Država i verske zajednice 1945–1970*, Vol. I, pp. 425–432.

14 *E.g.*, Bjelajac, M., 1999, *Jugoslovensko iskustvo sa multietničkom armijom: 1918–1991*, Beograd, Udruženje za društvenu istoriju; Hadžić, M., 2001, *Sudbina partijske vojske*, Beograd, Samizdat B92; Dimitrijević, B., 2006, *Jugoslovenska armija 1945–1954: nova ideologija, vojnik i oružje*, Beograd, Institut za savremenu istoriju; Marković, Z., 2007, *Jugoslovanska ljudska armada*, Ljubljana, Založba Defensov; Dimitrijević, B., 2014, *Jugoslovenska narodna armija 1945–1959*, Beograd, Institut za savremenu istoriju. Important exceptions are the abovementioned Anton Bebler's comparative study on conscientious objection in socialist states that also briefly summarized the Yugoslav experience, as well as Davor Marijan's excellent piece of research treating the position

try to fill the gap by outlining a legal struggle over a man's right to serve to his socialist fatherland in compliance with his own religious beliefs.

## 2. Prosecutors and Judges: Military Law and Order of the Yugoslav People's Army

Yugoslav People's Army was more than just an army. As one of the central embodiments of the Yugoslav state, JNA was an agent of strengthening the new socialist-type patriotism and citizenship. For that purpose, JNA relied on an old military tradition and patriarchal order that considered army service an important part of men's lives, "*a rite de passage to male adulthood*",[15] and "*one of the key elements of the normal biographies of socialist men*".[16] As a forgery of socialist manhood, JNA provided much more than a simple military training: serving army was a process whereby "*the identity of a young man at the beginning of adulthood became inseparable from his identity of a soldier serving his socialist country*".[17] Under such circumstances, any deviation from regular military service obligation such as avoiding, denying or openly refusing to join the army was regarded as an act of civil disobedience verging on treason.

### 2.1. FROM A SECULAR TO AN ANTICLERICAL DEFENSE FORCE

JNA had always been more of a *people's* (*i.e.,* a socialist) than a *Yugoslav* (*i.e.*, a national defense) army, achieving its political mission by spreading ideological purity in its own rows, rather than by building distinctive national identity among its troops. Defined as a *socialist* defense force, JNA symbols and ornaments were laden with ideological meaning

of JNA concerning religion based on the accessible archives entitled 'Jugoslavenska Narodna Armija i vjerske zajednice – prilog istraživanju' published in 2015 in *Croatica Christiniana periodica*, Vol. 39, No. 76, pp. 171–198.

15 Dumančić, M., 2023, He Who Does Not Serve Is Not Fit for a Wife: The Problems of Military Service and Late Socialist Masculinity in 1980s Yugoslavia, *The Soviet and Post-Soviet Review*, Vol. 50, No. 1, p. 92.

16 Petrović, T., Contested Normality: Negotiating Masculinity in Narratives of Service in the Yugoslav People's Army, in: Koleva, D., 2012, *Negotiating Normality, Everyday Lives in Socialist Institutions*, Routledge, p. 83.

17 Petrović, T., Becoming Real Men in Socialist Yugoslavia: Photographic Representations of the Yugoslav People's Army Soldiers and Their Memories of the Army Service, in: *CAS Sofia Working Paper Series*, 2009, Sofia, CAS, Vol. 2, p. 8, see also Petrović, T., Nostalgia for JNA? Remembering the Army in the Former Yugoslavia, in: Todorova M., Gille, Z. (eds.), 2010, *Post-Communist Nostalgia*, New York – Oxford, Berghahn Books, pp. 61–81.

rather than national connotation: instead of the Yugoslav national tricolor banners, it was the red star cockade that ornamented military hats and helmets, uniform buttons and epaulets until the very end of the Yugoslav state and army.[18] Similarly, the pieces of martial music, military decorations, names of fighting units and army facilities were mostly those of cherished partisan heroes and along the lines of revolutionary traditions, and only to a lesser extent those of Yugoslav toponyms and institutions.[19]

Unsurprisingly, ideological integrity of JNA was particularly sensitive to religion. Army press was a committed actor in state-sponsored anti-clerical campaigns during the late 1940s and the early 1950s.[20] Official politics of no religious exemptions, established by a federal law in 1953,[21] was applied even stricter in the military than civil affairs: there was no place for religious accommodations that existed in the former Royal Army, such as the policy of "*two cauldrons*" (*i.e.*, halal meals for Muslim soldiers) or clergy immunity from military service obligation.[22] In fact, not only was clergy immunity suppressed,[23] but the priests and seminarians altogether with "*religious fanatics*" – a derogatory term used for devoted members of small religious groups commonly referred to as "*sects*" – were considered morally and politically unreliable.[24] Moreover, those men were neither recruitable into some military units, such as Tito's presidential guard, border patrols, military police corps, nor were they eligible for serving as non-commissioned officers.[25]

Such strict JNA attitude towards religion was not always the same. Early in the summer of 1942, during the peak of Partisans' antifascist struggle, the Supreme Headquarters of the Yugoslav Resistance Movement issued a special decree, signed by Tito in his capacity of the Chief Commander, appointing religious affairs officials within the Partisans'

18 Dimitrijević, B., 2006, *Jugoslovenska armija 1945–1954*: *nova ideologija, vojnik i oružje*, Beograd, Institut za savremenu istoriju, p. 78.

19 Dimitrijević, B., 2001, Armija i jugoslovenski identitet, *Vojno delo*, Vol. 53, No. 2, p. 145.

20 Dimitrijević, B., 2006, p. 200.

21 For more on this: Božić, M., 2019, Neither Secular State nor Laical Republic, Legal Position of Religious Communities in Communist Yugoslavia – Legal Framework Analysis, *Pravni zapisi*, Vol. X, No. 1, pp. 40–64.

22 Dimitrijević, B., 2006, pp. 201–202.

23 Up to 1952, unlike public school students, seminarists and theology students were not allowed to postpone their military service obligation until the end of their education. For more on this: Radić, R., 2002, *Država i verske zajednice 1945–1970*, Beograd, INIS, pp. 425–426.

24 Marijan, D., 2015, p. 174.

25 *Ibid*.

combat units.[26] These officials were clergymen in charge of performing rites and certain administrative tasks, such as keeping death registries. They wore generic religious ornaments of their faith on their hats or helmets, such as the cross for Christian priests and the crescent moon for Muslim imams, but only combined with a communist red star. This reconciliatory approach to religion did not disappear immediately after communists took over the political power and felt no more obliged to negotiate good terms with the traditional religions. Indeed, the very first Code of Conduct of Yugoslav Army that of 1946, explicitly allowed performing military funerals altogether with confessional ceremonies,[27] all in respect of the deceased's last will or the will of deceased's closest relatives.[28] However, the next JNA Code of Conduct, issued in 1957, introduced a general prohibition of performing confessional rites within the frame of a military funeral service, but allowed certain exceptions by stipulating that the general rule is applicable unless "*there is not an opposite order*".[29] The same stipulation was kept in the 1969 Code of Conduct,[30] and again in the one of 1977,[31] the last one that Tito signed as the JNA Chief Commander. Yet, this stipulation was made stricter within the 1985 JNA Code of Conduct, inasmuch the latter military statute, unlike the three preceding ones, had "*an opposite order*" clause removed from it, making thus any exceptions from the general prohibition unlikely.[32] This was not a matter of chance. A meticulous reading of subsequent of JNA Codes editions indicates an apparent rising strictness of the secular army order: *e.g.* the notorious provisions of the Code, those proscribing a ban of religious symbols on military uniforms and introducing a strict interdiction of religious press and

26 Naredba Vrhovnog komandanta NOP i DV Jugoslavije Druga Tita od 23. juna 1942. god. Štabovima proleterskih brigada o ustanovljenju zvanja verskih referenata u brigadama i o njihovim dužnostima, in: *Zbornik dokumenata i podataka o narodnooslobodilačkom ratu jugoslovenskih naroda*, Vol. II, Issue 4, 1955, Beograd, Vojnoistorijski institut JNA, pp. 403–404.

27 For more about this practice in the final years of the war see Manojlović-Pintar, O., 2005, Široka strana moja rodnaja, Spomenici sovjetskim vojnicima podizani u Srbiji 1944–1954, *Tokovi istorije*, 1–2, pp. 134–144.

28 *Pravilo garnizonske službe u Jugoslovenskoj Armiji*, 1946, Beograd, Vojno-izdavački zavod Ministarstva narodne odbrane, p. 54.

29 *Pravilo službe Jugoslovenske Narodne Armije*, 1957, Beograd, Državni sekretarijat za poslove narodne odbrane, p. 436.

30 *Pravilo službe Jugoslovenske Narodne Armije*, 1969, Beograd, Državni sekretarijat za narodnu odbranu, p. 391.

31 *Pravilo službe oružanih snaga*, 1977, Beograd, Savezni sekretarijat za narodnu odbranu, p. 252.

32 *Pravilo službe oružanih snaga*, 1985, Beograd, Savezni sekretarijat za narodnu odbranu, p. 278.

rites within military facilities, were not introduced before 1977.[33] They were only to be reiterated and further constrained by the 1985 Code that explicitly forbade attendance at or participation in religious services to uniformed soldiers and army officers.[34] Implementation of these provisions was even more difficult since an extensive interpretation of the rules extended the rite ban up to acts of preaching and praying.[35] Thus, unlike in Yugoslav hospitals and prisons, there were no clerics or religious services in the Yugoslav army barracks. Consequently, the number of believers among soldiers was declining steadily throughout the researched period. An official survey of the time[36] indicated that only 12.4 percent of all JNA recruits considered themselves religious upon completing their military service in 1978, compared to nearly 17% of them a year before and little less than 21% in 1973. On the other hand, atheists composed a strong majority ranging from over a half to nearly two thirds of all respondents.

## 2.2. ON CRIME AND PUNISHMENT

Unlike the Partisan Army, that remained open to all believers ready to go to war without fighting in it, the new Yugoslav socialist state showed no appreciation of them and soon declared these dissenters lawbreakers and criminals. Shortly after the war, the Yugoslav Federal Assembly, adopted the Military Criminal Code, the Article 34 of which penalized "*avoidance of military service obligation due to religious or other personal convictions*" as a criminal offense,[37] a provision previously found in the Military Criminal Code of the Kingdom of Yugoslavia as well.[38] This

33 *Pravilo službe oružanih snaga*, 1977, Beograd, Savezni sekretarijat za narodnu odbranu, pp. 22 and 43.

34 *Pravilo službe oružanih snaga*, 1985, Beograd, Savezni sekretarijat za narodnu odbranu, pp. 24 and 47. As a matter of fact, this rule was introduced in the mid-1970s for the first time and only by a sublegal act (see Marijan, D., 2015, p. 176), so it was actually standardized only in 1985.

35 Marijan, D., 2015, p. 177; Radić, R., 2002, Vol. II, p. 428.

36 Samardžić, R., 1983, *Religija i vjerske zajednice u Socijalističkoj Federativnoj Republici Jugoslaviji*, Beograd, [s.n.], pp. 52–53.

37 Art. 34, Zakon o vojnim krivičnim delima, *The Official Gazette of the FPRY*, No. 107/48, p. 1757.

38 Art. 45, Vojni Krivični zakon Kraljevine Jugoslavije, according to Dabić, Lj. A., 1930, *Komentar Vojnog krivičnog zakonika*, Beograd, [s.n.], p. 63. However, the scope of this criminal offense was larger since it penalized avoidance of military duties on the ground of "religious, political or other convictions" and was most likely implemented from the 1945 to 1948 on the basis of the *Law on Invalidity of Legal Acts Enacted Before 6 April 1941 and During the Enemy Occupation* [Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije, *The*

crime was penalized by a maximum three years of imprisonment. However, the penalty could have been even more severe in two cases. The first was if the crime caused serious military damage or if it was considered a complicity, the punishment for which was maximum six years of hard prison time. The second was if it was committed in time of war, when offenders could have been sentenced to minimum two years of imprisonment, or even to death penalty, in both cases followed by confiscation of property. Poorly defined as it was, this criminal provision targeted all forms of disobedience to military authorities regardless of their personal causes. It is noteworthy that the stipulation *ad verbum* gave clear priority to 'religious' over all 'other' convictions might suggest that conscientious objectors of religious inspiration were perceived major troublemakers, therefore also the main addressees of the criminal provision. Additionally, the very timing of the Code enactment discloses the political background of the legislation. It was adopted in late November of 1948, surely the hottest moment of the Cold War exposing Yugoslavia to a serious threat of a Soviet invasion expected after Tito's clash with Stalin. Closing army ranks and strengthening the discipline was an urgent necessity. Thus, the envisaged penalties were so severe, ranging from two years of imprisonment to a capital punishment followed by confiscation of property if the crime had been committed at the time of mobilization or during the war that was "*in the air*".[39]

The 1948 Military Criminal Code was a short-lived act, though. It was abrogated nearly three years later by enactment of the new Yugoslav general criminal legislation – the 1951 Penal Code that neither recognized "*avoidance of military service obligation*", nor specified any religiously motivated crimes elsewhere in the body of its text. However, the 1951 Penal Code introduced some criminal provisions that could have bridged such a 'gap' and might still have enabled prosecution of conscientious objectors. Namely, Article 351, found in Title XXV of the Penal Code on "*Crimes Against Defense Forces*" proscribed "*refusal to carry and use of a weapon*" a distinctive criminal offense punishable by at least three years of hard prison time or, alternatively, by a death penalty.[40] Perceived broadly, the criminal provision was targeting all those members of the military who were about to refuse to carry and use arms, but only in time of war or mobilization. There was no specification of any

*Official Gazette of the FPRY*, Nos. 86/46, 105/46, 96/47, p. 1078]. According to this general abrogation law, every piece of old regime's legislation was declared invalid unless it complied with the new socialist order.

39 Art. 34, Zakon o vojnim krivičnim delima, *The Official Gazette of the FPRY*, No. 107/48, p. 1757.

40 Art. 351, Krivični zakonik, *The Official Gazette of the FPRY*, No. 13/51, p. 223.

kind pertaining to a personal conviction or religious belief as qualified motives of a criminal offense. On the other hand, the criminal law doctrine took a stand that "*under any circumstances, religious dogmas and provisions cannot offer a fair excuse for refusing to carry a weapon*",[41] but "*remain relevant for sentencing since they are reflecting a negative attitude towards military service obligation and defense forces in general*".[42] Anyway, the fact that refusal of carry a weapon as a specific form of disobedience was incriminated as an offence *per se* may suggest that Article 351 aimed at a distinctive category of recruits willing to serve and obey within the army, but unwilling to do it armed.

The simple fact that *actus reus* of the crime could be conducted only in time of war or mobilization made any prosecutions under Article 351 unlikely. It does not mean that objectors would have passed unpunished, though. In fact, "*refusal to carry and use of a weapon*" may have been – and, indeed, it was – easily prosecuted at any moment under Article 327 of the 1951 Penal Code, the one that prescribed for a prison sentence with no maximum limit for any kind of disobedience coming from "a *military member refusing to execute his superior's order related to army service*".[43] This judicial practice influenced the Yugoslav lawmaker to introduce amendments into the 1959 Penal Code. More precisely, the Federal Assembly had abolished Article 351,[44] and replaced it with a brand new Article 327a, one penalizing "*military members who refuse to carry or to use weapons against an order or in compliance with the army code of conduct*".[45] In other words, from 1959 onwards, the crime of "*refusal to carry and use of a weapon*" was not a distinct incrimination anymore, but only a special form of "*non-execution of orders*" proscribed by Article 327.[46] The aforementioned amendments were not only of nomothetic nature, but they introduced certain substantial novelties, too: they limited the maximum imprisonment sentence to 10 years. Besides, from then on, such criminal offense could have occurred anytime during military service, including during peacetime.

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41 Sentence of the Supreme Military Court, no II Kz-405/62, cited by Bačić, F., 1986, *Komentar Krivičnog zakonika Socijalističke Federativne Republike Jugoslavije*, Beograd, Savremena administracija, p. 663.

42 Bačić, F., 1986, p. 663.

43 Art. 327, Krivični zakonik, *The Official Gazette of the FPRY*, No. 13/51, p. 220.

44 Art. 261, Zakon o izmenama i dopunama Krivičnog zakonika, *The Official Gazette of the FPRY*, No. 30/59, p. 814.

45 Art. 240, Zakon o izmenama i dopunama Krivičnog zakonika, *The Official Gazette of the FPRY*, No. 30/59, p. 811.

46 Tahović, J., 1961, *Krivično pravo: posebni deo*, Beograd, Savremena administracija, p. 504.

The last Yugoslav Penal Code, that of 1976, retained the very same system: "*Refusing to carry and use of a weapon*" proscribed by Article 202,[47] which was considered only a special form of "*non-execution of orders*" as a general incrimination conceived by Article 201.[48] According to the criminal law doctrine, the mere announcement of refusal of weapon carrying did not qualify as a crime: a conscript's act of such refusal had to be a reaction to his superior's specific order.[49] Circumstances under which the conscription was done were irrelevant, so even a non-uniformed draftee, one signed up for military service against his will, may have been perceived a possible perpetrator of such criminal offense.[50] The 1976 Penal Code introduced some innovations by complementing the legal definition of this criminal offense in two ways. Firstly, Article 226 provided a qualified form of this criminal offense if committed in times of war.[51] In such case, its perpetrator may have been sentenced to minimum five years of imprisonment or, alternatively, to a death penalty. Similarly, Article 202 was complemented by an additional provision stipulating that "*military conscript who, without a justifiable reason, refuses to carry a weapon assigned to him for the purpose of service in the military reserve force*" would be punished by maximum of three years' and minimum of three months' imprisonment in time of peace.[52] A qualified form of this criminal offense committed in times of war provided for maximum ten and minimum a year's imprisonment.[53] In such a way,

47 Art 202, Krivični zakon SFRJ, *The Official Gazette of the SFRY*, No. 44/76, p. 1355.

48 This was a common interpretation in the Yugoslav criminal law doctrine (*e.g.*: Lazarević, Lj., 1982, *Krivično pravo: posebni deo*, Beograd, Savremena administracija, pp. 97–98; Atanacković, D., 1985, *Krivično pravo: posebni deo*, Beograd, Službeni list, pp. 83–84; Stajić, A., Vešović, M., 1987, *Krivično pravo: posebni deo*, Sarajevo, Svijetlost, pp. 59–60; Čejović, B., 1988, *Krivično pravo: posebni deo*, Beograd, Naučna knjiga, p. 115) that paied minor attention to this criminal offense, partly beacause of its accessory nature, but also because of its modest scope too – a relatively moderate number of offenders and their low ratio in the total number of criminals in Socialist Yugoslavia. It was due to all these reasons, but also referring to comparative law analyses showing a clear absence of this incrimination in both Western and Eastern blocks, that some Yugoslav authors questionned the meaningfulness of Article 327a and advocated for its abrogation. For more on this see: Đukić, N., 1972, Da li je potrebno postojanje samostalnog krivičnog dela iz člana 327a Krivičnog zakonika, *Bilten pravne službe JNA*, Nos. 1–2, pp. 19–22.

49 Bačić, F., 1986, p. 662.

50 Čejović, B., 1983, *Krivično pravo u sudskoj praksi, Vol. II, Posebni deo*, Beograd, Svetozar Marković, pp. 158–160.

51 Art. 226, line 3, Krivični zakon SFRJ, *The Official Gazette of the SFRY*, No. 44/76, p. 1359.

52 Art. 202, line 2, Krivični zakon SFRJ, *The Official Gazette of the SFRY*, No. 44/76, p. 1355.

53 Art. 226, line 1, Krivični zakon SFRJ, *The Official Gazette of the SFRY*, No. 44/76, p. 1359.

the range of possible perpetrators was extended considerably: Yugoslav men had to leave their jobs and families every so often in order to engage in regular military training exercises and maintain combat readiness of JNA, but also prove their personal commitment to the Yugoslav homeland and its socialist system.

Since all these criminal stipulations consistently referred to military members as the only possible perpetrators of the crime, the implementation of the law was an exclusive competence of Yugoslav military courts applying an inconsistent judicial policy-making. According to available data, sometime around 1953, the judicial practice shifted from more rigorous punishments to a more restrictive application of law and generally more moderate sentencing. After 1954, the annual average number of guilty verdicts fell from nearly 32 to only four,[54] remaining around that number until 1978 and their apparent rise at the time. [55] Sentences imposed ranged mostly from two to five years in prison.[56] Appropriate behavior of the accused, usually young people with no prior criminal records, was considered a mitigating circumstance.[57] However, good manners were insufficient to provide basis for sentence suspension or to assure a pardon for their deed.[58] Silent resilience of objectors was what troubled military courts the most: as uncompromising as the fist of socialist justice was, these zealots not only carried on with their quiet suffering, moreover: disobedience. Their trials were short and appeals rare.[59] A second, third and even fourth consecutive incarceration sentence for the same crime was not a seldom phenomenon. This was in the line with Article 77 of the 1955 National Defense Act, according to which military service obligation was suspended and then resumed only upon completion of a prison term or being released on parole.[60] In others words, there were convicts who

54 Mladenović, D., 1981, *Verski fanatizam i društvo*, PhD thesis, Novi Sad University School of Law, pp. 328–329.

55 According to data from Perica, V., 2002, *Balkan Idols: Religion and Nationalism in Yugoslav State*, Oxford, Oxford University Press, p. 136, from 1978 to 1986, this number reached nearly 14 convictions a year and it seemingly continued to raise. According to Davor Marijan's data analyses, it was steadily over 20 sentenced men a year during the mid-1980s. Marijan, D., 2015, p. 184. According to an official Ministry of Defense Report, there were 39 accused in 1986 and 22 of them in 1987. The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 291, Unit SP 265 – 200$^{th}$ session of the Presidium of the SFRY, 26 May 1988, folio: 73 and 74.

56 Mladenović, D., 1981, pp. 337–338.

57 *Ibid.*, p. 345.

58 Pardon was granted to only 13% of all convicted men between 1946 and 1978. *Ibid.*, p. 347.

59 *Ibid.*, pp. 341–344.

60 Art. 77, Zakon o narodnoj odbrani, *The Official Gazette of the FPRY*, No. 30/55, p. 504.

served consecutive sentences, staying in jail for over ten, twenty or even more years.[61] It is precisely adamant insistence of the accused during the trials in conjunction with poor results of penitentiary resocialization that was used to refer to religious zeal as the main cause of such criminal behavior.[62] After all, there were few objectors opposing to military service obligation because of their political, philosophical, moral or other viewpoints.[63] Indeed, convicts were mostly believers of few Protestant dissenting groups nearing extinction. Nevertheless, in the eyes of the Yugoslav criminal law and legal doctrine, these outsiders represented a serious ideological threat because of their firm communitarian stand. Instead of embracing the brave new socialist world, all those "*sectarians*" and "*fanatics*" were stubbornly defying even exasperating an all-mighty totalitarian state.

## 3. Defendants and Attorneys: Small Protestant Dissenting Groups and the 1980's Slovenian Peace Movement

Distrust of Yugoslav socialist state towards non-traditional Protestantism was reasonable. According to a mid-1980s exhaustive fieldwork in sociology of religion, such distrust was mutual. Namely, members of such religious groups cultivated an extremely negative attitude towards their own participation in state institutions such as the Socialist Alliance of Working People.[64] They were equally unenthusiastic about the Communist Party members willing to join their churches.[65] There was nothing new or strange in such a social distance: dissenting Protestants have always been suspicious of the state and government, trusting exclusively their religious communities and members of their congregations. The fact that the state relied on the intrinsically atheist Marxist

61 Dimitrije Mladenović's analysis of data available related to the period from 1946 to 1978, indicates that the second offense was reaching the rate of 15%. The third and fourth consecutive offenses were rare, but not excluded. Mladenović, D., 1981, p. 338.

62 The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 276, Unit SP 519 – 174th session of Presidium of the SFRY, 18 November 1987, folio: 569 and 721.

63 According to an official Ministry of Defense Report, from 1986 to 1988, four of convicted objectors were atheists of pacifist convictions, the Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 337, Unit SP. 63 – 244th session of the Presidium of the SFRY, 15 February 1989, folio: 139.

64 Flere, S., Pantić, D., 2002, *Male verske zajednice u Vojvodini*, Novi Sad, Arhiv Vojvodine, pp. 174–175.

65 *Ibid.*, p. 176.

doctrine could only aggravate such animosity and cause further problems in this respect.[66]

Historically, most dissenters were from the Autonomous Province of Vojvodina, a region differing from other Yugoslav federated entities by its highly heterogenic population. A patchwork of ethnicities and confessions, its society has always been more open and welcoming to newcomers and outsiders who had difficulties identifying with the dominant ethnic groups or traditional religions.[67] In fact, most of the small (and not so small) Protestant denominations settled their national head offices in Vojvodina.[68] Since the Province was a home of a vast majority of Yugoslav Nazarenes as the most prominent group among conscientious objectors,[69] the controversy remained an *endemic* phenomenon, relatively unknown outside the Province. Withdrawn into its own, self-imposed boundaries and without professional clergy, the Nazarene religious community included mostly indigent Serbian peasants without much education and social connections.[70] Alienated from the outside world, these "*odd ones*" resorted either to practicing their faith reclusively and spending years in jail or to emigration.[71] Without powerful

66 In the specific Yugoslav context, this could not have been only a problem, but an advantage, too. As Vjekoslav Perica pointed out by following Nikola Dugandžija's earlier research, members of these communities are devoted to salvation, to which nationality is of no importance, so *"they are worth mentioning not merely to complete the presentation of the ethnoreligious mosaic of Yugoslavia but also to contrast them to the mainstream religious organizations with regard to the crucial interaction between religion and nationalism. In contrast to the four major denominations, in which religion and nationality commingle and religious leaders carry out a* 'national mission' *in the political sphere and through mutual competition, the religious minorities, though not altogether apolitical, are definitely less nationalistic*", Perica, V., 2002, p. 13.

67 Flere, S., Pantić, D., 2021, pp. 178–179.

68 Most parishies and members of two traditional protestant denominations – the Evangelical Lutheran Church of Augsburg Confession (aka the Lutherans) and the Christian Reformed Church (aka the Calvinists) – were also located in Vojvodina.

69 Beside Nazarenes and Jehovah's Witnesses, reluctance towards handling the arms was also present among Yugoslav believers of the Seventh Day Adventist Reform Movement formed as a consequence of a schism in the Adventist Church over commitment to compulsory army service during World War I. As a Sabbatarian denomination, the Adventist Church focused on getting an exception permit for their members not to work on Saturdays. For more on this see: Radić, R., 2002, p. 426.

70 According to some statistics, convicted Nazarenes were men with no more than elementary education (90%), peasants (85%) and Serbian by ethnicity (65%), Mladenović, D., 1981, pp. 324–225.

71 Radić, R., 2002, pp. 430–431. Emigration was one of the main causes for a constant decline in the number of Nazarenes, eventually reducing them to female members and elderly men.

friends at home,[72] they could rely only on help coming from abroad. Indeed, Yugoslav Government was under an international pressure by some Western NGOs, such as *War Resisters International, International Association for the Defense of Religious Freedom* or *Lord Russel Foundation*.[73] Eventually, it resulted in some important concessions by the Government, leading to milder sentencing in the early 1960s[74] and renouncing prosecution of recidivism, *aka* consecutive sentencing for the same crime.[75] However, the main Nazarenes' request to serve the army without weapons, yet in an extended term (*i.e.,* twice longer than armed soldiers), did not resound with the authorities even though the advocacy of this idea did get its first foundation in criminal law theory by 1981.[76] Nevertheless, there was no room for discussion as far as the official state-communist doctrine was concerned: the right to conscientious objection remained an unjustified "*illusion and utopia*" undermining national security.[77]

From the late 1970s, the situation started changing inasmuch Jehovah's Witnesses, equally present all over Yugoslavia, gradually outnumbered Nazarenes, whose number and religious zeal had been in a constant decline.[78] At the time when the wind of change started blowing across

72 A single known exception among them was of Moša Pijade – one of the leading figures of the early Yugoslav socialist state. Pijade appreciated Nazarenes' unarmed participation in the Partizan resistance movement and took under his protection those men he spent years with in the old-regime dungeons. His advocacy followed the main line of Nazarenes' apology: by refusing to carry weapons, these men did not refuse to serve the army. They were asking for some accommodation and, therefore, could not have been treated as traitors. For more on this: Nešović, S., 1968, *Moša Pijade i njegovo vreme*, Beograd–Ljubljana, Prosveta–Mladinska knjiga, p. 738. Some archival sources, though, indicate support to Nazarenes' cause by other communist party leaders from Vojvodina, such as Jovan Veselinov or Isa Jovanović. The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 226, Unit DT 486 – 78th session of the Presidium of the SFRY, 11 December 1985, folio: 171.

73 Radić, R., 2002, pp. 430–431.

74 *Ibid.*, p. 432.

75 Based on internal army regulations, more precisely the Internal Act of the 3rd division of JNA headquarters str.pov.no 256 of the 28 October 1960, as well as the Internal Act of the 3rd division of JNA headquarters str. pov. no. 113 of 6 March 1961. According to the Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 226, Unit DT 486 – 78th session of the Presidium of the SFRY, 11 December 1985, folio: 173 and 174.

76 In the brief conclusion of his PhD thesis, Dimitrije Mladenović suggested that conscientious objectors should serve the army unarmed, but within punitive extention of terms, Madenović, D., 1981, pp. 351–352.

77 Samardžić, R., 1983, pp. 54–55.

78 According to the Ministry of Defense Report from 1986 to 1988, 50 convicted objectors were Jehovah's Witnesses, 31 were Nazarenes and three of them Adventists;

Eastern Europe, the struggle for the right to conscientious objection was mostly associated with Jehovah's Witnesses rather than with any other Protestant dissenting group.[79] The prominent case of Ivan Čečko, a Jehovah's Witness sentenced four times and spent a total of twelve years in jail, initiated a demand to examine the constitutionality of legal provisions relevant to military service obligation. The Yugoslav Constitutional Court, however, promptly rejected the demand on the grounds of equality of Yugoslav citizens in their rights and duties, including the military service one defined by 1974 Constitution as "an undeniable and inalienable right and the highest duty and honor of every citizen".[80] The Court reasoning reflected the Communist Party official standpoint within the scope of a broader social debate on conscientious objection and alternative civil service that was lasting ever since the summer of 1986. Launched by the Socialist Youth Union of Slovenia as the home republic of most convicted objectors,[81] backed by the local independent media such as *Mladina* or *Nova revija*[82] associated with the dissident Slovenian Peace Movement demanding further liberalization and democratization based on the Western model,[83] the idea of decriminalizing conscientious objection got some initial support, before it was flatly refused by the federal institutions pres-

The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 337, Unit SP. 63 – 244th session of the Presidium of the SFRY, 15 February 1989, folio: 139. Yugoslav sociology of religion was also aware of this. The *Marksističke teme* [Marxist Issues] journal issued a special compilation of Yugoslav Marxists' and sociologists' writings on small religious communities that only showed interest in Jehovah's witnesses. *Marksističke teme*, a special issue on small religious communities, 1987, No. 3–4.

79 It does not mean that Nazarenes totaly vanished from court records and penitantiary instititions; on the contrary. For more on this see Bjelajac, B., 2019, *The Believers in the Christ – Persecution of the Nazarenes in Serbia*, Tustin, Trilogy, p. 235.

80 Art. 172, Ustav SFRJ, *The Official Gazette of the SFRY*, No. 9/74, p. 236.

81 According to an official Ministry of Defense Report, from 1986 to 1987, there were 25 Slovenians, 21 Serbs, seven Croats, two Macedonians and one Muslim among the convicted objectors. There were 15 objectors who claimed there were Yugoslavs and few of them were members of a national minority, more precisely five Slovaks, three Hungerians, two Ukrainians and one Romanian and Italian. The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 337, Unit SP. 63 – 244th session of Presidium of the SFRY, 15 February 1989, folio: 139.

82 *E.g.*, the article Verske skupnosti in ugovor savesti, *Mladina*, No. 15, 18 April 1986, pp. 14–15.

83 For more on Slovenian Peace Movement see *e.g.* Hren, M., The Slovenian Peace Movement: An Insider's Account, in: Bilić, B., Janković, V., 2012, *Resisting the Evil: (Post-) Yugoslav Anti-War Contention*, Baden-Baden, Nomos; Kenney, P., 2002, *A Carnival of Revolution: Central Europe 1989*, Princeton, Princeton University Press; Jalušič, V., Kreft, L., (eds.), 2011, *Vojna in mir: refleksije dvajsetih letih*, Ljubljana, Mirovni inštitut. For more about an intellectual background and predecessors of Slo-

sured by the pro-military lobby.[84] Once again, the key counterargument was equality before law as a core principle of a secular socialist state order that did not stand any exception.[85]

The issue was of major importance. Recognition of conscientious objection was only one in a series of the Slovenian Peace Movement demands targeting the Yugoslav military system, such as giving up on heavy weapons, making national defense budget cuts and stopping arms export. In such a way, Slovenian Peace Movement was directly challenging JNA as a stronghold of the regime, but implicitly questioning a totalitarian system denying individual rights and suppressing private initiatives. The debate was actually about the ultimate source of political authority and the nature of government. The destiny of the socialist regime was at stake, as well as of the Yugoslav state, inasmuch as the inert central government and party hardliners of the time gave a perfect pretext to vocal separatist demands of all those Yugoslavs nationals willing to embrace liberal reforms. In such a way, conscientious objection became a frustrating bone of contention highly on both dissidents' agenda and in the regime's plans for army politicization as its last resort before facing its inevitable end.

## 4. The Settlement: The 1989 Legal Reform

Yet, the entire affair was not a dialogue of the deaf. The Yugoslav socialist state and army were more flexible on the issue than commonly believed. Truth be told, the right to conscientious objection was regarded as a potential threat to the regular recruitment procedure, military moral, national unity and defense system in general, but the system was still reasonable enough and ready to make some concessions. At the very end of 1985 – namely, even before the debate was open – the Presidium of Yugoslavia, aka the collective Head of the State, decided to restore the politics of recidivism impunity[86] that had been abandoned

venian Peace Movement, see Ramšak, J., 2022, *(Samo) upravljanje intelekta: društvena kritika u kasnosocijalističkoj Sloveniji*, Sarajevo, Udruženje za modernu historiju.

84 Bebler, A., 1991, p. 110.

85 But not the only one. JNA's official media reporting on this issue were rejecting initiatives for alternative civil service as unconstitutional request also because it was opposite to socialist ethics and humanism. For illustrative examples of official media discourse see Milošević, Lj., 1987, Tačka na „nezvaničnu" raspravu, *Narodna armija*, Vol. XLII, No. 2478, 8 January 1987, p. 2; Ispolitizirana marginalna društvena pojava, *Narodna armija*, Vol. XLII, No. 2480, 22 January, p. 2; Daljević, M., 1987, Brutalan nasrtaj na Revoluciju, *Narodna armija*, Vol. XLII, No. 2490, 2 April 1987, pp. 4–5.

86 Based on internal army regulations, more precisely the Internal Act of the 3rd Division of JNA Headquarters str. pov. No 650–5 of the 18 May 1984. According to the

meanwhile.[87] Instead of another condemnation after being released from jail, a conscientious objector was to be deployed to non-combat military corps, such as engineering, quartermaster or sanitary units.[88] During the mid-1980s, these men came into an additional focus of the Presidium while it granted pardons and punishment reductions more generously then it used to before.[89]

By the end of the 1980s, the national crises and international pressure forced most of Eastern-European socialist governments to undertake major structural reforms announcing their forthcoming transition. After Poland in late 1988 and Hungary in January 1989,[90] Yugoslavia was the third socialist country that officially recognized a legal right to conscientious objection, probably following an initiative of Ante Marković's reformist government. In fact, *"Prime Minister Ante Markovic´s (a Croatian business leader), urged new regulation in church-state relations emulating the West European model (e.g., Sweden, the Netherlands, Belgium). Markovic´ even put pressure on one of the most rigid institutions of the old regime—the Yugoslav People's Army—to begin revising military rules that banned active military personnel from attending worship service in uniform and reading religious publications inside garrisons"*.[91] Indeed, the last Amendments to the 1991 JNA Code of Conduct still did not allow religious rites within military facilities, but started tolerating discrete use of religious symbols

Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 226, Unit DT 486 – 78th session of the Presidium of the SFRY, 11 December 1985, folio: 174. Members of the Presidium were aware of the illegality of their decision, *aka*, that it was undoubtedly in contradiction with Article 77 of the National Defense Act. The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 276, Unit SP 519 – 174th session of Presidium of the SFRY, 18 November 1987, folio: 888–891.

87 The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 226, Unit DT 486 – 78th session of the Presidium of the SFRY, 11 December 1985, folio: 249 and 250.

88 Based on the Internal Act of the Ministry of Defense str. pov. No. 2207/85 of 27 August 1986. According to the Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 291, Unit SP 265 – 200th session of the Presidium of the SFRY, 26 May 1988, folio: 75.

89 The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 276, Unit SP 519 – 174th session of Presidium of the SFRY, 18 November 1987, folio: 569.

90 Polish legal reform introduced an alternative service within civilian institutions, but with punitive extension of three years. Decision-making process stayed in exclusive competence of police. Hungary introduced alternative civil service without punitive elements through constitutional revision of the Article 70 of 1949 Hungarian Constitution. Unlike Poland, all administrative matters related to the objectors were handed over to the impartial and independent review boards. For more on this see: Bebler, A., 1991, p. 109.

91 Perica, V., 2002, p. 139.

(when worn under the uniform) and press (possessing and reading printed religious materials, without distributing them to others). It also re-allowed military funerals along with religious ceremonies (but separately and by giving priority to the military pomp).[92] Actually, Yugoslav party and state leaders start revisiting their positions even before Marković took his office early in 1989. It was at least two times – in November 1987 and in May 1988 – that the Presidium of Yugoslavia called the Ministry of Defense to reconsider its attitude towards religious conscientious objectors.[93] Finally, the Presidium initiated a consequential legal reform on the 15 February 1989.[94] The Ministry of Defense submitted Amendments to the federal Military Service Obligation Act that the Federal Assembly adopted on the 20 April the same year. From then on, the relevant provision was that "*a soldier who refuses to carry the weapon on the grounds of his religious convictions will observe his military duty without the weapon, in duration of 24 months*."[95] In other words, the Yugoslav legislator recognized the right to conscientious objection only on religious basis and with a punitive extension since the regular term of military service remained limited to 12 months. According to archival materials, the norm was designed cautiously and with a purpose: the punitive extension was about to discourage non-religious draftees asking for exemption by simulating religious convictions and objections.[96] The 1989 Amendment did not contain any implementation clauses. It meant that the entire administrative procedure related to examination of objectors' requests was kept in the exclusive competence of the army recruitment committees, with no impartial review and no appeal rights outside the military system. Besides, draftees were not allowed to express their objections before being officially

92 *Pravilo o izmenama i dopunama pravila službe oružanih snaga*, 1991, Beograd, Vojnoizdavački i novinski centar, pp. 6 and 11.

93 The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 276, Unit SP 519 – 174th session of Presidium of SFRY, 18 November 1987, folio: 720 and 721; and the Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 291, Unit SP 265 – 200th session of Presidium of the SFRY, 26 May 1988, folio: 103 and 104.

94 The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 337, Unit SP. 63 – 244th session of Presidium of the SFRY, 15 February 1989, folio: 212 and 213.

95 Art. 1, Zakon o izmenama i dopunama Zakona o vojnoj obavezi, *The Official Gazette of the SFRY*, No. 26/89, p. 706.

96 It was explicitly said so in a brief disccusion that Yugoslav Minister of Defense Veljko Kadijević lead with the members of Presidium, Stane Dolanc, Josip Vrhovec and Raif Dizdarevic. The Archive of Yugoslavia, Fund of the Presidium of the SFRY – 803, Folder 337, Unit SP. 63 – 244th session of Presidium of the SFRY, 15 February 1989, folio: 486–488.

summoned to military service, nor to do an alternative civil service in non-military institutions, *i.e.*, outside a military facility.[97]

Even such quite limited reform caused further controversy. Archive materials indicated that the institutional opposition to such a solution was tireless until the very end.[98] According to some reports, the Amendment passed the voting in the Federal Assembly by a hair's breadth.[99] Hence, though the liberals triumphed,[100] the conservatives had yet not been defeated.[101] Indeed, the Amendment did not provide any precise legal means and methods for implementation of an alternative "military duty without carrying weapons". Instead, it foresaw a four-year transitional period intended for an effective but progressive introduction of an alternative military service.[102] It was up to the Federal Ministry of Defense, in fact, to specify the terms of the alternative military service

97 The Yugoslav criminal law doctrine endorsed the Amendment, without focusing on any of above-mentioned critical aspects. *E.g.,* Đorđić, B., Petrović, Z., 1990, *Komentar Zakona o vojnoj obavezi*, Beograd, Službeni list SFRJ, Službeni list SR BiH, pp. 30–34.

98 The Legislative Comission of the Federal Assembly issued a clearly unfavorable expert opinion, dated 10 April 1989, aka only ten days before the Amendement was adopted, claming that the Amendement on conscientious objection was an unconstitutional act since it was undermining the strict secular character of the Yugoslav socialist state by introducing legal inequalities among Yugoslav citizens, *i.e.,* by recognizing certain special rights on religious grounds. The Archive of Yugoslavia, Fund: Narodne Skupštine SFRJ – 160, Folder 1516 – Zakonodavno-pravna komisija Saveznog veća, Unit 62 – 62nd Session of Legislative Comission of the SFRY Federal Assembly, 12 April 1989.

99 Bebler, A., 1991, p. 111.

100 Although, media close to Slovenian Peace Movement stayed reserved and critized the 1989 Amendement as a false reform because it did not introduce an alternative civilan service, but only an alternative military service as a partial solution. *E.g.:* Hren, M., 1989, Propagandni manevri državnega predsedstva, *Mladina*, No. 13, 7 April, pp. 40–41.

101 The Vice Admiral Stane Brovet, one of the leading figures of JNA during the late 1980s, claimed that society finally had to face with the fact that Jehovah's Witnesses, the Nazarenes and Adventists "will never participate in an armed conflict", adding that "however, they are decent soldiers who had never made any troubles", Nenaoružani vojnici, *Danas*, No. 374, 18 April 1989, p. 32. On the other hand, the official army media opposed all such interpretations of the 1989 legal reform as a concession to dissident movements. Authors of these articles claimed that the reform had not introduced any kind of alternative civilian service, but only accommodated the compulsory military service obligation for religious conscientious objectors in neither harder nor easier way as compared to all other soldiers, except for their serving without weapons, Stojadinović, Lj. Bez ustupaka, *Narodna armija*, Vol. XLIV, No. 2600, 11th May 1989, p. 5.

102 Art. 17, Zakon o izmenama i dopunama Zakona o vojnoj obavezi, *The Official Gazette of the SFRY*, No. 26/89, p. 707.

in their own bylaws.[103] Fully controlled by the Yugoslav Army under no civilian control, the Federal Ministry of Defense has never passed any relevant regulation, most likely in order to passively obstruct the implementation of the law.

Nevertheless, the Yugoslav issue of the right to conscientious objection had not yet been completely aborted. According to some press accounts, there were as many as 17 religious conscientious objectors registered in late 1989.[104] "*Many of these were apparently simply classified as* 'unfit' *for service and dropped from call-up rolls*"[105] which means that "*objection was thus reduced to a purely symbolic issue*."[106] On the other hand, an official government report from November 1992 informs about 19 condemned men since 1989.[107] It is highly probable that these 19 convicts were conscripts who had been stubbornly rejecting any kind of serving in military bases or any military service at all. These conclusions correspond to some facts and later military court rulings. Unlike Nazarenes, who steadily rejected carrying weapons, but readily accepted military service as such, Jehovah's Witnesses were – and still are – categorically against any military service obligation and commitments.[108] Highly restrictive legal provisions on conscientious objection may have easily bypassed all of them.[109]

103 Art. 7, Zakon o izmenama i dopunama Zakona o vojnoj obavezi, *The Official Gazette of the SFRY,* No. 26/89, p. 706.

104 ZIS odgovarja Viki Potočnik, *Delo*, No. 30, 6 February 1990, p. 3. The article reported about an official answer of the Yugoslav federal governemnt to a parliamentary question posed by Viktorija Vika Potočnik, a MP from Slovenia.

105 Bebler, A., 1991, p. 111.

106 *Ibid*.

107 Lilić, S., Kovačević-Vučo, B., 2001, *Prigovor savesti*, Beograd, Jugoslovenski komitet pravnika za ljudska prava, pp. 23–24. However, the sentencing remained mild: most of the convicted men got only suspended sentencies and only a few passed more then a year in prison.

108 During the early 1990s, the Socialist Yugoslavia ended up in a bloody war, but Slobodan Milošević's Serbia kept its military system and order alive through the legal system of the rump Yugoslavia (a short-living Serbia-Montenegro Federation). Therefore, the rump Yugoslavia subsequent military court practice remains equally informative: *e.g.*, the Military Court sentenced Pavle Božić in 1993 and Goran Žižić in 1999, both Nazarene conscientious objectors who rejected to do their alternative military sevice in army facilities. For more on these cases see Lilić, S., Kovačević-Vučo, B., 2001, pp. 89–99.

109 Jeftić, M., 1990, Vojna obaveza i male verske zajednice, *Vojno-politički informator*, Vol. 27, No. 3, pp. 80–82. Earlier Yugoslav judicial practice did not sentence refusing to take the military oath or to put on the uniform as distinctive criminal offenses, but considered them only as consequent criminal behavior in conjunction with the refusal to carry weapons. Sentence of the Supreme Military Court, II K No 181/73 of 30 May 1973, *Bilten pravne službe JNA*, 1974, No. 1–2, p. 91.

All indications point in the direction that the 1989 Amendment on conscientious objection was applied, but in an arbitrary and restricted way. Unsurprisingly, since the socialist Yugoslavia was facing its imminent breakdown at the time. The tensions were high and the army confused at the dawn of a war in the region. Programmed to preserve a collapsing regime and a country in decay, JNA was in a serious identity crisis. In an attempt to save face and meaning of its own existence, the army started demonstrating its power in a usual manner: by targeting 'the weakest' first.[110]

## 5. Conclusion

When is a right not a right? Most certainly once it is granted arbitrarily, so it easily turns into a privilege. As an exemption from the law of general application, the right to conscientious objection seems controversial by itself, *a fortiori* when it is granted selectively. On the other hand, the whole idea of a secular state stands for nothing but avoiding such selectiveness, especially on religious basis. For nearly half of the 20th century, the Yugoslav socialist state consistently applied such a strict non-exemption policy to suddenly abandon it in its 1989 legal reform. Not only did the latter introduce the right to conscientious objection as an exemption

110 It is noteworthy to observe that, among the eight Yugoslav federated entities, only Croatia recognized conscientious objection as a distinctive constitutional right in December 1990, pretty much in order to undermine the JNA recruitment basis and efforts. As Oliwia Berdak pointed out, the right to conscientious objection was introduced into the Croatian constitutional act "at a time when the ruling party, the Croatian Democratic Union (HDZ), and its leader Franjo Tuđman were making maximum efforts to distance themselves from Yugoslavia and present themselves as pro-democratic, pro-Western and liberal. As Croatia was, at that time, still legally a part of Yugoslavia, adopting such a law was a snub for the authority of the Yugoslav People's Army. Not only did it shift the legal responsibility for the defense of the country from Yugoslavia to Croatia, but it also undermined JNA's basic military doctrine: to be able to draw on any citizen in the interest of the country's defense. [...] Article 47 of the new Croatian Constitution clearly demonstrates a change in the way the state is conceptualized, imposing legal limits on what it can demand from its citizens and even allowing for a difference in conscience." In practice, however, "the government simply did not advertise the right to conscientious objection. Since not many people read the constitution, not many men knew they had such a right, and when they received the call-up papers, it was often too late. To complicate matters further, conscientious objection initially only applied to potential new recruits. For anyone else, the government set up a non-announced deadline – requests for civilian service had to be submitted by 1 March 1992. Other forms of discouraging civilian service included making it longer than the military service obligation – 15 rather than 10 months." Berdak, O., 2013, Who Owns Your Body: Conscientious Objectors in Croatia in the 1990s, *Polemos*, Vol. 16, No. 1, pp. 42–43.

from a law of general application, but privileged objections were given on religious basis against all those on non-religious grounds. What may have caused such a radical turnover?

To all appearances, the simplest explanation might be the best one: most of convicted conscientious objectors in socialist Yugoslavia were faithful of small religious communities opposed to war and violence, so they were the first to be granted such a right. In the end, the recognition of conscientious objection was a result of their decades' long struggle and suffering. Convincing enough at first glance, this answer, however, may not be a complete one. Namely, the 1989 legal reform seems even more curious considering the fact that the Yugoslav People's Army was even stricter in observing the secular socio-political order than the state it was supposed to defend. As a guardian of a socialist order, the army was demonstrating its ideological purity on daily bases. Ever since 1945, its military law and order had evolved into an anticlerical system forbidding uniformed soldiers and officers to engage in any kind of public activity or possess personal items of religious connotation. Unlike Yugoslav prisons and hospitals, Yugoslav barracks and garrisons were tightly closed for religious press, symbols and rites. Such an army treated any demand for religious exemption as an act of disloyalty, even after socialist Yugoslavia progressively started proving itself as a socialist state more tolerant to religion, abandoning its earlier anticlerical zeal.

Nearing a revolutionary act, the late recognition of the right to conscientious objection must have been a serious concession that such an army was ready to give only in order to prevent greater damage. In that sense, a broader historical context discloses a hidden *ratio legis* of the 1989 legal reform: the late 1980s in Yugoslavia were the time of separatist claims, clanking of weapons and heavy verbal clashes announcing the forthcoming war that Yugoslav People's Army was not watching from the backstage, but was actively preparing for it. Such a preparation could not have tolerated any legislation that was about to allow massive draft evasion based on a general right to conscientious objection. Hence a restrictive recognition of this right, justified only by religious motives, with a punitive extension and no alternative service in civilian institutions. Besides, an apparent absence of subsequent bylaws concerning effective implementation of this right revealed the highly arbitrary nature of the army recruitment committees' decision-making. Obviously, the law was designed to be aborted and a war was meant to be. Tens of thousands of Yugoslav young men that choose to become army deserters rather than to participate in the slaughter to come provide grounds for such an interpretation. The pending question still is: could it have been otherwise had the right been taken seriously and granted equally?

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# JERETICI I DISIDENTI: VERNICI PRIGOVARAČI SAVESTI I JUGOSLOVENSKO VOJNO KRIVIČNO PRAVO OD 1945. DO 1991.

Marko Božić

APSTRAKT

U radu se izlažu rezultati istraživanja koje je za predmet imalo četrdeset godina dugu borbu za priznanje prava na prigovor savesti u socijalističkoj Jugoslaviji. Uzdržavajući se od vrednosnih sudova, autor teži da opiše i objasni evoluciju jugoslovenskog vojnog krivičnog zakonodavstva kroz ispitivanje njenih istorijskih uzroka i unutrašnje logike. Metodološki, studija se oslanja na normativnu analizu relevantnog pravnog okvira koji je do sada bio nedovoljno istražen ili čak potpuno zanemaren – što je posebno slučaj sa Izmenama i dopunama Zakona o vojnoj obavezi iz 1989. godine kojim je pravo na prigovor savesti i uvedeno u jugoslovenski pravni sistem – kao i sa tim povezanom arhivskom građom, novinskim izveštavanjem i drugim tekstovima koji upućuju na politički kontekst pravne reforme iz 1989. godine. Studija baca novo svetlo na socijalistički sekularizam, propituje raširena shvatanja o Jugoslovenskoj narodnoj armiji kao konzervativnoj i kompromisu nesklonoj instituciji, te doprinosi široj teorijskoj raspravi na temu nejasne pravne prirode prigovora savesti koji se shvata i kao pravo i kao privilegija.

**Ključne reči:** pravo na prigovor savesti, Socijalistička Jugoslavija, Jugoslovenska narodna armija, vernici prigovarači savesti, male protestantske verske zajednice, Slovenački mirovni pokret.

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ORIGINAL SCIENTIFIC ARTICLE

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# COMPLIANCE OFFICERS IN SERBIA: EMPLOYEES OR INTERIM MANAGERS?

***Abstract:*** *The first part of the paper analyzes the principle of legality in business and the basic features of the compliance function. Taking into account that the principle of legality in business is one of the core pillars for achieving good corporate governance, having a person who will perform the compliance function is of great significance. The legal position of the compliance officer may be differently regulated, whether as an employee or an outsourced expert. The second part of the paper deals with these two options taking into account the standing practice in the United Kingdom and Germany, where the compliance function has a long tradition. These examples may be challenging for Serbia to follow, since its compliance function is at the very beginning, although having a compliance officer (team) as an employee should be the ultimate objective. In the meantime, the authors propose for Serbian companies to hire compliance officers as interim managers as a solution.*

**Key words:** corporate governance, compliance, compliance officer, interim manager, principle of legality in business, new forms of work.

## 1. Introduction

The principle of legality in business is one of the basic principles of adequate corporate governance in companies. It is increasingly expressed through the establishment of the compliance function, which primarily includes monitoring of the business, as well as advising the management and employees in general.

The compliance function emerged in response to major corporate scandals, especially those in the financial sector, in order to improve corporate governance practices. One of the major corporate scandals outside

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the Europe, the Enron scandal,[1] gave compliance a push and led to its near-institutionalization in the Sarbanes-Oxley Act,[2] but the roots of the compliance duties are clarified in the decision in the *Caremark* derivative litigation.[3] On the other hand, the best example in Europe is the *Siemens AG* case, as one of the most famous corporate scandals that laid the foundations of the compliance function in Germany. In the case, the court found that the establishment of a functioning compliance system is part of the overall responsibility of the executive board.[4] Even before this case, the Federal Supreme Court (BGH) pointed out that it is necessary to clearly govern the compliance function as well as the responsibilities and tasks of the compliance officer.[5] Both these cases had a broad impact on further development of the compliance function within companies, and they demonstrated that it is necessary to clearly set the scope and limitations of the duties and liabilities of the compliance officer.

Currently, compliance "represents a melding of top-down strategies that draw on generalizations and abstract principles and bottom-up strategies that implement lessons learned from past successes and failures."[6] Bearing in mind all the risks that companies in the financial sector are exposed to, it is not surprising that this function is usually related to their business, although companies in other sectors also deal with compliance-related risks every day. Therefore, establishing the compliance function has become a necessary part of an adequately established corporate governance system.[7] Stricter regulations and huge penalties against companies that are in violation of regulations have made the role of the compliance officer more significant and prestigious[8] – from mere administration to an active advising and monitoring role.[9] This is exactly the main

1 The Enron scandal was one of the largest corporate scandals where the company hid the truth about its business, which led to its bankruptcy. After this affair, the corporate world was in need of a complete change of the corporate governance system.

2 US Congress, Public Law 107–204, Sarbanes-Oxley Act of 2002.

3 *Caremark International inc. Derivative Litigation*, 698 A.2d 959 (1996), decision dated 25 September 1996.

4 LG Munchen I, 10 December 2013, 5 HK O 1387/10.

5 BGH, 5 StR 394/08, Judgment of 17 July 2009.

6 Miller, G. P., Compliance in Historical Context, in: Manacorda, S., Centoze, F. (eds.), 2022, *Corporate Compliance on a Global Scale Legitimacy and Effectiveness*, Cham, Springer, p. 4.

7 For more on corporate governance in the financial (insurance) sector see Leković, V., 2018, Sistem upravljanja u društvu za osiguranje prema direktivi Solventnost II, *Strani pravni život*, 1, pp. 137–152.

8 Marti, S. L., 2015, Compliance Officers: More Jobs, More Responsibility, More Liability, *Notre Dame Journal of Law, Ethics & Public Policy*, Vol. 29, No. 1, p. 181.

9 Kanzenbach, K., 2020, *The Model of the Corporate Compliance Officer*, Berlin, Peter Lang, p. 311.

basis for the authors' hypothesis that the compliance function should be indispensable in every company. For example, having a compliance officer as a fulltime employee is the practice in the United Kingdom and Germany, where the job of a compliance officer is delegated from the management board to a highly qualified employee. Additionally, none of this legislation has yet regulated in detail the specific tasks and position of the compliance officer, although these legislations have known compliance function for a long time. In that arrangement, performing the compliance function is a task delegated by the management board and as such is a part of its legally duties and responsibilities.

In the case of Serbia, the compliance function is in its infancy even in the financial sector. In particular, control of compliance with the applicable law is mentioned in regard to the internal control system in the Law on Insurance,[10] while the Law on Banks contains an explicit norm regarding the compliance function.[11] A great step was made in August 2023, when the Government of the Republic of Serbia approved the Draft Law on the Management of Enterprises Owned by the Republic of Serbia, which stipulates that every company of capital must incorporate the compliance function.[12] Even before this Draft, the compliance function was specifically prescribed for some state-owned enterprises,[13] such as electric utility power company Javno preduzeće Elektroprivreda Srbije and the largest infrastructure and logistic business system in the country – Javno preduzeće Pošta Srbije.[14]

It is only a matter of time when and how compliance function will become equally important in all areas of economy in Serbia, since operating in accordance with the law is a priority of every company. Until this goal is reached, a solution must be found for all those companies that are not prepared to have a compliance officer as a fulltime employee, since the management board often perceives wrongly that this is a significant cost to the company. The previously elaborated is the main reason why

10 Art. 151, *Official Gazette of the RS*, Nos. 139/14 and 44/21.

11 *Official Gazette of the RS*, Nos. 107/05, 91/10 and 14/15.

12 National Assembly of Serbia, 2023, Draft Law on the Management of Enterprises Owned by the Republic of Serbia, (http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/13_saziv/1487–23%20-%20LAT%20PDF.pdf, 15. 9. 2023).

13 For corporate governance in these companies see Dedeić, P., Gasmi G., 2015, Corporate Governance in State-Owned Enterprises: Relevant European Standards, *Strani pravni život*, 4, pp. 43–50.

14 A similar solution has been enacted in Croatia, the latest country to join the European Union. In 2019, Decision on the obligation to introduce the compliance in all legal entities in majority state ownership was enacted. *Narodne Novine – Official Gazette of the Republic of Croatia*, No. 99/19.

the authors recommend that the compliance officer should have the status as an interim manager, although having a compliance officer as a fulltime employee should be the ultimate objective. Interim management, as one of the new forms of work recognized by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), is potentially an affordable and easily performed solution for all those companies in need of hiring a highly qualified expert, such as a compliance officer, but do not have the resources or are not constantly exposed to a high level of compliance-related risks. In Serbia the compliance function is still at a basic level, whereas market development level is increasing. The possibility of having an *interim compliance manager* may significantly contribute to the further development of the market, becoming one where companies always operate in accordance with the law.

## 2. The Principle of Legality in Business as the Basis for the Compliance Function

Adherence to norms is indispensable for the functioning of any company.[15] For this reason and considering that it represents an expression of business ethics, operating a business in accordance with the law has long been recognized as mandatory in the business environment.

The principle of legality in business is one of the basic principles of business, which obligates company to act in accordance with the law, secondary legislation, internal acts, to monitor all changes in legal regulations, propose measures and ensure that the company and its employees comply with all these regulations.[16] The Code of Business Ethics of the

15 A great example can be found in the Germany legislation, which explicitly prescribes that management board is responsible for ensuring that all provisions of the law and internal policies are adhered to and strives to achieve the enterprise's compliance. Regierungskommission Deutscher Corporate Governance Kodex, 2019, *Empfehlungen und Anregung A.2*, Grundsatz 5, p. 4.

16 See Benedek, P., 2012, Compliance Management: A New Response to Legal and Business Challenges, *Acta polytechnica Hungarica*, Vol. 9, No. 3, pp. 135–148. For more see Vasiljević M., 2008, Korporativno upravljanje – od problema do rešenja, *Pravo i privreda*, 5–8, pp. 3–32; Vasiljević M., 2003, Corporate governance akcionarskog društva – modeli i trendovi u uporednom pravu i praksi, *Pravo i privreda*, 9–12, pp. 3–22; Vasiljević M., Petrović Tomić, N., 2020, Odgovornost uprave akcionarskog društva za osiguranje za sprečavanje nezakonitog poslovanja, *Pravo i privreda*, 1, pp. 7–39; Petrović Tomić, N., Načelo zakonitosti poslovanja u sektoru osiguranja – tezice o odgovornosti članova uprave društva za osiguranje u svetlu compliance funkcije, in: Radović, V., (ed.), 2021, *Usklađivanje poslovnog prava Srbije sa pravom EU*, Belgrade, Pravni fakultet Univerzitet u Beogradu, pp. 99–115.

Republic of Serbia also defines the principle of legality in business as one of the core principles.[17] Having in mind the importance of the mentioned principle, the performance of employees' obligations conscientiously and in accordance with the law will largely depend on the company's policy and attitude towards the principle of legality in business.[18] Therefore, many companies are becoming aware that their "existence" in the market depends on doing business in accordance with ethical principles and beliefs. Companies that have understood that profitability and ethics are consistent concepts, show better business results than those that put their own interests first.

Business ethics is essential for the long-term success at both the macroeconomic level (immoral behavior can lead to market disruptions and inadequate resource allocation) and the microeconomic level (where it is often associated with trust in the suppliers, customers, employees and community), and every company has certain social and economic responsibilities.[19] The application of ethical principles in business provides protection for the owners of capital as well as third parties who have an interest in the market.

Business in accordance with the law has become much more than just a business principle.[20] For each business activity, compliance with the rules is not only a matter of compliance with national laws but also the need to abide by international principles.[21] For these reasons, it is necessary to establish a special function within the company as an expression of the principle of legality in business (compliance function),[22] and to pay attention to the role of the compliance officer.

17 Code of Business Ethics, Art. 10, *Official Gazette of the RS*, No. 1/06.

18 "For example, a lot of companies struggle to comply with the law in the area of labor. A US survey on labor compliance at the enterprises has shown that 80% of the respondents are trying to comply with labor legislation, 73% have problems with complying with labor legislation and changes introduced, and only 66% of respondents are taking measures to effectively implement changes in legislation." Kiselyova, E., 2020, Labor Compliance as an Instrument of Labor Relations Control, *Central European Journal of Labour Law and Personnel Management*, Vol. 3, No. 1, p. 22.

19 Cvijanović, D., Mihailović, B., Pejanović, R., 2012, *Poslovna etika i komuniciranje*, Belgrade, Institut za ekonomiku poljoprivrede, p. 11.

20 Doing business in accordance with the law not only protects employees from liability, but also protects the company from losing its reputation. Dreher, M., 2015, *Treatises on Solvency II*, Berlin–Heidelberg, Springer, p. 285.

21 Banks, T. L., 2015, Compliance: The New International Law, *Compliance Elliance Journal*, 1, p. 22.

22 See Miller, G. P., 2014, The Compliance Function: An Overview, *NYU Law and Economics Research Paper*, pp. 14–36; Ramirez, S. A., 2018, Diversity and Ethics: Toward an Objective Business Compliance Function, *Loyola University Chicago Law Journal*, Vol. 49, No. 3, pp. 581–609.

## 3. The Compliance Function

As Warren Buffet said in his famous statement "it takes 20 years to build a reputation and five minutes to lose it." Driven by the expanding regulations and the increasing risk of non-compliance,[23] compliance has developed rapidly into its own industry and profession.[24]

In order to understand the compliance function and its development, it is necessary to determine its definition, basic features and the significance.

### 3.1. THE DEFINITION AND BASIC FEATURES OF THE COMPLIANCE FUNCTION

Following the corporate scandals and the ensuing financial crisis, it was necessary to improve corporate governance systems. The crisis made it possible to determine the shortcomings of the existing systems. Fortunately, the compliance function appeared as one of the key functions among companies, as a form of improvement of corporate governance. Based on this, companies are required to hire a person who will continuously monitor changes in legal regulations, regulations that are in the process of being adopted or are certain to be adopted, and advise the management and employees on how to implement the regulations and harmonize their business with them.

In addition, compliance focuses not only on making decisions in accordance with the law, but also on making decision that are risk-free, by examining the correctness of certain forms of behavior, even when they are legally permitted. Hence, the goal is to comply not only with legal regulations but also with ethical principles, thus making companies socially responsible and creating a good business reputation and maintaining the trust of their clients. In this way, the compliance function becomes part of the comprehensive system of corporate governance.

The compliance function primarily covers monitoring and control of compliance and application of laws and regulations[25] from an internal

23 It is up to the compliance officer to create the mechanisms, policies and procedures that protect the company from non-compliance. Krambia-Kapardis, M., Dimitriou, S., Stylianou, I., Disentangling the Expectation Gap for Compliance Officers, in: Krambia-Kapardis, M., (ed.), 2019, *Financial Compliance Issues, Concerns and Future Directions*, 1st ed., Cham, Palgrave Macmillan, p. 197.

24 Soltes, E., The Professionalization of Compliance, in: Rooij, B. van, Sokol, D. D., (eds.), 2021, *The Cambridge Handbook of Compliance*, Cambridge, Cambridge University Press, p. 35. See Fanto, J. A., 2021, The Professionalization of Compliance: Its Progress, Impediments and Outcomes, *Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 35, No. 1.

25 The roots for this statement may be found in the documents in the area of finance, specifically insurance. For example, Delegated Regulation (EU) 2015/35 states that

perspective, while special attention is given to operational risk management. This function is not the same as the function of the traditional legal department, which concentrates on operational tasks instead of providing advice or taking responsibility for prevention and control.[26] Although independence is one of the main characteristics of the compliance function, it does not mean that cooperation between compliance and the legal department or any other organizational part of company is discouraged.[27] Namely, this cooperation may be key to targeting and controlling compliance risk at an early stage.[28] Compliance officers must be independent from the operational part of the company[29] and should not perform or be responsible for operational activities.[30] However, in comparative jurisprudence, independence of the compliance officer is considered sometimes as a potential issue, when they are appointed from within the employees in the same company.[31]

insurance and reinsurance undertakings should comply with applicable laws, regulations and administrative provisions, and ensure the effectiveness and efficiency of their operations in light of its objectives. Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *OJ* L 12, 17 January 2015, Art. 270.

26 Moorman, L., 2013, Key functions in the system of governance – Responsibilities, interfaces and outsourcing under Solvency II, *Munich RE*, p. 4 (https://docplayer.net/20055088-Key-functions-in-the-system-of-governance-responsibilities-interfaces-and-outsourcing-under-solvency-ii.html, 15. 8. 2023).

27 Regulations in the field of compliance should offer relative freedom to companies in terms of structuring the compliance function (proportionality principle). Hence, only the requirement to have this function should be provided by the law, leaving it up to the companies to determine whether this function will be performed by one or more persons or in cooperation with some other organizational part of the company. However, this is acceptable as long as there is no threat of non-compliance. Bürkle, J., 2020, *Compliance in Versicherungsunternehmen – Rechtliche Anforderungen und praktische Umsetzung*, Munich, C.H. Beck, p. 62.

28 Braun, T., 2019, *Compliance Norms in Financial Institutions: Measures, Case Studies and Best Practices*, Cham, Springer International Publishing, pp. 151–152.

29 In the case, when the compliance officer is an employee at the company, they have to be professionals who work within company but with recognized independence given to them by their professional status. Fanto, J. A., The Uncertain Professional Status of Compliance, in: Krambia-Kapardis, M. (ed.), 2019, *Financial Compliance Issues, Concerns and Future Directions*, 1st ed., Cham, Palgrave Macmillan, p. 77.

30 If there is a compliance department, the employees who perform this function should be prevented from working with organizational parts of the company they are responsible for monitoring. IIA Norge, 2015, *Guidelines for the Compliance function*, (https://iia.no/wp-content/uploads/2019/09/2017-Guidance-for-the-Compliance-function-FINAL.pdf, 1. 9. 2023).

31 This is specifically the case in the German jurisprudence. For example, BAG, 5 AZR 123/92, Judgment of 9 June1993; BAG, 7 AZR 31/91, Judgment of 13 November 1991.

In the broadest sense, the compliance function is defined as the monitoring of compliance of the company's operations with applicable legal regulations. However, it should be borne in mind that the obligations of the compliance officer include much more than mere control of whether the company operates in accordance with the law,[32] and therefore this function cannot be so vaguely defined. In order to fully understand and define this function, all obligations of the compliance officer, i.e., the department that performs this function, should be analyzed.[33]

The compliance officer usually has five responsibilities – identification, prevention, monitoring and detection, resolving, and counseling. On the first place, they identify compliance-related risks and advice management how to avoid them; implement control over company in order to protect company against these risks; monitor and report on effectiveness of compliance risk management. The compliance officer also solves compliance problems and advises the management board on rules and controls.[34] It is important to emphasize that the advisory function of the compliance department does not compromise the execution of control measures. On the contrary, the advisory role is established as a guiding force for business activities, intended to facilitate accurate and consistent oversight of the implemented standards. This function is anticipated to play an active role in advancing strategic business objectives through consultation (including providing guidance, instructions, responses to specific inquiries, involvement in the implementation of new business initiatives, ad hoc risk assessments, and regular participation in committees

32 For more on compliance officer duties see Tošić, I., Usklađenost poslovanja u osiguravajućim društvima – koje su obaveze compliance officer-a?, in: Petrović, Z., Čolović, V., Obradović, D., (eds.), 2023, *Prouzrokovanje štete, naknada štete i osiguranje*, Belgrade, Institut za uporedno pravo, pp. 539–552.

33 The organizational structure of the compliance function may be set up in such a way that the compliance department consists of a single officer. In that case, however, several members of other departments assist in performing the compliance function, in addition to their "primary" tasks. On the other hand, in large companies, a large number of employees may be assigned to the compliance department, possibly organized in smaller groups (Braun, T., 2019, p. 153). The responsibilities of compliance officers should not be set so as to discourage persons from accepting this position within the company, since sometimes they threaten to reduce the number of efficient, qualified candidates who aspire to this position or those who should remain in it. See Golumbić, C. E., 2017, "The Big Chill": Personal Liability and the Targeting of Financial Sector Compliance Officers, *Hastings Law Journal*, Vol. 69, No. 1, pp. 49–81; Broughton, K., 2019, Recruiting and Retaining Compliance Staff Is Key Risk for Banks, Regulator Says, *Risk and Compliance Journal/ Wall Street Journal*, May 20, (https://www.wsj.com/articles/recruiting-and-retaining-compliance-staff-is-key-risk-for-banks-regulator-says-11558395878, 20. 8. 2023).

34 Kanzenbach, K., 2020, p. 302.

and working groups).[35] Compliance officers are required to cooperate with management and other employees to identify and manage regulatory risk. Their goal is to ensure that the company possesses internal controls that effectively assess and handle the risks it encounters. Nonetheless, it is worth noting that compliance officers are not involved in the decision-making process; this activity is performed exclusively by the management board. They offer an internal service that efficiently aids the company in meeting its obligations under the applicable laws, regulations, and internal protocols. Consequently, the compliance officer frequently serves as the company's chief advisor.[36]

### 3.2. SIGNIFICANCE OF COMPLIANCE FUNCTION

Establishing an effective compliance function[37] is the basis of doing business with integrity, which includes responsibility and conscientiousness as an essential part of the behavior of the management and all employees.[38]

The compliance function must be included in the overall business culture of the company,[39] so it can be competitive in the market, preserve its reputation and good governance, as well as to retain shareholder and customer trust.[40] The importance of this function is reflected in the possibility for all employees and management to have a highly educated person who can advise them on how to operate in accordance with regulations.[41] Compliance is much more than formally following a set of

35 Tanjević, M., 2018, Komplajans funkcija – status i perspektive, *Bankarstvo*, 1, p. 124.

36 Hayes, A., 2021, Compliance Officer: Definition, Job Duties, and How to Become One, *Investopedia*, 28 October (15 September 2023).

37 Regarding the recognition of compliance function significance, Bürkle's statement should be highly emphasized: *The greatest enemy of the compliance is the bureaucracy*. Bürkle, J., Hauschka, C. E. (eds.), 2015, *Der Compliance Officer – Ein Handbuch in eigener Sache*, Munich, C.H. Beck, p. 10.

38 "For compliance to work, it needs to be part of a united effort, starting from the highest stratum of the organization all the way to the frontline personnel; it needs to be part of the organizational culture." Krambia-Kapardis, M., Dimitriou, S., Stylianou, I., 2019, p. 209.

39 Strachan, D., Walsh, R., 2015, *The Changing Role of Compliance*, London, Deloitte, (https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-financial-changing-role-compliance.pdf, 5. 9. 2023), p. 9.

40 Soltes, E., 2021, p. 32.

41 The greatest value of compliance may be the anticipation of potential unlawful behavior of employees and their reaction to a system with positive or negative incentives. Centonze, F., The Imperfect Science: Structural Limits of Corporate Compliance and Co-regulation, in: Manacorda, S., Centoze, F., (eds.), 2022, *Corporate Compliance on a Global Scale*, Cham, Springer Nature, p. 48.

rules;[42] it should represent a way of thinking and needs to be included in all activities and processes within the company, in order to ensure corporate social responsibility and ethical behavior.

A good compliance culture can have many benefits for the company. For example, it can lower organizational, individual and reputational risk, increase employee confidence in doing business, retain employees, attract better quality candidates for new positions, improve transparency, which enables better decisions by company staff, etc.[43] It is inevitable that an adequately established compliance function (in addition to client trust and reputation) can affect employee trust in the company business, making them feel safer and improve their work motivation. Hence, it is not surprising that one of the most important functions that should be emphasized regarding compliance officer position is their position as the "protectors" of whistleblowers.[44] Whistleblowing is defined as "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."[45] The compliance officer would prevent employees from reacting at their own initiative to violations of regulations at the company and other irregularities that may occur in the workplace.[46] It is suggested that whistleblowing can uncover misconduct

42 Khanna, V. S., Compliance as Costs and Benefits, in: Rooij, B. van, Sokol, D. D., (eds.), 2021, *The Cambridge Handbook of Compliance*, Cambridge, Cambridge University Press, p. 15.

43 Jain, M. K., 2019, Regulatory and Supervisory Expectations on Compliance Function in Banks, *RBI Bulletin*, 23, p. 89.

44 What further supports the importance of the compliance officer position in terms of whistleblower protection is the fact that it is claimed: "whistleblower reward programs increase costs for business as they undermine companies' internal compliance programs by introducing incentives for whistleblowers to go directly to regulators in hope of a reward, rather than raise their concerns in-house." The previously stated may be alleviated in situations where there is a responsible person for compliance at the company, to whom employee can address their concerns regarding company business. Austin, J., To Reward or Not to Reward: A Cross-Jurisdictional Comparison of the Reasons Why Securities Regulators Have Adopted or Rejected Policies to Pay Whistleblowers, in: Lombard, S., Brand, V., Austin, J. (eds.), 2020, *Corporate Whistleblowing Regulation: Theory, Practice and Design*, Singapore, Springer Nature, p. 67. What is also interesting is the fact that the concept of compliance, like the origins of the term whistleblowing, is linked to the US capital markets law and in particular to the Sarbanes-Oxley Act, although the phenomenon of whistleblowing is much older. Rudkowski, L., Schreiber, A., 2015, *Aufklärung von Compliance-Verstößen Whistleblowing, Arbeitnehmerüberwachung, Auskunftspflichte*, Wiesbaden, Springer Gabler, p. 16.

45 Near, J. P., Miceli, M. P., 1985, Organizational Dissidence: The Case of Whistle-Blowing, *Journal of Business Ethics*, 4, p. 4.

46 The issue of whistleblowing keeps courts and supervisory authorities busy. It regularly gives rise to emotions and expressions of free very different associations that range from sublime enlightenment to malicious denunciation. For example, if transnational

at an early stage, giving companies the chance to address it promptly and enhance their organizational processes to prevent such occurrences in the future. This proactive approach can help companies avoid subsequent financial and non-financial losses.[47]

The knowledge of irregularities related to business often puts employees in a position of suspicion in the company, and can be associated with a loss of trust and security at work. However, over the past two decades, the negative attitude towards employees who have become whistleblowers has partially changed and whistleblowing is increasingly associated with positive connotations, such as civic courage and altruistic pursuit of the public interest. Therefore, it is not surprising that numerous authors point out that whistleblower systems are an appropriate instrument for ensuring compliance with legal norms by companies, which thus strengthens corporate governance.[48] Nonetheless, a professional, i.e., the *compliance officer*, would be a "perfect address" for all those employees who are certain that something is not being done in accordance with the law but do not have the courage to report it.[49] This fear is usually linked to social repercussions or the risk of being fired.[50]

### 3.3. COMPLIANCE OFFICERS AS EMPLOYEES – EXAMPLES OF THE UNITED KINGDOM AND GERMANY

As we have seen, the compliance function has many benefits for businesses. Still, there are not many countries that can boast of a legally regulated compliance function and position of compliance officer. However,

companies want to use whistleblowing systems as a corporate governance and compliance tool, they find themselves caught between the promotion of a uniform corporate culture and the need to respect different national legal cultures, which have different assessments of the opportunities and risks of whistleblowing. Klaus, S., 2012, Whistleblowing-Systeme als Corporate Governance-Instrument transnationaler Unternehmen, *Recht der internationalen Wirtschaft*, p. 224.

47 Cheema, M. U., Munir, R., Su, S., 2021, *Corporate Governance and Whistleblowing Corporate Culture and Employee Behavior*, London–New York, Routledge, p. 85.

48 Krause, R., 2016, Duty to Loyalty, Fundamental Rights, and Public Policy: German Whistleblowing Law Between Conflicting Values, *Whistleblowing – A Comparative Study*, Cham Switzerland, Springer International Publishing, p. 158.

49 This is especially important since in many European countries, whistleblowing is regulated by statutes on data protection (e.g., in the Czech Republic, Finland, France, Germany and Italy), striking a balance between the right of the accused person to be informed of the source of information relating to them and the interest of the whistleblower to have their identity kept confidential. Thüsing, G., Forst, G., 2016, Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries, *Whistleblowing – A Comparative Study*, Switzerland Cham, Springer, p. 9.

50 Momsen, C., Benedict, P., 2020, Limited Protection and No Reward: An Overview of Whistleblowing in Germany, *Kriminalpolitische Zeitschrift*, 4, p. 238.

those that have, usually regulate the position of compliance officers as employees to whom the management board has delegated this responsibility. The position of the compliance officer as an employee will be further elaborated using examples of legislation of the United Kingdom, where this function originated, and Germany, where this institute is widespread and legislation is usually considered as a good guideline to follow. However, this does mean that these experiences will be the best solution for the Republic of Serbia at this moment, but rather the ultimate objective to be achieved in the future.

### 3.3.1. Legal Position of Compliance Officers in the United Kingdom

It is presumed that the roots of compliance originate in 19th century in the United States of America. On the other hand, the first attempt to regulate compliance was noted in the United Kingdom in the 17th century, in an attempt to achieve compliance in order to limit unfair practices of brokers and stake-holders.[51] Therefore, one could argue that common law system is the origin of the notion of compliance.

In the United Kingdom, the compliance function – as well as position of the person who should perform this function, an officer – is closely connected to the duties and responsibilities of directors. Hence, it is not surprising that the Companies Act[52] is the basic source for the regulation of the legal position of officers, managers and directors, and therefor also includes the compliance officer. The main problem may be the fact that the position of any officer under the Companies Act does not differ from that of a director. According to this Act *officer* includes "a director, manager or (company) secretary, and any person who is to be treated as an officer of the company for the purposes of the provisions in question."[53] It should be further underlined is that, surprisingly, the legal position of a company secretary may be closely related to the legal position of compliance officer, although it would be difficult to reach such a conclusion by linguistic interpretation alone. This is based on the fact that the Institute for Chartered Secretaries and Administrators has noted that one of the key duties of a company secretary is to "ensure compliance with the corporate law, regulation and the company's constitution and advise board of directors,"[54]

51 Kanzenbach, K., 2020, p. 521.

52 Companies Act 2006, §1437.

53 *Ibid.*, §1121(2).

54 Dickinson, R., (N.D.), *The Company Secretary in the UK and Their Role in Upholding Best Practice in Corporate Governance in Banks and Other Organisations*, (http://www.ebrd.com/downloads/legal/corporate/icsa.pdf, 7. 9. 2023).

both of which are considered the main duties of the compliance officer. It appears that the company secretary is to be considered an officer with extensive responsibilities, which include legal duties and responsibilities concerning the administration of the company and compliance with company law and the company's constitution. The analysis of the legal position of the compliance officer in the United Kingdom, leads to the conclusion that the company secretary, as a compliance officer in a broader sense, has employee status under United Kingdom employment law (Employment Rights Act 1996). This means that the compliance officer is completely covered by the protection provided under the Employment Rights Act and other acts related to the status of an employee.[55] Having a fulltime employee as a compliance officer is a sound solution, although transferring the duties of the compliance officer to the company secretary may be a serious burden on the employee who in already responsible for many major legal issues within company. This is why the United Kingdom experience is not a completely adequate guideline for the Republic of Serbia.

### 3.3.2. The Compliance Function and Compliance Officer in the German Legal System

The compliance function was introduced from the United States of America and the United Kingdom to Europe and Germany for the same reason – as a legal response to the corporate scandals.

When it comes to the introduction of the compliance in the Germany, the term compliance is enshrined in the European Investment Services Directive,[56] adopted in 1994. The development of the compliance function in European businesses has been driven by the necessity to implement directives into national laws. This evolution has primarily been a response to legal enforcement and shifts in the regulatory landscape, particularly within the financial services and securities sectors.[57] For example, based

55 EU Council Directive No. 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, *OJ* L 288, 18 October 1991. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* L 299, 18 November 2003. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *OJ* L 204, 26 July 2006.

56 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, *OJ* L 141, 11 June 1993.

57 Kanzenbach, K., 2020, p. 159.

on MiFID Directive[58] requirements, the German legislator inserted requirements of compliance and the compliance function into the German Securities Trading Act[59] and the Securities Trading Implementing Provision.[60] Additionally, in January 2014, the Basel III international framework for banks entered into effect, as did the capital requirements Directive IV[61] and the Capital Requirements Regulation.[62] Although there are no explicit requirements of compliance and the compliance function, both the compliance function[63] and compliance officer are required as mandatory within credit institutions,[64] under the German Banking Act.

Similar to the solution in the United Kingdom, the compliance officer position is closely related to responsibilities of the management board, bearing in mind that according to the German Corporate Governance Code, it is the management board that establishes an appropriate compliance management system reflecting the enterprise's risk situation, and discloses the main features of this system.[65] The responsibilities of the management board include, among other things, the obligation to ensure

58 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ* L 173, 12 June 2014.

59 Wertpapierhandelsgesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2708), das zuletzt durch Artikel 56 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, §32, §87 and §88.

60 Wertpapierdienstleistungs-Verhaltens– und Organisationsverordnung vom 17. Oktober 2017 (BGBl. I S. 3566), die zuletzt durch Artikel 57 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist.

61 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, *OJ* L 176, 27 June 2013.

62 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, *OJ* L 176, 27 June 2013.

63 Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 90 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, Art. 25a.

64 "Credit Institutions shall appoint a compliance officer (money laundering), who shall be directly subordinate to the management board. The compliance officer is responsible for carrying out the provisions regarding the combating and prevention of money laundering and terrorist financing and is the contact person for the criminal prosecution authorities, the Federal Criminal Police Office – Financial Intelligence Unit – and BaFin". Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 90 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, §25h (4).

65 Regierungskommission Deutscher Corporate Governance Kodex, 2019, *Empfehlungen und Anregung A.2*, p. 4.

compliance. To mitigate the liability of the board members, compliance tasks can be delegated to compliance officers who possess the necessary qualifications. Consequently, these duties can be altered as needed. German legislation mandates the appointment of a compliance officer as a permanent, effective, and independent compliance function.[66] As a consequence, the compliance officer is predominantly regarded as employees with all associated rights and responsibilities, including the statutory duty to perform their work.[67] The compliance officer's responsibilities are derived from a specific job description in their employment contract, instructions provided by the employer, or specific tasks delegated by the management board.[68] Having in mind that compliance officer is a higher-level position, it may be disputable whether their independence is an obstacle to them being considered employees. On this regard, the German Federal Labor Court (BAG)[69] has stated that it is usual for employees with high-level duties and responsibilities to be independent. Hence, in this regard there is no barrier to compliance officers having the status of an employee under German law.

## 4. The Compliance Officer as an Interim Manager

Interim management is considered as a new form of work, although it was first introduced by Eurofound in 2015.[70] Still, there is no legal regulation that contains detailed provisions regarding this type of work. Despite its absence, many countries are familiar to this form of work, as a useful tool for companies to overcome business challenges by contracting highly qualified managers. Accordingly, this work arrangement may be a convenient solution for all those companies that are in need of a person to perform the function of compliance officer, but cannot afford paying them fulltime, or for those in the early stages of introducing the compliance function to their business. The position of this legal expert may be considered as an *interim compliance manager* – a new type of compliance officer engagement within the company.

66 Kanzenbach, K., 2020, p. 160.

67 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 2 des Gesetzes vom 21. Dezember 2021 (BGBl. I S. 5252) geändert worden ist, Art. 611(1).

68 Kanzenbach, K., 2020, pp. 472–473.

69 BAG, 5 AZR 123/92, Judgment of 9 June 1993; BAG, 7 AZR 31/91, Judgment of 13 November 1991.

70 Mandl, I. *et al*., 2015, *New Forms of Employment*, Publications Office of the European Union, p. 40.

In a broader sense, interim management may be considered a work form where a company hires a worker temporarily and for a specific purpose.[71] The engagement of a highly specialized expert for a defined period of time is what may precisely be seen as a prevailing reason (among others) for considering the compliance officer as an interim manager. Furthermore, interim management is widely understood as a *service* that involves the temporary assumption of management tasks by someone from outside the company.[72] In contrast to this, some authors state that interim management is a sort of staff externalization, as an atypical work form, which is based on a *work or service contract* and is aimed at management positions in companies. Instead of the traditional long-term employment, there is now a market-oriented short-term relationship between a manager and the company.[73] They can also be hired on a basis of fixed-term employment contracts, like any other professional whose work the company requires temporarily (e.g., legal advisor). In addition, the need for the engagement of a manager can be met by hiring a seconded worker who is employed by a temporary employment agency. The option exists for the company to hire a company specializing in business management activities, instead of directly hiring an interim manager, which means that no contractual relationship is established between the beneficiary company and the interim manager. In this regard, it should be noted that companies regularly resort to interim management in times of economic and financial crisis and other situations in which the company faces difficulties,

71 See Marica, M. E., 2021, Interim – Management as a New Form of Employment – Opportune in a Globalized Context, *Proceedings of the 15th International Conference on Business Excellence 2021*, Bucharest, Bucharest University of Economic Studies, pp. 976–977. Similarly, in German literature, "interim management" means "the temporary transfer of management tasks to self-employed managers outside the company. These are often made available to companies via interim management agencies that specialize in placing interim managers (so-called providers)". Uffmann, K., 2015, *Interim Management*, Tübingen, Mohr Siebeck, p. 1, translated by authors.

72 A distinction must be made between the two basic models of contractual design of interim management. In the Anglo-Saxon model, the provider and company conclude a so-called *service procurement contract*, which results in a direct contract being concluded between the company and the interim manager. In contrast, the Dutch model, which is more common, creates a contractual triangular relationship: the interim manager concludes a contract with the provider, and the provider in turn with the company where the interim manager is to be deployed. Buschbaum, J., Klösel, D., 2012, Interim Management aus Sicht der arbeitsrechtlichen Vertragspraxis, *Neue Juristische Wochenschrift*, 21, p. 1482.

73 Rybnikova, I., 2010, Interim Management. Analyse einer atypischen Beschäftigungsform für Führungskräfte, *Zeitschrift für Personalforschung / German Journal of Research in Human Resource Management*, 24(3), p. 316.

as well as in the case of the reorganization of the company.[74] Accordingly, the function of compliance officer may just be perfect for the interim manager in the case of small companies that are not in the position to pay an expert as a fulltime employee, but rather as an outsourced manager with a service contract, who can help them to overcome challenging business time. It is not only the size of the company that dictates the need for separate compliance department in the company, but rather the fact that many companies are not in need of a fulltime employed compliance officer, based on the fact they are not constantly facing compliance-related risks. Furthermore, when the compliance function is performed by an outsourced interim manager (interim compliance manager), there is a greater possibility of avoiding conflict of interest, which is beneficial for doing business in accordance with the law.[75] An additional reason in favor of hiring an interim compliance manager is that in many countries (especially in Serbia) there are not many compliance professionals who are particularly educated and trained for pursuing the job of compliance officer.

Interim management is used in the strategic preparations of companies for entering the international market or certain innovations, because it allows for the engagement of experts with special skills when there is no possibility for their permanent employment. Finally, interim management is a solution often resorted to by companies striving to reduce the scope and costs of training[76] as well as investment in human resources management, while the professional career of interim managers is based on the accumulation of knowledge through working in various organizations.[77]

The knowledge and experience of interim manager must be assessed before they are appointed to the position of interim compliance manager. They are expected to possess all the skills needed to fulfill all their obligations in a professional and impartial manner. In order to adhere to the aforementioned obligations, they need to possess competence, motivation, continuous education, as well as to maintain a close relationships with associates in order to preserve and disseminate knowledge and skills.[78] For example, in the financial sector, which was the starting

74 Kovačević, Lj., 2021, *Zasnivanje radnog odnosa*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 104.

75 Braun, T., 2019, p. 239.

76 Compliance training, as an important part of an effective compliance management system, helps employees to become familiar with policies and procedures, as well as to foster a culture of integrity. Li, T., 2017, Compliance Management and Compliance Training in China, *Compliance Elliance Journal*, 3, p. 74.

77 Kovačević, Lj., 2021, p. 104.

78 Magyar Bankszovetseg Compliance Working Group, 2017, *The Best Practice for Operating the Compliance Function, Code of Best Practice*, (https://www.bankszovetseg.

point for the development of this function, fit and proper requirements are defined for persons performing this function.[79] In order to be engaged in performing the compliance function, an interim compliance manager must meet two groups of conditions: the objective (concerning professional qualifications and certain experiences) and the subjective (related to ethical behavior and integrity).[80] Hence, interim compliance manager focus on preventing administrative penalties and avoiding potential property losses and damage to reputation associated with violations of the law and internal regulations.[81]

Moreover, interim compliance manager should focus on transparency, customer protection, as well as proactive introduction of the compliance benefits to the employees. This entails the interim compliance manager being acquainted with the positive regulations, regulations that are in the enactment phase, as well as the impact that they might have on the company and its business. They have an obligation to ensure that all employees act in accordance with the regulatory framework, both external and internal.[82] Laws can sometimes appear abstract, even incomprehensible to a large portion of employees. For this reason, the person performing the compliance function must consider how to best introduce practices that will ensure compliance within the company.[83] Since this is an extremely

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hu/Content/alapdokumentumok/6_melleklet_Compliance_Code_of_Best_Practice_ENG.pdf, 15. 8. 2023), p. 15.

79 Art. 42, Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *OJ* L 335, 17 December 2009.

80 Tomić, Z., Petrović Tomić, N., 2011, O licenciranju kandidata za članove organa društva osiguranja – osvrt na odluke Ustavnog suda Srbije, *Pravo i privreda*, 4–6, p. 101.

81 Considering that prevention of non-compliance is the main goal, the interim compliance manager should have the obligation and responsibility to propose measures to establish compliance: *ex post*, in situations where the risk of non-compliance has already occurred; *ex ante*, when it is necessary to prepare the company for changes that occur within the legislative framework, through adequate actions and decisions within the company itself, as well as when it is necessary to clarify the impact of the changed legal framework on the company's activities in all its segments.

82 For the efficient functioning of the company, it is necessary for the compliance programs to include respect of both internal and external laws and regulations. That way the company creates a strong sense of moral responsibility. See Weber, J., Wasieleski, D. M., 2012, Corporate Ethics and Compliance Programs: A Report, Analysis and Critique, *Journal of Business Ethics*, Vol. 112, No. 4, p. 613.

83 Various ways of adequately managing the compliance function can be found in the literature. For example, the following presented by Kurer. "The strategic approach to the management of legal and compliance risks rests on three pillars: The first one is the notion that managing these risks must not be left to the experts but rather should be steered from the very top of an organization, the senior management and the board. [...] The second notion is that companies should define the legal and compli-

sensitive area, education and counseling are of special importance because in most cases violations occur due to ignorance of the mostly new and sometimes unclear regulations.

## 5. Conclusion

Bearing in mind that modern businesses operate in a legal and regulatory environment that is constantly and rapidly evolving, the role of the compliance officer becomes very important. The authors see two solution companies can choose from: having a compliance officer as an employee (insourcing) or as an expert who is not their employee (outsourcing). As it was presented on the examples of United Kingdom and Germany, companies engaged in the mass markets, both locally and internationally, opt for the compliance officer as an employee. This is a sound solution for developed markets where companies have to constantly deal with compliance-related risks and hence must strive to overcome them. Contrary to this, in Serbia, having a compliance officer as a fulltime employee may be a burden for smaller companies, which do not face such a need all the time. It could also be counterproductive to transfer this obligation to any other organizational part of the company (as is practice in the United Kingdom). However, since all companies, regardless of their size or market, face compliance-related risks, a solution must be found for them. In the given circumstances in Serbia, an interim compliance manager could be a good transitional solution, although it is the authors' conclusion that having a compliance officer as a fulltime employee should be the ultimate objective.

Nevertheless, during the period of the adaptation and legal regulation of the compliance function in Serbia, it could be beneficial for companies to utilize new forms of work, e.g., interim management, especially with the aim of adapting to the new challenges, both in the field of business and in the establishment of new professions.

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ance risk management as a core management process which engages all elements of the company [...] like a business planning, strategy, or product development process does. A company might push this process even to an extent where it gets a distinctive capability of it and sets it apart from its competitors. The third notion is that companies should [...] use specific tools to develop and support the process of legal and compliance risk management. [...] The top tool is [...] that the company [...] should go through a process which consists of seven steps: (1) understanding the roots, (2) defining a strategy, (3) setting the risk governance, (4) implementing processes and operations, (4) sourcing experts and advisors, (5) using technology, (7) influencing behavior of staff." Kurer, P., 2015, Legal and Compliance Risk in a Global World: Nemesis or Catharsis?, *Compliance Elliance Journal*, Vol. 1, No. 1, pp. 11–12.

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# LICE ZADUŽENO ZA USKLAĐENOST POSLOVANJA U REPUBLICI SRBIJI: ZAPOSLENI ILI PRIVREMENI MENADŽER?

Iva Tošić

Jovana Misailović

APSTRAKT

U prvom delu rada autorke analiziraju načelo zakonitosti poslovanja i osnovne karakteristike funkcije praćenja usklađenosti. S obzirom na to da je načelo zakonitosti poslovanja jedan od preduslova za postizanje dobrog korporativnog upravljanja, od velikog je značaja uređivanje pravnog položaja lica (odeljenja) koje će obavljati funkciju usklađenosti poslovanja. Pravni položaj lica koje obavlja ovu funkciju može biti različito uređen, te ovo lice može biti angažovano kao zaposleni ili eksterni stručnjak.

U drugom delu rada autorke analiziraju načine angažovanja lica koje obavlja *compliance* funkciju uzimajući u obzir postojeću praksu u Ujedinjenom Kraljevstvu i Nemačkoj gde ova funkcija ima dugu tradiciju. Usklađivanje sa ovim primerima, u trenutku kada je ova funkcija tek u razvitku, može biti izazovno za Republiku Srbiju. U međuvremenu, autorke predlažu da kompanije u Republici Srbiji angažuju lice zaduženo za usklađenost poslovanja u formi privremenog menadžera.

**Ključne reči:** korporativno upravljanje, usklađenost, lice zaduženo za usklađenost poslovanja, privremeni menadžer, načelo zakonitosti poslovanja, novi oblici rada.

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ORIGINAL SCIENTIFIC ARTICLE

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# POSTHUMOUS REPRODUCTION: LIFE AFTER DEATH?

***Abstract:*** *This paper reviews the issue of posthumous reproduction at the international and domestic levels. The overview covers the legal systems of the United Kingdom, as a country that allows posthumous reproduction, and France, as a country that prohibits posthumous reproduction. Subsequently, Serbian legal provisions, which forbid posthumous reproduction, are analyzed. The provisions are analyzed through the lens of the recent private initiative submitted to Serbian national authorities. Although infertility is a great obstacle in life, the proposed amendments present are one-sided as they mainly focus on fulfilling the individual's wish to become a parent, rather than on creating a legal framework. As a result, and bearing in mind that no consensus has been reached regarding the issue of permissibility of posthumous reproduction, the author determines that Serbian legislator is not at fault – at least for the time being.*

**Key words:** medically assisted reproduction, posthumous reproduction, written consent, the right to respect for private and family life, the child's right to know their origins.

## 1. Introduction

Various medically assisted reproduction procedures have undoubtedly grown in importance over the past several decades. This is best evidenced by the growing number of different medically assisted reproduction technologies aimed at treating infertility. The term medically assisted reproduction (MAR) covers different technologies of in vivo and in vitro fertilization, which are used when it is impossible to conceive a child without medical assistance.[1] One such technology is cryopreservation, the process of storing

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1 Draškić, M., Biomedicinski potpomognuto oplođenje, in: Lilić, S. (ed.), 2013, *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 219.

reproductive cells at sub-zero temperatures, allowing for the preserved cells to be used in medically assisted reproduction.[2] Some legal scholars[3] point out that, as early as the 19th century Italian scientist Paolo Montegazza discovered that human spermatozoa may be preserved by freezing.[4] Nevertheless, cryopreservation became successful only after experts came to the knowledge that a small quantity of glycerol added before the freezing significantly enhanced the sperm's survival rate.[5]

Due to its specific nature, cryopreservation has been, quite expectedly, primarily used by those individuals who are, for various reasons, concerned about their future reproductive capacity. For example, Greenfield[6] maintains that astronauts, military personnel, and cancer patients receiving chemotherapy or radiation therapy have used cryopreservation to preserve their seminal fluid and subsequently use it at a later time.[7] It was the development of cryopreservation that marked the beginning of posthumous reproduction.

## 2. Posthumous Reproduction

Posthumous reproduction is carried out by combining cryopreservation and other MAR technologies, resulting in the birth of a child even after the death of one parent. It should be noted that cryopreservation may be employed in different circumstances. First, one can speak of a situation involving a couple that is undergoing in vitro fertilization treatment, and there are frozen embryos or fertilized cells, there is also partners' consent

2 Doroghazi, J., 2005, Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children, *Washington University Law Quarterly*, Vol. 83, No. 5, p. 1597. See also Živojinović, D., Posthumno začeće u evropskim pravima i novom srpskom zakonodavstvu, in: Mićović, M. (ed.), 2018, *XXI vek – vek usluga i Uslužnog prava*, 9, Kragujevac, Pravni fakultet, Institut za društvene nauke, p. 249.

3 Greenfield, J., 2006, Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance with a Focus on the Rule against Perpetuities, *Minnesota Journal of Law, Science & Technology*, Vol. 8, No. 1, p. 278, fn.16.

4 For more information on cryopreservation, see Bila, S., Tulić, I., Radunović, N., 1994, *Osnove vantelesnog oplođenja*, Belgrade, Zavod za udžbenike i nastavna sredstva, p. 113. See Vidić, J., Posthumna oplodnja i njena naslednopravna dejstva, in: Marjanski, V. (ed.), 2011, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 45, No. 3, Novi Sad, Univerzitet u Novom Sadu – Pravni fakultet, p. 554.

5 Greenfield, J., 2006, p. 281, fn. 24.

6 *Ibid.*, pp. 281–282.

7 Pennigs, G., *et al.*, 2006, ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction, *Human Reproduction*, Vol. 21, No. 12, p. 3050; See Shuster, E., 1999, Posthumous Gift of Life: The World According to Kane, *Journal of Contemporary Health Law and Policy*, Vol. 15, No. 2, p. 402.

that in the case of death of one of the partners, the surviving partner is entitled to use the frozen genetic material to produce progeny.[8] Second, there are situations in which the partners undergoing assisted reproduction treatment do not state their wishes regarding posthumous reproduction, however, since their genetic material has been frozen during the procedure itself, the surviving partner is granted the right to request that the frozen material be used for posthumous reproduction.[9] Lastly, there are situations in which there is no pre-frozen genetic material and the surviving partner or another close family member requests that the deceased man's genetic material be released after his death.[10]

Nevertheless, the author is of the opinion that it is necessary to answer certain preliminary questions prior to addressing the issue of the permissibility of posthumous reproduction. The question could be raised about the legal status of the genetic material used in posthumous reproduction and whether disposition of such genetic material should be allowed. If the latter question can be answered in the affirmative, the question still remains whether disposition is possible only in cases when the deceased person has consented to the posthumous use of his or her genetic material. Further, if conception, and subsequently the birth of a child through posthumous reproduction, does occur, what will the child's legal status be in relation to the deceased person whose genetic material has been used?

This paper attempts to provide answers to some of these questions by looking at the existing legal provisions used in United Kingdom and France, which regulate posthumous reproduction differently. First, the legal norms and case law in the United Kingdom, as an example of a legal system that permits posthumous reproduction under specific conditions, are analyzed, followed by an examination of the French legal system, which has a negative attitude toward posthumous reproduction. Taking into consideration such positions in comparative law, the author then focusses on existing legal norms and current problems and challenges faced by the Serbian legislator in this regard.

## 2.1. POSTHUMOUS REPRODUCTION IN ENGLISH LAW

The United Kingdom presents a country with a permissive attitude toward posthumous reproduction. Prior to reviewing the current legal provisions, it is important to analyze one of the most significant cases

8 Vidić, J., 2011, pp. 554–556. See also Samardžić, S., Porodičnopravni aspekti posthumne oplodnje, in: Marjanski, V. (ed.), 2013, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 4, Novi Sad, Univerzitet u Novom Sadu – Pravni fakultet, p. 389.

9 *Ibid*.

10 *Ibid*.

from its case law, namely the case of *R v. Human Fertilization and Embryology Authority*.[11] The said case involved a woman, Diane Blood, whose husband was comatose from meningitis. At that time reproduction matters were regulated by the 1990 Human Fertilization and Embryology Act. The Act prohibited the storage of gametes and their use in any treatment without written consent from the gamete provider.[12] After it became apparent that her husband would die soon, Mrs. Blood asked a doctor to use electroejaculation to obtain sperm from her husband for posthumous conception.[13] The request was accepted and the doctors retrieved the seminal fluid from Mrs. Blood's husband using the aforementioned method, after which he was declared clinically dead.[14] Mrs. Blood then sought release of her deceased husband's seminal fluid to her for posthumous insemination abroad.[15]

Since the gametes were retrieved from Mrs. Blood's husband without his consent, the Human Fertilization and Embryology Authority (HFEA)[16] denied her request. The HFEA argued that such a request was intended to circumvent the norms regulating posthumous reproduction,[17] as posthumous reproduction can be conducted provided that consent to perform it has been previously obtained.[18] After Mrs. Blood appealed to the Court of Appeal, which allowed for the procedure to be carried out and pointed out that the HFEA did not take into account the value of human rights in health care when it prohibited Mrs. Blood from taking her husband's genetic material outside the United Kingdom.[19] Therefore, the

11 Court of Appeal, *R v. Human Fertilisation and Embryology Authority*, ex parte Blood, [1997] EWCA Civ J0206 13, Judgement of 6 February 1997.

12 See Sch. 3, para. 5 (1) HFEA of 1990.

13 For more details on methods of posthumous seminal fluid collection, see Batzer, F. R., Hurwitz, J. M., Caplan, A., 2003, Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement, *Fertility and Sterility*, Vol. 79, No. 6, pp. 1264–1265.

14 *Ibid.*, p. 1264.

15 *Ibid*.

16 The Human Fertilisation and Embryology Authority was established by the Human Fertilisation and Embryology Act as a body that, among other things, performs activities related to the disposition of gametes, records data related to donors, treatments and children, and ensures that treatments and research are carried out with respect for human life and with a responsibility toward the parties involved in the procedures. For more details on the Human Fertilisation and Embryology Authority, see Section 5: The Human Fertilisation and Embryology Authority, its functions and procedure, of the 1990 Human Fertilisation and Embryology Act.

17 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 120.

18 Vidić, J., 2011, p. 556.

19 Deech, R., Smajdor, A., 2007, p. 120.

Court of Appeal indicated that the HFEA should reconsider its decision, and that the fact that the genetic material was obtained and stored in an illegal manner did not create an obstacle to granting permission to export the genetic material.[20] In response to the HFEA concerns that in the given case posthumous reproduction treatment would be unlawful, the Court of Appeal stated that, in the specific case, the doctors, though unlawfully, had already mistakenly retrieved the genetic material; therefor, its export should be allowed.[21] Consequently, under the influence of the Court of Appeal, but also due to great pressure from the public, the HFEA allowed Mrs. Blood to take her husband's genetic material abroad.[22] She went to Belgium where she underwent in vitro fertilization which resulted in the birth of a son.[23] Moreover, a few years later she underwent the same treatment again and had another son, and is now the mother of two boys, who were born using her husband's genetic material obtained posthumously and without his consent.[24] Such a decision by the Court of Appeal raised the question of whether the provisions of English law should be changed.[25] It was concluded that the legislator rightly envisaged the requirement for written consent from the person whose genetic material is to be used posthumously and that such a provision should not be changed.[26] Furthermore, it was explicitly recommended to the HFEA to prohibit the export of seminal fluid as the opposite would lead to possible circumvention of the provisions of English law.[27] Legal scholars underline that the HFEA could have very likely concluded that the interference with the right to provide services to Mrs. Blood was justified due to the requirement to protect the public interest, had there not been such tremendous public pressure.[28] Although the provisions of English law were eventually changed, it is important to note that it insists that posthumous reproduction may only be carried out if the genetic material provider had given their consent.[29] It is un-

20 *Ibid.*

21 *Ibid.*

22 Batzer, F. R., Hurwitz, J. M., Caplan, A., 2003.

23 *Ibid.*

24 *Ibid.*, p. 126. See Samardžić, S., 2013, p. 394. See also Vidić, J., 2011, p. 556, fn. 8.

25 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 126.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*, p. 125.

29 The Human Fertilisation and Embryology Act was revised and amended in 2008. See the 2008 Human Fertilisation and Embryology Act. See Human Fertilisation and Embryology Authority Code of Practice 2021, Guidance 5.

derlined that written consent must be signed by the consenter[30] and that a woman would not be granted the right to undergo MAR treatment if the best interest of the child that would be born through the procedure had been taken into account beforehand.[31]

With that in mind, it is clear that the legislator took a positive stance regarding the permissibility of posthumous reproduction, provided that specific requirements are met. Certainly, this primarily refers to the fact that the deceased person's gametes (including brain death) cannot be stored or used without the person's prior written consent, whereby the consent must refer to the possibility of using them posthumously.[32] Additionally, the man whose seminal fluid was used for posthumous conception, or the man whose genetic material was used for the creation of an embryo before his death, but which was transferred to a woman's uterus after his death, can be recognized as the father of the child.[33] In this sense, the current provisions differ from the ones in the 1990 Act, according to which the man whose sperm cells were used in conception after his death would not be considered the father of the child.[34] Kovaček Stanić underlines that the former legal provision was introduced with the aim of ensuring legal certainty regarding the distribution of property and discouraging fertilization after the death of one partner due to the possible psychological problems for the child and the mother, arising as a consequence of the posthumous reproduction.[35]

However, the English courts have recently dealt with this issue quite differently. Specifically, the case of *Jennings v. Human Fertilisation and Embryology Authority*[36] demonstrates that, in certain cases, posthumous reproduction may be permitted without written consent. Mr. Jennings had

30 HFEA Sch. 3, 1(1).

31 Section 13(5) of the 2008 Human Fertilisation and Embryology Act.

32 HFEA Code of Practice 2021, Guidance 5.

33 Sections 5A and 5B of the 2008 HFEA. See also Kovaček Stanić, G., Porodičnopravni aspekt biomedicinski potpomognutog oplođenja u pravu Srbije i evropskim pravima, in: Ocić, Č. (ed.), 2010, *Zbornik Matice srpske za društvene nauke*, Novi Sad, Matica srpska – Odeljenje za društvene nauke, Vol. 131, p. 427.

34 *Ibid*.

35 *Ibid*. See also Warnock, M., 1984, Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report), Her Majesty's Stationery Office, ch. 10.9. The Warnock Committee was established to evaluate the acceptability of measures in the area of infertility treatment involving in vitro fertilization and embryological research. See Draškić, M., Ugovor o surogat materinstvu – između punovažnosti i ništavosti, in: Baretić, M., Nikšić, S., (eds.), 2022, *Zbornik Treće regionalne konferencije o obveznom pravu*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, p. 350.

36 High Court of Justice, *Jennings v. Human Fertilisation and Embryology Authority*, [2022] EWHC 1619 Fam, 22 June 2022.

been in a committed relationship with Ms. Choya since 2007.[37] After they got married in 2009, they were planning of having a family of their own.[38] As they had trouble with natural conception, they opted for IVF and underwent three unsuccessful in vitro fertilization cycles.[39]

Ms. Choya conceived naturally twice, but both pregnancies ended in miscarriages.[40] She underwent further cycles of in vitro fertilization treatment in late 2018. However, prior to undergoing in vitro fertilization treatment cycles, they decided to store two embryos so they could have more children in the future. After storing two embryos, the third embryo was transferred into Ms. Choya, and she conceived twins.[41] Unfortunately, the pregnancy began to get complicated, resulting in Ms. Choya suffering a uterine rupture and dying on 25 February 2019.[42] As a result, the second embryo that was stored, presented the subject of the dispute in this case. Specifically, even though Mr. Jennings and Ms. Choya filled out several HFEA forms prior to starting cycles of in vitro fertilization treatment, Ms. Choya never signed the form required for consent to use of an embryo for surrogacy.[43] She was asked to complete the HFEA WT form, while Mr. Jennings completed and signed the HFEA MT form.[44] However, the two forms differed in one very important item. On the one hand, the MT form offers the man the possibility to give his consent to the use of his embryo in his partner's treatment in the event of his passing.[45] In contrast, the WT form, which was signed by Ms. Choya, does not contain such a provision.[46] In this regard, Mr. Jennings sought permission from the HFEA to use the last embryo in storage to have a family with a surrogate.[47] The HFEA rejected his request due to the absence of Ms. Choya's written consent to the posthumous use of her genetic material.[48] Mr. Jennings then filed an application to the High Court of England and

37 *Ibid.*, para. 7.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*, paras. 7–8.

41 *Ibid.*, para. 8.

42 *Ibid.*, para. 2.

43 Zakreski, K., 2022, UK Court allows posthumous use of embryo despite lack of written consent, British Columbia Law Institute (https://www.bcli.org/uk-court-allows-posthumous-use-of-embryo-despite-lack-of-written-consent/, 14. 10. 2023).

44 *Ibid.*

45 High Court of Justice, *Jennings v. Human Fertilisation and Embryology Authority*, [2022] EWHC 1619 Fam, 22 June 2022, para. 12.

46 *Ibid.*, paras. 11–14.

47 *Ibid.*, para. 2.

48 *Ibid.*, para. 5.

Wales asking the court to declare that it is lawful for him to use his late wife's genetic material.[49] Mr. Jennings agreed that his wife's written consent was missing.[50] Instead, he pointed out that the staff at the Center for Reproductive and Genetic Health (CRGH), where the embryo was stored, did not raise any issue with the couple when one of them provided posthumous consent, while the other did not.[51] Mr. Jennings argued that they lacked both the information and the opportunity to provide the requested consent.[52] Moreover, he stressed that the court could conclude that Ms. Choya would have provided such consent had they not been deprived of such possibility.[53] The HFEA underlined that there was no "valid written consent at the relevant time by Ms. Choya to use the embryos in the way sought in the event of her death."[54] Instead, it was underlined that existing legal regulations require such consent to be in writing and that Ms. Choya was both well-informed and provided with the chance to give such consent.[55] After considering the previously presented arguments by both parties to the proceedings, the court first acknowledged that "the issue of consent is the cornerstone of the statutory scheme and that the statutory scheme requires such consent to be in writing that cannot, in my judgment, be considered in a vacuum."[56] The court emphasized two important considerations from these surrounding circumstances: (1) the WT form used for women was far from clear on the issue[57] and (2) there was ample evidence made available to the Court that indicated that Ms. Choya would undoubtedly have given her written consent to posthumous use of the embryo for birth by a surrogate if she had been given that option.[58] This was considered in the context where, according to the court's assessment, Ms. Choya was not given sufficient information or a sufficient opportunity to discuss it with the clinic. It was underlined that the court can "dispense with the requirement for written and signed consent in this limited situation where a person has been denied a fair and reasonable opportunity in their lifetime to provide consent for the posthumous use of their embryos and there is evidence that the court concludes, directly and/or by inference, that if that opportunity had been given, that consent

49 *Ibid.*, para. 1.
50 *Ibid.*, para. 2.
51 *Ibid.*, para. 18.
52 *Ibid.*, para. 2.
53 *Ibid.*
54 *Ibid.*, para. 5.
55 *Ibid.*
56 *Ibid.*, paras. 82–83.
57 *Ibid.*, paras. 88. See also Zakreski, K., 2022.
58 *Ibid.*, para. 92. See also Zakreski, K., 2022.

by that person would have been provided in writing."[59] In this regard, the court held that there was an interference of Mr. Jennings' right to respect for private and family life set forth in the European Convention on Human Rights (ECHR).[60] The court pointed out that a public authority interfered with the exercise of the right to respect for private and family life and such interference was not justified.[61] Therefore, regardless of the fact that the court agreed that a requirement for written consent "pursues a legitimate aim, in the circumstances of this case, where, on the findings the court has made, there was a lack of opportunity to Ms. Choya to provide that consent in writing, in circumstances where [...] she would have given that consent, the interference with Mr. Jennings' [...] right [to private and family life] would be significant, final and lifelong."[62] All the available evidence led the court to the conclusion that Ms. Choya would have given her consent to the possibility of using the partner-created embryo by Mr. Jennings in a surrogacy treatment.[63] Accordingly, the court allowed Mr. Jennings to posthumously use the said embryo for birth by surrogacy, even though Ms. Choya did not provide written consent for this use.[64]

Hence, regardless of the fact that the legislator insists on the requirement for written consent to posthumous reproduction, the English courts tend to treat this issue differently. Such case law indicates that a requirement for written consent, in certain cases, according to their reasoning, should be relativized and considered in the circumstances of the case. However, caution should be taken, because written consent is in fact correlated with the protection of the reproductive autonomy of each individual. In other words, it has been stressed that consent occupies the central position in disputes regarding postmortem reproduction and that "the predominant approach is that retrieving and using the deceased's gametes when there is no consent is morally wrong and represents a breach of the paramount ethical principle of respect for autonomy."[65] Prior written consent is closely related to the need to protect

59 *Ibid.*, para. 104.

60 *Ibid.*, para. 102. See ECHR Art. 8.

61 *Ibid.*

62 *Ibid.*, para. 102.

63 *Ibid.*, para. 92.

64 Zakreski, K., 2022.

65 Simana, S., 2018, Creating Life after Death: Should Posthumous Reproduction Be Legally Permissible without the Deceased's Prior Consent?, *Journal of Law and the Biosciences*, Vol. 5, No. 2, p. 334, fn. 29. Batzer *et al.* point out that the best way to protect reproductive rights in this case is to have informed consent. See Batzer F. R., Hurwitz, J. M., Caplan, A.,, 2003, p. 1265.

the human body from unwanted and unsafe interventions, because the human body cannot be seen as the property of another person.[66]

## 2.2. POSTHUMOUS REPRODUCTION IN FRENCH LAW

On the other hand, there are countries, such as France, that completely prohibit posthumous reproduction. When speaking about posthumous reproduction in France it is first important to analyze the case of *Parpalaix et. al v. CESCO*[67] – undoubtedly one of the most prominent cases in French judicial practice to deal with posthumous reproduction. Allain Parpalaix met Corrine Richards in 1981. Shortly thereafter, he was diagnosed with testicular cancer and decided to undergo chemotherapy treatment, which came with a risk of leaving him sterile. At the advice of his doctor, he decided to make a deposit of sperm at the Center for the Study and Conservation of Sperm (*Centre d'Etude et de Conservation du Sperme*, CECOS).[68] Mr. Parpalaix underwent a series of chemotherapy treatment over the following two years in order to cure cancer, which at some points went into remission. However, Allan and Corrine postponed their wedding date several times during the bout of illness and finally got married on 23 December 1984. Allan died two days later.[69] After his death, his wife Corinne requested that the CECOS release Allan's sperm in order for her to use it for artificial insemination.[70] The request was denied by the CECOS, as it was not clear whether Mr. Parpalaix, who has previously deposited the sperm to avoid sterility, would consent to his sperm being used posthumously.[71] Hence, since the clear authorization from Mr. Parpalaix was missing, the CECOS was of the opinion that there was no obligation for it to make available the sperm to his wife Corinne.[72] Corinne argued that her husband's decision to preserve his genetic material could have only been motivated by his wish to designate her as the mother of their future child.[73] Moreover, she stressed that the CECOS "violated not

66 Deech, R., Smajdor, A., 2007, p. 120.

67 Tribunal de Grande Instance Creteil, *Parpalaix et. al v. C.E.S.C.O.*, JCP II 20321, 16–17 September 1984. As cited in Jones, D. J., 1988, Artificial Procreation, Societal Reconceptions: Legal Insight from France, *The American Journal of Comparative Law*, Vol. 36, No. 3, p. 525, fn.1.

68 Draškić, M., 1992, Porodičnopravni aspekti artificijelne inseminacije, *Annals (Belgrade Law Review)*, Vol. 40, No. 4, p. 240, fn. 6.

69 Jones, D. J., 1988, p. 527.

70 Draškić, M., 1992, p. 240, fn. 6.

71 Shuster, E., 1999, p. 405, fn. 20.

72 *Ibid.*, fn. 21.

73 *Ibid.*, fn. 23.

only her husband's implicit wishes, but also her protected right to procreate."[74] As a result, Corinne, together with her in-laws, decided to pursue the matter in the High Court of Creteil (*Tribunal de Grande Instance de Creteil*). They argued that, as them being Mr. Parpalaix's successors, they were the owners of the sperm and that "CECOS had broken its contract by not returning the sperm."[75] They relied on Article 1939 of the French Civil Code (*Code Civile*), which provides that if the person who has made a bailment passes away, the bailed item can be returned solely to their heirs.[76] Moreover, if the bailed item is indivisible, the heirs must reach a consensus among themselves to take possession of it.[77] Such an understanding leads to the conclusion that sperm is a movable object or property and consequently is inheritable.[78] The CECOS argued that "sperm is an indivisible part of the body, much like a limb, an organ, or a cadaver and is therefore not inheritable absent express instruction."[79] As Mr. Parpalaix omitted to verbalize his wishes in relation to the use of his sperm and as he and Ms. Corinne were not married at the time of the deposition, it was underlined that his intentions were unclear.[80]

The High Court of Creteil focused its attention on the sperm and what it represented to Mr. Parpalaix.[81] The Court underlined that "it is impossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme"[82] and that the French Civil Code was inapplicable.[83] The court characterized the sperm as "the seed of life ... tied to the fundamental liberty of a human being to conceive or not to conceive."[84] The court insisted that this fundamental right must be protected and cannot be subjected to the rules of a contract[85] and the fate of the sperm must be decided by the person from whom the

74 *Ibid.*, fn. 24.

75 Shapiro, D. E., Sonnenblick, B., 1986, Widow and the Sperm: The Law of Post-mortem Insemination, *Journal of Law and Health*, Vol. 1, No. 2, p. 230.

76 Art. 1939 of the French Civil Code (Code Civil) as cited in Shapiro, D.E., Sonnenblick, B., 1986, p. 230, fns. 12 and 13.

77 *Ibid.*, p. 230, fns. 12 and 13.

78 *Ibid.*, fn. 13.

79 *Ibid.*, p. 231, fn. 16.

80 *Ibid.*, p. 231.

81 Jones, D. J., 1988, p. 528, fn. 19.

82 Shapiro, D.E., Sonnenblick, B., 1986, p. 232.

83 *Ibid.*

84 For more details, see Shuster, E., 1999, p. 405, fn. 26.

85 It should be emphasized that the Court specifically rejected the applicability of the French Civil Code, pointing out that sperm does not constitute a thing in commerce but secretion containing the seed of life destined for human procreation. See Jones, D. J., p. 1988, 529, fn. 22.

sperm was drawn.[86] Accordingly, the court found that "[Mr.] Parpalaix's intent and 'deep desire' to make his wife 'the mother of a common child' was 'unequivocal, if not absolute.'"[87] Additionally, the Court noted that if sperm banks notify their clients in advance of their policy, they are free to decline the request for releasing of such sperm after their death.[88] The Court concluded that "[h]ad CECOS told Parpalaix that it would not release the sperm for posthumous insemination, CECOS would have been justified in its refusal to release the sperm."[89] However, the CECOS failed to do so. The court noted that this was a specific contractual relationship according to which the CECOS undertook both to preserve the sperm and release it at the request of the sperm depositor or other person specified by the depositor.[90] Hence, the court decided that the CECOS is required to return the sperm to a doctor as chosen by Corrine and that it can dispose of such sperm provided that no request for obtaining the sperm has not been made within 6 months.[91] Consequently, the CECOS adopted new gamete policy guidelines, stipulating that prior to the deposition of sperm, each depositor must sign a written agreement stipulating that his genetic material will only be used in his presence and with his explicit consent.[92] Consequently, in a similar scenario, the CECOS denied to provide the sperm to the depositor's heir.[93] The heir filed an appeal with the High Court of Toulouse (*Tribunal de Grande Instance de Toulouse*), stating that a person's decision to bring a child into the world was being influenced in this way and that she was deprived of her fundamental right to procreate.[94] The High Court of Toulouse rejected her arguments, stating that a right to procreate is not the right to a child and no one is obligated to do everything scientifically possible to achieve a pregnancy.[95] As the CECOS had provided in advance the information that it would not release the sperm to a widow, it had no obligation to do so after his death.[96] The Court of Appeal of Toulouse (*Cour d'appel de Toulouse*) also decided on

86 Shuster, E., 1999, p. 406, fn. 27.

87 *Ibid.*, fn. 28.

88 *Ibid.*, p. 406.

89 *Ibid*.

90 Draškić, M., 1992, p. 240, fn. 6.

91 *Ibid*. See Shuster, E., 1999, p. 406. See also Jones, D. J., 1988, p. 530, fn. 27.

92 See Shuster, E., 1999, p. 406.

93 *Ibid*., p. 406.

94 For more details, see Contin, M., 2010, Procréer par delà mort? À propos de l' ordonnance de référé du Tribunal de grande instance de Rennes du 15 october 2009, *Reveu juridique de l' Ouest*, No. 2, p. 131; See also Shuster, E., 1999, p. 406.

95 See Shuster, E., 1999, p. 406, fn. 32.

96 *Ibid.*, fn. 33.

the appeal and upheld the decision of the High Court of Toulouse.[97] In this sense, Contin indicates that the Court of Cassation emphasized that it cannot be said that: "the legitimate goal of having a child in an already formed family is achieved through medically assisted procreation, when in vitro fertilization or its continuation is impossible because a couple that was supposed to have a child was separated due to the death of the husband, and prior to the embryo transfer, which should be carried out as the last stage of the procedure."[98]

The legislator was of the same opinion, adopting legal norms that explicitly prohibit the use of gametes for posthumous reproduction. More precisely, the norms specified that MAR can be used only at the request of a heterosexual couple to make up for medically diagnosed infertility or to prevent the transmission of a serious disease to the future child.[99] Moreover, it was stipulated that both members of the couple must be alive, of reproductive age, must have previously consented to embryo transfer or insemination, and they must be married or able to provide evidence of at least two years of cohabitation.[100] The law has been amended and revised in the meantime. Medically assisted reproduction may now be used at the request of any couple, be it a heterosexual or lesbian couple, or a single woman. Moreover, persons undergoing MAR procedure or embryo transfer must consent to its implementation before starting the procedure itself. It should be underlined that this requirement applies to both persons in the given couple (the man and the woman/both women), or the single woman. The same article stipulates that it is forbidden to carry out the MAR procedure or embryo transfer when the request is submitted by a couple, and one of the persons in the couple dies.[101]

It may be deduced that the French legislator has a negative attitude toward posthumous insemination. Such an attitude of the French legislator was recently contested before the European Court of Human Rights (ECtHR), in the case of *Petitori Lanzmann v. France*.[102] The applicant was a French citizen, whose son was diagnosed with cancer in 2014. Shortly after being diagnosed with cancer, the applicant's son informed his mother

97 Cour d'appel de Toulouse, 18 avril 1994: Juris-Data n° 1994–043187; JCP 1995, II, n° 22472. As cited in Contin, M., 2010, p. 131.

98 Contin, M., 2010, p. 132, translated by author.

99 See Kovaček Stanić, G., 2010, p. 426.

100 See Law No. 94–654 of July 29th, 1994 related to the donation and use of elements and products of the human body, to assisted reproductive technologies and prenatal diagnosis (*Journal officiel de la République française, Lois et Décrets*). See also. Shuster, E., 1999, pp. 421–422.

101 See Public Health Code (*Code de la santé publique*), L2141–4.

102 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019.

that he wanted to have children of his own, even in the event of his death.[103] He decided to deposit his sperm with the CECOS at a hospital in Paris and on 22 November 2016 he requested the hospital to extend the storage of the gametes.[104] However, the applicant's son died on 13 January 2017. In the spring of 2017, the applicant requested that her son's gametes be transferred to a healthcare establishment in Israel.[105] The president of the CECOS denied the applicant's request, a decision which she challenged[106] in the Administrative Court of Paris.[107] She underlined that her right to private and family life as well as her right to become a grandmother were being violated.[108] Her petition was rejected on the grounds that prohibitions on posthumous procreation are not in contravention with Article 8 of the ECHR.[109] On the contrary, the Administrative Court pointed out "that such a ban falls within a wide margin of appreciation that is recognized by every state when ensuring the rights and freedoms guaranteed by the ECHR."[110] The applicant then appealed against the decision to the Council of State (*Conseil d'État*), France's supreme administrative jurisdiction, which upheld the lower courts' decisions.[111] The applicant then lodged an application with the ECtHR, complaining "that it was impossible to have access to her deceased son's gametes, in accordance with her son's last wishes, to arrange MAR treatment in a country that allows posthumous reproduction."[112]

The ECtHR noted that the applicant's complaint encompassed two parts.[113] The first part of the complaint alleged that Article 8 of the ECHR was violated in relation to her deceased son, while the second part, alleging that there was a direct violation as her right to descendants, was denied.[114] Regarding the first part, the ECtHR noted that the question of the fate of the gametes deposited by the individual and the question of respecting the will of the individual to use them posthumously refers to the individual's right to decide how and when they want to become a parent,

103 *Ibid.*, para. 4.
104 *Ibid.*
105 *Ibid.*, para. 5.
106 *Ibid.*
107 *Ibid.*, para. 6.
108 *Ibid.*
109 *Ibid.*, para. 7.
110 *Ibid.*, para. 7, translated by author.
111 *Ibid.*, para. 9.
112 *Ibid.*, translated by author.
113 *Ibid.*, para. 15.
114 *Ibid.*

which belonged to the category of non-transferable rights.[115] Accordingly, the applicant could not claim, on her son's behalf, to be the victim of a violation of Article 8 of the ECHR.[116] As to the second part, alleging a direct violation, the ECtHR underlined that although the concept of private and family life also includes the right to respect the decision of a person to become a parent in the genetic sense[117] and make use of medically assisted procreation for that purpose, Article 8 of the ECHR does not guarantee a right to found a family.[118] Instead, the court pointed out that on one hand "the national courts considered that the prohibition of posthumous reproduction was in accordance with the provisions of the ECHR, while on the other hand the refusal to authorize the export of the applicant's deceased son's gametes did not violate her right to respect for private and family life."[119] Finally, it was pointed out that the applicant's inability to become a grandmother does not constitute a violation of the right to respect for private and family life, especially taking into account that the goal of the norms of French law that regulate the issue of medical reproduction is aimed at treating couples' infertility.[120] The ECtHR therefore noted that it did not intend to depart from such a position taken by national courts[121] and declared both parts of the application inadmissible.[122]

Hence, the use of posthumous reproduction is not a procedure that should and must be guaranteed to an individual, but rather each country has the right to regulate the issue at its own discretion. This claim is certainly supported by the position of the ECtHR, which has always held that states should enjoy a wide margin of appreciation in resolving issues related to medically assisted reproduction.[123] Such a position was recently

115 *Ibid.*, para. 16. See also, ECtHR, *Sanles Sanles v. Spain*, no. 48335/99, Decision of 26 October 2000; ECtHR, *Center for Legal Resources in the name of Valentin Câmpeanu v. Roumanice*, no. 47848/08, Judgment of 17 July 2014 [GC], para. 100; ECtHR, *Rõigas v. Estonia*, no. 49045/13, Judgment of 12 September 2017, para. 127.

116 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 16.

117 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 72.

118 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 18. See also ECtHR, *E. B. v. France*, no. 43546/02, Judgment of 22 January 2008 [GC], para. 41.

119 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 19, translated by author.

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*, para. 20.

123 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 81. See also ECtHR, *S. H. and Others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 97.

unequivocally taken by the European Court in the case of *Pejrilov v. Czech Republic*,[124] in which it was emphasized that in a sensitive area such as artificial insemination, moral viewpoints and social acceptability must be taken seriously. This is precisely why it is important not only to assess whether the prohibition of a certain available method of artificial insemination is in accordance with the provisions of the ECHR, but also to look at the legal framework within which the prohibition falls and view it in a broader context.[125]

## 2.3. COMPARATIVE REVIEW OF THE MOST COMMON LEGAL ISSUES SURROUNDING POSTHUMOUS REPRODUCTION

Some questions raised in the first paragraphs of Section 2 can now be answered. The first question is related to the legal qualification of the genetic material used for posthumous reproduction. In theory and in practice, no unique or clear answer can be found in this regard. Robertson points out that certain court cases raised the question about who has the greater property interest in stored seminal fluid and that the defining of the issue assumes that body fluids and gametes can be considered property and treated as any other thing, i.e., an asset of an estate.[126] On the other hand, Byk underlines that body parts cannot be considered property and that a distinction cannot be made between a person and their body, especially when a financial element is included in the process.[127] Vodinelić distinguishes between several different theories regarding the legal qualification of the human body, body parts, corpse, and *nasciturus*.[128] He underlines that: "a separate reproductive cell has all the properties of a (movable) object and the special ability (which other objects do not have) to create a human being from it (by uniting with another cell of the opposite sex)."[129] In this regard, Vodinelić emphasizes that reproductive cells, as personal property, represent the

124 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58. See also ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 112.

125 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023. This case will be discussed in more detail in the section dealing with Serbian law.

126 Robertson, J. A., 1994, Posthumous Reproduction, *Indiana Law Journal*, Vol. 69, No. 4, p. 1038.

127 Byk, C., What Rules for Procreation?, in: Mazzoni, C.M. (ed.), 1998, *A Legal Framework for Bioethics*, The Hague, Kluwer Law International, p. 86.

128 For more on these theories see Vodinelić, V., 1995, Moderni okvir prava na život, *Pravni život*, Vol. 9, p. 26.

129 *Ibid.*, p. 27, translated by author.

object of a personal right and that each person has the authority to decide on the use of their reproductive cells.[130]

With that in mind, it is not surprising that judicial practice does not have a clear answer to this question. As has been noted, the position taken by the French court in the case of *Parpalaix et. al v. CECOS*, is that sperm cannot be considered a movable, inheritable property, but rather a genetic expression of the fundamental human right to make a decision concerning procreation.[131] Gilbert underlines that the approach adopted by American courts is to "view sperm as a unique kind of property because of its potential for human life"[132] and that consequently "[t]he man from whom it is drawn, retains an ownership or possessory interest over the sperm."[133] According to Katz, in *Hecht v. Superior Court (Kane),*[134] the court underlined that „frozen sperm can only be utilized according to the intent of the donor."[135] Moreover, it was stressed that "the fate of the sperm must be decided by the person from whom it is drawn, because genetic material represents a unique form of property."[136] The author believes that it is important to mention that the ECtHR, in the case of *Parrillo v. Italy*,[137] also answered the question whether human embryos can be considered as property, within the meaning of Article 1 of Protocol 1 to the ECHR, which stipulates that "every person is entitled to the peaceful enjoyment of his possessions."[138] The ECtHR first noted that "the concept of 'possession' within the meaning of Article 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets may also be regarded as 'property rights' and thus as 'possessions' for the purposes of this provision."[139] The court further stated that although Article 1 only applies to a person's existing possessions, in certain circumstances a *legitimate expectation* of obtaining

130 Vodinelić, V., 2023., *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava*, Belgrade, Pravni fakultet Univerziteta Union, Službeni glasnik, p. 356.

131 Shapiro, D.E., Sonnenblick, B., 1986, p. 232.

132 Gilbert, S., 1993, Fatherhood from the Grave: An Analysis of Postmortem Insemination, *Hofstra Law Review*, Vol. 22, No. 2, p. 548, fn. 136.

133 *Ibid.*, fn. 137.

134 Court of Appeal, *Hecht v. Superior Court (Kane)*, no. B097742, 13 November 1996.

135 Katz, G. A., 1998. Parpalaix v. CECOS: Protecting Intent in Reproductive Technology, *Harward Journal of Law & Technology*, Vol. 11, No. 3, p. 688.

136 Vidić, J., 2011, p. 555.

137 See ECtHR, *Parrillo v. Italy*, no. 46470/11, Judgment of 27 August 2015 [GC], para. 3.

138 ECHR Protocol 1, Art. 1.

139 See ECtHR, *Parrillo v. Italy*, no. 46470/11, Judgment of 27 August 2015 [GC], para. 211.

possessions may also be protected within the meaning of this Article.[140] However, it was concluded that given "the economic and pecuniary scope of that Article, human embryos cannot be reduced to 'possessions' within the meaning of that provision."[141]

The provided analysis of these two different legislation approaches shows that the issue of legal qualification of reproductive cells is very complex. More precisely, English law does not discuss the issue of the legal status of gametes, concerning posthumous reproduction. Instead, the central issues are those related to the way posthumous reproduction is regulated. Yet, the Warnock Committee report recommends that legal norms ensuring there is no right of ownership in a human embryo should be enacted. However, this would not apply to the issue of the right to use the embryo previously deposited by a couple.[142] When one member of a couple dies, the right to use or dispose of the embryo stored by that couple should pass to the surviving partner, according to the report.[143] In France, on the other hand, the position on the legal qualification of seminal fluid was expressed, with the Court clearly taking the position in *Parpalaix at. al. v. CECOS* that human sperm cannot be considered a movable or inheritable thing, but rather as a genetic expression of fundamental human rights.[144]

It is clear that neither legal scholars nor case law provide a unique answer to the issue of the legal qualification of reproductive cells. Instead, the question of whether a person is entitled to the use of another person's reproductive material in posthumous reproduction is given much more attention. Therefore, case law contains positions that when determining on whether a third party may use genetic material in posthumous reproduction, the intention of the person from whom the material is drawn must be considered prior to reaching a decision. Anyhow, there are wide differences in comparative law as to whether it is justified to allow the posthumous use of genetic material. This position was recently confirmed by the ECtHR, which pointed out that, based on the information obtained from the member states, it can be concluded that there is no consensus on this issue.[145] A comparative analysis of the legal provisions, which contain

140 *Ibid.*, para. 213.

141 *Ibid.*, paras. 211–216.

142 Warnock, M., 1984, ch. 10.11.

143 *Ibid.*, ch. 10.12.

144 For more details, see Jones, D. J., 1988, p. 528, fn. 20.

145 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 45.

entirely opposite solutions, demonstrates that specific issues related to posthumous reproduction remain to be solved, regardless of the solution chosen by any given state.

One of the questions also raised refers to whether posthumous reproduction (if allowed) can be carried out without prior written consent from the person whose genetic material is to be used. Byk points out that respect for human integrity represents the basis for setting a requirement that without a person's free and informed consent, their body cannot be treated, and that it is therefore clear that doctors, when implementing various reproductive technologies, have an obligation to obtain the consent of both the woman and the person whose gametes are to be used in the treatment.[146] Indeed, the previous analysis could lead to the conclusion that prior written consent is a mandatory condition in both French law and English law. However, unlike French law which provides for this condition in cases of medically assisted reproduction performed while the person whose genetic material is being used is alive, English law stipulates that a MAR treatment cannot be carried out without prior written consent from the person whose material is to be used (be they deceased or living). Such a solution is in line with the recommendation of the Warnock Committee, which emphasized that MAR treatment should not be carried out without the prior informed consent of the patient.[147] There is a prevailing opinion that the written consent of the person whose gametes are being used must be obtained in order to carry out posthumous reproduction treatment, because it is considered that doing otherwise would be morally wrong and would lead to a violation of the right to respect for autonomy.[148] In addition, legal scholars point out that the best way to resolve disputes over gametes, in the event of the death of the gamete provider, is to obtain written consent.[149]

The final question, concerning the legal status of the person born as a result of posthumous reproduction, will be answered in the next section so that, on the one hand, the complexity of this problem can be systematically examined, while, on the other hand, presenting an appropriate argument indicating that there is no present need to adopt legal norms in the Republic of Serbia that would allow posthumous insemination.

146 Byk, C., 1998, p. 85.

147 Warnock, M., 1984, ch. 3.5.

148 Simana, S., 2018, p. 334, fn. 29.

149 Pennings, G. *et al.*, 2006, ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction, *Human Reproduction*, Vol. 21, No. 12, p. 3051.

## 3. Posthumous Reproduction in Serbian Law

When speaking about the right to procreate in Serbia, it is important to start from the Constitution of the Republic of Serbia[150] which stipulates that everyone has a right to choose whether or not to procreate.[151] Such a right encompasses a multitude of rights, one of them being the right to choose to conceive a child through artificial reproduction.[152] Moreover, the right to procreate through MAR techniques is also guaranteed under the ECHR,[153] which has been confirmed on multiple occasions by the ECtHR.[154] The right to freely decide on giving birth is also provided by the provisions of the Family Act,[155] which stipulates that every woman is free to make choices about her pregnancy and childbirth.[156] A particularly important legal act that regulates the right to MAR procedure in Serbian law is the Law on Medically Assisted Reproduction[157] (LMAR). The LMAR defines MAR procedures as procedures managed in accordance with the contemporary biomedical standards aimed at combating infertility and safeguarding fertility.[158] Individuals entitled to the right to MAR procedures are spouses or extramarital partners who are of legal age and with legal capacity, as well as single women of legal age and with legal capacity.[159] The Serbian legislator insists on the requirement of the written consent of all individuals before undergoing MAR treatment.[160] Regarding the issue of posthumous reproduction, the law unequivocally prohibits posthumous reproduction. Specifically, the LMAR stipulates

150 The Constitution of the Republic of Serbia, *Official Gazette of the RS*, Nos. 98/06 and 115/02.

151 *Ibid.*, Art. 63.

152 Stevanov, M., 1977, Pravo na slobodno roditeljstvo, *Zbornik radova Pravnog fakulteta u Novom Sadu*,Vol. 11, p. 49.

153 The Act on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette of Serbia and Montenegro – International Agreements*, Nos. 9/03, 5/05, 7/05 and *Official Gazette of the RS – International Agreements*, Nos. 12/10 and 10/15.

154 For more details, see Barać, I., 2021, Biomedicinski potpomognuto oplođenje i demografska politika, *Politička revija*, Vol. 70, No. 4, p. 176, fns. 4 and 177.

155 Family Act, *Official Gazette of the RS*, Nos. 18/05, 72/11 – other law and 6/15.

156 *Ibid.*, Art. 5, para. 1. For more details on the constitutionality of such legal provisions, see Draškić, M., 2013, p. 224.

157 Law on Medically Assisted Reproduction, *Official Gazette of the RS*, Nos. 40/17 and 113/17 – other law.

158 LMAR, Art. 3, para. 1, point 1.

159 LMAR, Art. 25, para. 1 and 2. For more details on the conditions set for exercising the right to MAR, see Barać, I., 2021, p. 178.

160 LMAR, Art. 27, para. 1.

that reproductive cells, i.e., embryos used in MAR treatments, can only be used if they are obtained from living depositors.[161] Additionally, the legislator clearly emphasizes that a person who, due to possible reduction or loss of reproductive function, has delayed the use of their reproductive cell, is entitled to store such reproductive cells and tissues in the MAR center, i.e., a bank,[162] for their own use later, provided that they have given written consent.[163] The legal norms set in this way indicate that only the depositor is allowed to use reproductive cells in the future, and, in the event of their death, this right cannot be transferred to third parties.[164] Finally, it should be pointed out that the law explicitly prohibits any use of reproductive cells after the death of the depositor for the purpose of producing embryos.[165]

The issues of whether such legal provisions are justified and whether the legislator's choice to prohibit posthumous reproduction is appropriate have been heavily debated in recent months. The debate was initiated by Mrs. Tijana Prizrenac-Nedeljković. Since Mrs. Prizrenac-Nedeljković's husband developed testicular cancer, the two of them decided to undergo in vitro fertilization treatment so that they could become parents. According to Mrs. Prizrenac-Nedeljković, before her husband died in 2019, they had deposited ten embryos with the SPEBO Clinic in Leskovac. Prior to his death, Mr. Prizrenac-Nedeljković made a will in the presence of two witnesses, in which he allowed his wife to use the embryos created from his and her reproductive material after his death. Upon her husband's death, Mrs. Prizrenac-Nedeljković contacted the Department of Biomedicine and requested the embryos. The Department of Biomedicine denied her request and advised her to undergo a psychological test and an interview with the ethics committee due to the specificity of her request, which she refused.[166] Bearing in mind that she believed that she should not be denied the right to use embryos created from her husband's and her own genetic material, she submitted the Initiative for the amendment

161 LMAR, Art. 41.

162 A reproductive cells, tissues and embryos bank is a healthcare institution or an organizational unit of a healthcare institution responsible for the intake, processing, preservation, storage and distribution of reproductive cells and tissues for heterologous insemination, including the storage and distribution of embryos for heterologous insemination. See LMAR, Art. 3, para. 1, point 34.

163 LMAR, Art. 50, para. 2 in connection with Art. 25, para. 3.

164 Živojinović, D., 2018, p. 256.

165 LMAR, Art. 52, para. 2.

166 Danas, *Država Tijani ne da da rodi dete pokojnog supruga: Neko mi je oduzeo čudo*, (https://www.danas.rs/vesti/drustvo/drzava-tijani-ne-da-da-rodi-dete-pokojnog-supruga-neko-mi-je-oduzeo-cudo/, 28. 11. 2022).

of ineffective regulations,[167] to the Public Policy Secretariat of the Republic of Serbia (PPSRS).[168] She pointed out that several articles of the LMAR should be amended to enable posthumous reproduction in cases when in vitro fertilization procedure is under way, but the provider of reproductive cells dies before the process of fertilization has begun. On the basis of her Initiative, the PPSRS submitted its own Initiative for the amendment of the LMAR in which it made two proposals to the Ministry of Health, stating the need to conduct an analysis of international comparative practices, with the aim of possibly approving posthumous reproduction, and to initiate proceedings for the amendment of the LMAR in order to prescribe the manner in which unused reproductive material is to be handled.[169]

Although the author understands that the desire of people affected with infertility to have offspring is great, it is important for such a desire to be "carefully evaluated in regard to many other factors and interests affected by the development of reproductive technology."[170] In this sense, it is important to make an appropriate assessment of the optimal relationship between the expected benefit and the possible risk.[171]

This analysis of the recent ECtHR's decision, in which the facts of the case can largely be equated with the facts of Mrs. Prizrenac-Nedeljković case, will attempt to point out that there is presently no need to amend the text of the law in the Republic of Serbia, at least not the way it was proposed in the said Initiative. In the case of *Pejrilova v. The Czech Republic*,[172] the applicant and her husband entered into marriage in 2012.[173] As they were unable to achieve natural conception and as there was a serious health problem by the applicant's husband, the couple opted to undergo MAR treatment.[174] The applicant's husband cryopreserved his sperm in June 2014 and following that had signed a consent form under which he had agreed upon that the storage of his genetic material is solely for the purposes of having infertility treatment.[175] The consent form explicitly stipulated that any future written consent would be needed before each

167 The document was obtained from the Ministry of Health archives.

168 The Public Policy Secretariat is the body responsible for collecting and processing initiatives submitted by business entities, other legal entities and citizens for the amendment of inefficient regulations at the national level. See Law on Ministries, *Official Gazette of the RS*, Nos. 128/20 and 116/22, Art. 38, para. 3.

169 PPSRS, 2022, Initiative for the amendment of the LMAR, p. 2.

170 Draškić, M., 1992, p. 262, translated by author.

171 *Ibid*.

172 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023.

173 *Ibid.*, para. 5.

174 *Ibid*.

175 *Ibid.*, para. 6.

instance in which the sperm needed to be obtained for the said procedure, and that, if not differently agreed upon, the storing of the sperm would be obsolete once the depositor of the sperm has died.[176] In December 2014, the applicant and her husband have signed the informed consent forms according to which they agreed to treatment using in vitro fertilization and to "the thawing of the applicant's husband's sperm and its use in intracytoplasmic sperm injection."[177] Shortly thereafter, in June 2015, the applicant's husband died, without any further steps having been taken.[178]

Consequently, the applicant asked the Center where the sperm was stored to fertilize her eggs using the cryopreserved sperm of her late husband.[179] The Center denied her request on the basis of the fact that such procedure would violate the law, and instead proposed to the applicant to commence proceedings that would result in a settlement.[180] Although the applicant did so, the Plzeň-City District Court rejected such a possibility.[181] The decision of the District Court was upheld by the Plzeň Regional Court.[182] It was the court's opinion that, regardless of the fact that the applicant's husband had indeed provided his consent to the treatment, "his later wishes could be prejudged and replaced by a court decision."[183] The Supreme Court, deciding on an appeal, underlined "that it was in a child's best interests to be born to a complete family and have both parents, at least at the stage of conception."[184] Additionally, the Supreme Court remarked that there was no real interference with the applicant's right to respect for her private and family life since she was not denied of all possibilities of becoming a mother.[185] At that time, while the case was decided, the Specific Health Services Act[186] was

176 *Ibid*.

177 *Ibid.*, para. 7.

178 *Ibid.*, para. 8.

179 *Ibid.*, para. 9.

180 *Ibid*.

181 *Ibid.*, para. 11.

182 *Ibid.*, para. 12.

183 *Ibid*.

184 *Ibid.*, para. 15.

185 *Ibid*.

186 This Act stipulates that assisted reproduction means techniques and procedures for harvesting gametes, manipulating them, creating a human embryo by fertilizing the egg with the sperm outside the woman's body. The same act further stipulates that artificial insemination can be performed on a woman of childbearing age, based on a written request from a woman and a man who intend to undertake this treatment together. This written request must not be older than six months. After the infertile couple had been given the aforementioned information, they could give written consent to assisted reproduction. The said consent would have to be given continuously

in force in the Czech Republic. The applicant then lodged an application with the ECtHR, emphasizing that the State should "respect her choice of the father of her child, as well as her late husband's wish to have a child with her, and should allow her to continue with the assisted reproduction procedure using her late husband's frozen sperm."[187] In this she relied on the right to respect for private and family life, home and correspondence.[188] She pointed out that the fact that consent had been obtained at the commencement of the procedure should be enough,[189] as well as that the Czech Republic's margin of appreciation "was not unlimited and could not justify any interference and certainly not the present one which prevented her from having a family with her husband."[190] In response to the applicant's allegations, the Government of the Czech Republic stated that the interference with the applicant's right pursued two legitimate aims.[191] The first aim was to enact legal norms aimed at securing the protection of rights and freedoms of the child to be born through this procedure, by providing them a chance to be born into a complete family.[192] Moreover, the legal provisions were aimed at providing the protection of the autonomy of a man who had given his consent to the MAR procedure, since the mere fact that he had given his consent to such procedure while alive did not automatically lead to the conclusion that he would provide such a consent to it even after his death.[193] The second aim pursued by the interference was the protection of morals, since medically assisted reproduction is considered to be a rather sensitive topic, and that "the legislature's policy choice reflected above all the moral, cultural, religious and ethical values of society."[194]

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prior to any artificial insemination. See The Specific Health Services Act (Law No. 373/2011 as in force on 15 December 2014). See also ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 17–19.

187 See ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 22.

188 See Art. 8 of the ECHR. See ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 22.

189 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 29. It should be noted that under Czech law, due to the assumption that the father of the child is a man who consents to artificial insemination, insemination cannot be carried out without the continued consent of the infertile couple. ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 20.

190 *Ibid.*, para. 33.

191 *Ibid.*, para. 36.

192 *Ibid.*

193 *Ibid.*

194 *Ibid.*

The ECtHR first confirmed that the right to conceive a child through MAR treatment was protected under Article 8 of the ECHR.[195] It emphasized that its task was not to substitute the competent national authorities when deciding on the most suitable policy for dealing with the question of artificial reproduction, especially when having in mind that IVF treatment is at the center of moral and ethical debates related to medical discoveries.[196] This is one of the reasons why the ECtHR has always considered that states should enjoy a wide margin of appreciation in resolving these issues.[197] Such a wide margin of appreciation extends both to the state's decision to intervene in the area, and to the detailed rules it lays down to achieve an appropriate balance between competing public and private interests.[198] The ECtHR accepted the Czech Government's submission that these issues "are of a morally and ethically delicate nature and involve, beyond individual interests, a number of wider, public interests as well."[199] The Court underlined that since there was no common position of the European states regarding this issue, each state needs to be afforded a wide margin of appreciation with respect to regulating the issues of consent given for the use of genetic material provided for IVF treatment and using a deceased man's sperm.[200] In the case at hand, the ECtHR analyzed whether the Czech Republic's interference with the applicant's rights guaranteed under Article 8 of the ECHR was in accordance with the law, whether it pursued a legitimate aim, and whether it was necessary in a democratic society.[201] Regarding the first issues, the ECtHR considered that prohibition on posthumous reproduction was provided for by law.[202] It then analyzed whether the measure pursued a legitimate aim. In the ECtHR's view, the decision of the Czech legislator to enact provisions such as those as well as the interpretation of the said provisions by national courts testify to the goal of respecting both human dignity and free will

195 *Ibid.*, para. 42.

196 *Ibid.*, para. 43.

197 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 81; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 97.

198 *Ibid.*, para. 43.

199 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 46.

200 *Ibid*.

201 In this way, the court wanted to apply a test that is based on the principle of proportionality, which it began to apply over time on a regular basis when deciding whether there were violations of the rights guaranteed under Arts. 8–11 of the European Convention on Human Rights.

202 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 47.

in order to allow for every person, as a donor of gametes for conducting such a procedure, to know in advance that "no use could be made of his or her genetic material without his or her continuing consent."[203] The ECtHR was of the opinion that the measure in question pursued a legitimate aim, i.e. "the protection of morals and the rights and freedoms of others."[204] In order to answer the last question, the Court had to consider whether such interference was necessary in a democratic society. It noted that "where such important aspects are at stake, it is not inconsistent with Article 8 [of the ECHR] that the legislature adopts rules of an absolute nature which serve to promote legal certainty."[205] It also underlined that rights guaranteed under Article 8 of the ECHR are not absolute and therefore do not require states to allow posthumous reproduction.[206] Hence, in the present case, the court was of the opinion that the applicant's legitimate right to respect for the decision to have a child genetically related to her deceased husband should not "be accorded greater weight than the legitimate general interests protected by the impugned legislation."[207] As a result, the Czech Republic "has to be afforded a wide margin of appreciation in this respect, which it did not overstep."[208] Therefore, the ECtHR concluded that there had been no violation of the applicant's right to respect for private life.[209]

Based on all the above, it can be concluded that states must be afforded a wide margin of appreciation when deciding on issues of medically assisted reproduction and, where such important aspects of private life are at stake, it is consistent with Article 8 of the ECHR for the legislator to adopt rules of an absolute nature that serve to promote legal certainty. The author therefore believes it is important to relativize Mrs. Prizrenac-Nedeljković's submissions and offer a different perspective on existing solutions in Serbian law.

Firstly, Mrs. Prizrenac-Nedeljković claims that the "EU regulation recognizes situations of posthumous reproduction, which are regulated at the national level of the member states."[210] However, although it is true

203 *Ibid.*, paras. 51–52.

204 *Ibid.*, para. 54.

205 *Ibid.*, para. 58. See ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 89; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 110.

206 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 59.

207 *Ibid.*, para. 62.

208 *Ibid.*

209 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, paras. 62–63.

210 PPSRS, 2022, p. 4, translated by author.

that some European Union countries allow posthumous reproduction treatment (Belgium, the Netherlands, Greece, Denmark),[211] this does not mean that the same possibility should be adopted in Serbian law. On the contrary, it should be emphasized that just as there are EU member states where there is a possibility to carry out posthumous reproduction, there are also countries that explicitly prohibit such a possibility, such as France, Germany, Croatia, Slovakia, Slovenia, and the Czech Republic.[212] In this sense, it is important to underline that the ECtHR, as previously stated, unequivocally emphasized that states should not be required to allow posthumous reproduction.

Mrs. Prizrenac-Nedeljković further stated that the provisions should be amended to allow partners to decide the fate of the reproductive material in the event of unforeseen circumstances or the death of one of the providers/partners – at the beginning of IVF treatment. She also pointed out that the five-year period prescribed for the storage of reproductive material must be extended, "especially in situations related to posthumous reproduction."[213] However, the author believes that such proposals are inappropriate for several reasons. Firstly, it should be emphasized that, as the ECtHR pointed out, when assessing whether prohibition on posthumous reproduction is contrary to the requirements of the ECHR, the legal framework of the state, which also contains those legal norms, must be taken into account, and such a prohibition must be viewed in a wider context.[214] It should also be noted that the Constitution of the Republic of Serbia stipulates that every person has the right to inviolability of physical and mental integrity.[215] In addition to the Constitution of the RS, the Convention on Human Rights and Biomedicine[216] stipulates that an intervention in the field of healthcare can only be performed after the person concerned has been given information about it and has given free consent to it. It is further stated that the person concerned can freely withdraw consent and at any time.[217] Also, it is important to note that the

211 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 21.

212 *Ibid.*, para. 35.

213 PPSRS, 2022, p. 5, translated by author.

214 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58. ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 112.

215 See Constitution of the Republic of Serbia, Art. 25, para. 1.

216 The Act on the ratification of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), *Official Gazette of the RS – International Agreements*, No. 12/10.

217 See Convention on Human Rights and Biomedicine, Art. 5, paras. 1 and 3.

Patients' Rights Act[218] stipulates that patients have the right to freely decide on everything concerning their life and health, and, that as a rule, medical or surgical procedures may not be carried out without their informed consent.[219] Moreover, it is explicitly stated that the patient can withdraw their consent to the proposed medical procedure (verbally or in writing), before it is performed, as well as in the course of treatment.[220] As to MAR, the legislator emphasizes that all individuals are required to give written consent prior to undergoing MAR treatment.[221] Consent is given for each MAR treatment[222] and the patient can withdraw consent before the sperm or eggs, zygotes, or embryos are placed in the woman's body.[223] The legislator also points out that before each transfer of sperm cells, zygotes or embryos to the woman, a competent specialist must check whether there is written consent or it has been withdrawn.[224] The legislator's view is not surprising given that free consent, which can be withdrawn, is a universal principle in medical ethics.[225]

Therefore, it could be argued that Serbian law, as well as Czech law, requires continuous consent so that every person donating their reproductive material for the purpose of IVF treatment would know in advance that their genetic material cannot be used without their continued consent. It should, thus, be pointed out that a requirement for continuous consent, as well as the use of MAR treatment during the lifetime of the genetic material provider, is necessary in order to protect not only the free will of the man who has consented to assisted reproduction, but also the rights of the unborn child to know their parents.[226] The ECtHR has concluded that this type of measure pursued a legitimate aim, i.e., the protection of the morals and the rights and freedoms of others,[227] and that the woman's legitimate right to respect for the decision to have a child genetically related to her deceased husband should not be accorded greater weight than the legitimate general interests protected by the impugned legislation.[228]

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218 Patients' Rights Act, *Official Gazette of the RS*, Nos. 45/13 and 25/19 – other law.

219 *Ibid.*, Art. 15. paras. 1 and 2.

220 *Ibid.*, Art. 16, para. 4.

221 See LMAR, Art. 27, para. 1.

222 See *Ibid.*, para. 2.

223 See LMAR, Art. 28, para. 1.

224 LMAR, Art. 28, para. 3.

225 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 103.

226 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 59.

227 *Ibid.*, para. 54.

228 *Ibid.*, para. 62.

Furthermore, if posthumous reproduction was allowed under the provisions of Serbian law, the question of establishing the paternity of the child born in this way could be raised. This issue becomes even more important if taking into account the abovementioned proposal to extend the period prescribed for the storage of reproductive material and also to "allow couples who have undergone all necessary IVF procedures to use their reproductive material, if their health permits, again after the five-year period has elapsed."[229] The author underlines that if legal norms were amended in this way, it would certainly contribute to legal uncertainty.

Serbia's legal system stipulates that the father of a child conceived with biomedical assistance is considered to be the spouse/common-law partner, provided that he had consented to the MAR procedure.[230] If, on the other hand, posthumous reproduction was allowed under Serbian law, it would be questionable whether a man, whose sperm cells were used for insemination after his death, should be deemed the father of the child or, if, on the contrary, it should be stipulated that in such cases the child's legal father has not been determined. The author is of the view that both scenarios would result in a number of specific problems.

If it is assumed that the father of the child is considered to be a man whose sperm cells were used for conception after his death, the issue of inheritance rights would certainly arise – can a child conceived by IVF after the death of their father become an heir? Đurđević points out that opinions on this issue remain divided.[231] On the one hand, there are those who believe that the objective interpretation of *nasciturus* fiction[232] could be to derive the rule that the child can inherit its deceased father, if born alive, regardless of the time of conception.[233] In this sense, Vidić-Trninić and Krstić[234] point out that a child should be recognized as having the right to inherit its genetic parents, whose reproductive cells were used

229 PPSRS, 2022, p. 5, translated by author.

230 Family Act, Art. 58, paras. 1 and 2.

231 See Đurđević, D., 2023, *Institucije naslednog prava*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 63.

232 Serbian law has adopted the concept of the conditional legal capacity of nasciturus, which implies that if a child was in gestation at the time of the intestate person's death and, if subsequently it was born alive, the child can also inherit from the intestate person. See Succession Act, *Official Gazette of the RS*, Nos. 46/95, 101/03 – decision CCRS and 6/15, Art. 3, para. 2. See Đurđević, D., 2023, p. 62. For more details, see Vodinelić, V., 2023, p. 355.

233 Antić, O., 2008, *Nasledno pravo*, Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 68–69. As cited in Đurđević, D., 2023, p. 63, fn. 223.

234 Vidić (Trninić), J., Krstić, N., 2014, Naslednopravne posledice rođenja deteta začetog biomedicinski potpomognutom oplodnjom, *Pravni život*, 10, p. 539.

for posthumous conception, and that the legislator must not discriminate children in terms of their inheritance rights because they were conceived differently.[235] It seems that this kind of argument for the most part avoids problems that may arise from acknowledging the inheritance rights of a *nondum conceptus*. Thus, there are opinions that "the need to preserve legal security and trust of both heirs and third parties, speaks against expanding the *nasciturus* fiction to cases of posthumous reproduction."[236] As it is possible to talk about cases in which a child was born from seminal fluid that is thirty years old,[237] the acknowledgment of the right of a child born as a result of posthumous artificial insemination, who appears as an heir, would "ruin any chance to definitively discuss and conclude a specific inheritance case, because the demands of posthumously conceived children for their shares of the inheritance would never cease."[238] The ECtHR took a similar position, emphasizing that where such important aspects of private life are at stake, it is consistent with Article 8 of the ECHR that the legislator adopts rules of an absolute nature that serve to promote legal certainty.[239]

An alternative to this solution would be to consider that the paternity of the child born through posthumous reproduction has not been established. Legal norms set in this way create a special type of problem pertaining to the violation of the right of a child born as a result of posthumous reproduction to know its parents. The right to know one's own origin is guaranteed under the Convention on the Rights of the Child,[240] which emphasizes that the child shall have the right from birth, and as far as possible, to know and be cared for by its parents.[241] Živojinović points out that the prohibition on posthumous reproduction is in accordance with

235 *Ibid.*, p. 540.

236 Đurđević, D., 2023, p. 63, translated by author.

237 In the United States, twins Lydia and Timothy Ridgeway were born from embryos that were stored and frozen for thirty years. Kristensen, J., Kounang, N., Parents welcome twins from embryos frozen 30 years ago, *CNN* (https://edition.cnn.com/2022/11/21/health/30-year-old-embryos-twins/index.html, 21. 11. 2022).

238 Đurđević, D., 2023, *Institucije naslednog prava*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 63, fn. 225, translated by author.

239 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58; ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 89; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 110.

240 The Act on the ratification of the UN Convention on the Rights of the Child, *Official Gazette of the SFRJ – International Agreements*, No. 15/90 and *Official Gazette of the SRJ*, No. 15/90 and *Official Gazette of the SRJ – International Agreements*, Nos. 4/96 and 2/97.

241 Convention on the Rights of the Child, Art. 7, para. 1.

the Convention on the Rights of the Child, which stipulates that the child has the right to know and be cared for by its parents.[242] Legal scholars emphasize that there are three groups of reasons that explain the interest of a person to know their biological or genetic origins.[243] The first group of reasons is of psychological nature. Draškić states that "psychologically speaking, the person's identity is a confirmation of their existence" and "an important component of that recognition is the fact that one can trace the origin of one's biological ancestors."[244] The opposite action, as pointed out, would cause "strong negative feelings of marginalization, social exclusion, frustration, insecurity, confusion."[245] Kovaček Stanić takes a similar point of view, emphasizing that psychological interest is reflected precisely in the desire and need to know one's own origin.[246] If, on the other hand, the child was granted the right to know its origins when it was conceived through posthumous reproduction, it could give rise to additional negative psychological consequences for the child. The second group of reasons why such a legal solution would be inappropriate is of a medical nature. Specifically, the medical interest of a person to know their origins is especially important if genetic inheritance is taken into account, i.e., the fact that certain genetically determined diseases are hereditary.[247] The third group of reasons is of a legal nature. Specifically, if paternity was not established in relation to the child, then the child would not be entitled to the right to inheritance, the right to family pension, etc.[248]

All of the issues that have been discussed thus far lead to a single conclusion. More precisely, and contrary to the claims by Mrs. Prizrenac-Nedeljković and the PPSRS, the legal norms of the Republic of Serbia should not be amended in the manner proposed. This position is based on the fact that the previous analysis confirmed that the current position of the ECtHR is unequivocally directed toward the fact that states must be afforded a wide margin of appreciation when deciding on issues of medically assisted reproduction, such as posthumous reproduction. With this in mind, it is unquestionable that a comparative analysis of international

242 Živojinović, D., 2018, pp. 257–258.

243 Kovaček Stanić, G., 1997, *Pravo deteta da zna svoje poreklo*, Novi Sad, Pravni fakultet Univerziteta u Novom Sadu. See also Draškić, M., *Pravo deteta na saznanje porekla*, in: Lilić, S. (ed.), 2009, *Pravni kapacitet Srbije za evropske integracije*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 42.

244 Draškić, M., 2009, p. 42, translated.

245 *Ibid*., translated.

246 Kovaček Stanić, G., 1997, p. 11.

247 Draškić, M., 2009, p. 42. See Kovaček Stanić, G., 1997, p. 11.

248 See Kovaček Stanić, G., 2010, p. 11. See Draškić, M., 2009, p. 42.

practices would be heterogeneous, which would confirm the position that the legal norms in Serbia should not be changed. Additionally, the proposal to allow partners to decide the fate of reproductive material in the event of the death of one of the partners at the beginning of the IVF treatment, completely bypasses the existing legal norms that require continuous consent of the persons whose genetic material is used in MAR. The opposite solution could lead not only to the violation of the interest of the depositor of genetic material, but also to the violation of the unborn child's right to know its parents. The last proposal, which is aimed at extending the five-year period prescribed for the storage of reproductive material and allowing couples who have undergone all necessary IVF procedures to use their reproductive material again even after the five-year period has elapsed, is particularly problematic. Thus, a Pandora's box would be opened, because it would be possible to imagine children being posthumously born from the genetic material drawn from the same person several decades prior. The consequence of such a solution would prevent any considerable discussion about and the resolution of the inheritance status of a posthumous child, precisely because the genetic material could be used at any time after the person's death. The alternative to this proposal is equally problematic, as it potentially creates room for the violation of the child's right to know its origins.

## 4. Conclusion

The questions that arise regarding posthumous reproduction remain unsolved pieces of the puzzle. This is why the author has attempted, through different legal solutions adopted by the United Kingdom and France, to provide answers to some of the questions concerning posthumous reproduction. The first in a series of questions concerns the legal qualification of reproductive cells. However, an analysis of both theory and case law in both countries indicated there was no single answer to that question. In other words, the issue of legal qualification of reproductive cells is barely discussed in English law, while the French courts have clearly taken the position that human sperm cannot be considered a movable or inheritable property because it represents a part of fundamental human rights. Here it would be useful to recall Vodinelić's position that "a separate reproductive cell has all the properties of a (movable) object and a special ability (which other objects do not have) to create a human being from it (by uniting with another of the opposite sex)."[249]

249 See Vodinelić, V., 2023, p. 256, translated by author.

Nevertheless, in both English and French law considerable attention has been focused on resolving the issue of whether a person is authorized to posthumously use another person's genetic material. Unlike English law, which permits posthumous reproduction, French law prohibits posthumous reproduction. By setting several different norms, the French legislator explicitly stipulated that genetic material cannot be used posthumously by a third party. These two opposite solutions reflect the positions taken by all other countries, because, on a comparative level, a broad consensus on whether it is justified to allow the posthumous use of genetic material has not been reached.

Finally, an answer to the question of whether posthumous reproduction could be carried out without the written consent of the genetic material provider, in legal systems that allow posthumous reproduction, was provided. The conclusion is that posthumous reproduction, as a rule, could only be carried out if written consent had been obtained from the genetic material provider. However, as previously elaborated, recent case law in England testifies that the courts have treated posthumous reproduction issues differently. In other words, the intention of the court in the specific case was not to circumvent or violate the legal provisions, but on the contrary, to enable the fulfillment of the intention of the person whose genetic material was used posthumously.

The Serbian legislator banned posthumous reproduction, and instead stipulated that reproductive cells, i.e., embryos, may only be used in MAR if the depositors are living. Additionally, the legislator stipulated that written consent must be obtained from all persons undergoing MAR treatment prior to starting each treatment cycle. However, Mrs. Prizrenac-Nedeljković has fiercely criticized this position taken by the legislator in recent months, emphasizing that several provisions of the LMAR need to be amended. The author explained that such proposals cannot be accepted, for the time being, for a number of reasons. The first argument by Mrs. Prizrenac-Nedeljković for allowing posthumous reproduction was that there were Member States of the European Union that allowed posthumous reproduction. Such an argument is weak, because there are also those that do not permit posthumous reproduction. Hence, there is no generally accepted position at the level of the European Union with which Serbia would be required to align. Further proposals are aimed at allowing the partners to decide the fate of the reproductive material in the event of the death of one of the providers/partners at the beginning of the IVF treatment or in the case of unforeseen circumstances. First, it is necessary to reiterate that when assessing whether the imposition of a prohibition on posthumous reproduction is contrary to the requirements of the

ECHR, the legal framework of the country that contains such legal provisions must be taken into account, and such a prohibition must be viewed in a wider context. As it could have been seen, the legal framework of the Republic of Serbia is undoubtedly focused on the person's continuous, free and informed consent without which no medical procedure, i.e., medical measure, can be carried out. The adoption of the said proposal would contribute to the violation of existing legal norms that require continuous consent from the persons whose genetic material is used in MAR, including potential violations of the rights and interests of the unborn child. The last proposal in the Initiative was to extend the five-year period prescribed for the storage of reproductive material and allow couples who have undergone IVF treatment to use their reproductive material again after the five-year period has elapsed. This proposal raises the question of the legal status of a posthumous child. In the previous section, the author pointed out that both possible solutions to the legal status of a posthumous child would lead to a series of problems. More precisely, we would be faced with a dilemma of whether a child's paternity was established by written consent to the posthumous use of genetic material or whether to consider the child as being without established paternity.

Be that as it may, it is evident that the proposals stated in the Initiative were viewed one-sidedly. It seems that the issue of posthumous reproduction was approached from the perspective of those who have difficulties in conceiving. Without disputing the gravity of the problem of infertility and the struggle of all persons affected by infertility to produce their offspring, when deciding MAR issues, it is necessary to look at the wider picture and take into account both the legal framework of the country where the proposal is made and the fact that self-interest does not take precedence over the general interest of the state, which is protected by the law.

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## POSTHUMNA OPLODNJA: ŽIVOT POSLE SMRTI?

Ivana Barać

APSTRAKT

Predmet rada je analiza posthumne oplodnje na međunarodnom i nacionalnom nivou. Autorka analizira pravni sistem Velike Britanije, kao države koja ima permisivni stav prema posthumnoj oplodnji, a potom i pravni sistem Francuske, kao države sa negativnim stavom prema posthumnoj oplodnji. Analizi su podvrgnute i zakonske norme srpskog prava koje zabranjuju posthumnu oplodnju. Zakonske norme sagledane su iz perspektive jedne privatne inicijative koja je upućena nadležnim državnim organima Srbije. Iako autorka razume da neplodnost predstavlja veliku prepreku u životu svakog čoveka, zaključuje da su predložene izmene jednostrane jer se njima zanemaruje činjenica da one treba da budu deo pravnog okvira sa kojim ujedno moraju biti usklađene. Upravo zato, a kako među državama nema konsenzusa o dozvoljenosti posthumne oplodnje, autorka ističe da srpski zakonodavac, u ovom trenutku, ne čini povredu prava pojedinaca propisujući zabranu posthumne oplodnje.

**Ključne reči:** medicinski asistirana reprodukcija, posthumna oplodnja, pismena saglasnost, pravo na poštovanje privatnog i porodičnog života, pravo deteta na saznanje sopstvenog porekla.

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REVIEW ARTICLE

*Miloš Kuzman**

# ELECTRIC VEHICLES IN SERBIA: INSTRUMENT FOR THE ENERGY TRANSITION?

***Abstract:*** *The increasing global impact of climate change has not circumvented Serbia. Committed to take measures that will reduce the impact of climate change through numerous international conventions, the Republic of Serbia has started implementing the energy transition as one of the instruments with which it aims to achieve the set goals. Electric and hybrid vehicles represent one of the ways that the energy transition can be accelerated; the initial provisions on them found their place in positive law in April 2021. This paper will discuss whether the adopted regulations in this area represent a good starting point for achieving the goals of the energy transition, as well as what further measures need to be implemented in order to achieve the desired effect.*

**Key words:** climate change, energy transition, electric vehicles, renewable energy sources, autonomous vehicles.

## 1. Introduction

We are witnessing the growth of global demand for electric vehicles, primarily related to environmental protection and climate change reasons. Two agreements related to the decarbonization of the automotive industry were announced during the 2021 United Nations Climate Change Conference in Glasgow. One of them, the Global Memorandum of Understanding for Zero-Emission Medium and Heavy-Duty Vehicles, defined the goal of cooperation between the fifteen governments regarding the sales of new 100% zero-emission trucks and buses by 2040. Another one is the Declaration on accelerating the transition to 100% zero emission cars and vans, signed by various governments, car companies and other organizations. The aim of the Declaration is to implement the transition in leading markets by 2035 and globally by 2040.[1]

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1 Wang, Y., Liu, Y., Gu, B., 2022, COP26: Progress, Challenges, and Outlook, *Advances in Atmospheric Sciences*, 39, p. 1212.

Many of the signatories of these two agreements are Member States of the European Union. Even though they do not include the countries that are the biggest car producers in the EU, it is expected that the Union's policy will strongly follow and implement such agreements. This is also because the majority of countries globally and in the EU are parties to the most important convention related to decarbonization – the United Nations Framework Convention on Climate Change (UNFCCC), which has also a great impact on the Energy Community Contracting Parties, including the countries of the Western Balkans.[2] One of the key documents that the European Union follows on its pathway to decarburization and environmental protection is European Green Deal. At the Western Balkans Summit in Sofia on 10 November 2020 it was decided to follow the European Green Deal and adopt the Green Agenda for the Western Balkans,[3] which also has the great impact on development of charging stations and electric vehicles themselves.

The Western Balkans is a European region that has often been and still remains on the margins when it comes to implementing innovative solutions, including those in the field of green transition. Nevertheless, Serbia, as one of the Western Balkans countries, intends to follow the same pattern and implement such solutions. The Government of the Republic of Serbia has recently adopted a bylaw that grants subsidies to buyers of electric and hybrid vehicles, thus demonstrating interest in creating a greener national vehicle market.[4] The Republic of Serbia intends to become a European Union Member State and the accession negotiations process on the Green Agenda and the sustainable connectivity cluster was opened in December 2021.[5] Development of the electric vehicles in Serbia will certainly help the progress related to this cluster, especially regarding

2 For more about how the UNFCCC affects countries see Tompkins, E. L., Amundsen, H., 2008, Perceptions of the Effectiveness of the United Nations Framework Convention on Climate Change in Advancing National Action on Climate Change, *Environmental Science & Policy*, Vol. 11, No. 1, pp. 1–13.

3 For more about the impact of national energy and climate planning in the Western Balkans see Batas-Bjelić, I., Rajaković, N., 2022, National Energy and Climate Planning Approach for the Western Balkans: Between the Carrot and the Stick of the EU Green Agenda, *International Journal of Global Environmental Issues*, Vol. 20, No. 2–4, pp. 123–134.

4 Regulation on the conditions and manner of carrying out subsidized purchase of new vehicles with exclusively electric drive, as well as vehicles powered by an electric drive (hybrid drive) in addition to an internal combustion engine, *Official Gazette of the RS*, No. 18/23.

5 This cluster includes: Chapter 14 on Transport, Chapter 15 on Energy, Chapter 21 on Trans-European networks, and Chapter 27 on Environment and Climate Change.

the chapters on energy, and environment and climate change, and accelerate the Republic of Serbia on the path to European Union membership.[6]

Construction of electric vehicle charging stations, i.e., charging stations for hybrid vehicles, is required in order to enable the charging of electric and hybrid vehicles. The development of the construction of charging stations in Serbia will be of great importance for the entire Western Balkans, as a complete network of charging stations will be established. The absence of regulations in this field in the Republic of Serbia did not prevent certain oil and gas companies from building charging stations for electric vehicles and becoming the pioneers in this field.[7] However, some legal and other issues regarding the construction and operation of charging stations remain open, which requires specific regulation of this field. The first step has already been taken with the amendment of the Law on Energy of the Republic of Serbia ("Energy Law"), which set the ground rules regarding the institute of charging stations for the electric and hybrid vehicles ("charging stations").[8]

The following phases in the regulations process should establish the entire regulatory playing field for electric and hybrid vehicles ("electric vehicles"). They will predominantly cover technical requirements for the charging stations and electric vehicles, but the crucial ones should regulate which type of energy will be used for the charging of the electric vehicles. In addition, equal distribution of charging stations in Serbia should be provided, either by existing or new legal acts. One of the issues that should also be covered is the demarcation between what should be regulated by the state and what should be regulated by the market, in accordance with the applicable international and national rules.

In this paper, the focus will be on the open issues regarding electric vehicles, in relation to the energy transition in the Republic of Serbia. One of the key questions is whether we can claim that the electric vehicles are an energy transition tool if they are charged from non-renewable energy sources. Another one is whether the electric vehicles can be used as a tool

6 For more on the role of environmental protection in EU enlargement history see Bogojević, S., Drenovak-Ivanović, M., 2019, Environmental Protection through the Prism of Enlargement: Time for Reflection, *Common Market Law Review*, Vol. 56, No. 4, pp. 949–977.

7 This is despite the fact that the first charging station for electric vehicles in Serbia was installed in the town of Leskovac, by the TotalEnergies company back in 2021. TotalEnergies, 2021, *Kompanija TotalEnergies je instalirala prvi punjač za električna vozila u Srbiji* (https://totalenergies.rs/sr/totalenergies-u-srbiji/vesti/kompanija-totalenergies-je-instalirala-prvi-punjac-za-elektricna-vozila, 11. 8. 2023).

8 Energy Law, Art. 210v, *Official Gazette of the RS*, Nos. 145/14, 95/18 – other law, 40/21 and 35/23 – other law.

for electricity storage and how this might contribute to the energy transition. It will also be discussed how the regulations on the production of the electric vehicles and the waste generated from them can be improved. One part of this article will address the concerns related to the charging infrastructure, while certain legal issues of importance to electric vehicles will also be analyzed. The aim of the paper is to generally present the legal dilemmas related to electric vehicles, while further development of regulation in this area will enable deeper research into certain legal issues.

## 2. What Has Been Regulated So Far

The Energy Law[9] provides the definitions for the main participants and institutes related to electric and hybrid vehicles. According to the Energy Law, the provider of charging services for electric and hybrid vehicles can be a company or an entrepreneur who provides a public charging service for electric vehicles and at the same time represents the end customer in the electricity market. A charging station is defined as a public place where the electric vehicle charging service is provided or where electric vehicles for public transportation of passengers are charged.

The Law further stipulates that the electricity distribution system operator (DSO) is required to cooperate on a non-discriminatory basis with any natural or legal person who owns, develops or operates charging stations. As a rule, the DSO cannot own, develop or operate charging stations, with the exception of charging stations solely for its use.[10]

The amendments to the Law on Planning and Construction,[11] which entered into force in August 2023, provide definitions of electro mobility, charging points for electric vehicles, and chargers. Electro mobility is defined as a special form of environmental transport, using electric vehicles that mainly utilize electricity for propulsion. For the first time in Serbian legislation, this law defines a charging station as the place where it is possible to replace the battery on one or more electric vehicles. A charger is

9 *Ibid*.

10 For more about regulations related to charging stations see Kuzman, M., Grujić, D., 2022, Charging stations for electric vehicles on the market of the Republic of Serbia, *Proceedings of 13th Conference on Electricity Distribution with Regional Participation*, Kopaonik, Serbia, (http://ciredserbia.org.rs/Radovi/KO2022/STK%204/R-4.06%20109_Milos%20Kuzman_Dunja%20Grujic_PUNIONICE%20ELEKTRICNIH%20VOZILA%20NA%20TRZISTU%20REPUBLIKE%20SRBIJE.pdf, 11. 8. 2023).

11 Law on Planning and Construction, *Official Gazette of the RS*, Nos. 72/09, 81/09 – correction, 64/10 – CC decision, 24/11, 121/12, 42/13 – CC decision, 50/13 – CC decision, 98/13 – CC decision, 132/14, 145/14, 83/18, 31/19, 37/19 – other law, 9/20, 52/21 and 62/23.

defined as a device, installed on land or in a facility used for public or private purposes. The law also stipulates that the Energy Agency of the Republic of Serbia is responsible for more closely regulating the method of supply and billing of the delivered electricity required for electric vehicle chargers.[12] By comparing legal solutions from the Law on Energy and the Law on Planning and Construction, it can be seen that the terms related to electric vehicles are not regulated in the same way, and it is necessary to harmonize the legal terminology in order to avoid causing any doubts in their application.

To improve the regulatory framework related to electric vehicles, in addition to the abovementioned bylaw, which is to be adopted by the Energy Agency of the Republic of Serbia, the Government of the Republic of Serbia is required to stipulate the technical specifications for the charging stations, the capability, manner and place of measurement of electricity consumed, the obligations of the DSO to the end customer, and other related rules.[13] Furthermore, specific electric vehicle charging services for electric and hybrid vehicles, as well as the obligations of the electric and hybrid vehicle charging service provider should be regulated. The implementation of these rules is expected to take place following the enactment of the bylaws that will regulate the subject area, which are still in the drafting stage. One of the very first versions of the amendments to the Energy Law stated that electric vehicle charging services for electric and hybrid vehicles are special energy activities, which requires a license. This view was not applied in the final version of the amendments, and the possible licensing of charging stations is no longer an issue.[14]

Hence, bearing in mind the existing legal framework, the role of electric vehicles in the energy transition can hardly be presented through legal analysis and conclusions, but rather through practical questions and issues related to the charging station operators and infrastructure. Some of the conclusions and suggestions from this article can be used as guidelines the legislator, and hence contribute to the energy transition.

12 Art. 2, paras. 18, 38 and 59 and Art. 85(s9) of Law on Planning and Construction.

13 Moreover, the following DSO bylaws must be amended in order to make the electric vehicle operators and infrastructure operable: a) Distribution Grid Code, *Official Gazette of the RS*, Nos. 71/17 and 14/19, and b) Electricity Market Code, *Official Gazette of the RS*, No. 135/22.

14 Most countries do not require licensing of charging stations. It seems that, as claimed in one article, the Government is supporting the establishment of charging stations infrastructure by exempting the providers from licensing. See Meszaros, F., Shatanawi, M., Ogunkunbi, G. A., 2020, Challenges of the Electric Vehicle Markets in Emerging Economies, *Periodica Polytechnica Transportation Engineering*, Vol. 49, No. 1, p. 3.

## 3. Charging Electric and Hybrid Vehicles in Serbia with the Electricity Generated from Renewable Energy Sources

An important issue that has great impact on the energy transition is the existence of charging stations, representing a positive example in the fight against climate change while the same time contributing to environmental protection. To provide an answer to this question requires an analysis of whether the electric energy that powers charging stations comes from the renewable energy sources. If such electricity does come from the renewable sources, the answer needs to be a positive one. It would be controversial to present the construction of the charging stations as a per se response to the global climate and environmental problems, without further analysis.

In Serbia, the electricity that is distributed to the end customers through the distribution network – including end customers who charge their vehicles from the charging stations – is generated both from non-renewable and renewable sources. The energy mix in 2022 consisted of around 30% of the energy coming from renewable and 70% from nonrenewable sources,[15] with the government plans for 40% of the Serbian residual energy mix will consist of renewable sources by 2024.[16] Most of the energy from renewable sources comes from hydropower, while a smaller percentage comes from the wind, sun and biomass.

Although it has been in existence for several years, the Guarantee of Origin market is not properly developed in the Serbian electricity market.[17] The majority of users are companies that follow a green agenda and want to present that they only purchase electricity from renewable sources. These guarantees are still not used for charging stations and electric vehicles drivers cannot be certain that they are buying electricity only from renewable sources. Even if that were the case, the system could not physically

15 Elektromreža Srbije j.s.c., 2023, *Annual Report on the National residual mix for Serbia for 2022*, p. 4, (https://ems.rs/wp-content/uploads/2023/06/Godisnji-izvestaj-o-nacionalnom-rezidualnom-miksu-2022.pdf, 11. 8. 2023).

16 eKapija, 2021, Cilj Srbije 40% zelene energije do 2040. godine, *eKapija*, 21 April, (https://oie.rs/cilj-srbije-40-zelene-energije-do-2040-godine-potpisan-sporazum-ministarstva-i-udruzenja-obnovljivi-izvori-energije/, 11. 8. 2023).

17 The Guarantee of Origin is an electronic document that has the sole function of proving to the final customer that a certain amount of energy is produced from renewable energy sources and is regulated by Art. 47 of the Law on Use of Renewable Energy Sources, *Official Gazette of the RS*, Nos. 40/21 and 35/23.

separate the electricity coming from renewable and nonrenewable sources, so it is questionable whether such certificates would have a practical impact on what is the core of their purpose – to slow down climate change and its consequences.[18]

Charging stations could have their own energy plants powered by renewable energy sources, which is a solution already used in practice worldwide.[19] In recent years, this solution has become a trend in Serbia and the major filling stations, which are at the same time charging stations, have installed photovoltaic capacities sufficient for their own consumption. Again, this solution is only of a local character and does not have a large impact on the residual energy mix in Serbia.

Could there be a rule that would simply specify that all electric and hybrid vehicles must use the power coming from renewables? Such a rule could exist, but it would be difficult to implement in practice. Charging stations could provide a Certificates of Origin and we could formally tick the box. Alternatively, charging stations could have their own sources of renewable energy, most commonly solar panels. This could be achieved in the coming years, since the percentage of electric and hybrid vehicles on the roads is not high, and we have enough renewable power to serve the market. But would that mean that the goal has been met?

In its essence, the energy transition is a complex mechanism that will reach common global goals in the long run. If we make the green-only electricity for charging stations, the goal of energy transition will not be reached and the box we ticked will not be of great importance. Without increasing the percentage of renewables in the energy mix, it will be difficult to make improvements in this field and the stakeholders will still face the same big picture.[20]

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18 Many authors doubt that the Guarantee of Origin is an efficient tool for energy transition. See Hamburger, A., 2019, Is Guarantee of Origin Really an Effective Energy Policy Tool in Europe? A Critical Approach, *Society and Economy*, Vol. 41, No. 4, pp. 487–507.

19 For more about the positive aspects of photovoltaic power station installation on charging stations see Brenna, M. *et al*., 2014, Urban Scale Photovoltaic Charging Stations for Electric Vehicles, *IEEE Transactions on Sustainable Energy*, Vol. 5, No. 4, pp. 1234–1241.

20 For a study in Germany on the present future impact of electric vehicle development on the power system see Schill, W-P., Gerbaulet, C., 2015, Power system impacts of electric vehicles in Germany: Charging with Coal or Renewables?, *Applied Energy*, 156, pp. 185–196. Similar studies will be useful to show how recent electric or hybrid vehicles in Serbia can only be charged from renewable energy sources *i.e.* when the power system is prepared for that.

## 4. Electric and Hybrid Vehicles as Electricity Storage

Storage of electric energy in one of the tools for energy transition. The 2021 Amendments to the Energy Law introduced the storage operator as a new participant in the energy market, which clearly shows the intention of the lawmaker to develop electric energy storage operations.[21] By saving the electric energy in storage, a storage operator could save the surplus of the produced electric energy for the periods when there is not enough electric energy to meet the needs of all consumers. On a daily basis, it could be a situation when electric energy produced from the sun during the day ends up being used at night.[22]

The electric energy storage industry is still in the development phase, since the production and installation of storage requires significant funds. As the technology develops, they it become more affordable and we can expect its growth in the future.[23] This will also enable the more precise planning of electric energy production and consumption, as well as a more efficient usage of electrical energy.

Considering electric and hybrid vehicles, the law does not provide any obstacles to their use as electric energy storage. This means that the owner of an electric or hybrid vehicle, or its user as the case may be, could store energy in the vehicle during periods of lower electric energy tariffs and use it in periods when the tariffs are higher. They could use it not only for driving the vehicle but also for the everyday household purposes by simply connecting such a storage to a household installation.

Even if a law or bylaw does not expressly forbid this, it is advisable to stipulate in the regulation that such a possibility is permitted. If not, based on similar experiences, some institutions may conclude that using your own energy, stored in electric or hybrid vehicles, for your own purposes is not allowed and thus instruct consumers to use only the energy from the public distribution network and/or their own energy, in the event that they are certified prosumers.

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21 Energy Law, Art. 2, para. 52.

22 There are many studies that show how electric and hybrid vehicles storage can contribute to households and together with installed renewable capacity create less dependence on the grid. See Mesarić, P., Krajcar, S., 2015, Home Demand Side Management Integrated with Electric Vehicles and Renewable Energy Sources, *Energy and Buildings*, 108, pp. 1–9.

23 For one of the pioneering articles in this field see Karden, E. *et al.*,2007, Energy Storage Devices for Future Hybrid Electric Vehicles, *Journal of Power Sources*, Vol. 168, No. 1, pp. 2–11.

The role of electric and hybrid vehicles as electric energy storages shows that their role in the energy transition may be more significant than previously thought. Prerequisites for this are: a) that the law and (sometimes more importantly) the interpretation of the law allows this, b) that a representative number of electric and hybrid vehicles is present on the roads, and c) that the electric energy from vehicles can be connected to household installation without high expenses. It seems that in the near future this will become achievable, bearing in mind both the sustainable and economic interests of all the stakeholders.

## 5. Production of Electric and Hybrid Vehicles

The claim cannot be made that electric or hybrid vehicles fully promote the energy transition if their production is not sustainable and environmentally friendly. As stipulated earlier at the United Nations Climate Change Conference in Glasgow, some governments and other stakeholders opened this topic and set the goals to enable the production of electric vehicles with zero emissions. The problem is that this is not a global commitment, due to different interests of certain states and the slow development of the energy transition process.

The Republic of Serbia does not have a set of rules that regulates this field. There are no parameters that determine whether the production of electric vehicles is environmentally friendly or not.[24] In the early phases of the energy transition, less environmentally friendly production of electric vehicles could be partially compensated by the benefits that the use of electric vehicles might have on the energy transition. Again, such conclusions require further analysis, and certain parameters for that analysis should be defined by the relevant regulations.

The impact of electric or hybrid vehicles the environment should not be excluded when talking about the energy transition, having in mind the strong interdependence between these two concepts and their impact on climate change. Hence it is advisable for the Serbian Government and other institutions to set rules that will help and enable the more environmentally friendly production of electric vehicles, with due respect to competition rules, including those related to state aid.

Another important aspect that must considered is the sustainable consumption of electric vehicles. In the United Nations 2030 Sustainable

24 In the past decade, many scholars have addressed the topic of sustainable production of electric vehicles, e.g. Günther, H.-O., Kannegiesser, M., Autenrieb, N., 2015, The Role of Electric Vehicles for Supply Chain Sustainability in the Automotive Industry, *Journal of Cleaner Production*, 90, pp. 220–233.

Development Agenda, ensuring sustainable consumption and production are together provided in Goal 12.[25] The concept of sustainable consumption, among others, implies that the consumption of products takes place in accordance with good environmental and energy practices, but it also deals with consumer awareness of product sustainability as well as consumer habits in this regard. This concept, as well as the concept of sustainable production, deals with the topic of waste generation, which is discussed in the next chapter.

## 6. Waste Generated From Electric Vehicle Production and/or Consumption

Production of electric and hybrid vehicles involves different industries, including steel and machine industries, which generate different types of waste. After its lifetime, the vehicles end up as waste, which can be treated in different ways depending on their type. It is important that such waste does not harm the environment and does not have a negative impact on climate change, otherwise regarding energy vehicles as a tool for energy transition will remain questionable.

There are several laws in the Republic of Serbia that apply to different types of waste and procedures for their storage and disposal.[26] On the other hand, there are no laws or bylaws, or any regulations that specifically stipulate rules regarding waste generated by electric vehicles and consumption, including batteries. Treatment of such waste is primarily up to its holder – the producer or owner of the electric or hybrid vehicle, as the case may be, or a waste management entity, if the waste is classified as the type of waste that can only be treated by a specialized entity.[27]

Producers or owners are therefore tasked with ensuring that the waste generated in the of production and consumption of electric vehicles is properly treated. When buying a vehicle, the owner needs to be presented with the facts on what type of waste could be generated from it. Furthermore, the Republic of Serbia will present this fact in relevant reports and try to minimize the waste coming from the electric vehicles industry in

25 United Nations, 2015, *2030 Agenda for Sustainable Development*, Goal 12.

26 The general set of rules regarding waste removal is defined in the Waste Management Law, *Official Gazette of the RS*, Nos. 6/09, 88/10, 14/16, 95/18 – other law and 35/23.

27 It is important that each type of waste coming from electric and hybrid vehicles is treated properly under the general rules. Some waste can be recycled and reused, and in recent years scholars have been paying attention to different types of waste treatment. See Bulach, W. *et al.,* 2018, Electric Vehicle Recycling 2020: Key Component Power Electronic, *Waste Management & Research*, Vol. 36, No. 4, pp. 1–10.

general, especially hazardous and non-recyclable waste. Only then it can be claimed that the production and/or consumption of the electric vehicles is moving in the right direction for achieving the energy transition goals.

## 7. Charging Infrastructure

A well-established charging infrastructure is a prerequisite for the development of electric vehicles and their presence on the roads. Many Member States of the European Union have established plans for the development of the charging infrastructure areas, as there is a lack of such infrastructure.[28] In the Serbia, most charging stations are built at filling stations and are operated by the filling station operators. They are predominantly located in major metropolitan areas or in their vicinity, but even in those areas their number is not significant.

Another issue related to the charging stations infrastructure is the high cost of its development. This is why the government needs to provide grants for its development in areas where it is not commercially viable. In areas where there is commercial interest, stakeholders will find a way to establish a network of charging stations, and one of the motives will certainly be the promotion of policies for the sustainability of such stakeholders.

One more issue related to charging stations is the slow development of the technology. At the moment, charging electric vehicles is not as fast as filling vehicles that run on fossil fuels. This will change with the development of technology, and less infrastructure will be required. Smart planning of infrastructure is therefore crucial, as a surplus of charging stations could become a reality.

Relevant international practices related to the designing and planning charging infrastructure areas, with a special focus on the best European practices, can help the relevant stakeholders in Serbia to establish a sustainable and efficient network of charging stations. The government should support the building of infrastructure in remote areas through its policies, so that every electric vehicle can be charged anywhere in the country. Without the developed infrastructure of charging stations, electric vehicles will not be fully deployed in Serbia and hence the energy transition will not be as effective.[29]

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28 In existing charging infrastructure development plans, great attention is paid to specific aspects of such planning, e.g. planning of charging stations on highways. See Szumska, E., 2023, Electric Vehicle Charging Infrastructure along Highways in the EU, *Energies*, Vol. 16, No. 2, p. 895.

29 The development of the charging infrastructure should always be carefully planned, taking also into account the future developments in the energy sector. See Funke, S. Á. *et al*., 2019, How Much Charging Infrastructure Do Electric Vehicles Need? A

The charging infrastructure for electric and hybrid vehicles is an important tool for increasing the number of electric and hybrid vehicles on the roads. Hence, the construction of charging stations must follow the transition from fossil fuel to electric and hybrid vehicles, and therefore needs to be carefully planned.[30] Well-drafted regulations represent the basic precondition for a smooth transition.

The network of charging stations in Serbia, whether public or private, is in an early stage of development.[31] Therefore, the set of rules for the construction and operation of charging stations needs to be smoothly drafted to facilitate easy implementation. The experiences of other countries regarding the charging stations legislative framework should be considered, to assist decision makers in using the best standards and practices, in order to create a productive legal environment for the increase of the usage of electric and hybrid vehicles in the Western Balkans.

## 8. Open Legal Issues

The proper functioning of any legal instrument is only possible if there are no open legal issues and the instrument can perform its role. To claim that electric vehicles can contribute to the energy transition, all legal issues need to be discussed with the hope that they will be resolved in the future and that such an instrument can be used widely. Regarding electric vehicles, three open legal questions will be considered: a) ownership of electric meters at charging stations, b) electric vehicle licensing, and c) responsibility of autonomous electric vehicles.

### 8.1. OWNERSHIP OF ELECTRIC METERS AT CHARGING STATIONS

One of the open issues expected to be resolved in the by-laws is the ownership of the electric meter at the charging station, i.e., whether it is

Review of the Evidence and International Comparison, *Transportation Research Part D: Transport and Environment*, 77, pp. 224–242.

30 There are already studies that propose criteria for charging stations infrastructure planning in Serbia, such as Janjić, A. *et al.*, 2021, Estimating the Optimal Number and Locations of Electric Vehicle Charging Stations: The Application of Multi-criteria p-median Methodology, *Transportation Planning and Technology*, Vol. 44, No. 8, pp. 827–842.

31 Electromaps, a useful platform for finding the nearest charging station, was established in Barcelona in 2009. This platform can also be used to search charging stations in Serbia. It is available at https://www.electromaps.com/en/charging-stations/serbia (11. 8. 2023). According to data from the platform, in the mid-August 2023, there were 117 charging stations in Serbia, of which 48 were in Belgrade. It can be noted that in most districts in Serbia there are only one or two charging stations.

the DSO or the charging station operator. The Energy Law stipulates that the electric meter will financed by the charging station operator, while the owner will be the DSO.[32] This solution is stipulated, given the fact that the DSO shall have access to electric meters at any time in order to ensure their operation, and only ownership of them grants such rights. As the public charging stations are built under current legislation, this principle is followed and will be followed in the future.

Generally, households and prosumers in Serbia are required to invest and provide electric meters for themselves, and the DSO remains the owner of these electric meters.[33] The problem lies in the acquisition of these meters by the DSO, as the private owners do not want to simply hand over their property to the DSO, claiming the general principle of law protecting their private property. One of the solutions mentioned by experts is to simply make a provision in the law stating that as of a certain date all electric meters in Serbia will be the property of the DSO. The problem with this solution is that some could appeal to the Constitutional Court and claim that the protection of private property has supremacy over the public interest in giving ownership of electric meters over to the DSO, whatever the reason may be.

One of the suggestions for how to resolve this issue is to give the DSO the lease rights over the electric meters so that the DSO can operate them, while the owners would not charge the DSO for such a lease. Whatever the final solution will be, this issue needs to be settled, ensuring the operation of charging stations for the benefit of both the distribution system and the operator of the charging station.

### 8.2. ELECTRIC VEHICLES LICENSING

The current system of vehicles licensing has been made for conventional vehicles, i.e., those running on fossil fuel. Such a system is based on technical specifications, which are particular to this type of vehicles. The technical characteristics of electric vehicles are different than those of conventional vehicles, and hence their licensing needs to be treated differently.

Firstly, the requirements for licensing electric vehicles need to be different, for example they should not be based on weight requirements, as they are lighter than the conventional ones. Secondly, there are practical issues of how to register a vehicle that has been technically transformed from a conventional vehicle into an electric one by the users themselves. This would not be a problem with vehicles that were initially produced as

32 Energy Law, Art. 141.

33 *Ibid.*

electric vehicles, but in practice, there have been cases of users attempting to register a vehicle as an electrical one, although it had originally been manufactured as a conventional one.[34]

In many jurisdictions, the licensing fee for electric vehicles is lower than that for the conventional ones.[35] The rationale for this is that electric vehicles produce less pollution and noise, they weigh less, have better engine performance, etc. All of these solutions and arguments will need to be considered by lawmakers in the Republic of Serbia. Currently, the requirements for licensing of electric and conventional vehicles are the same, which is expected to change in the future, in accordance with the best European and international standards and practices.

## 8.3. RESPONSIBILITY OF AUTONOMOUS ELECTRIC VEHICLES

Autonomous vehicles are vehicles that can operate on their own, i.e., without human involvement. Both conventional and electric vehicles could be autonomous, but in this article we will discuss the electric ones, which will represent the majority of vehicles on streets in the future.

The type of automation of such vehicles may vary, from ones where only certain components are automated to ones that can fully perform their function without a driver. In the majority of jurisdictions that have regulated this field, if a driver is present in the vehicle and there is no full level of automation, the driver is held responsible for any damage caused by the vehicle, as it is the driver who has the duty to take reasonable care of the vehicle and prevent accidents. In situations of full automation, some believe that the driver should also be held responsible while others claim that the driver cannot be held responsible if the vehicle is fully automated: any mistake in automation rests with the manufacturer.[36]

According to the Serbian mandatory general law provisions, the possessor of the vehicle is the one who is responsible for a vehicle in motion that has caused an accident, as they are the user of a dangerous object. In addition, the manufacturer of a defective object is held responsible for

34 013Info, 2022, Pančevac napravio elektroautomobil i već deset godina ne može da ga registruje, *013info*, 27 June, (https://013info.rs/vesti/drustvo/pancevac-napravio-elektroautomobil-i-10-godina-ne-moze-da-ga-registruje, 13. 8. 2023).

35 In some countries, such as China, this used to be free of charge for a long time, but presently the price policy is different. See Li, G., Walls, W. D., Zheng, X., 2023, Differential License Plate Pricing and Electric Vehicle Adoption in Shanghai, China, *Transportation Research Part A: Policy and Practice*, 172.

36 Hevelke, A., Nida-Rümelin, J., 2015, Responsibility for Crashes of Autonomous Vehicles: An Ethical Analysis, *Science and Engineering Ethics*, 21, pp. 628–629.

damage if it was caused by such a defect.[37] Based on these provisions, it could be claimed that the manufacturer can be held responsible for damages caused by a vehicle in motion, when such damage is caused by an initial defect of the vehicle.

The solutions that presently exist in Serbian law seems clear, rational and applicable to electric cars, but the question remains how they will be interpreted in practice. However, the Serbian criminal law does not seem to recognize the responsibility of the driver or manufacturer of autonomous vehicle in cases of criminal acts against public transport, which law shall be changed. Hence, it is advisable to set the specific provisions concerning the responsibility in connection with autonomous electric vehicles, so that in future there is no uncertainty regarding this issue.[38]

## 9. Conclusion

We are witnessing a global explosion in the demand for electric and hybrid vehicles, which enables the progress towards climate neutral goals. Many of the strongest world economies are still not fully supporting a fast transition toward a more energy-efficient society. However, the anti-carbon and anti-pollution coalition is increasing with each United Nations Climate Change Conference, which shows that the world is more and more cautious about climate change issues.

The energy transition is one of useful and necessary tools in the fight for a climate neutral world. Without a fast transition to renewable energy sources, climate neutrality will not be reached in the next several decades. The time is running out for the world, and governments need to do whatever is in their power to support a smooth and sustainable transition, leaving conventional energy sources behind. One of the instruments of energy transition can be the switch to electric and hybrid vehicles.

The demand for electric and hybrid vehicles will therefore be used to meet the energy transition goals. The issues raised in this paper should help the Serbian legislator and decision-makers in general to establish regulations and practices that will enable electric and hybrid vehicles to become one of the pillars of the energy transition. Furthermore, a general

37 Law of Contract and Torts, Arts. 178–179, *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 – decision of CCY and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/03 – Constitutional Charter and *Official Gazette of the RS*, No. 18/20.

38 For more on liability involving autonomous vehicles see Noussia, K., Autonomous Vehicles: Legal Considerations and Dilemmas, in: Marano, P., Noussia, K. (eds.), 2020, *InsurTech: A Legal and Regulatory View*, 1, Cham, Springer, pp. 255–258.

regulatory framework should also be designed as an energy transition support mechanism.

The question whether in Serbia electric vehicles are an instrument for the energy transition cannot be answered at the present. Actually, the answer is – it depends. The general public and the experts in this field expect that this answer will change to "yes", but still need to wait a bit until that moment.

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# ELEKTRIČNA VOZILA U REPUBLICI SRBIJI: INSTRUMENT ENERGETSKE TRANZICIJE?

Miloš Kuzman

APSTRAKT

Sve učestalije globalne posledice klimatskih promena nisu zaobišle ni Republiku Srbiju. Kako se brojnim međunarodnim konvencijama obavezala da preduzme mere koje će smanjiti uticaj klimatskih promena, Republika Srbija je započela sprovođenje energetske tranzicije kao jednog od instrumenata uz pomoć koga će postići preuzete ciljeve. Vozila na električni pogon, odnosno hibridna vozila predstavljaju način uz pomoć koga se energetska tranzicija može ubrzati i u aprilu 2021. godine osnovne odredbe o njima su našle mesto u pozitivnom zakonodavstvu. U ovom radu se razmatra da li doneti propisi u ovoj oblasti predstavljaju dobru polaznu osnovu za dostizanje ciljeva energetske tranzicije kao i šta je potrebno dodatno učiniti da bi se njihovom primenom postigao željeni efekat.

**Ključne reči:** klimatske promene, energetska tranzicija, električna vozila, obnovljivi izvori energije, autonomna vozila.

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*Tamara Ilić**

# LONG-AWAITED NEW HISTORY OF MEDIEVAL SERBIAN LAW

## Srđan Šarkić, *A History of Serbian Mediaeval Law*, Leiden–Boston, Brill, 2023, 616 pp.

As the 39th volume in its series Medieval Law and Its Practice, the prestigious publisher Brill published *A History of Serbian Mediaeval Law* (2023) by Srđan Šarkić, a long-time researcher of mediaeval Serbian and Byzantine law and a retired professor of the Faculty of Law of the University of Novi Sad. The monograph has 616 pages, which, in addition to the research part of the text with a critical apparatus, contain a list of the latest editions of sources and the relevant secondary literature, as well as indexes of names, places, and technical terms, all of which makes the book a helpful tool in research projects.

The subject matter of the book is split into six parts. The first looks at the historical background, sources, and the concept of law. It briefly familiarizes the reader with the history of the Serbian state by listing the most important rulers and events, from the first ruling family known to us, the House of Vlastimirović, until the collapse of the Serbian medieval state with the fall of its capital, Smederevo, into Ottoman hands in 1459. The author then explains the legal sources analyzed in the following chapters, systematizing them into pre-12th century sources, charters, treaties with Dubrovnik/Ragusa, the Nomocanon of Saint Sava, the Codification of Emperor Dušan (Dušan's Code with the Syntagma and the so-called Code of Justinian), the Mining Law issued by Stefan Lazarević, and the Slavonic manuscript of the Farmer's Law. This is followed by an overview of the relevant literary and epigraphic sources. Before proceeding to expound his subject by legal branch, the author explains the concept of law in the Serbian medieval state, which did not follow the traditions established in the developed Roman law but represented a continuation of the

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Byzantine understanding of law (νόμος) as act passed by the rulers; in other cases, he proposes authentic readings, in which the law is a general rule independent of the ruler's person.

The second part, The Law of Persons, traces the different scopes of the rights and duties of specific groups of people in medieval Serbia. Based on examples from the Hilandar and Žiča charters, the author describes several social strata known to have emerged in the earliest period, supplementing this with information from Dušan's Code, which reveals a society stratified into noblemen (*vlastela*), commoners (*sebri*), townsmen (*gradjani*), and foreigners (*stranci*), with each group analyzed in its own chapter. Multiple sources were used for every class or stratum; the rights and duties the law prescribed for them are explained, as is the sub-stratification process, with Byzantine analogies listed.

The third part of Professor Šarkić's *A History of Serbian Mediaeval Law* is entitled Constitutional Law. It addresses the complex question of the nature of Dušan's Code as the highest state-legal act by analyzing some of its provisions and revisiting the conclusions of prominent medievalists, including an explanation of the medieval understanding of statehood. The author then outlines the place of the Serbian state in the so-called Byzantine commonwealth and compared to the Byzantine emperor as the figure that headed this hierarchy. Serbian legal documents adopted the Byzantine ruling ideology described in the Macedonian-era collection *Isagoge*, which, among other things, described the roles of the ruler. The well-known relationship of equality and balance between political and ecclesiastical authority, known as the symphony doctrine, was also adopted into the Serbian milieu from the Byzantine tradition, although the Serbian compiler or translator modified it in the process. The Serbian medieval ruler and his titulature, clerks, dignitaries, and state councils are discussed in a chapter that includes a broader historical analysis, from the pre-12$^{th}$ century period to the Byzantinization of the Serbian state to the fall of the Despotate. Another chapter is devoted to the Serbian Orthodox Church, organized first as the autocephalous Archbishopric of Žiča and later as the Patriarchate of Peć, including the historical background, delineation of their bishoprics, and listing the relevant legal documents.

The last three parts are more narrowly focused on jurisprudence. The part Civil Law explores the understanding of natural and legal persons; property is discussed at length in a separate chapter, tracing the Roman notion of *res* in Serbian medieval law, property rights through the double-pronged concepts of *baština* and *pronoia*, focusing on how they were acquired, limited rights of ownership – easements, liens, and long-term land leases, understood in Serbian medieval sources in Roman terms, with

smaller or larger departures; the law of obligations, with numerous charters examined and some conclusions drawn from the sources in regards to contracts (sale and purchase agreements, barter, gift, depositum, lease, loan, commodate/loan for use, and societas/partnership). The chapter on The Law of Wills and Succession traces two types of grounds for claiming inheritance that made their way from the Roman tradition via Byzantine law to Serbian legislation: the law and wills, as well as the legal institute of *mortis causa* – donation in the prospect of death or deathbed gifts. The following chapter, Family Law, explores the concepts of marriage, matrimonial impediments, marital property, divorce, and the family cooperative as a distinctive feature of Serbian society up to the 13$^{th}$ century.

Part 5, Criminal Law, delves into the concept of culpability and its source and the elements that constitute a criminal offense. It lists the punishments mentioned in the sources, with the author examining their authenticity while also discussing spiritual sanctions. He includes a detailed classification of criminal offenses and their analysis (crimes against the state and sovereign, against the judicial system, against public peace and order, against the church and religion, against the person, against morality, and against property). The final part, Court System and Trial Procedure, looks at the peculiarities of the medieval practice, exploring the powers of noblemen's courts, the court of good men, church courts, town courts, foreigner courts, and so-called *stanak*. The ruler's judicial prerogative (*vladarev rezervat*) is assessed from several angles based on charters from various periods. The trial procedure, its course and its participants, with all the peculiarities of Serbian medieval law, are illustrated using examples from Dušan's Code and offer grounds for an analysis in the last chapter.

The appearance of an English-language history of Serbian medieval law is a pioneering effort that will make it much easier for scholars of medieval law who are not native speakers of Serbian to explore this judicial system. In addition, this voluminous and comprehensive work, which includes an analysis of legal monuments in Serbian-Slavonic and Greek, another language that Serbian medieval rulers used in their charters, covers the entire corpus of private and public law. It is the first monograph of its kind since the interwar period, when Professor Teodor Taranovski published his seminal work. All of the above, with a modern critical apparatus, helpful appendices, and accurate and deft use of English legal terminology, makes this book a much needed and welcome addition to the literature available to active and future scholars.

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*Erazem Bohinc**

# CRISES, EVOLUTION, AND THE FUTURE OF EU CONSTITUTIONALISM

## Matej Avbelj (ed.), *The Future of EU Constitutionalism*, Oxford, Hart Publishing, 2023

The monograph *The Future of EU Constitutionalism*, edited by the anthology editor Prof. Dr. Matej Avbelj (New University, Ljubljana), offers a comprehensive examination of the critical issues of constitutionalism within the European Union (EU). The book consists of a collection of eleven thought-provoking chapters written by the leading scholars of EU law. Each chapter contributes to a unique perspective on the EU constitutionalism discourse and elaborates on the book's main question and essence – is there a real and meaningful future for EU constitutionalism? The monograph delves into the perplexing nature of the EU's constitutional framework and its contemporary challenges, be it both endogenous or exogenous. *Inter alia*, these challenges include the intra-EU political schisms, the financial crisis, the migration crisis, the COVID-19 pandemic, as well as broader geopolitical events (e.g. migration crisis, war in Ukraine).

The authors highlight the need to reevaluate the EU's constitutional foundations, the importance of common values, and the role of dialogue in resolving constitutional conflicts. The Conference on the Future of Europe (the Conference), which the EU institutions organised from April 2021 to May 2022, was seen as a unique opportunity for addressing these issues and shaping the EU's path forward. This Conference ran parallel to the research project[1] from which this book resulted. The research project thus had an excellent insight into this "democratic experiment", which was organised in the form of the Conference. However, it needs to be noted that the constitutional mandate for the big 'C' formal

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1 The Integral Theory of the Future of Europe, Slovenian Research Agency Research Project J5–1791 (A),(https://eufuture.nova-uni.si/en/home/).

constitution-making process was missing from the Conference. Thus, it (unfortunately) did not follow the Ljubljana Initiative from April 2016, where the European Faculty of Law, New University, organised the Conference on the new constitutional process and the new draft treaty establishing a constitution for the EU.[2]

In substance, the book first opens with a theoretical debate on EU constitutionalism, followed by chapters addressing the EU's constitutional values. This is followed by the EU's formal, political, and economic constitution and concludes with a question of sovereignty in the EU, a foundational concept of modern constitutionalism.

As mentioned earlier, the future of the EU is uncertain as it faces several challenges of different natures. Avbelj convincingly argues that the *status quo*, marked by pragmatic *ad hoc* responses to crises, is unsustainable. The recent Conference has indicated the need for more fundamental changes, not limited to potential EU Treaty revisions. However, a unified stance by the MSs on the extent of these changes is missing to achieve the revitalisation of the EU. For example, France has proposed a more ambitious vision of an EU political community that includes non-EU countries committed to democracy and the rule of law. Avbelj predicts that the burden of EU constitutionalism will continue to grow due to increased integration in various domains. This should ultimately lead to a new constitutional settlement; however, the latter's timeline is undefined.

As part of the introductory debate, Neil Walker engages with the paradox of EU constitutionalism and the nature of the EU's constitutional development. The latter can be described as incremental and has been characterised by accumulating specific institutional and policy competencies without a broader constitutional framework. Several crises the EU has faced recently highlighted the need to address unresolved integration and polity identity questions. While the EU has managed to survive these challenges, it faces the ongoing dilemma of whether to confront and resolve broader constitutional questions for the sake of its legitimacy.

At this crossroads the EU is facing now, the answer to the underlying dilemmas might be in the common values in the EU and revisiting their role in addressing legitimacy concerns. Alun Gibbs advocates that common values are essential for legitimising EU governance, but they alone cannot resolve the deeper issue of the uncertainty of the political form. Furthermore, Gibbs suggests that common values can contribute to developing

2 The Ljubljana Initiative on new constitutional process and new draft treaty establishing a Constitution for European Union, (https://www.politico.eu/wp-content/uploads/2017/01/The-Ljubljana-initiative.pdf). The Ljubljana initiative was first signed by Borut Pahor, then the President of the Republic of Slovenia.

political solidarity and a common constitutional space, but this requires overcoming the challenge of constructing values rooted in the EU's shared political experience rather than individual MSs' traditions. Thus, the Conference was a welcomed democratic consultation and an opportunity to foster dialogue, if not the big 'C' formal constitution-making process.

In the next chapter of the book, Matej Avbelj elaborates on the idea that a federal culture may be seen as a prerequisite for European integration and achieving this big 'C' constitutionalism. Moreover, the federal culture, which includes common public ethos and commitment to the EU, should be the building stone for pursuing and achieving a deeper integration. However, building such a culture faces challenges, as it should be embraced by the EU citizens and be broader than purely economic or functional integration. Thus, the Conference and other similar events in the future may help assess the extent of this federal culture. However, it must be noted that the federal culture awareness may likely vary among MSs. Avbelj thus suggests a model of differentiated integration with a formal constitution for MSs, which gravitates closer to the centre of several concentric circles and a treaty framework for those MSs with weaker federal cultures and thus lower intensity of integration – i.e. further away from the centre of concentric circles.

Mattias Wendel then tackles the EU's formal constitution and the autonomy of the EU's legal order. In this regard, the impact and resolution of the Public Sector Purchase Program (PSPP) conflict highlights the underlying conflict concerning the constitutional foundations of the EU. Ultimately, as Wendel shows, this boils down to the question of *Kompetenz-Kompetenz,* which cannot be legally resolved. In the end, this conflict was settled politically through, firstly, what Wendel calls "constructive misunderstandings". It was clear to both the European Commission and the German Federal Government that this conflict could not reach a final solution in legal terms, so the Federal Government ultimately used the strategy of appeasement and refrained from issuing a legally detailed response to the Commission. Secondly, as Wendel proved, such conflict required an ongoing dialogue.

Very relevant in this regard is also Martinico's chapter which provides an intriguing study of the historical relationship between Thomas Jefferson and John C. Calhoun concerning secession and nullification. *Historia magistra vitae est* – the author draws parallels between the pre-Civil War United States and the EU today, emphasising the enduring relevance of concepts like nullification and the intricacies of federalism. This chapter encourages readers to consider the EU's evolving federal dynamics in a Jeffersonian context when American federalism was developed.

The book then continues with chapters focusing on EU constitution from the political and economic sides. Sacha Gerben dives into the EU's constitutional issues by focusing on three crucial political issues – firstly, the lack of popular sovereignty; secondly, normative hierarchy imbalances (fundamental market freedoms are over-constitutionalised); and thirdly, the under-constitutionalisation of EU integration. Gerben advocates that the contemporary quasi-constitutional order of the EU is not sustainable in the long term. He believes it is necessary to address these problems comprehensively and, preferably, simultaneously, as these issues are of existential importance to one another when pursuing the ultimate goal of the EU – a stable constitutional democracy. More drastically, the EU could also abandon its constitutional aspirations, effectively and significantly reducing the EU's authority.

Federico Fabbrini's chapter, on the other hand, investigates the economic predicaments of the EU constitution through the prism of the transformative changes resulting from the wide-ranging impacts of COVID-19. The latter is considered pivotal for the EU and the Europeans. Consequently, the EU adopted unprecedented measures, *inter alia*, in the field of economic governance, which, as opposed to other aspects of EU integration (most prominently, the free movement of people and workers), accelerated the integration within the Economic and Monetary Union (EMU). Especially innovative in this regard was the Next Generation EU (NGEU). The latter empowered the EU to borrow money and allocate resources to the MSs, bridging the economic and monetary pillars of EU fiscal integration.

Cormac Mac Amhlaigh's chapter examines the EU's decade-long crises and the issue of legitimacy. However, despite the crises, as the title of the chapter says: *Eppur Esiste*. The history of the EU is a showcase of persistence and existence despite challenges or opposition. Amhlaigh offers a fresh perspective by adopting a political realist approach based on Bernard Williams's philosophy to manage crises effectively. Amhlaigh's contribution calls for reevaluating EU legitimacy in a more practical and context-appropriate manner.

In the last two chapters, Daniel Augenstein and Katarina Vatovec focus on the issues of sovereignty in the EU. Augenstein delves into the multifaceted nature of EU sovereignty within the global context of economic globalisation, highlighting sustainability and social responsibility. He warns against the neoliberal emptying of democratic welfare-state regimes and imposing predominantly economic EU regulatory standards in the MSs if the EU sovereignty would be strengthened. Katarina Vatovec, on the contrary, presents a more positive stance on the issue of EU sovereignty. Vatovec highlights the

need for legislative adaptations in the EU's approach to extraterritorial sanctions and the importance of a unified EU stance. However, this should not be pursued by emphasising the MSs' sovereignty, considering the globalised nature of the challenges, as this would further add to the fragmentation and disunity. To the contrary, this should be addressed by a comprehensive and efficient normative response on the EU level and facilitated by achieving a broader dialogue on extraterritorial sanctions.

Although the book clearly shows the concept of the EU and that constitutionalism is a multifaceted issue, there is a clear red thread that connects the book's content in a very compelling manner. Even though the book addresses various issues, it does so adeptly in a holistic manner as it addresses the historical context, contemporary challenges, and potential solutions. Drawing upon the past crises and their impact on EU integration, the book proves that the EU is a unique political project. The prospect of preserving the EU's existence has frequently served as a consequence and an incentive for furthering the integration, highlighting the notion of "perseverance" as a core driving force. Most recently, these examples include geopolitical events, such as the war in Ukraine, which sparked the discussions on potentially creating the EU armed forces[3]. This would be rather unimaginable before the start of this war.

In summary, the future of EU constitutionalism is uncertain and subject to ongoing political and legal developments. Whether there will be a real and meaningful future for EU constitutionalism depends on how the MSs and EU institutions navigate between the Scylla and Charybdis regarding the complex issues of integration, sovereignty, democratic governance, and adaptation to changing circumstances. It is a dynamic process which continues to evolve. The book offers valuable insights for scholars, policymakers, and anyone interested in EU constitutionalism's ever-evolving nature.

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3 EU leaders approve updated military plan, (https://www.politico.eu/article/eu-leader-approve-defense-military-plan/, 3. 11. 2023). Defense: Is the EU creating a European army?, (https://www.europarl.europa.eu/news/nl/headlines/security/20190612STO54310/defensie-creeert-de-eu-een-europees-leger, 3. 11. 2023).

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# HRONIKA PRAVNOG FAKULTETA UNIVERZITETA UNION U BEOGRADU (1.10.2022 – 30.9.2023)*

## IZBORI NASTAVNIKA I SARADNIKA

1. Prof. dr Nebojša Šarkić izabran je 31. maja 2023. godine u zvanje profesora *emeritusa*.
2. Ankica Dragin reizabrana je počev od 20. maja 2023. godine u zvanje nastavnika engleskog jezika.
3. Petar Mitrović izabran je 3. oktobra 2022. godine u zvanje demonstratora na OAS za užu Teorijskopravnu naučnu oblast.
4. Igor Popović izabran je 3. oktobra 2022. godine u zvanje demonstratora na OAS za užu Krivičnopravnu naučnu oblast.
5. Ana Vladisavljević izabrana je 20. marta 2023. godine u zvanje demonstratorke na OAS za užu Javnopravnu naučnu oblast.

## ODBRANJENE DOKTORSKE DISERTACIJE

1. Ivana Stjelja, doktor nauka – pravne nauka, doktorirala je 29. avgusta 2023. godine odbranivši disertaciju pod nazivom „Učešće javnosti u ostvarivanju ekološke pravde u Srbiji".

## ODBRANJENI MASTER RADOVI

1. Andrijana Polić, master pravnik iz oblasti Korporativno pravo i pravo organizacija, odbranila je 14. marta 2023. godine master rad pod nazivom „Pravno regulisanje investicionih fondova u EU i Republici Srbiji";
2. Ružica Popović, master pravnik iz oblasti Međunarodno privredno pravo, odbranila je 26. aprila 2023. godine master rad pod nazivom „Rešavanje sporova u vezi sa poslovnim tajnama u međunarodnim poslovnim odnosima";
3. Gordana Bjelica, master pravnik iz oblasti Međunarodno privredno pravo, odbranila je 28. aprila 2023. godine master rad pod nazivom „Uloga i pravni značaj bankarske garancije u međunarodnim poslovima";
4. Nevena Ilić, master pravnik iz oblasti Korporativno pravo i pravo organizacija, odbranila je 8. maja 2023. godine master rad pod nazivom „Evropska centralna banka – pravni položaj, uloga i značaj";
5. Bojana Ćirić, master pravnik iz oblasti Korporativno pravo i pravo organizacija, odbranila je 8. juna 2023. godine master rad pod nazivom „Javni prihodi jedinica lokalne samouprave u Republici Srbiji";

* Priredila Jovana Popović, asistent, Pravni fakultet Univerziteta Union u Beogradu

6. Tamara Sićević, master pravnik iz oblasti Korporativno pravo i pravo organizacija, odbranila je 19. septembra 2023. godine master rad pod nazivom „Posebna dužnost prema društvu – dužnost prijavljivanja poslova i radnji u kojima postoji lični interes";
7. Ivana Dimitrijević, master pravnik iz oblasti Pravosudno-organizaciono pravo, odbranila je 20. septembra 2023. godine master rad pod nazivom „Pravila profesionalnog ponašanja nosilaca pravosudnih profesija".

## USPESI NAŠIH NASTAVNIKA

- Troje profesora PFUUB-a – predsednik PFUUB-a prof. emeritus Nebojša Šarkić, prof. dr Bogoljub Milosavljević i prof. dr Jelena Jerinić – od Udruženja ombudsmana Srbije dobilo je zahvalnice za stručni i naučnoistraživački doprinos afirmaciji institucije ombudsmana u Republici Srbiji.
- Prof. dr Jelena Jerinić je reizabrana za članicu Grupe nezavisnih eksperata za Evropsku povelju o lokalnoj samoupravi, savetodavnog tela Kongresa lokalnih i regionalnih vlasti Saveta Evrope.
- Asistent Nikola Kovačević je izabran za ličnost godine većinom glasova uređivačkog kolegijuma nedeljnika „Vreme". Kako su istakli iz uređivačkog kolegijuma, Kovačević već više od deset godina predano i profesionalno podržava tražioce azila i izbeglice, pomažući im da tokom procedure za dobijanje azila – u slučajevima kolektivnog proterivanja, pronađu skloništе, nađu posao, ostvare pristup zdravstvenom i obrazovnom sistemu. „Ličnim primerom je pokazao kako se zaista bori za ljudska prava i kako se takvim trudom pomeraju granice sistema", navodi se u obrazloženju „Vremena".
- Doc. dr Đorđe Sibinović je dobitnik Vukove nagrade za 2022. godinu. Vukova nagrada je priznanje koje po tradiciji dodeljuje Kulturno-prosvetna zajednica Srbije već 59. put zaredom. Među 84 kandidata, žiri u kojem su bili prof. dr Darko Tanasković, filolog orijentalista, Zoran Gutović, izdavač, prof. dr Uroš Dojčinović, muzički umetnik, Bora Dugić, muzičar, Selimir Radulović, književnik, prof. dr Elizabeta Ristanović, profesor na VMA, Radovan Trnavac Mića, slikar, i Živorad Ajdačić, reditelj i scenarista, odlučio je da nagradu dobije deset istaknutih ličnosti iz oblasti nauke, kulture, prosvete i umetnosti.

## IZDAVAČKA DELATNOST

### *Udžbenici*

- Violeta Beširević, *Osnovi ustavnog prava Evropske unije*, 2023;
- Marko Božić, *Uvod u pravo*, 2023;
- Aleksa Radonjić, *Osnovi potrošačkog prava*, 2023;
- Vladimir V. Vodinelić, *Građansko pravo: uvod u građansko pravo i opšti deo građanskog prava, 5. izdanje*;
- Srđan Šarkić, *Osnovi pravne istorije, 9. izdanje*;
- Srđan Šarkić, *Osnovi rimskog prava, 7. izdanje*;
- Dušan Kitić, *Međunarodno privatno pravo*, *4. izdanje*;
- Nataša Mrvić Petrović, *Krivično pravo: opšti deo, 7. izdanje*;

- Bogoljub Milosavljević, *Upravno pravo, 8. izmenjeno i dopunjeno izdanje*;
- Bogoljub Milosavljević, Dragoljub Popović, *Ustavno pravo, 9. izdanje*;
- Milan Počuča, Nebojša Šarkić, *Porodično pravo i porodičnopravna zaštita, 8. izdanje*.

### *Monografije*

- Mladen Nikolić, Nebojša Šarkić, *Komentar Zakona o izvršenju i obezbeđenju: sudska praksa i propisi s posebnim dodatkom o građanskom izvršnom postupku: prema stanju zakonodavstva od 1. jula 2022. godine, 4. izmenjeno i dopunjeno izdanje*.

### *Zbornici radova*

- Bogoljub Milosavljević (ur.), Jelena Jerinić (ur.), Marko Tomašević (ur.), *Lokalni ombudsmani u gradovima i opštinama Srbije.*

### *Praktikumi, skripta i drugi nastavni materijali*

- *English for Law Students I: Second Year of Undergraduate Academic Legal Studies;*
- *English for Law Students II: Third Year of Undergraduate Academic Legal Studies;*
- Slobodan Vukadinović, *Praktikum za Osnove građanskog i privrednog prava*.

## PROMOCIJE KNJIGA

- Promocija knjige prof. dr Violete Beširević, *Osnovi ustavnog prava Evropske unije* održana je 4. aprila 2023. godine na našem fakultetu. O knjizi su govorili: prof. Miodrag Jovanović, redovni profesor Pravnog fakulteta u Beogradu, prof. Andrej Savin, dekan pravnih studija na Poslovnom univerzitetu Kopenhagen, prof. Igor Štiks, redovni profesor Fakulteta za medije i komunikacije u Beogradu, i autorka, a moderator je bio prof. Marko Božić, prodekan za nastavu našeg fakulteta. Promociji su pored nastavnika i nastavnica i studenata i studentkinja PFUUB-a prisustvovali i brojni dragi gosti našeg fakulteta – stručnjaci iz oblasti prava, sudije, tužioci, advokati i predstavnici civilnog sektora.

## PROJEKTNA DELATNOST

### Projekti koje finansira Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije

- Uticaj Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda na vladavinu prava u Sloveniji i Srbiji – Ovo je projekat koji se u okviru bilateralne saradnje PFUUB-a ostvaruje sa Evropskim pravnim fakultetom Univerziteta Nova univerza iz Ljubljane. Rukovodilac projekta za Srbiju je prof.

dr Violeta Beširević, a projektni tim PFUUB-a čine još prof. dr Tatjana Papić, prof. dr Jelena Jerinić, doc. dr Aleksa Radonjić, Boris Topić, student doktorskih studija na Fakultetu i Uroš Siljanović, student doktorskih studija na Fakultetu. Projekat se bavi implementacijom Evropske konvencije o ljudskim pravima i osnovnim slobodama u pravnim sistemima Slovenije i Srbije, sa stanovišta ljudskih prava kao preduslova zaštite vladavine prava.

## Međunarodni projekti

- COST Action 18123: *The Pan-European Family Support Research Network: A bottom-up, evidence-based and multidisciplinary approach* (2018–2023). Projekat uspostavlja mrežu istraživača za podršku porodici iz preko 20 zemalja, koja uvažava zajedničke ciljeve država u pogledu podrške porodici i razvoja politika roditeljstva, ali prepoznaje i kulturološke specifičnosti, kao i posebnosti porodičnog konteksta. Osnovni ciljevi projekta prevashodno se vezuju za koordinaciju relevantnih istraživanja, kao i za jačanje kapaciteta postojećih sistema podrške porodici. Projekat koordinira Univerzitet u Sevilji (Španija), a u njemu učestvuju prof. dr Jelena Arsić, kao rukovodilac za Srbiju, i prof. dr Jelena Jerinić, kao zamenica rukovodioca za Srbiju. Projekat je dobio još jednu potvrdu od izuzetnog naučnog značaja kada mu je nedavno dodeljen prvi COST Innovators Grant u oblasti društvenih nauka. Ovaj uspeh samo potvđuje činjenica da je za ovu i narednu godinu dodeljeno samo pet ovakvih grantova u svim naučnim oblastima.
- COST Action CA19143: *Global Digital Human Rights Network* (2020–2024). Prof. dr Violeta Beširević, rukovodilac za Srbiju, imenovana je u Upravni odbor koji upravlja projektom, a prof. dr Jelena Simić, za njenog zamenika. Globalna mreža za digitalna ljudska prava ima za cilj da na sistematski način istraži teorijske i praktične probleme vezane za zaštitu ljudskih prava u onlajn kontekstu. Prof. dr Violeta Beširević je učestvovala na sastanku Upravnog odbora projekta održanom 27–28. aprila na Pravnom fakultetu Sveučilišta u Rijeci.
- COST Action CA21120: *The History of Identity Documentation in European Nations (HIDDEN)*. COST mreža Istorija dokumentacije o identitetu u evropskim nacijama okuplja naučnike iz istorije, studija migracija, geografije, sociologije, prava, lingvistike, postkolonijalnih studija, ljudskih prava i drugih srodnih oblasti u cilju analize istorije režima ID u Evropi i šire, povezujući prošlost i sadašnjost. U kontekstu plana održivog razvoja UN, u kome se navodi da svako treba da ima pravni identitet do 2030. godine, i razvoja novih oblika biometrijskih indentifikacionih dokumenata, kao što su sertifikati o vakcinaciji protiv virusa kovid 19, pravo je vreme da interdisciplinarna i multidisciplinarna grupa naučnika kritički ispita istorijske i savremene prakse koje su uticale ili mogu uticati na povećanje društvene nejednakosti. Rukovodilac projekta za Srbiju je prof. dr Violeta Beširević, a u projektu učestvuju i prof. dr Marko Božić i doc. dr Srđan Milošević. Prof. dr Violeta Beširević učestvovala je na sastanku Upravnog odbora projekta i konferenciji održanoj na Univerzitetu Mejnot, u Mejnotu, Irska, 21–22 juna 2023.

# KONFERENCIJE, OKRUGLI STOLOVI I SAVETOVANJA KOJE JE ORGANIZOVAO FAKULTET

- Naučno-stručni skup „Maloletnički brak i izazovi u zaštiti prava deteta" – Na Pravnom fakultetu Univerziteta Union u Beogradu održan je 21. oktobra 2022. godine naučno-stručni skup pod nazivom „Maloletnički brak i izazovi u zaštiti prava deteta". Cilj skupa je bio da se na multidisciplinaran način sagleda postojeće stanje u Republici Srbiji, razmotre potrebna unapređenja zakonodavstva, politika i prakse na putu ka boljoj i efikasnijoj zaštiti prava deteta i da se doprinese akademskom i društvenom dijalogu u ovoj oblasti. Skup je organizovan u hibridnom formatu, u prostorijama PFUUB-a i onlajn, preko Zoom internet platforme.
- Seminar o primeni Zakona o izvršenju i obezbeđenju – Na Pravnom fakultetu Univerziteta Union u Beogradu održan je 21. decembra 2022. godine Seminar o primeni Zakona o izvršenju i obezbeđenju na temu „Opšta pravila o postupku izvršenja". Predavači su bili prof. dr Nebojša Šarkić i doc. dr Zoran Vavan, licencirani predavači za stručnu obuku javnih izvršitelja prema sertifikatu Komore javnih izvršitelja. Na skupu je učestvovao i odgovarao na pitanja Mladen Nikolić, sudija Privrednog apelacionog suda u Beogradu. Na savetovanju su bila obrađena, dodatno, u okviru diskusije i sva sporna pitanja iz domena primene Zakona o izvršenju i obezbeđenju koji se primenjuje od 1. 1. 2020. godine. Program seminara usaglašen je sa aktom o stručnom usavršavanju koji se primenjuje za permanentnu edukaciju javnih izvršitelja. Učešće na seminaru organizovano je neposredno, u prostorijama Fakulteta i onlajn, preko Zoom internet platforme. Učesnici seminara dobili su sertifikat priznat od strane Komore javnih izvršitelja.
- Seminar za javne izvršitelje – Pravni fakultet Univerziteta Union u Beogradu organizovao je 10. marta 2023. godine Seminar za javne izvršitelje na temu „Uloga i položaj učesnika izvršnog postupka". Predavači su bili prof. dr Nebojša Šarkić i doc. dr Zoran Vavan, licencirani predavači za stručnu obuku javnih izvršitelja prema sertifikatu Komore javnih izvršitelja. Na skupu su uzeli učešće i odgovarali na pitanja Mladen Nikolić, sudija Privrednog apelacionog suda u Beogradu i Zoran Rogić, sudija Višeg suda u Beogradu. Program seminara usaglašen je sa aktom o stručnom usavršavanju koji se primenjuje za permanentnu edukaciju javnih izvršitelja. Učešće na seminaru organizovano je neposredno, u prostorijama Fakulteta i onlajn, preko Zoom internet platforme. Učesnici seminara dobili su sertifikat priznat od strane Komore javnih izvršitelja.
- Regionalna konferencija „60 godina od donošenja Ustava iz 1963. godine – pogled iz ugla savremenog prava" održana je 21. aprila 2023. godine na Pravnom fakultetu Univerziteta Union u Beogradu. Konferencija je organizovana u saradnji sa časopisom „Arhiv" za pravne i društvene nauke i Udruženjem pravnika Srbije. Jugoslovenski Ustav iz 1963. godine doneo je značajne promene u ustavni život socijalističke Jugoslavije, a 2023. godine se navršava 60 godina od njegovog donošenja, što je podstaklo ideju da se organizuje naučni skup. U radu Konferencije učestvovali su naučni radnici i istraživači iz nekoliko republika bivše Jugoslavije koji su svojim izlaganjima otvorili čitav niz ustavnopravnih, pravnoistorijskih i politikološko-ideoloških pitanja. Među izlagačima su bili sudije Ustavnog suda i advokati koji su

rezultatima svojih istraživanja otvorili brojna praktična pitanja. Konferenciju su pozdravnim rečima otvorili prof. dr Violeta Beširević, dekanica Pravnog fakulteta Univerziteta Union u Beogradu, prof. dr Vladimir Čolović, direktor Instituta za uporedno pravo, i prof. dr Nebojša Šarkić, predsednik Pravnog fakulteta Univerziteta Union u Beogradu i predsednik Udruženja pravnika Srbije.

- Okrugli sto „Politika otpriznanja pre i posle sporazuma u Briselu i Ohridu", u okviru projekta „Monitoring i indeksiranje mira i bezbednosti na Zapadnom Balkanu" podržanog od strane Fonda za nauku Republike Srbije, održan je 24. aprila 2023. godine na Pravnom fakultetu Univerziteta Union u Beogradu. Učesnici okruglog stola bili su Violeta Beširević i Tatjana Papić sa Pravnog fakulteta Univerziteta Union u Beogradu i predavači i istraživači Aleksandar Milošević, Filip Ejdus, Marko Kovačević, Jelena Pejić Nikić, Jelena Lončar, Tijana Rečević i Stefan Surlić sa Fakulteta političkih nauka Univerziteta u Beogradu. Oni su govorili o pitanju statusa Kosova i predstavili početnu fazu svog istraživanja. Osvrnuli su se na aktuelnu političku situaciju na međunarodnom planu i ulogu velikih sila u dijalogu Beograda i Prištine. Panelisti su istakli značaj proučavanja kriterijuma za klasifikaciju država na one koje su priznale nezavisnost Kosova, države koje to nisu uradile i države koje su svoje inicijalno priznanje povukle. Fokus daljeg istraživanja usmeren je na prikupljanje podataka o državama koje su otpriznale Kosovo. Tom prilikom predstavljen je i novi vebsajt statusofkosovo.info koji ima za cilj da na vizuelno atraktivan način, zasnovan na podacima, ponudi objektivnu i ažuriranu sliku o stanju međunarodnog (ot)priznanja Kosova. Moderatorka okruglog stola je bila Sonja Stojanović Gajić iz Beogradskog centra za bezbednosnu politiku. Okrugli sto su organizovali Fakultet političkih nauka Univerziteta u Beogradu, Fakultet organizacionih nauka Univerziteta u Beogradu i Pravni fakultet Univerziteta Union. Projekat „MIND – Monitoring i indeksiranje mira i bezbednosti na Zapadnom Balkanu" realizuje se u okviru programa IDEJE Fonda za nauku Republike Srbije.
- Naučni skup „Reforma pravosudnog sistema Srbije" – Na Pravnom fakultetu Univerziteta Union u Beogradu održan je 12. i 13. maja 2023. godine dvodnevni naučni skup na temu „Reforma pravosudnog sistema Srbije". Imajući u vidu započete reforme u pravosudnom sistemu Srbije, Pravni fakultet Univerziteta Union u Beogradu, Institut za uporedno pravo i Udruženje pravnika Srbije organizovali su dvodnevni naučni skup sa ciljem da se čuje reč teorije, prakse, ali i onih koji su neposredno učestvovali u procesu reforme pravosuđa.
- Konferencija za mlade istraživače ELLYS (European Labour Law Young Scholars) – Pravni fakultet Univerziteta Union u Beogradu 8. i 9. juna 2023. godine bio je domaćin uspešne konferencije za mlade istraživače ELLYS na temu „Rekonfiguracija temelja radnog prava i prava socijalne sigurnosti: suočavanje sa aktuelnim izazovima". ELLYS predstavlja ogranak Međunarodnog društva za radno pravo i pravo socijalne sigurnosti (*International Society for Labour and Social Security Law – ISLSSL*) koji već tradicionalno, na godišnjem nivou, organizuje ovakve konferencije sa ciljem da podrži mlade istraživače u njihovom daljem akademskom razvoju. Ovogodišnja konferencija protekla je uz konstruktivnu diskusiju u pogledu tema koje su bile predmet istraživanja mladih kolega, a završila se preispitivanjem budućih pravaca u razvitku radnog prava i prava socijalne sigurnosti, u svetlu okolnosti u kojima se svi kao društvo nalazimo.

# OSTALE VANNASTAVNE AKTIVNOSTI U ORGANIZACIJI FAKULTETA

- Besplatni kurs za rad sa elektronskom pravnom bazom „Paragraf Lex" – Fakultet je i ove godine u saradnji sa kompanijom Paragraf organizovao besplatnu obuku za rad sa elektronskom pravnom bazom **„**Paragraf Lex". Svi polaznici koji su uspešno završili kurs dobili su sertifikat o osposobljenosti za osnovni nivo korišćenja elektronske pravne baze **„**Paragraf Lex". Sertifikat se vrednuje kao dodatak diplomi u skladu sa Bolonjskom deklaracijom.
- Kurs: „Pravna retorika i savremeni odnosi s javnošću" – Ove kao i prethodnih sedamnaest akademskih godina Fakultet je organizovao kurs **„**Pravna retorika i savremeni odnosi s javnošću". Predavač je bio Dejan Milić.
- Kurs: „Pisanje pravnih akata iz Građanskog prava" – Kurs se održava u jesenjem i prolećnom semestru. Namenjen je studentima našeg fakulteta, diplomiranim pravnicima koji pripremaju pravosudni ispit, ali i svim drugim zainteresovanim koleginicama i kolegama. Pored nastavnika našeg fakulteta, predavanja na kursu su držali sudije i advokati.
- Kurs: „Pisanje pravnih akata iz Krivičnog prava" – Kurs se održava u jesenjem i prolećnom semestru. Namenjen je studentima našeg fakulteta, diplomiranim pravnicima koji pripremaju pravosudni ispit, ali i svim drugim zainteresovanim koleginicama i kolegama. Pored nastavnika našeg fakulteta, predavanja na kursu su držali sudije i advokati.
- Kurs: „Priprema za polaganje pravosudnog ispita" – Fakultet već dugi niz godina organizuje pripremnu nastavu za polaganje pravosudnog ispIta. Kurs traje tri meseca sa ukupnim fondom od 180 časova. Predavači na kursu su: prof. dr Nebojša Šarkić, prof. dr Bogoljub Milosavljević, prof. dr Slađana Jovanović, prof. dr Jelena Simić, Ljubica Milutinović, sudija, Vida Petrović-Škero, sudija, Mladen Nikolić, sudija, Maja Panić, sudija, Miodrag Majić, sudija, Dragica Saveljić-Nikolić, sudija, Siniša Važić, sudija, Tatjana Đurica, sudija, Aleksandar Ivanović, sudija, Tatjana Matković-Stefanović, sudija, doc. dr Vladimir Crnjanski, prof. dr Vladimir Čolović, Tatjana Vlaisavljević, sudija i drugi istaknuti stručnjaci iz oblasti prava. Nastava se realizuje regularno (klasično) u prostorijama fakulteta, a takođe postoji mogućnost da se nastava prati onlajn. Posle održanog predavanja postoji mogućnost preuzimanja audio-video zapisa.
- Pravne klinike – Zbog početka primene novog Zakona o besplatnoj pravnoj pomoći, Pravni fakultet Univerziteta Union u Beogradu do daljeg nije u mogućnosti da u okviru *Pravne klinike za medicinsko pravo*, *Pravne klinike za porodično pravo* i *Pravne klinike za intelektualnu svojinu* pruža besplatnu pravnu pomoć. Kada se steknu uslovi za nastavak rada, PFUUB će nastaviti da pruža besplatnu pravnu pomoć u okviru Pravne klinike.
- Pravni fakultet UUB i USAID organizovali su predavanje i radionicu za studente i studentkinje PFUUB-a o javnim nabavkama i prekršajnopravnim aspektima u ovoj sferi. Prisutni su 9. marta 2023. godine imali priliku da nauče kako se piše zahtev za pokretanje prekršajnog postupka za hipotetičke slučajeve prekršaja iz Zakona o javnim nabavkama. Predavači su bili Saša Varinac, konsultant USAID-ovog Projekta za unapređenje javnih nabavki i dr Mirjana Martić, pravna savetnica na istom projektu i predavačica van radnog odnosa u PFUUB-u.

- Studijska poseta Instituta za intelektualno vlasništvo Bosne i Hercegovine Pravnom fakultetu Univerziteta Union – Na Pravnom fakultetu Univerziteta Union, od 10. do 15. oktobra 2022. godine, boravili su zaposleni u Institutu za intelektualno vlasništvo Bosne i Hercegovine. Poseta je organizovana u okviru projekta „EU Support to Intellectual Property Rights", u kojem je jedan od članova tima eksperata i prof. dr Mario Lukinović. Prvog dana posete učesnike je pozdravio vršilac dužnosti dekana prof. dr Nebojše Šarkića, a potom su u toku pet radnih dana održana predavanja iz različitih oblasti prava intelektualne svojine i transfera tehnologije. Predavači su bili: dr Ljiljana Kundaković, vođa projekta mr Miodrag Marković, prof. dr Mario Lukinović, Dejan Đukić, direktor RNIDS-a, advokat Dragan Milić iz Advokatske kancelarije Milić, kao i advokat Vladimir Marenović iz Advokatske kancelarije Živko Mijatović and Partners.

## UČEŠĆE NAŠIH NASTAVNIKA NA NAUČNIM KONFERENCIJAMA I TRIBINAMA I PRISUSTVO U MEDIJIMA

- Profesorke Violeta Beširević, Jelena Jerinić i Tatjana Papić izlagale su na akademskom forumu Fakulteta za državne i evropske studije Novog univerziteta u Ljubljani, na temu „Ustavnopravni i međunarodnopravni izazovi Zapadnog Balkana" u Ljubljani, 22. decembra 2022. godine.
- Prof. dr Jelena Arsić i doc. dr Milena Banić učestvovale su na naučno-stručnom skupu „Maloletnički brak i izazovi u zaštiti prava deteta", koji je održan 21. oktobra 2022. godine na Pravnom fakultetu Univerziteta Union.
- Prof. dr Jelena Arsić učestvovala je na seminaru „Integrisanje rodne perspektive u postupak medijacije", koji je održan 12. aprila 2023. godine u Podgorici, u organizaciji Centra za alternativno rješavanje sporova Crne Gore. Na seminaru su predstavljeni rezultati rada o rodnim perspektivama medijacije, koji je početkom godine objavljen u okviru naučne monografije „Gender Perspectives in Private Law", u izdanju Springera.
- Prof. dr Jelena Arsić i prof. dr Jelena Jerinić učestvovale su na međunarodnoj naučnoj konferenciji „Family Support research and policy for all children and families: Creating an Agenda for 2030", koja je održana 4. jula 2023. godine u Madridu, u organizaciji Evropskog foruma za podršku porodici (EuroFam). Na konferenciji je predstavljen rad profesorki Arsić i Jerinić pod naslovom „Going back to the drawing board: The picture of family support in European constitutions".
- Prof. dr Violeta Beširević je izlagala na okruglom stolu „Politika otpriznanja pre i posle sporazuma u Briselu i Ohridu", u organizaciji PFUUB-a, Fakulteta političkih nauka BU i Fakulteta organizacionih nauka BU, 24. aprila 2023. godine, koji je organizovan u okviru projekta MIND, koji je podržao Fond za nauku Republike Srbije.
- Prof. dr Violeta Beširević je izlagala na godišnjoj konferenciji srpskog udruženja za pravnu i socijalnu filozofiju, „Work in Progress", koja je održana na PFUUB-u 1. septembra 2023. godine, na temu „Constitutional Aspects of Derecognition of States: A Review of Missing Questions in Constitutional Theory".
- Prof. dr Violeta Beširević predsedavala je panelom „Judicial Independence and the Courts", na konferenciji „From Rule of Law Backsliding to a Sustainable

Rule of Law", održanoj na Radboud Univerzitetu u Najmigenu, Holandija, 21–22. septembra 2023. godine.

- Prof. dr Marko Božić učestvovao je u radu redovne godišnje skupštine istraživačkog centra Eur'orbem pri Univerzitetu Pariz Sorbona, čiji je pridruženi član, a koja je održana 22. juna 2023. godine.
- Prof. dr Marko Božić učestvovao je u organizaciji i radu godišnje konferencije srpskog udruženja za pravnu i socijalnu filozofiju, Work in Progress koja je održana na PFUUB-u 1. septembra 2023. godine.
- Prof. dr Marko Božić učestvovao je u radu šeste konferencije „Socijalizam u klupi, krize i reforme" koju organizuje Centar za kulturološka i povijesna istraživanja socijalizma pri Sveučilištvu Jurja Dobrile u Puli, koja je održana između 28. i 30. septembra 2023. godine. Na konferenciji je učestvovao sa izlaganjem „Veronauka bez Boga?: Pravni okvir i ideološke premise marksističkog obrazovanja u školama socijalističke Jugoslavije 1945–1991", u okviru panela „Obrazovanje, dijeca i mladi", koji je održan 30. septembra 2023. godine.
- Prof. dr Saša Gajin održao je 3. i 4. aprila 2023. godine seriju predavanja na Pravnom fakultetu Karlovog univerziteta u Pragu u okviru predmeta Evropski konstitucionalizam – Ljudska prava, jednakost i dostojanstvo ličnosti. Profesor Gajin držao je predavanja na temu sistema ljudskih prava i pojma diskriminacije u evropskom i uporednom pravu.
- Prof. dr Jelena Jerinić je učestvovala na godišnjem sastanku Grupe eksperata za Evropsku povelju o lokalnoj samoupravi, savetodavnog tela Kongresa lokalnih i regionalnih vlasti Saveta Evrope, koji je održan 28. i 29. septembra.
- Prof. dr Slađana Jovanović izlagala je rad na temu „Maloletnički brak kao indikator trgovine ljudima" na naučno-stručnom skupu „Maloletnički brak i izazovi u zaštiti prava deteta" u organizaciji Pravnog fakulteta Univerziteta Union u Beogradu, 21. oktobra 2022. godine.
- Prof. dr Slađana Jovanović je izlagala na temu „Elder Abuse in Domestic Settings" na međunarodnoj naučnoj konferenciji Protection of Human Rights: From Childhood to the Right to a Dignified Old Age – Human Rights and Institutions, u organizaciji Pokrajinskog zaštitnika građana i Instituta za kriminološka i sociološka istraživanja, 27. i 28. oktobra 2022. godine.
- Prof. dr Slađana Jovanović gostovala je 21. novembra 2022. godine na TV K1 u jutarnjem programu na temu „Povećanje dostupnosti besplatne pravne pomoći ženama žrtvama nasilja u porodici". Reč je o projektu udruženja građana Fenomena koji je realizovan u saradnji sa PFUUB-om (i drugim fakultetima), te je gostovanje na različitim televizijama bio jedan od projektnih zadataka.
- Prof. dr Slađana Jovanović predstavila je rad „Juvenile Perpetrators of Traffic Offenses: (Ir)responsibility of the Parents" na međunarodnom tematskom naučnom skupu „Traffic, Criminality and Urban Safety" u organizaciji Instituta za kriminološka i sociološka istraživanja koji je održan na Paliću, 14. i 15. juna 2023. godine.
- Prof. dr Mario Lukinović učestvovao je na međunarodnoj naučnoj konferenciji „Green Economy in the Function of Solving Global Environmental Problems", održanoj u Beogradu 20. i 21. aprila 2023. godine.
- Prof. dr Mario Lukinović učestovao je na XXVI Savetovanju pravnika „Budvanski pravnički dani", održanom u Budvi od 2. do 6. juna 2023. godine.

- Prof. dr Mario Lukinović održao je predavanje na međunarodnoj naučnoj konferenciji „Geopolitical challenges of China-Central and Eastern Europe", održanoj u Beogradu 26. juna 2023. godine.
- Prof. dr Mario Lukinović predstavio je na Tokijskom univerzitetu u Japanu, na 41. Svetskom kongresu profesora i naučnih istraživača intelektualne svojine, koautorski rad koji je napisao sa prof. dr Robertom Garza-Barbosom sa Univerziteta Tecnológico de Monterrey, iz Montereja u Meksiku pod nazivom „Freedom to Assign and the Role of Collective Management Societies, A Comparative Perspective: Mexico and Serbia", od 9. do 12. jula 2023. godine.
- Prof. dr Dijana Marković-Bajalović održala je uvodno predavanje na temu „Reforma zakonodavstva o restrukturiranju i stečaju" na međunarodnom naučnom skupu „Reforma zakonodavstva o restrukturiranju, reorganizaciji i stečaju u svetlu evropskih tendencija", održanom na Pravnom fakultetu Univerziteta u Istočnom Sarajevu 2. decembra 2022. godine.
- Prof. dr Dijana Marković-Bajalović izlagala je referat „Sporna pitanja izvršenja stranih sudskih odluka" na međunarodnoj naučnoj konferenciji – 35. susretu Kopaoničke škole prirodnog prava „Sudski postupak – pravda i pravičnost" koja je održana od 13. do 17. decembra 2022. godine.
- Prof. dr Dijana Marković-Bajalović predstavila je svoj rad „Proving Antitrust Damages in Civil Proceedings" na međunarodnoj naučnoj konferenciji „Admissability of Evidence in the European Legal Space", održanoj u Beogradu 15. i 16. juna 2023. godine u organizaciji Kriminalističko-policijskog univerziteta.
- Prof. dr Tatjana Papić održala je predavanje na Pravnom fakultetu Univerziteta u Beogradu, na predmetu Pravo i Pravda, na temu „Značaj međunarodnog prava u kontekstu oružanog sukoba u Ukrajini", 8. marta 2023. godine.
- Prof. dr Tatjana Papić je izlagala na okruglom stolu „Politika otpriznanja pre i posle sporazuma u Briselu i Ohridu", u organizaciji PFUUB-a, Fakulteta političkih nauka BU i Fakulteta organizacionih nauka BU, 24. aprila 2023. godine, koji je organizovan u okviru projekta MIND, koji je podržao Fond za nauku Republike Srbije.
- Prof. dr Tatjana Papić održala je predavanje na temu „Sociologija međunarodnog prava na prostoru bivše Jugoslavije" na Pravnom fakultetu Univerziteta Milano-Bikoka, 22. maja 2023. godine.
- Prof dr. Jelena Simić i asistentkinja Jovana Popović predstavile su koautorski rad pod nazivom „Doctor's freedom to choose therapy, between ideal and reality – legal challenges during Sars-Cov-2 Pandemic" na međunarodnoj naučnoj koferenciji „Pravo između ideala i stvarnosti" održanoj 19. maja 2023. godine na Pravnom fakultetu Univerziteta u Prištini sa privremenim sedištem u Kosovskoj Mitrovici.
- Prof. dr Nebojša Šarkić i doc. dr Vladimir Crnjanski izlagali su na temu „Da li je društveni pravobranilac samoupravljanja preteča zaštitnika građana (ombudsmana)" na naučnom skupu „Položaj lokalnih ombudsmana u opštinama i gradovima Srbije", održanom na Pravnom fakultetu Univerziteta Union u Beogradu, 25. februara 2022. godine.
- Doc. dr Slobodan Vukadinović je učestvovao na konferenciji „Dvadeset pet godina Arhuske konvencije", koja je održana 8. maja 2023. godine na Prav-

nom fakultetu Univerziteta u Beogradu, izlaganjem na temu „Parlament i Arhuska konvencija: doprinos dobrom upravljanju i parlamentarni nadzor".

- Doc. dr Slobodan Vukadinović je učestvovao na XXVI međunarodnoj naučnoj konferenciji „Prouzrokovanje štete, naknada štete i osiguranje", koja je održana u Valjevu od 20. do 22. septembra 2023. godine, u organizaciji Instituta za uporedno pravo, Udruženja za odštetno pravo i Pravosudne akademije, radom na temu „Nepravične ugovorne odredbe: međunarodni, evropski i nacionalni nivo regulative i zaštite".
- Doc. dr Mila Petrović je učestvovala na međunarodnoj konferenciji za mlade istraživače ELLYS (*European Labour Law Young Scholars*), održanoj na Pravnom fakultetu Univerziteta u Ljubljani od 27. do 28. oktobra 2022. godine, na temu „Future Challenges of Decent and Sustainable Work". Doc. dr Mila Petrović je ovom prilikom izložila svoje istraživanje na temu „Food Delivery Platforms in Serbia: A Rocketship with no Seat Belts Attached".
- Doc. dr Mila Petrović je, zajedno sa prof. dr Bojanom Urdarevićem, redovnim profesorom Pravnog fakulteta Univerziteta u Kragujevcu, 15. decembra 2022. godine, predstavila njihov zajednički izveštaj o stanju radnih prava u Srbiji u 2022. godini, na godišnjoj konferenciji Fondacije centar za demokratiju (FCD), održanoj u okviru projekta „Socio-ekonomska prava i održivi razvoj".
- Doc. dr Vladimir Crnjanski izlagao je na temu „Pravni značaj procene tržišne vrednosti nepokretnosti u vansudskom postupku hipotekarnog namirenja" na seminaru „Procesni položaj procenitelja u postupku eksproprijacije" u organizaciji Pravnog fakulteta Univerziteta Union u saradnji sa Nacionalnim udruženjem procenitelja Srbije, održanom 25. marta 2022. godine.
- Doc. dr Vladimir Crnjanski izlagao je na temu „Mere obezbeđenja i položaj izlučnih i razlučnih poverilaca" na naučnoj konferenciji „Izvršno i stečajno pravo" u organizaciji Instituta za uporedno pravo i Pravnog fakulteta Univerziteta Union u Beogradu koja je održana od 23. do 25. juna 2022. godine u Vršcu.
- Doc. dr Vladimir Crnjanski izlagao je na temu „Potrebne zakonske izmene za proširenje nadležnosti javnih izvršitelja na vansudski postupak hipotekarnog namirenja" na naučnom skupu „Reforma pravosudnog sistema Srbije" u organizaciji Pravnog fakulteta Univerziteta Union u Beogradu, Instituta za uporedno pravo i Udruženja pravnika Srbije održanom 12. i 13. maja 2023. godine.
- Doc. dr Aleksa Radonjić je kao kopredsedavajući Foruma mladih pravnika u oblasti stvarnog prava (*Young Property Lawyers Forum*) učestvovao u organizaciji ovogodišnje konferencije Foruma koja je održana 1. i 2. juna na Univerzitetu u Osnabriku (Osnabrück) u Nemačkoj. Šira tema konferencije je bila granice i stvarno pravo, a doc. dr Aleksa Radonjić je moderirao panel o stvarnom pravu i nacionalnim granicama.
- MA Ankica Dragin izlagala je na temu „Ombudsman u očima javnosti: izgradnja imidža nove institucije" na međunarodnoj naučno-stručnoj konferenciji „Značaj i uloga ombudsmana u unapređenju ljudskih prava i razvoju demokratije", upriličenoj povodom dvadeset godina od uspostavljanja prvog ombudsmana u Republici Srbiji, koja je održana od 21. do 23. juna 2023. godine.

## GOSTOVANJA DOMAĆIH PREDAVAČA

- Dr Cvijetin Đorđić, upravnik KPZ u Nišu, održao je 14. novembra 2022. godine predavanje na temu „Zatvorski sistem u Srbiji" u okviru nastave na predmetima Krivično pravo i Kriminologija sa penologijom.
- Dr Milica Delević, direktorka za konkurentnost, dobro upravljanje i politička pitanja Evropske banke za obnovu i razvoj (EBRD), održala je gostujuće predavanje za naše studente u okviru Foruma za međunarodno i uporedno pravo. Tema predavanja je bila „Ljudska prava u međunarodnoj razvojnoj saradnji – teorija naspram prakse".
- Doc. dr Irena Kolaj Ristanović sa Filološkog fakulteta, priznati stručnjak za osmanistiku i nasleđe šerijatskog prava u postosmanskoj Srbiji, održala je 10. maja 2023. godine predavanje „Vakufi u postosmanskom dobu: pravno-istorijski okvir" u okviru nastave na predmetu Uporedno pravo.

## USPESI NAŠIH STUDENATA

- Projekat o podizanju svesti javnosti o akušerskom nasilju, koji su tri studentkinje Pravnog fakulteta Univerziteta Union u Beogradu osmislile u okviru fakultativnog kursa „Demokratija od teorije do prakse", dobio je nagradu publike na završnom događaju istoimenog krovnog projekta edukacije studentkinja i studenata na fakultetima u Srbiji o građanskom aktivizmu održanom 8. jula u Impakt habu /Impact Hub/ u Beogradu. Studentkinje Una Danilović, Dajana Bogavac i Milica Joković nagradu su podelile sa koleginicama i kolegama sa Fakulteta političkih nauka u Beogradu koji će se u svom projektu pod imenom „Uključi me, nauči me" baviti motivisanjem srednjoškolaca i mladih iz ranjivih društvenih grupa da se uključe u obrazovni sistem i nastave školovanje.

## NAGRADE NAJBOLJIM STUDENTIMA

- Student osnovnih akademskih studija Stefan Mandić, sa ostvarenim prosekom 8,88, oslobođen je u celosti obaveze plaćanja školarine za upis treće godine studija u akademskoj 2022/2023. godini.
- Student osnovnih akademskih studija Igor Pantelić, sa ostvarenim prosekom 8,88, oslobođen je 50% od ukupno ugovorenog iznosa školarine za upis treće godine studija u akademskoj 2022/2023. godini.
- Student osnovnih akademskih studija Nemanja Milošević, sa ostvarenim prosekom 8,63, oslobođen je 50% od ukupno ugovorenog iznosa školarine za upis treće godine studija u akademskoj 2022/2023. godini.
- Student osnovnih akademskih studija Stefan Topolić, sa ostvarenim prosekom 8,38, oslobođen je u celosti obaveze plaćanja školarine za upis četvrte godine studija u akademskoj 2022/2023. godini.

## STUDENTSKE PRAKSE I STUDIJSKE POSETE

- Prakse – Tokom studija na Pravnom fakultetu Univerziteta Union u Beogradu organizuju se različiti oblici studentske prakse. Studenti su u toku akademske 2022/2023. godine u trajanju od najmanje deset radnih dana učestvovali na sledećim studentskim praksama: praksa kod javnog izvršitelja,

praksa kod javnog beležnika, praksa kod Zaštitnika građana, praksa u Gradskom javnom pravobranilaštvu, praksa u Građanskom i Krivičnom odeljenju Prvog osnovnog suda u Beogradu, praksa u Građanskom i Krivičnom odeljenju Drugog osnovnog suda u Beogradu, praksa u Građanskom i Krivičnom odeljenju Trećeg osnovnog suda u Beogradu, praksa u Višem sudu u Beogradu, praksa u Privrednom sudu u Beogradu, praksa u Prekršajnom sudu, praksa u bankama, praksa u advokatskim kancelarijama. Studentske prakse se organizuju tokom cele akademske godine (osim u vreme ispitnih rokova), ali i u letnjim mesecima. Po obavljenoj praksi studenti dobijaju potvrdu sa opisnom ocenom angažovanja za vreme prakse koja se unosi u dodatak diplome. U mnogim slučajevima uspešan završetak prakse studentima je pružio priliku za volontiranje, ali i radno angažovanje po okončanju studija.

## SPISAK STUDENATA KOJI SU DIPLOMIRALI

| Redni broj | Ime i prezime | Datum diplomiranja |
|---|---|---|
| 1. | Lazar Miljković | 14.10.2022. |
| 2. | Katarina Jovanović | 18.10.2022. |
| 3. | Aleksandar Rajačić | 20.10.2022. |
| 4. | Aleksandar Živojinović | 09.11.2022. |
| 5. | Konstatin Stojković | 14.11.2022. |
| 6. | Luka Vlahović | 18.11.2022. |
| 7. | Miloš Mihajlović | 18.11.2022. |
| 8. | Dragana Stojiljković | 05.12.2022. |
| 9. | Renato Asanić | 07.12.2022. |
| 10. | Kristina Dragović | 09.12.2022. |
| 11. | Igor Popović | 09.12.2022. |
| 12. | Petar Simić | 09.12.2022. |
| 13. | Đorđe Kršljanski | 13.12.2022. |
| 14. | Bojana Miletić | 25.01.2023. |
| 15. | Marijana Zorić | 01.02.2023. |
| 16. | Igor Radlović | 06.02.2023. |
| 17. | Anja Petrović | 07.02.2023. |
| 18. | Ljiljana Dimitrijević | 09.02.2023. |
| 19. | Jovana Jančić | 10.02.2023. |

| Redni broj | Ime i prezime | Datum diplomiranja |
|---|---|---|
| 20. | Vedrana Ivanović | 02.03.2023. |
| 21. | Ana Milosavljević | 06.03.2023. |
| 22. | Dušan Tomović | 07.03.2023. |
| 23. | Milica Brajković | 04.04.2023. |
| 24. | Gorana Vučenović | 12.05.2023. |
| 25. | Milica Panić | 28.06.2023. |
| 26. | Marija Božović | 31.08.2023. |
| 27. | Ivana Nedović | 31.08.2023. |
| 28. | Nemanja Bunardžić | 09.05.2023. |
| 29. | Janko Đorđević | 12.05.2023. |
| 30. | Uroš Branković | 17.05.2023. |
| 31. | Milica Đikanović | 18.05.2023. |
| 32. | Pavle Zirojević | 08.06.2023. |
| 33. | Nevena Ličinić | 08.06.2023. |
| 34. | Milja Dimitrov | 29.06.2023. |
| 35. | Nevenka Kukolj | 03.07.2023. |
| 36. | Jelena Stajić | 04.07.2023. |
| 37. | Stefan Topolić | 05.07.2023. |
| 38. | Manja Ćuk | 05.07.2023. |
| 39. | Dejana Čolović | 05.07.2023. |
| 40. | Ksenija Trivković | 06.07.2023. |
| 41. | Jelena Stojković | 06.07.2023. |
| 42. | Milica Radunić | 29.08.2023. |
| 43. | Lidija Radaković | 29.08.2023. |
| 44. | Milica Đurović | 01.09.2023. |
| 45. | Aleksandar Tišma | 04.09.2023. |
| 46. | Angelina Perić | 04.09.2023. |
| 47. | Uroš Ičelić | 07.09.2023. |

| Redni broj | Ime i prezime | Datum diplomiranja |
|---|---|---|
| 48. | Julija Spasić | 07.09.2023. |
| 49. | Marija Purić | 07.09.2023. |
| 50. | Mišo Ljujić | 08.09.2023. |
| 51. | Una Danilović | 25.09.2023. |
| 52. | Tara Bojović | 25.09.2023. |
| 53. | Dragan Bačanin | 25.09.2023. |
| 54. | Vanja Selečanin | 25.09.2023. |
| 55. | Slađana Ivanović | 28.09.2023. |
| 56. | Nikolina Savić | 28.09.2023. |
| 57. | Đorđe Borović | 28.09.2023. |
| 58. | Dejana Braunović | 28.09.2023. |
| 59. | Bogdan Bogdanović | 29.09.2023. |
| 60. | Dušan Romić | 29.09.2023. |

Dostavljeno Uredništvu: 26. oktobra 2023. godine

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## PRAVILA CITIRANJA

*Članci*

Vodinelić, V., 2015, Zabrana plagiranja i pravo citiranja u nauci, *Pravni zapisi*, 1, str. 126–200.

Naziv časopisa *Pravni zapisi* prilikom citiranja treba uvek pisati na srpskom jeziku.

Salacuse, J., Sullivan, N., 2005, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, *Harvard International Law Journal*, Vol. 46, No. 1, p. 109.

*Monografije*

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija, str. 25.

Mitrović, D., Kumpan, A., 2010, *Osnovi međunarodnog privatnog prava*, Beograd, Pravni fakultet Univerziteta Union, str. 50.

Ako ima više od tri autora:

Varadi, T. *et al*., 2007, *Međunarodno privatno pravo,* Beograd, Pravni fakultet Univerziteta u Beogradu, str. 55.

Upućivanje samo na monografiju (bez navođenja stranica):

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija.

*Prilozi u zbornicima i serijskim publikacijama*

Dimitrijević, N., Militantna demokratija, konstitucionalna demokratija i osnovna prava: da li su prijatelji demokratije neprijatelji slobode?, u: Beširević, V., (ur.), 2013, *Militantna demokratija – nekada i sada*, Beograd, Pravni fakultet Univerziteta Union & Službeni glasnik, str. 31–60.

Dimitrijević, V., 1963, Nacrt deklaracije Ujedinjenih nacija o pravu azila i neka aktuelna pitanja azila i izbeglištva, *Međunarodni problemi*, 4, str. 55–66.

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Npr. ako je Jovanović napisao neke stranice u komentaru koji je uredio Popović, u fusnoti će pisati:

Jovanović, J. u: Popović, P. (ur.), *Komentar*, a u popisu literature na kraju članka samo: Popović, P. (ur.), *Komentar*.

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*Propisi*

Zakon o izvršnom postupku, *Sl. glasnik RS*, br. 125/04 (u daljem tekstu: ZIP)

Ako se pomenuti zakon citira i kasnije: ZIP

Ako je propis menjan i dopunjavan:

Zakon o društvenoj brizi o deci, *Sl. glasnik RS*, br. 49/92, 29/93, 53/93, 67/93, 8/94.

Ako se citira zakon koji više ne važi:

Zakon o opštem upravnom postupku, *Sl. list SRJ*, br. 33/97, 31/01.

Prilikom ponovljenog citiranja treba navesti godinu: ZUP, 1997.

Označavanje člana/članova, stava/stavova i tačke/tačaka propisa **u tekstu**: član 7. stav 2. tačka 4. Zakona; član 8. st. 3– 4. Zakona; član 9. stav 5. tač. 6–7. Zakona.

**U fusnotama**: čl. 3–5. i 7. Zakona; čl. 5–9. Zakona; čl. 5, st. 1–3, čl. 7, 9. i 12. itd.

*Dokumenti UN*

Naslov dokumenta, odrednica da je u pitanju dokument UN (UN doc.) posle koje sledi službena numeracija UN, a potom u zagradi navesti datum kada je dokument usvojen.

UNSC Resolution 1244, UN doc. S/RES/1244 (10 June 1999).

Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Serbia*, UN dok. CCPR/C/SRB/CO/2 (20 May 2011).

*Dokumenti EU*

Commission Decision 93/42/EEC of 21 December 1992 concerning additional guarantees relating to infectious bovine rhinotracheitis for bovines destined for Denmark.

*Praksa međunarodnih sudova*

Opšta pravila:

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*Međunarodni sud pravde*

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ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14, p. 62, para. 109.

*Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Advisory Opinion of 20 December 1980, *ICJ Reports 1980*, p. 73, pp. 89–90, para. 37.

U slučaju pozivanja na izdvojeno mišljenje sudije, posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije.

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, *ICJ Reports 1986*, p. 259, p. 388, para. 257.

*Stalni sud međunarodne pravde*

Npr. PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B, No. 5, p. 7.

*Međunarodni krivični tribunali*

Navođenje tribunala u engleskoj skraćenici (ICTY, ICTR), puno ime predmeta u kurzivu, veće, broj predmeta, vrsta odluke, datum, u zagradi internet adresa na kojoj se nalazi odluka posle koje sledi datum pristupa stranici (u skladu s pravilom o citiranju tekstova s interneta) i broj stava na koji se poziva.

ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (http://***, DATUM), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema*, ICTR-95–1, Judgment of 7 June 2001 (http://***, DATUM), para. 85.

*Evropski sud za ljudska prava*

Navođenje ovog suda u engleskoj skraćenici (ECtHR), puno ime predmeta u kurzivu, broj predstavke, vrsta odluke, datum i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

ECtHR, *Osman v. the United Kingdom*, no. 23452/94, Judgment of 28 October 1998, para. 116.

Ako je u pitanju odluka Velikog veća (Grand Chamber) navesti njegovu englesku skraćenicu u uglastoj zagradi [GC], nakon datuma.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], para. 70.

U slučaju pozivanja na izdvojeno mišljenje sudije, shodno primeniti pravilo navedeno u citiranju presuda Međunarodnog suda pravde (posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije) i navesti tačku mišljenja na koje se poziva.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], Concurring Opinion of Judge Bonello, point 3.5.

*Sud pravde EU*

Navođenje ovog suda u engleskoj skraćenici (CJEU), broj predmeta, puno ime predmeta u kurzivu, vrsta odluke i datum, referenca za identifikovanje i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013, ECLI:EU:C:2013:107, para. 11.

Kod navođenja mišljenja opšteg pravozastupnika ili mišljenja CJEU ne treba navoditi vrstu odluke.

Opinion of AG Tanchev to CJEU, case C-619/18, *European Commission v. Republic of Poland*, 11 April 2019, ECLI:EU:C:2019:325, para. 8.

Case Opinion 2/13, *Opinion of the Court*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 79.

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Gajin, S., 2012, *Ljudska prava, Pravno-sistemski okvir*, Beograd, Pravni fakultet Univerziteta Union u Beogradu, (http://www.pravnifakultet.rs/images/2012/Sasa_Gajin_-_Ljudska_prava_E_izdanje.pdf, 01. 01. 2013).

Kod sadržaja veb-stranica vrlo često se autori i ne navode. Ukoliko ime autora postoji, navesti ime. U krajnjem slučaju, navesti samo internet adresu.

Walter, M., Konaguchi, J., *Multicriteria analysis*, (http://www.gigabook/multicriteriaanalysis.pdf, 05. 05. 2005)

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Milikić, M., 2013, Sudije već tri godine niko ne ocenjuje, *Danas*, 12–13. januar, str. 4, stubac a.

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*Ponovljeno citiranje*

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*Ostale napomene*

Prilikom navođenja literature na stranom jeziku, koristiti odgovarajuće skraćenice za strane (p. 5; pp. 2–8).

Radovi prezentovani na konferencijama, objavljeni u zbornicima radova sa konferencija:

Brown, C., 2008, Multicriteria analysis, pp. 89–112, *Operational Research Conference*, London, September 17–19.

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## RULES OF CITATION

*Books*

Sunstein, C., 2001, *Designing Democracy: What Constitutions Do*, New York, Oxford University Press .

Barak, A., 2008, *The Judge in a Democracy,* Princeton, Princeton University Press, p. 28.

Kommers, D., Miller, R., 2012, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham, Duke University Press, p. 196.

For more than three authors:

Dorsen, N., *et al*., 2003, *Comparative Constitutionalism: Cases and Materials*, St. Paul, Minnesota, West Group, p. 286.

*Journal Articles*

Tushnet, M., 2002, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, *North Carolina Law Review*, Vol. 80, No. 4, pp. 1203–1235.

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Brown, C., 2008, Multicriteria analysis, pp. 89–112, *Operational Research Conference*, London, September 17–19.

*Citation of legislation*

Advertising Law, *Official Gazette of the RS,* No. 79/05. (Further in the text: AL)

If the mention legislation is cited later: AL.

For amended legislation: Law on the Constitutional Court, *Official Gazette of the RS*, Nos. 109/07, 99/11 and 18/13.

For legislation which is no longer in force: Act on Administrative Procedure, *Sl. list SRJ*, Nos. 33/97, 31/01.

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Presenting articles, paragraphs and items of the legislation in the **text**: Article 7 para. 2 item 4 of the Law; Article 8 paras. 3–4 have the Law; Article 9 para. 5 items 6–7 of the Law;

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ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14, p. 62, para. 109.

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In case a dissenting opinion is cited, after the date of the decision the type of dissenting opinion and surname of the judge should be given:

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel*, ICJ Reports 1986*, p. 259, p. 388, para. 257.

*Permanent Court of International Justice*

PCIJ, *Status of Eastern Carelia,* Advisory Opinion of 23 July 1923, Series B, No. 5, p. 7.

*International criminal tribunals*

English abbreviation of the name of the tribunal (ICTY, ICTR), full title of the case *in italic*, chamber, number of the case, type of decision, date, Internet site where the decision can be downloaded from in parentheses followed by the date when the page was accessed (in accordance with citation of texts from the Internet) and number of para. which is cited.

ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic,* IT-94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (http://***, DATE), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema,* ICTR-95–1, Judgment of 7 June 2001 (http://***, DATE), para. 85.

*European Court of Human Rights*

English abbreviation of the court's name (ECtHR), full title of the case *in italic*, application number, type of decision, date, paragraph in which the cited part of the text is.

ECtHR, *Osman v. the United Kingdom*, no. 23452/94, Judgment of 28 October 1998, para. 116.

When decisions of the Grand Chamber are cited, its English abbreviation in square parentheses should be written after the date.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], para. 70.

If a dissenting opinion is cited, apply accordingly the rule for citation of judgements of the International Court of Justice (after the date of the decision write the type of dissenting opinion and surname of the judge) and provide the number of paragraph in the opinion referred to.

*Lautsi and Others v. Italy*, no. 30814/06, Judgment of 18 March 2011 [GC], Concurring Opinion of Judge Bonello, para. 3.5.

*Court of Justice of the European Union*

English abbreviation of the court's name (CJEU), case number, full title of the case *in italic*, type of decision and date, ECLI identifier, paragraph in which the cited part of the text is.

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When citing the opinion of the Advocate General or the opinion of the CJEU, a type of decision should not be included:

Opinion of AG Tanchev to CJEU, case C-619/18, *European Commission v. Republic of Poland*, 11 April 2019, ECLI:EU:C:2019:325, para. 8.

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Walter, M., Konaguchi, J., Multicriteria analysis, (http://www.gigabook/multicriteria-analysis.pdf, 05. 05. 2005)

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Aleksandra ČAVOŠKI, Ana KNEŽEVIĆ BOJOVIĆ (ur.), Ekologija i pravo, 2012.

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