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Book (a number of authors)	Konstantinovic-Vilic,S.,Nikolic-Ristanovic, V., Kostic, M., (2009). *Kriminologija (Criminology)*, Nis, Pelikan print.	First in-text citation: (Konstantinovic-Vilic, Nikolic-Ristanovic, Kostic, 2009: 35). A subsequent in-text citation: (Konstantinovic-Vilic, et all., 2009: 77)
Joint authorship (a group of authors)	*Oxford Essential World Atlas* (7th ed). (2012). Oxford, UK: Oxford University Press	(Oxford, 1996: 100)
An article or a chapter in a book with an editor	Kostic, M., Miric, F., (2009).Ustanove za izvršenje krivičnih sankcija-pozitivno zakonodavstvo i strana regulativa-stanje i perspektive,(Facilities for execution of criminal sanctions -positive legislation and international regulations, state and perspectives) / In Djukanovic, P. (ed), *Proceedings of penology* /. - Banja Luka, Penological organization of KPZ, 2009, Vol.1, No.1, pp. 10-32.	(Kostic, Miric, 2009: 295)
Journal article	Papageorgiou,V., Vostanis, P., (2000).Psychosocial characteristics of Greek young offenders, *The Journal of Forensic Psychiatry*, Vol.11., No.2., 2000, pp.390-400	(Papageorgiou et all, 2000: 397)
Encyclopedia	(2009). *The Oxford International Encyclopedia of Legal History*. Oxford, UK: Oxford University Press	(Oxford, 2009:33)
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Court decisions	Case Ap.23037/04 *Matijasevic* v. Serbia	Footnote: Case Ap.23037/04 Matijasevic v. Serbia
Online sources	Ocobock, P., Beier, A.L., (2008). *History of Vagrancy and Homeless in Global Perspective*, Ohio University Press, Swallow Press, Retrieved 31 November, 2015, from http://www.ohioswallow.com/book/Cast+Out	In-text citation: (Ocobock, Beier, 2008)

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EDITORIAL

Dear Readers,

The third issue of the scientific journal ***Facta Universitatis*: Law and Politics** for the year 2018 contains articles from different fields of law, social sciences and humanities.

Prof. Marija Ignjatović, LL.D., Associate Professor, Faculty of Law, University of Niš (Serbia), submitted the paper titled **"*Exercitor* and *magister navis* in Roman law"**, where she analyzes the legal position of the owner of a vessel (*exercitor navis*) and the captain of a vessel (*magister navis*), which was not always precisely defined in Roman law. Taking into account insufficiently developed navigation in the period of the late Republic, there was no need for defining the legal position of the owner of a vessel and the captain of a vessel. With the development of maritime trade in the classical period, they started being perceived as two separate roles, including a clear distinction between their rights and obligations. In the postclassical period, with the general decadence which was omnipresent in the Roman society, there was a decline in navigation; one of the negative reflections was merging the roles of the *exercitor* and *magister navis* in one person again. In order to better understand the positive effects of the situation when the ship owner was also the captain of that ship in the period of the late Republic, as well as the negative effects of merging these two roles into one in the Dominate period, the paper examines the the legal position of *exercitor* and *magister navis* during three periods in the development of Roman law: the last centuries of the late Republic, the classical period and the postclassical period.

Prof. Edyta Krzysztofik, PhD, Associate Professor, Department of European Union Law, Faculty of Law, Canon Law and Administration, *John Paul II* Catholic University of Lublin (Poland), submitted the paper titled ***"The Applicability of the Charter of Fundamental Rights in Poland".*** The author analyses the EU system for the protection of fundamental rights. This system had been developing since 1969 until the date of entry into force of the Treaty of Lisbon, which established three areas for the protection of human rights. The first is based on the Charter of Fundamental Rights. The second refers to the general principle, as emphasized by the Court of Justice in its case law in the 1970s. The last area is the future one and it assumes strengthening the protection of fundamental rights within the Council of Europe system by obliging the EU to join the ECHR. Moreover, Poland and the United Kingdom are parties to Protocol No. 30, which is also treated as primary law. In addition, Poland attached two Declarations to the Treaty of Lisbon. The Declarations are only political in nature and do not affect the scope of the Charter's application, but they define certain values that are important from the perspective of the Polish legal system.

Prof. Michał Peno, Ph.D. Assistant Professor, Department of Philosophy of Law and Legal Theory, Faculty of Law and Administration, University of Szczecin (Poland), submitted the paper titled ***"Prima Facie Retributivism: on the Obligation to Administer Justice".*** The paper examines retributivism in the normative perspective in an attempt to penetrate the structure of the fundamental premises and theses of retributivism.

Retributivism assumes that punishment is just, in the broad sense of the term, but in reality punishment is not just. The model of retributive punishment is contrafactual, which is evident above all in the problem of punishing the innocent. A proper modification of retributivism's normative premises consists in seeing these premises not as unconditionally binding directives, but as optimization rules, a kind of *prima facie* duty. These are mainly the ethical duties of the state considered from the viewpoint of criminal policy. In effect, it is possible to formulate a non-fundamentalist (non-idealistic) variant of retributivism - better corresponding to social reality. The core of the paper consists in outlining such a concept. The inspiration for it was provided above all by the ideas of W.D. Ross and R. Alexy.

Krzysztof Tomaszycki, PhD (in Sociology), Faculty of Law, University of Bialystok (Poland), submitted the paper titled ***"The Interoperability of European information systems for border and migration management and for ensuring security".*** The author notes that the European Union has been exposed to an increase in illegal migration in recent years. As a result, the threat of terrorist acts increased, which further contributed to reducing the sense of internal security of citizens. The EU citizens expect more effective external border controls and more efficient migration management. Such challenges are addressed by the interoperability of European information systems for border management and migration, and ensuring security of the EU. A key element of interoperability is the adaptation of current systems and the development of new ones, especially in the technical aspect. In addition to legal, organizational and logistic activities, it is a key element in the entire system of activities of European institutions and agencies.

Mirna Dželetović, PhD student, Faculty of Law, University of Novi Sad (Serbia) submitted the paper titled ***"Civil Liability of Minors".*** The author examines the concept of causing damage to another, which entails tort liability in accordance with the conditions specified by the law. The national law stipulates that children under the age of 7 are not liable for damage caused to another, while minors over the age of 7, if capable of reasoning, can be held liable for damage. A minor attains general tort liability at the age of 14. Considering that minors can be held liable for damage caused to another, the Serbian Obligations Act (on Contracts and Torts) makes a justifiable distinction between minors of different age regarding their individual liability. This distinction is not common in other European legal systems. The author concludes that it would be sensible to postpone the process of establishing tort liability of a minor for a later period, when the minor attains full contractual capacity. The conclusion is based on two main reasons. The first one is the fact that parental right, which last until the said age, implies the parents' obligation to take care of their underage child. The second reason is the financial situation of the child that prevents him/her from compensating the damage s/he has caused to another person.

Jelena Tasić, LL.B., Judicial Assistant-Associate, Basic Court in Niš, Republic of Serbia submitted the paper titled ***"Legal Provisions on Violence in Sports and Disputable Issues in Court Practice".*** The author provides an overview of the most significant international and national legal documents on violence in sports. In particular, the paper examines the Serbian legislative framework on sports violence. The Serbian Act on the Prevention of Violence at Sports Events, which regulates the behaviour of participants in sports events, contains numerous novelties related to this criminal offence. This paper discusses the most relevant legal provisions on violence in sports, provides official statistics, and analyzes the existing case law of Serbian courts on this matter. The author focuses on some landmark decisions and disputable issues encountered in the judicial practice of Serbian courts, particularly in the jurisdiction of the Appellate Court in Niš and higher courts in this region.

We hope you will enjoy reading the results of scientific research on the legal, economic, social and policy-related other issues that the contributing authors have chosen to discuss in their theoretical and empirical research. The multidisciplinary nature of the submitted papers and the authors' choice of current legal issues indicate that our scientific journal ***Facta Universitatis: Law and Politics*** is open to different approaches to the legal matter under observation and committed to publishing scientific articles across a wide range of social sciences and humanities. In that context, we invite you to submit research articles on topics of your professional interest.

We would like to extend our appreciation and gratitude to our distinguished reviewers whose professional attitude to double-blind peer review has significantly contributed to the quality of our scientific journal.

We wish you a happy New Year and we look forward to our prospective cooperation.

Editor-in-Chief
Prof. Miomira Kostić, LL.D.
Niš, 17th November 2018

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Original Scientific Paper

EXERCITOR AND *MAGISTER NAVIS* IN ROMAN LAW *

UDC 347.79(37)

Marija Ignjatović

Faculty of Law, University of Niš, Serbia

Abstract. *The legal position of the owner of a vessel (exercitor navis) and the captain of a vessel (magister navis) was not always precisely defined in Roman law. A number of factors had an influence on it, and the most important one was the development of the maritime trade, which had a direct impact on this issue. At the beginning of its development, taking into account its insufficiently developed navigation, it is clear that there was no need for defining the legal position of the vessel owner and the captain of a vessel and establishing the difference between them. Since the navigation was primitive in the first phases of the development of maritime sailing, it was necessary for the vessel owner to monitor his vessel during a journey and look after all the goods he was entrusted with and passengers who were transported. With the development of maritime trade, especially in the classical period, they started to perceive the vessel owner and the captain of a vessel as two separate roles, which necessarily called for clearly and precisely defining their legal position, i.e. the clear distinction of the rights and obligations of a person who was the owner of a vessel and a person who was entrusted with operating the vessel. In the post-classical period, the general decadence which was omnipresent in the Roman society generated the decadence in the navigation, which had a number of negative reflections. One of them was merging the roles of the owner and the captain of a vessel in one person again. In order to better understand the positive effects of the situation when the ship owner was also the captain of that ship in the period of the late republic, as well as the negative effects of merging these two roles into one which occurred in the Dominate period, this paper will address the question of the legal position of exercitor navis and magister navis during three periods of the development of Roman law: the last centuries of the late Republic, the classical period and the postclassical period.*

Key words: *exercitor navis, magister navis, late Republic period, classical period, postclassical period.*

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* The study is a result of research on the project *Harmonizing Serbian Law with the Law in the European Union* which is financed by the Faculty of Law, University of Nis, for the period 2013-2018..

INTRODUCTION

The legal position of the owner of a vessel (*exercitor navis)* and the captain of a vessel (*magister navis)* in Roman law was one of the extremely interesting issues in Roman law because it was an integral part of the development of maritime trade in Rome.

The development of maritime trade in the Roman state occurred during the period after the conquest of Carthage, when Romans started to rule over the entire Mediterranean area and when they conquered northern and southern Gaul. In the newly conquered countries, they established their colonies (provinces) and built traffic connections for unhindered development of trade (primarily for the transportation of wheat and marble). The occupation of neighbouring nations after the Punic wars, the suppression of pirates at sea, and using military roads exclusively for commercial purposes (Stojčević, 1947: 47) made it possible to come into contact with different cultures and different goods (Stojčević, 1947: 47).[1] Most of the objects were made for the needs of local population, but there were certain regions of the Empire which specialized in producing particular products, for which reason merchants used to travel long distances, sometimes even beyond the borders of the Empire.

The survival of certain regions of the Empire, known for their local products, was the result of the Roman conquering policy. When they conquered the neighbouring countries, Romans did not destroy their cultures. They only stopped their further development, and included them in the Roman war, commercial and state machine (Ignjatović, 2002: 328). That significantly increased Roman production forces and the general culture level, which became especially noticeable in the case of maritime trade. Thus, conquering the Mediterranean made the world more connected than it had ever been before. Roman ships sailed everywhere from the Mediterranean, over the Black and the Red sea, to the Indian Ocean, in the west along the coast of modern Morocco, in the northwest to Britain, but the centre of navigation had always been the Mediterranean (the Roman sea) (Marquardt, 1892: 19-30). In these circumstances, the whole Mediterranean area, almost the complete ancient world, became a big commercial area (Stojčević, 1947: 47).

It is understandable that maritime trade, especially in the beginning, did not develop in the same way as it had developed during the period of classical law. Although Romans were famous in legal science for their legal ingenuity, legal logic, interpretation, formation and creation of law in accordance with practical needs (Ignjatović, 2016: 325-338), it is unlikely that they were the first creators of legal rules of maritime trade since they were not remembered as a maritime nation in history; maritime trade was developed a long time before the Romans by the Hellenic nation whose maritime law (*lex Rhodia de iactu*) was developed in the IX century BC (Ignjatović, 2017: 186)[2]. However, thanks to the reception of the maritime law of the island of Rhodes, which happened after they had conquered this island, Romans were ready for the development of maritime trade. The existence of the basis of maritime law offered an opportunity to further develop this field of law, particularly in the part related to transportation industry. Thus, in order to understand and comprehend certain principles related to the issue which is the topic of this paper, it is

[1] At the same time, there were two other significant trade-related developments: money and credit.

[2] This legislation developed under the strong influence of the Phoenicians, who were the most important traders in the ancient world. The Phoenician influence was prominent in Rhodes, which had been their colony for a long time. The Rhodian maritime code (*lexRhodia de iactu*) has never been found but, according to the works of Roman historians, it dates back to 475-479 BC. This legislation was later incorporated in the Roman legislation, and, from there, into Byzantine law.

necessary to establish certain time frame within which it would be observed. For this reason, in this paper, the issue of the legal position of the owner of a vessel and the captain of a vessel will be observed through all three periods in the development of Roman maritime law: the last centuries of the late Republic period, the classical period, and the postclassical period.

1. *Exercitor navis* and *magister navis* in the late Republic period

In the beginning of the development of maritime trade, maritime transport was done by *pater familias* himself – the owner of a ship (*exercitor navis*). That was the period when the functions of the owner and the captain of a vessel were united in one person, primarily because it was more economical (Šarac, 2008: 85),[3] On the other hand, in this period, the dominant principle was still *alteri stipulari nemo potest*, which meant that only *pater familias* was the one who could look after his cargo during the journey, arrange legal affairs independently and organize a sailing venture, accepting full responsibility for all the benefits as well as for the incurred damage.

The rule *alteri stipulari nemo potest* was particularly obeyed by the Romans of the upper social classes, who supported the attitude that the direct participation of persons *alieni iuris* and slaves in legal affairs was beneath their dignity. However, although that was the prevailing attitude, the legal practice at the end of the 3rd century BC, and especially at the end of the 2nd century BC, showed that the heads of families were willing to share profit of business performed by persons *alieni iuris* or slaves; they justified it by the fact that they were the owners of these slaves, referring to the provisions of the ancient Roman law which included that possibility.

***Gai. Inst.* 2.86**: *ADQUIRITUR AUTEM NOBIS NON SOLUM PER NOSMET IPSOS, SED ETISM PER EOS QUOS IN POTESTATE MANU MANCIPIOVE HABEMUS; ITEM PER EOS SERVOS, IN QUIBUS USUM FRUCTUM HABEUS; ITEM PER HOMINES LIBEROS ET SERVOS ALIENOS QUOS BONA FIDE POSSIDEMUS. DE QUIBUS SINGULIS DILIGENTER DISPICIAMUS* (Translation: Stanojević, 2009: 122-123)[4]

Thus, it was becoming more and more common that persons *alieni iuris* and slaves appeared as contracting parties that arranged certain legal affairs for *pater familias* by his order. Nevertheless, the participation of *alieni iuris* persons and slaves in legal-economic transactions generated some legal uncertainty since, in the beginning, no one wanted to do business and to arrange legal affairs with these persons because they did not have their own property, and the owner was not bound in this way. Since the principle *alteri stipulari nemo potest* had a dominant role, if there were people who arranged such business, they were not able to claim receivables in any way (Šarac, 2011: 45) since it was a matter of natural obligations (*obligations naturalles*) which could not be enforced by judicial action, but they could be claimed.

On the other hand, the fast development of legal-economic transactions, especially at the end of the period of the Republic, called for some changes in a particular direction.

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[3] In the period of undeveloped navigation, the owner of a vessel monitored his vessel himself, arranged and managed affairs related to its operation, management and maintenance.

[4] ***GaiInst*. 2.86** (translation: Stojanovic, 2009: 122-123): “We get our supplies not only by our own actions, but also by actions of other people, persons *alieni iuris* and slaves, regardless of whether they acquire them by means of a contract or inherited them.”

The appearance of private property and its accumulation were suitable for the new circumstances, as well as the introduction of *traditio* as an informal way of gaining property, which made it possible to have fast transactions, by gaining property *a manu in manu*. The liberation of trade from strict formalism, which had been present previously in the form of *mancipatio*, made it necessary to narrow the scope of the legal capability of *pater familias*, in favour of persons *alieni iuris* and slaves. Actually, the more prominent need of *pater familias* to arrange a large number of legal affairs with different contracting parties and in different places at the same time made it necessary to narrow the scope of his legal capacity in favour of persons *alieni iuris* and slaves.

The new situation demanded additional activity of the *praetor*, meaning that there was a need for new, more flexible solutions which would, in a way, depart from the strict rule *alteri stipulari nemo potest* which started to increasingly interfere with the need for fast legal-economic development. As a result of the *praetor'*s efforts, they reached a solution by introducing six new lawsuits (*actions adiecticiae qualitatis*), which precisely defined the situations in which both persons *alieni iuris* and slaves could appear and make commitments for *pater familias* (Bujuklić, 2013: 142)[5] One of these six lawsuits was *actio exercitoria,* which defined the responsibility of *pater familias* in case he entrusted a person *alieni iuris* or a slave with the management of his vessel. The introduction of this lawsuit was precisely the moment when they started to draw a distinction between the roles of *exercitor navis* (the owner of a vessel) and *magister navis* (the captain of a vessel) who was entrusted with operating the vessel.

2. *Exercitor* and *magister navis* in the classical period

In the history of Rome, the classical period is remembered as a period of general prosperity. When it comes to trade, it was the period of a great expansion to the east; Roman merchants exploited not only Asia Minor but they also crossed the Suez Canal, and travelled as far as China. The general development of trade, therefore, did not allow for rigid solutions and strict forms. The need for quick and efficient ways of arranging legal affairs created the need for the participation of other persons in legal-economic transactions, whose engagement would enable the *pater familias* to arrange a great number of legal affairs in different places at the same time. Since one of the basic principles of the Roman law of obligations was *alteri stipulari nemo potest* (i.e. that no one could be contractually obliged if he did not participate in making that contract), the solution for the fast turnover of goods was the *praetor*'s introduction of *actions adiecticiae qualitatis.* In this way, he established the responsibility of the *pater familias* in cases where he was not present during the arrangement of legal affairs, because he was sometimes far away from the place of making a contract.

From the aspect of maritime trade, the introduction of *actio exercitoria* in maritime-law relations in the 2nd century BC led to faster transactions in maritime trade, and it also brought consensualism of the classical period to the fore, which was embodied in the will of *exercitor*, expressed in *praepositio*[6], to name the captain of a vessel *(magister navis).*

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[5] From Lat.***adiecticius*** – added, the name given by medieval jurists (glossators) because the obligations which they produced were "added" to the primary responsibility of *pater familias*.

[6] *Praepositio* – one-sided legal business in which *exercitor* appointed a certain person as the captain of a vessel and at the same time he implicitly took responsibility to the third party that he would accept all the obligations accepted by the captain of a vessel, as if he was present during the arrangement of legal business

Expressing the freedom of will that, in certain legal affairs related to the transportation of goods and passengers by sea, an appointed person could act according to the orders of the owner of a vessel *(exercitor navis),* represented the fulfilment of the need for fast legal-economic transactions, since the other contracting party did not waste time seeking information about a captain and his qualities, but was only focused on what was stated in *praepositio* (the person named the captain of a vessel and the scope of his authorization). Thus, *exercitor* was the manager in the company: "*ad quem obventiones et reditus omnes perveniunt sive is dominus navis sit, sive a domino navem per aversionem conduxerit vel ad tempus vel in perpetuum"* (Brunetti, 1929: 109) The complete authorization related to the organization and management of a vessel was united in his personality; thus, *magister navis* was an expression of his will to entrust the vessel management to a certain person.

D.14.1.1.1. (Ulp. 28 ad ed): *MAGISTRUM NAVIS ACCIPERE DEBEMUS, CUI TOTIUS NAVIS CURA MANDATA EST.*

The *exercitor* usually chose one of his *alieni iuris* persons or slaves for the captain of his vessel (*magister navis*) (Romac, 1994: 835).[7] Under Roman law, apart from these persons, it was also possible to appoint a free person (who hired a vessel) as the captain, who did maritime transport professionally for his own benefit and who had responsibilities to the third party related to his obligations in maritime business (Pezelj, 2017: 315)

***Gai, Inst.* 4.71**: *EADEM RATIONE CONPARAVIT DUAS ALIAS ACTIONES, EXERCITORIAM ET INSISTORIAM. TUNC AUTEM EXERCITORIA LOCUM HABET, CUM PATER DOMINUSVE FILIUM SERVUMVE MAGISTRUM NAVI PRAEPOSUERIT, ET QUID CUM EO EIUS REI GRATIA CUI PRAEPOSITUS FUERIT GESTUM ERIT. CUM ENIM EA QUOQUE RES EX VOLUNTATE PATRIS DOMINIVE CONTRAHI VIDEATUR, AEQUISSIMUM ESSE VISUM EST IN SOLIDUM ACTIONEM IN EUM DARI. QUIN ETIAM, LICET EXTRANEUM QUISQUAE MAGISTRUM NAVI PRAEPOSUERIT SIVE SERVUM SIVE LIBERUM, TAMEN EA PRAETORIA ACTIO IN EUM REDDITUR*. (Translation: Stanojević, 2009: 318-319).[8]

Although Roman law, especially after introducing *actio exercitoria,* offered a possibility to appoint not only a person *alieni iuris* but also a slave as the captain of a vessel, it rarely happened in practice (Romac, 1973: 481)[9] Namely, the risk was too big in this case; there was a possibility that a slave would run away, because it was not possible to monitor a slave (Šarac, 2008: 93) In that case, *exercitor navis* was exposed to a great loss taking into consideration the value of a ship, ship equipment, crew and cargo. Therefore, that might be one of the reasons why the texts of the ancient Roman law did

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[7] Taking into consideration the fact that in the first stages of the development of maritime trade Romans did not have much experience, they usually entrusted maritime work to slaves of the Greek or Oriental origin.

[8] ***Gai*, *Inst*. 4.71** (translation: Stojanovic, 2009: 318-319): "For the same reason two other lawsuits were given: *exercitoria* and *insistoria*. *Actio exercitoria* was implemented when a father or a master appointed his son or slave as the captain of a vessel and someone arranged business with him, which was related to his position. Namely, as it was considered in this case that the business was arranged in accordance with the will of the father or master, it was completely just to file a suit against him for the total value of the debt, even though the commander of a vessel was a person that did not belong to that family, either someone else's slave or a free man, and it was possible to bring *actio exercitoria* against him (the head of a family).

[9] In case that a slave was appointed as captain of a vessel, it was usually a slave of Greek or Oriental origin, given the fact that they were educated people who had certain maritime knowledge and skills.

not offer a single real proof that it was necessary to appoint a person *alieni iuris* or a slave as the captain of a vessel; but, in some texts, like in the above cited source written by Gaius, it was stated that it could be a foreigner (*extraneus*). Ulpianus shared the same attitude.

D. 14.1.4. (Ulp. 28 ad ed): *CUIUS AUTEM CONDICIONIS SIT MAGISTER ISTE, NIHIL INTEREST, UTRUM LIBER AN SERVUS, ET UTRUM EXERCITORIS AN ALIENUS:SED NEC CUIUS AETATIS SIT, INTERERIT, SIBI IMPUTATURO QUI PRAEPOSUIT.*[10]

"The captain had to be not only the person who *exercitor* trusted most but also a very educated person. The commander of a ship determined the course of the ship, because of which he had to have maritime knowledge and skills; it often depended on his skilfulness whether the ship, cargo and passengers would survive a storm or a pirate attack. Apart from that, in order to have control over his crew, he had to be a respected and authoritative person" (Šarac, 2008: 94). From all the aforesaid, it may be concluded that the common practice was to appoint either a person *alieni iuris* or a free citizen as captain of a vessel (*magister navis*), who was entrusted with managing the vessel, while the complete responsibility was placed on the owner of a vessel (*exercitor*) and it was estimated *in solidum* (Horvat, 1998: 236).[11]

In this context, there is another interesting attitude given by Ulpianus who, referring to Julianus' attitude, pointed out that the captain of a vessel was not only the person appointed by *exercitor* but also the person appointed by the captain of a vessel himself (*magister navis*). In that case, the owner of a vessel (*exercitor*) was also responsible for the work of the *promagister*, because the basic attitude was that the *exercitor* had to know that the *promagister* had been appointed by the captain and it was supposed that he had approved it. According to Ulpianus, even if the *exercitor* explicitly opposed it, he was responsible for general safety of all the participants of a sailing venture (Šarac, 2008:123) In addition, the *exercitor* could appoint more than one person as the captain of a vessel, and in that case every single person had his own duties. The most common duties of the captain of a vessel were renting a ship, loading and unloading goods, the transportation of passengers, buying ship equipment, etc. For all these tasks, the *exercitor* was responsible *in solidum*, because they relied on the *praepositio* where all these duties were specifically stated, so that they represented the will of the *exercitor*.

The introduction of this type of responsibility was necessary, inter alia, because it represented the basis for the relationship of trust between providers and recipients of service of maritime transportation in the classical period.

3. *Exercitor* and *magister navis* in the postclassical period

The postclassical period in the history of the Roman state was characterized as a period of the decline of the slave-holding system and the emergence of the feudal system. The Dominate period was marked by a general decadence in the Roman society. A group of authors used political reasons to explain the problem of decadence, claiming that

[10] **D. 14.1.4. (Ulp. 28 ad ed):** 'The legal status of a captain had no significance; it was not important if he was a free person or a slave and, if he was a slave, whether he belonged to exercitor or to someone else. His age was not important either, since it was something that a person who appointed him should take care of".

[11] Most probably, appointing a free person as the captain of a vessel started in the classical period and that was not the case in the period of introducing *actiones adiecticiae qualitatis*.

pretenders to the emperor's throne were focused on the power-related issues and fought long and exhausting battles with each other, which resulted in the weakening of the defence capacity of the state and its collapse when it faced the attacks of barbaric tribes. Other authors, however, found the explanation for this in moral and spiritual decline of the Roman society in the Dominate period, pointing out to the weakening of old Roman traditions and virtues, as well as the decline of paternal authority and other fundamental Roman law institutions (Boras, Margetić, 1980: 211).

The most significant consequence which the Roman Empire had to face in this period, due to economic and other types of decline, was certainly their return to agricultural production. All branches of economy which had existed up to that point (crafts, trade, transportation, mining, etc.) ceased to exist if they were not useful for agriculture (Lot, 1927: 62-64).[12] It also had a direct influence on the drastic reduction of turnover and trade; on the other hand, it affirmed the already started process of naturalization. The general tendency was a return to a closed home production, whose pivotal point was a large estate which was the core of general social events. This type of economy was incompatible with commodity production, which led to the weakening and total collapse of middle-sized estates, which did not have any conditions for further survival.

Due to such developments, state authorities started to lose their power as they were no longer able to stand against the increasingly prominent process of naturalization. The tendency of increasing the number of large estates led to the emergence of *coloni*, independent farmers, who became part of large estates, either willingly or because of specific circumstances, and this strengthened the role of estate owners. According to Beaudoin, the estate owner was a sort of *iudex privatus*, which was opposite to the principles applicable in the late Roman Empire. Yet, besides the existing prohibitions, he still had full power which was a consequence of weakening of the state (on the one hand) and strengthening of estates (on the other hand) (Beaudoin, 1889: 71). Thus, large estates started to get more economic independence and autonomy, and gathered people from a larger area (Romac, 1966: 62)[13]

The instability of money, putting all branches of economy (crafts, trade, transportation, mining, etc.) at the service of agriculture and the unsafety of sailing at sea had a direct influence on the changing legal position of *exercitor* and *magister navis.* Unlike the previous periods, it did not have its foundation in *voluntas exercitora*, but it was based on the safety of sailing at sea and the protection of passengers' interests. In that regard, it is understandable why in this period, in order to protect their interests before making a contract, the other contracting party had to obtain information about the captain of a vessel and the scope of his authorization, as well as about what it had been stated in the *praepositio*. In addition, they had to obtain information about the person *exercitor* and weather he would be responsible for obligations from the arrangements made by authorized persons in his name.

As it can be noticed, in the postclassical period, with the decline of the maritime Mediterranean transportation, the classical figure of the *exercitor* disappeared. It is safe to say that in this period the situation was the same as the one at the beginning of the development of maritime sailing, i.e. the *exercitor* and the *magister navis* were again joined

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[12] Anarchy, which appeared in the Dominate period, was a period of violence, robberry, unsafety of life and property, and it led to almost complete disappearance of trade and exchange in certain areas.

[13] "Occasionally, this behaviour of Roman noblemen was interpreted as a loss of the collective awareness and a lack of care for the interests of the empire as a whole, and the reasons for this were seen in different influences, some of which were the influence of Christianity and the church, the change in the social structure of the upper classes of the society, the disappearance of rectitude of the old Rome, and similar reasons." (Romac, 1966: 62)

in one and the same person. Actually, *ius exercitoria* started to disappear, which can be explained by the collapse of navigation. On the other hand, due to the collapse of navigation, it happened that primarily smaller ships with small cargo travelled at sea; hence, for reasons of economic profitability, the owner of a vessel and the technical manager of the expedition were joined in the same person (Brunetti, 1929: 110).[14]

Due to general circumstances in the state at that time, the emphasis was put on the safety of sailing and the protection of passengers' interests, and not on the *voluntas* of a ship operator. Considering that fact, *praepositio* resembled an authorization for representation. The will expressed in *praepositio* was concretized by the *magister navis*, when he arranged particular legal business, which means that he was primarily guided by his free will. On the other hand, Roman law kept the basic principle that the person who accepted the obligations was the one who made a contract (*alteri stipulari nemo potest*), which meant that an intermediary who made a contract also accepted some obligations. On the basis of the aforesaid, it may be concluded that, in this period, the captain of a vessel *(magister navis)* still did not have authorization for representation, legally speaking. He arranged business in his own name and he became a contracting partner. On the other hand, given the fact that the *magister navis* was authorized by the *exercitor*'s will, the *exercitor* was bound by the contract but he was responsible only if the *magister* did not exceed his authorization. For this reason, when arranging legal affairs, the other contracting party had to pay attention to personal qualities of the *magister* as well as to personal qualities and interests of the *exercitor*.

CONCLUSION

Taking everything into consideration, it may be concluded that the legal position of the owner of a vessel (*exercitor*) and the captain of a vessel (*magister navis*) was not equally treated in all phases of the development of the Roman maritime law. Namely, with the development of maritime trade after the Punic wars and the conquest of the Mediterranean, the rule was that the owner of a vessel had to be on board during the journey and to look after the vessel, since it was more economical; thus, he was supposed to reap the benefits of his vessel but also to suffer negative consequences.

On the other hand, the ruling principle *alteri stipulari nemo potest* did not allow that any other person make commitments for an owner. However, with the development of trade in general, and especially with the development of maritime trade, the old forms became rigid and started to impede the fast development of legally economic dealings. Although the prevailing attitude of Romans that belonged to the upper social classes was that the participation of *alieni iuris* persons and slaves in arranging legal affairs was beneath the dignity of *pater familias*, the practice from the end of the 3rd and 2nd century BC showed that it was becoming more and more common for these people to arrange legal affairs for the heads of families, who were thus willing to share profit.

For the given reasons, the new situation required the *praetor*'s fast intervention and his actions led to reaching solutions suitable for the fast turnover of goods and services. In his Edict, the *praetor* prescribed the introduction of *actiones adiecticiae qualitatis*,

[14]The loss of *ius exercitoria* was one of the reasons why in later laws, and especially in pseudo-Rodian law, there was no mention of the classical figure of *exercitor*.

which, viewed from the aspect of maritime trade, enabled persons alieni iuris and slaves to manage a vessel by order of pater familias, i.e. to be appointed captain of a vessel (magister navis). This point in the development of maritime trade was the breakthrough moment when the function of the owner of a vessel (*exercitor*) started to be differentiated from the function of the captain of a vessel (*magister navis*). On the other hand, this moment was in accordance with the spirit of the classical period, when the will was favoured as an important element of a contract. Due to that, the owner of a vessel could be kilometres away from the place where the contract was made between the captain of a vessel and the other contracting party. It was enough that he stated his unequivocal will that a certain person should be appointed as captain of a vessel in *preapositio*, unilateral legal business. At the same time, by this act, he implicitly made a commitment to the third party that he would assume all obligations taken by the captain of the vessel, as if he attended the arrangement of a particular legal affair. The legal ground of his responsibility was *ius exercitoria,* and, in case of a failure to abide by the agreement, the third party could invoke the *exercitor's* liability on the basis of *actio exercitoria*.

In the postclassical period, with the general decadence of the Roman society, the roles of the *exercitor* and *magister navis* merged again in one person. The decline of navigation and the reappearance of pirates at sea led to the situation that the ships that travelled at sea were mostly small ones with small cargo. Thus, for the reason of economic feasibility, the roles of the owner of a vessel and the technical manager of the expedition were united in the same person. The difference is that, in the period of starting maritime trade, the merging of the *exercitor* and *magister navis* was the result of the beginning of its development, while in the classical period, this merging was the result of declining and the general decadence which led to the disappearance of the *exercitor* and its replacement with the person *nauclero* in the late preclassical period.

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EXERCITOR NAVIS AND *MAGISTER NAVIS* U RIMSKOM PRAVU

Pravni položaj vlasnika broda (exercitor navis) i kapetana brodara (magister navis), nije bio oduvek precizno definisan u rimskom pravu. Na njega je uticalo niz faktora, a najznačajniji činilac koji je imao direktne refleksije na ovo pitanje, bio je sam razvoj pomorske trgovine. U prvim danima razvoja, imajući u vidu nedovoljno razvijenu plovidbu, razumljivo je bilo što se pitanje definisanja i razlike u pravnom položaju vlasnika broda i kapetana brodara nije ni postavljalo. Sa razvojem trgovine uopšte, a posebno sa razvojem pomorske trgovine, stari obrasci postali su kruti i počeli su da ometaju brz razvoj pravno-ekonomskog prometa. Iako je kod Rimljana iz viših društvenih slojeva dugo preovladavalo shvatanje da je učešće lica alieni iuris i robova u zaključivanju pravnih poslova ispod svakog dostojanstva pater familiasa, praksa s kraja III i II veka pre nove ere govori o tome da su sve češći bili primeri gde su ova lica zaključivala pravne poslove za starešine porodica, koji su pak na ovaj način rado delili profite.

Ključne reči: *exercitor navis, magister navis, period kasne republike, klasični period principata, postklasični period dominata*

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Original Scientific Paper

THE APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS IN POLAND

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Abstract. *The EU system for the protection of fundamental rights had been developing since 1969 until the date of entry into force of the Treaty of Lisbon, which established three areas for the protection of human rights. The first is based on the Charter of Fundamental Rights, the second refers to the general principle, as emphasized by the Court of Justice in its case law in the 1970s. The last area is the future one and it assumes strengthening the protection of fundamental rights within the Council of Europe system by obliging the EU to join the ECHR. The Charter of Fundamental Rights initially had the status of an inter-institutional agreement, which acquired binding force only under the Treaty of Lisbon. Currently, it is a document with normative power equal to primary law. Each of the Member States is bound by the provisions of the Charter within the scope of EU competences and when implementing the EU law. Additionally, Poland and the United Kingdom are parties to Protocol No. 30, which is also treated as primary law. In addition, Poland attached two Declarations to the Treaty of Lisbon. The analysis of the Charter provisions and views of the doctrine clearly indicates that it is not a classic opt-out clause and the parties cannot release themselves from the obligation to apply the provisions of the Charter. The Declarations, on the other hand, are only political in nature and do not affect the scope of the Charter's application, but they define certain values that are important from the perspective of the Polish legal system.*

Key words: *Protection of fundamental rights, EU law, Charter of Fundamental Rights*

1. GENERAL REMARKS

One of the distinguishing elements of contemporary international relations is the reference to the concept of personalism, affirmation of the human being and the recognition of dignity as a source of individual rights and freedoms. The tragic war experience made

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the international community aware of the need to create effective mechanisms to protect human rights and freedoms at various levels. The processes initiated immediately after the end of World War II have led to the formation of three types of human rights protection systems: intra-state - separate for each country and valid on its territory; international - universal, which develops under the auspices of the UN, and regional - characteristic of a specific region of the world (e.g. European, African, inter-American); and transnational - connected directly with the emergence and development of the European Union (hereinafter: the EU) (Banaszak 2000: 16). The indicated systems permeate and complement each other, which makes them an increasingly effective form of protection of human rights.

Poland, like other European countries, having completed the process of political transformation that took place in the years 1989-1997, guarantees fundamental rights at various levels. First of all, constitutional guarantees were formed. Secondly, it is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and the International Covenant on Civil and Political Rights, and thus participates in the universal and regional system. Thirdly, as a Member State, it is obliged to guarantee the effectiveness of the EU system for the protection of fundamental rights.

The subject matter of this article is the analysis of one aspect of the system created by the EU and its impact on the protection of fundamental rights in Poland. The considerations will be divided into two parts. The first will be devoted to discussing the structure of protection of human rights in the EU and a detailed analysis of the legal character and structure of the Charter of Fundamental Rights of the European Union (hereinafter: the CFR). The second part will present problems related to the application of the CFR in Poland in connection with the signing of Protocol No. 30.

2. The Meaning of the Charter of Fundamental Rights in the System of EU Law

The EU system for the protection of fundamental rights had been developing since 1969 until the date of entry into force of the Treaty of Lisbon (hereinafter: TL) (Krzysztofik 2008:33-52, Krzysztofik 2014:63-78), which established three areas for the protection of human rights (Art. 6 TL).[1] The first is based on the Charter of Fundamental Rights (CFR) of the European Union[2]; the second refers to the general principle which the Court of Justice stressed in its case law in the 1970s. The last area is the future one and it assumes strengthening the protection of fundamental rights within the Council of Europe system by obliging the EU to join the ECHR.

2.1. The scope of application of the Charter of Fundamental Rights

The need to create a single catalogue of rights and freedoms protected in the European Union appeared along with the indication of respect for human rights as a general principle

[1] See: Treaty of Lisbon (TL) amending the Treaty on European Union (TEU) and the Treaty establishing the European Community, OJ EU 2007 C 306, of. 17.12.*2007*., available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT

[2] See: Charter of Fundamental Rights (CFR) of the European Union, OJ EU 2007 C 306; available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2007%3A306%3ATOC

of EU law in the jurisprudence of the Court of Justice. Work in this area started with the decision to unify the system of protection of human rights, undertaken by the European Council during the Cologne summit and ended with the adoption of a single document - the CFR (Presidency Conclusions, Cologne European Council, 3-4 June 1999).[3] The Annex to the Conclusions contains general assumptions regarding the provisions of the Charter and the guidelines relating to the body established for its elaboration. It was emphasized that the Charter should contain general principles resulting from the ECHR, constitutional traditions of the Member States, rights granted in the Treaties to citizens of the European Union, as well as economic and social rights arising from the European Social Charter and the Community Charter of Workers Rights and principles stemming from the jurisprudence of the European Court of Justice and the European Court of Human Rights. The next meeting of the European Council took place in Tampere on 15-16 October 1999, where provisions regarding the composition of the body defined as the Convention and the methods of its work were presented in the Presidency Conclusions, specifically in the Annex (Precidency Conclusions, Tampere European Council, 15-16 October 1999).[4] The Convention adopted the project on 2 October 2000, and it was later adopted by the European Parliament on 14 November 2000, by the European Commission on 6 December 2000, and it was signed and proclaimed in Nice on 7 December 2000 by the Presidents of three Community institutions: the European Parliament, the European Commission and the European Council. Finally, the CFR was signed in Nice in 2000 by three institutions: the Council, the Commission and the Parliament.

The Charter of Fundamental Rights is based on the concept of anthropocentrism, which places man at the centre of regulations (Mik, 2001:66-70). The creators codified the rights, freedoms and principles that had various sources: the European Convention on Human Rights, the European Social Charter, constitutional traditions common to all Member States, as well as the provisions of the Founding Treaties (Arnold, 2002: 38).

In the initial period, the Nice Charter was not binding. During the European Council summit in Nice, it was emphasized that it is only a “declaration of European morality” (Muszyński, 2009: 56). The legal character of the CFR was ambiguous. The literature assumes that it was an inter-institutional agreement (Muszyński, *et al.,* 2009: 58). There is no doubt, however, that it had a huge influence on the functioning of EU institutions. As an example, the position presented by the Commission immediately after the proclamation of the CFR should be indicated, in which the Commission emphasized that it would treat the CFR as a binding act. It consistently studied legislative proposals in terms of compliance with the Charter’s provisions. A similar position was taken by the European Parliament which, based on Article 34 of the regulations, controlled legislative projects dealing with the provisions of the CFR (Wieruszewski, 2008: 52-53). However, the position of the Court of Justice of the European Union was the most important in defining the place of the CFR in the system of EU law. The first spokesman was Advocate General M. Damaso Ruiz Jarabo Colomer, who stressed that “*it does not have any autonomous binding effect because it does not have any legal force of its own”*. However, its content is based on the Member States’ values which, by virtue of the CJEU jurisprudence, have been recognized as general

[3] See: Presidency conclusions, Cologne European Council, 3-4 June 1999, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm
[4] See: Precidency conclusions, Tampere European Council, 15-16 October 1999; available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm

principles of EU law. He added that the CFR "*Should be treated as a substance of a common European acquis in the area of fundamental rights. It does not create a new law, but it codifies existing "unwritten Community rules" known in universal international law as general principles of rights (...) The Charter does not become legally binding, but legally significant*" (Muszyński, *et al*., 2009: 56-57).

This stance was also shared by the CJEU, which stressed in one of its judgments that "*While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.*"[5] According to the CJEU, the CFR's applicability is dictated by the fact that it is consistent with the standards of protection of human rights, which were protected in the EU on the basis of the general principle.

Legal actions aimed at giving binding force to the CFR were taken during the work on the Treaty establishing a Constitution for Europe. A general reference to its provisions was made in Article I-7 of the first part and its test was included in part II as an integral element of the Treaty.[6] Due to the fact that the Treaty was not ratified by all Member States, the current reforms were adopted under the Treaty of Lisbon. By virtue of the provisions of Article 6 par. 1 TEU, the position of the CFR in the system of EU law was clarified.

The Treaty of Lisbon gave the CFR binding force equal to primary law. In the provisions of Article 6 par. 1 TEU, it gave the CFR normative power equal to primary law. Thus, it has become a source of law with the highest normative power in the system of sources of EU law. The consequence of this is the direct effectiveness of the CFR, the possibility of relying on its provisions before national courts and the CJEU (of course, provided they are rights which are directly effective and only in the area of EU law), and an indirect effect in interpreting the provisions of EU and national law in the scope of the functioning of EU law. In addition, it was subject to the principle of primacy in the event of a conflict with rules of national law within the scope of EU law and provided that the fundamental rights were properly invoked (Wyrozumska, 2008: 83-84).

The analysis of the scope of application of the CFR should start from the last chapter and the provisions of Articles 51-54 CFR, (especially Article 51 CFR) and Article 6 par. 1 TEU, as well as paragraph 2 of Declaration No. 1 attached to the Treaty of Lisbon concerning the Charter of Fundamental Rights of the European Union and explanations attached to the CFR (Article 51). Wyrozumska emphasizes that "*the use of the Charter was subject to conditions specified in the Charter itself, then repeated in the Treaty of Lisbon in Article 6 par. 1 and strengthened politically by the Declaration of the Conference.*" (Wyrozumska, *et al.* 2008: 86).

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[5] Case 540/03 *European Parliament v. Council of the European Union*, of 27 June 2006, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0540

[6] See: Treaty establishing a Constitution for Europe, OJ EU C 310, of 16 December 2004, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3AC2004%2F310%2F01

The basic condition expressed in the indicated provisions is the limitation of the application of the CFR only to the scope of application of EU law. It was clearly emphasized that the catalogue of rights, freedoms and principles included in the CFR does not extend the scope of application of EU law beyond EU competences, nor its tasks, nor does it change the competences and tasks defined in the Treaties (Article 51 CFR). Thus, the EU takes action in accordance with the principle of competences entrusted to it and only within the limits of the competences delegated to it by the Member States, contained in the TEU and the TFEU; the principle of conferral was expressed in Article 5 par. 2 TEU. At the same time, the Treaty of Lisbon specified the types of competences by dividing them to exclusive (Article 3 TFEU), shared (Article 4 TFEU) and coordination competences (Article 6 TFEU). EU institutions, including the CJEU, are fully bound by this principle. Thus, the CFR does not bind the Member States to the full extent of the application of national law, but it is binding in those areas which fall within the competence of the EU; District Court in Częstochowa, IV Division of Labour and Social Insurance in Częstochowa, on 13 December 2013 (Case IV U1470 / 12) directed five questions regarding the retirement provision of the officers of Police, Internal Security Agency, Intelligence Agency, Military Counter-intelligence Service, Military Intelligence Service, Central Anti-corruption Bureau, Border Guard, Government Protection Bureau, State Fire Service and Prison Service and their families, and compliance with principles of respect for human dignity, the rule of law, equality, non-discrimination and the right to a fair trial. The Court of Justice found that it was not competent to answer these questions. In the argumentation, the CJEU emphasized that the CFR only binds Member States when they apply EU law, and that its provisions do not extend the scope of EU competences. In the CJEU's view, the Polish Court *has not sufficiently shown that the Act of 2009 falls within the scope of application of EU law or is its direct application*. The key judgment in the analysis of the provisions of Article 51 par. 1 CFR is the judgment of the CJEU in case C 617/10 *Åklagaren v. Hans Åkerrberg Fransson* (EU:C; 2013: 105), where the CJEU emphasized that "[...] *the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. [...]. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*"[7]

The obligated entities are the EU, EU institutions and EU organizational units respecting the principle of subsidiarity, and the Member States, but only when they implement EU law. This condition means that the CFR binds the States only in the implementation of EU law and not in the entire sphere of national law.

The indicated provisions are strengthened by Article 51 par. 2 CFR, which emphasizes that "*The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*." The indicated wording should be understood as a legally

[7] C 617/10 *Åklagaren v. Hans Åkerrberg Fransson*, EU:C; 2013:105, of 26 February 2013, available at. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2013:105

binding principle of interpretation and application of EU law (Wróbel, 2013: 1343). The interpretation should be that the interpretation of EU law in relation to the CFR or in accordance with its provisions should not lead to the extension of EU competences (Wróbel, *et al*. 2013: 1343).

Another issue related to the application of the CFR is the diversity of the rights contained therein. The Charter itself indicates rights, freedoms and principles. The rights may be directly effective, while the freedoms are specific program standards that require implementing acts and can be used to interpret implementing acts or to control their validity. The Charter of Fundamental Rights does not specify which regulations contain rights and which contain principles. In addition, explanations to the CFR indicate provisions that in some elements include both principles and rights; in accordance with the views expressed in the literature on the subject, rights were regulated in: Art. 2, Art. 4-8, Art. 9-14, Art. 16-19, Art. 21, Art. 39-40, Art. 42-48, Art. 50. Principles were regulated in: Art. 20, Art. 25-26, Art. 35-38, whereas the regulations that combine rights and principles are regulated in: Art. 3, Art. 15, Art. 23-24, Art. 27-33, Art. 34, Art. 41, Art. 49 (Kamiński 2009: 42; Wróbel 2009: 44).

The last matter which should be given special attention is the provisions of Article 52 par. 2-4 CFR, which contain interpretative guidelines. The CFR contains the rights, freedoms and principles that derive from the ECHR, the Founding Treaties and the constitutional traditions common to all Member States. In addition, as indicated, the explanations to the Charter specify what the source of a given provision is. Therefore, the CFR provisions should be interpreted in accordance with the source of origin, i.e. the ECtHR jurisprudence, the CJEU case law or the constitutional traditions common to all Member States.

When analysing the case law of Polish courts, particular attention should be paid to the problem of examining the scope of the Charter. Many times courts omit the reference to the general provisions of the Charter and do not articulate argumentation to determine whether it is possible to invoke its provisions on the subject of the proceedings (Wróblewski, 2015:18). Wróblewski emphasizes that administrative courts very often refer to the provisions of the CFR primarily in the context of the principle of respecting the right to good administration. However, the problem is that in none of the judgments have the courts considered whether or not the CFR's stance is possible in a given case. In addition, they did not interpret the provisions of Article 41 CFR which, according to the literal wording, provides that the right to good administration applies to the institutions, bodies and agencies of the Union (C 604/12, EU: C; 2013:714).[8] Similar observations concern judgments of common courts. They use the CFR's provisions without analysing the scope of its application. In contrast, the Supreme Administrative Court and the Supreme Court sporadically refer to the CFR, but they apply it correctly in the context of EU law. It is worth recalling the position of the Supreme Administrative Court, which drew attention to the relationship between the CFR provisions and the existing norms of EU law. It emphasized that "*the Charter of Fundamental Rights, as a primary law, is part of the legal order of the European Union, but the allegation of violation of the provisions of this Charter can only be raised if EU law other than the Charter applies or should apply. Thus,*

[8] C 604/12 *H. N. v. Minister for Justice*, *Equality and Law Reform and Others*, EU: C:2013:714, of 7 Nov. 2013, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2013%3A714

the allegation of violation of the provisions of the CFR cannot be independent grounds for the complaint for declaring the Supreme Administrative Court's decisions contrary to law, because the Charter is applicable only if other European Union law may apply in the case, and the indication of these provisions is required in a complaint of non-compliance of the Supreme Administrative Court rulings specified in art. 285e § 1 point 3 p.p.s.a. (law on proceedings before administrative courts). Failure to do so results in the complaint being rejected, pursuant to art. 285 h § 1 p.p.s.a (NSA Decision of 22 August 2014 r. (II ONP 4/14), LEX nr. 1584120)*"* (Wróblewski, *et al*. 2015: 18-19 and 21-22).

3. The Impact of the Polish-British Protocol on the Application of the Charter of Fundamental Rights in Poland and the United Kingdom.

When considering the problem of using the CFR, reference should also be made to the Polish-British Protocol (Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom)[9] attached to the Treaty of Lisbon (hereinafter: the TL).

The content of the Protocol was essentially negotiated by the United Kingdom, and Poland joined it in the final phase of the negotiations (Wieruszewski, 2008: 56-59; Wyrozumska, 2007: 59). It is assumed in the literature that it is an international agreement that is at the same time an integral part of the TL. Therefore, after the TL entered into force, this agreement gained the power of primary law (Wyrozumska, 2008: 32).

The analysis of the provisions of the Preamble to the Protocol indicates that its purpose is to specify to what extent and how the CFR will be applied in Poland and the United Kingdom. Therefore, it cannot be an *opt-out* clause in the classic sense (Schütze, 2012: 441). It seems, however, that the aims of the state parties were different; it should be emphasized here that, throughout the work on the CFR, the United Kingdom was against making it binding and stressed that it cannot be the beginning of the process of shaping of the European constitution or become a new standard in the currently binding legal system (Skrzydło, 2015: 25-29). They assumed that the Protocol would result in limiting the use of the CFR in their legal systems. This is confirmed by the position of a British judge who emphasized in one of the judgements that he was *"surprised that the legal basis was invoked by the plaintiff, i.e. that the Charter of Fundamental Rights applies in the case, despite the fact that the British Government - as well as Polish - secured a derogation during the negotiations on the Treaty of Lisbon. Meanwhile, despite the efforts of the representatives in Lisbon, the Charter is apparently a part of British law*." (Skrzydło, 2015: 26).

When considering the effect of the Protocol, one should first and foremost make literal interpretations of its provisions. It indicates that, first, the CFR is applied in Poland and the United Kingdom only when they implement EU law. According to Article 1 CFR, the Protocol does not extend the ability of the CJEU or the national courts (in Poland and in the United Kingdom) to recognize that national provisions violate the rights or principles contained in the CFR. In addition, pursuant to Article 2, provisions of Title IV are justiciable solely in the situation and to the extent in which they result from the provisions in Poland or in the United Kingdom. There is no doubt that the indicated provisions

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[9] See: Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ EU C 326, of 26 October 2012, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F30

correspond with the provisions of Article 51 CFR, which has been discussed in more detail above.

It should be noted, however, that the CFR contains rights and principles that come from three different sources. As has been indicated, these sources are the constitutional traditions common to all Member States, the ECHR and the Founding Treaties. In principle, it should be assumed that the CFR confirms the already existing rights and principles that are protected in the Member States, because they are consistent with each State's constitutional traditions; in this respect, the CFR, using common constitutional traditions as the basis, may be the minimum standard of protection, while states can retain wider protection. (Cf.: Position of the CJEU in the case of *Omega*[10]; the subject matter of the analysis was the prohibition of betting in the "Playing at killing" game. German authorities referred to the premise of public order indicating that the game infringes the constitutional principle of protection of human dignity. The discussed decision does not refer to the provisions of the CFR, because the German level of protection exceeded the EU standard.)

The second indicated source is the ECHR. Poland is a party to the Convention and the protection of these rights and principles results from legal and international obligations. On the other hand, the rights and principles derived from the Founding Treaties were protected at the EU level even before the adoption of the CFR. From the Polish perspective, it has been a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms since 1992 (the Convention was drafted on 4 November 1950 in Rome, ratified by Poland in 1993, and published in Dz. U. 1993.61.284), joined the EU in 2004 (by The Treaty of Accession to the EU of 16 April 2003, OJ EU, L 236, 23 September 2003, published in Poland in Dz. U. 2004.90.864),[11] so that EU law has been in force in the Polish legal system since 1 May 2004. Moreover, the Polish Constitution was based on common European values (Łętowska, 2005: 3ff). Therefore, from this perspective, it seems that the CFR provisions do not pose a threat to the Polish legal system.

Poland also added two unilateral declarations to the TL relating to the CFR's applicability. Of course, the legal nature of the declarations is different from the CFR. They are not binding, but they are political declarations of the state. The first of them, Declaration No. 61, refers to values that are very important and especially prized in Poland. It stipulates that "*The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity*." The second, Declaration No. 62, refers indirectly to the Protocol because it takes the same scope of provisions. According to its wording, "*Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union*." It seems that the Polish assumptions regarding the role of the Protocol should be interpreted together with the Declarations. The Polish government sought to

[10] C - 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn 1,* ECR 2004, p. I-9609.

[11] See: The Treaty of Accession of the *Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic* to the European Union, Athens, 16 April 2003, OJ EU, L 236, 23 September 2003, published in Poland in Dz. U. 2004.90.864, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12003T/

create instruments for the protection of the values protected in the Polish legal system, i.e. human dignity, public morality, but also employee rights (Barcz, 2008: 101–106). Poland's fears were mostly related to the future situation, when the CJEU, through its broad interpretation of the provisions of the CFR, would violate the protected values (Sieniow, 2012: 106). In this context, it is worth paying attention to the position of Constitutional Courts in relation to the position in the previously mentioned *Åklagaren* case on the scope of application of the CFR in the legal systems of the Member States. The Federal Constitutional Court stressed that "*if it were found that the CJEU was operating ultra vires, undermining the constitutional bases of states by unjustifiably extending the scope of the Charter, EU law must give way to constitutional regulations*." On the other hand, the Supreme Court of the United Kingdom found that "*there are also boundaries in the unwritten constitution of the United Kingdom that the Court of Justice cannot transgress when interpreting EU law: under no circumstances can the British courts rule on the legality of parliamentary procedures or derogate from fundamental constitutional principles*." (Skrzydło 2015:28).

The final stance regarding the applicability of the CFR in the legal systems of Poland and the United Kingdom was taken by the Court of Justice in case C 411/10. The CJEU took the view that "*[...] Protocol No 30 [...] does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. [...] the Charter must be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in Article 1 of the protocol. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union, and makes those rights more visible, but does not create new rights or principles. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to its field of application and is not intended to exempt the Republic of Poland or the United Kingdom from the duty to comply with the provisions of the Charter, or to prevent a court of one of those Member States from ensuring compliance with those provisions.*"[12] The cited position of the CJEU may indicate that in practice the discussed Protocol will have little relevance in areas already regulated by EU law.

4. FINAL REMARKS

The EU system for the protection of fundamental rights was the beginning of a new dimension of European integration aimed at establishing European constitutional identity based on common values. An individual who, in the initial period of integration, could not benefit from protection of fundamental rights and freedoms acquired a new status. The Treaty of Lisbon not only confirms this state of affairs but additionally strengthens their protection by establishing three levels of protection. Making the Charter of Fundamental Rights binding increased the transparency of protection standards. In accordance with horizontal clauses, Member States are bound by its provisions in every situation where they apply EU law or when a given situation falls within the scope of EU competence. This issue was widely interpreted at the EU and national level.

[12] C 411/10 Court of Justice case, *N. S. v Secretary of State for the Home Department and M. E. and Others* (C-493/10) *v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011; available at http://curia.europa.eu/juris/liste.jsf?num=C-411/10

A separate issue is the binding effect given to the CFR by two countries, Poland and the United Kingdom, which signed Protocol No. 30. The structure of the document corresponds to the provisions of Article 51 of the CFR and thus does not constitute an instrument limiting its effectiveness, but has an interpretive value. However, the signing of the Protocol caused many problems for entities applying the CFR.

The analysis of the jurisprudence of Polish courts indicates that they readily refer to the provisions of the CFR. This is most visible in the judgments of administrative courts, which have repeatedly referred to the right to good administration. A serious failure, however, is the omission of the most important element or examining the scope of applicability of the CFR. The exceptions in this respect are the judgments of the Supreme Court and the Supreme Administrative Court. There is no doubt that Protocol No. 30 has caused problems and is still a problematic issue. Due to the ambiguous position of the doctrine in the initial period of the CFR's existence, the courts try not to refer to the provisions of Title IV of the CFR. This is obviously incorrect because, as shown, the CFR is a fully binding document in the Polish legal system.

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PRIMENA POVELJE O OSNOVNIM PRAVIMA U POLJSKOJ

Sistem zaštite osnovnih prava Evropske unije razvijao se od 1969. godine do dana stupanja na snagu Lisabonskog ugovora, koji je uspostavio tri oblasti za zaštitu ljudskih prava. Prva oblast se zasniva na Povelji o osnovnim pravima; druga se odnosi na opšte načelo koji je Sud pravde proklamovao u svojoj sudskoj praksi 1970-ih godina. Poslednja oblast odnosi se na jačanja zaštite osnovnih prava u sistemu Saveta Evrope u budućnosti, koja podrazumeva obavezuju EU da pristupi Evropskoj konvenciji o ljudskim pravima. Povelja o osnovnim pravima je na početku imala status međuinstitucionalnog sporazuma, koji je dobio obavezujuću snagu tek na osnovu Lisabonskog ugovora. Ovaj dokument trenutno ima_normativnu snagu primarnog izvora prava. Odredbe Povelje obavezuju svaku državu članicu na primenu zakona EU u okviru nadležnosti EU. Pored toga, Poljska i Ujedinjeno Kraljevstvo su države ugovornice Protokola br. 30, koji se takođe tretira kao primarni izvor prava. Osim toga, Poljska je pridodala dve deklaracije Lisabonskom ugovoru. Analiza odredbi Povelje o osnovnim pravila i stavova u doktrini jasno ukazuje na to da se ne radi o klasičnoj opt-out klauzuli, pa se države ugovornice ne mogu osloboditi obaveze primene odredaba Povelje o osnovnim pravima. Sa druge strane, s obzirom da su deklaracije dokumenti isključivo političke prirode, one ne utiču na obim primene ove Povelje, ali definišu određene vrednosti koje su važne iz perspektive poljskog pravnog sistema.

Ključne reči: *zaštita osnovnih prava, pravo Evropske unije, Povelja o osnovnim pravima*

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PRIMA FACIE RETRIBUTIVISM: ON THE OBLIGATION TO ADMINISTER JUSTICE

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Abstract. *The EU system for the protection of fundamental rights had been developing since 1969 The justification of punishment is a difficult problem. The paper attempts to examine retributivism in the normative perspective and to penetrate the structure of the fundamental premises and theses of retributivism. Retributivism assumes that punishment is just, in the broad understanding of the term, while in reality punishment is not just; the model of retributive punishment is contrafactual, which is evident above all in the problem of punishing the innocent. A proper modification of retributivism's normative premises (i.e. how and why people ought to be punished, etc.) consists in seeing these premises not as unconditionally binding directives but as optimization rules, a kind of prima facie duty. These are mainly the ethical duties of the state considered from the point of view of criminal policy. In effect, it is possible to formulate a non-fundamentalist (non-idealistic) variant of retributivism - better corresponding to social reality. The core of the paper consists in outlining such a concept. The paper has been primarily inspired by the ideas of W.D. Ross and R. Alexy..*

Key words: *W. D. Ross, inner structure of retributivism, prima facie obligations, punishment of the innocent, criminal law theories*

INTRODUCTION

Modern theories of punishment, according to the legal or philosophical tradition may be categorized as utilitarian-teleological or retributive justice-oriented.[1] They constitute ways of justifying or explaining punishment and the practice of punishing. Justification of punishment ought to be understood as providing reasons why punishment is needed or necessary from the social or axiological point of view (why people ought to be punished), while explanation refers to describing the phenomenon of punishing and the related needs, experiences etc. It is worth noting that explaining punishment is sometimes done by

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[1] See: C. L. Ten, 1989: 39-63.

reference to the functions which criminal law and punishment perform. In the first instance, it is a teleological function (the realization of certain social goals, punishment is a means) while, in the second instance, it is a function of the administration of justice (punishment is an ethical necessity).[2]

The subject under scrutiny is the problem of justifying punishment and the retributive justification. The goal of the paper is to confront the justice-based premises of retributivism with the broadly-defined problem of punishing the innocent. The first section presents the premises of retributivism or rather its main varieties in the philosophy of punishment. The second section discusses the controversies regarding punishing the innocent. The final section deals with *prima facie* retributivism as a response to the dilemma of administering justice as a value in an imperfect social reality, so as to render the obligations resulting from embracing retributivism more realistic (above all as a guiding principle of real criminal policy).

This article does not apply to the relation between retributivism to punishing the innocent, but such concept of a just punishment which will be based on *prima facie* obligation to punish the guilty. *Prima facie* obligation to punish the guilty should be understood in such a way that, on the one hand, there is an obligation to punish the innocent; however, on the other hand, this is not an obligation that needs to be fulfilled completely. Instead, what is meant here is the obligation to deploy best efforts, so that in the greatest number of cases a guilty person is punished, whereas an innocent person is protected against the punishment. However, things are not as classic representatives of retributivism perceive them, meaning that there exists an absolute rule (obligation) to punish the guilty, without accepting any exceptions. These exceptions result from the facts of punishing the innocent. From the retributive viewpoint, the measure applied to an innocent person cannot be called "punishment". In the proposal of the *prima facie* retributivism presented in the article, there will not be such linguistic or analytical contradiction, while keeping basic attributes of retributive concept.

AN OUTLINE OF DIFFERENT VARIETIES OF RETRIBUTIVISM

Three main approaches can be currently distinguished in connection to retributivism: first – the pure theory of repayment, second – the expressive theory, and third – the fairness theory (social balance theory) (Ryberg, 2004: 43-50).

The first theory refers to a narrowly understood category of retributive justice that demands a punishment proportional to the wrong that was done (i.e to the offence). The perpetrator of an offence deserves to be punished, which constitutes repayment, if not vengeance. The offender ought to be punished because he or she deserves it (Nozick, 1981: 377ff; Zaibert , 2006: 81ff.). Philosophy of criminal law includes a dialogical element in the second theory; namely, the perpetrator deserves to be punished, but, on top of that, punishment should be exacted because of the message it carries, a condemnation of the act, and the demand of society, including the victim, for the wrong to be righted. The perpetrator deserves punishment as well as condemnation, and he or she ought to repent (the so called secular repentance) (Feinberg, 1970: 98; Primoratz, 1989: 199). The third theory stems from the idea of social contract and social balance, and asserts that the

[2] See: H. Gross, 1979: 22-23, 155-169.

perpetrator ought to be punished not only because he or she deserves it, but also because a certain balance of benefits and burdens must be restored. The perpetrator enjoys more freedoms and fewer burdens than his or her fellow citizens who chose not to commit an offence and remain honest members of society. Balance ought to be restored, which is possible by means of criminal punishment (Cottingham, 1979; Duff, 1986: 289; Morris, 1968: 475ff.).

All these approaches share a common core – the claim that society or the state has an obligation to repay for a wrong (an offence) manifested in punishment, which can additionally carry a message to the responsible moral subject (the perpetrator), or a means to restore a fair balance of burdens and benefits – *ordo iuris*. They do not exhaust all possible ways of justifying punishment, of course. The fundamentalist character of this claim does not allow for a formulation of a conditional justification – the one that would include conditionality of the duty to repay. It is so even though dogmatic institutions of criminal law themselves allow for limitations in connection to the obligation to punish, and so the impossibility of justifying punishment in certain circumstances (e.g. for political and criminal protection of offenders who testify in criminal cases) (Husak, 2008). Also, the goal of criminal proceedings in most jurisdictions is not only to punish the perpetrator but also to ensure that an innocent person is not punished (which is an act of balancing the interest of the innocent with the obligation to respond to a crime; sometimes the latter must give way before the former, which reflects the way criminal proceedings or the system of criminal justice is shaped *per se*) (Cf. Merryman, 1969: 132-148; Duff, 2007: 195ff.).

The next part of the article will be discussed the problem of punishing the innocent. Based on the analysis of this issue, the proposal of the fourth variant of retributivism (ie. *prima facie* retributivism) will be presented.

PUNISHING THE INNOCENT AND RETRIBUTIVISM

We are therefore confronted with the problem of punishing the innocent in connection to the retributive justification of punishment (J. Ryberg, 2004: 43-50. Gross, 1984: 65). Referring to common moral feelings or intuitions, one could say that in the eyes of most people punishing the innocent is a wrong and a mistake. The phrase „the innocent" is not unambiguous. Yet, for the sake of this discussion, we can assume that it denotes a person who should not be punished according to the accepted rules of justice. Guilt is understood as the weight of the wrong done by the offender, which allows us to disregard theoretical constructs of guilt (offence) when discussing punishment. One can easily distinguish two basic situations. The first regards punishing the innocent as a result of an error committed during trial proceedings. This would be a person who, according to the accepted rules of criminal responsibility, should not be punished. The second is related to the way rules of liability are constructed; some approaches do not consider guilt necessary for a penal response. Here one can distinguish two cases: where the penal response is based on objective premises, and where liability is attributed not only based on guilt but also based on other criteria.

Considering the second of the distinguished categories of cases where the innocent may be held responsible, it may be used to formulate anti-utilitarian arguments. Such arguments are put forth by proponents of retributivism so as to prove the axiological superiority of punishment as proportional repayment; the superiority is supposed to consist in the fact that

it is allegedly unhumanitarian and objectifying to treat perpetrators as mere means to achieve certain social goals – to maximize utility (Honderich, 2005: 36ff; Primoratz, 1978: 185–193). Utilitarians maintain that criminal law must achieve certain goals, above all related to crime prevention. From the philosophical standpoint (i.e. without reference to a real system of criminal law in a given jurisdiction), they embrace protection of the innocent as well as abstention of punishing the guilty, as long as it serves the common good (maximalist utility). The utilitarian character, though radicalized in its philosophical and anthropological premises, does include a social defense element referring to social inutility (i.e. a danger) as a basis for a quasi-penal response (Ancel, 1965: 13).

The first approach, on the other hand, raises further questions regarding retributivism, which focus on the *sui generis* non-universality of criminal justice. "Non-universality" denotes the impossibility to ensure that all offenders in the same situation are punished in the exact same way. There are three reasons why. First, not every offender is held criminally liable. Second, punishment is not determined according to some simple algorithm; as there is no algorithm that allows one to calculate the weight of the punishment as related to the weight of the offense, there is no certainty that offender O_1 will be punished in the same way for crime C as offender O_2 (as far as identity of offences is concerned, one may refer to formal types of offences) (See: Posner, 1985: 1193ff.). Even if there are directives determining the type and severity of punishment, there is no jurisdiction in which they would be purely based on retribution. Every criminal trial must include teleological elements, limiting its purely retributive character (e.g. limitations regarding evidence, the scope of the causal link not necessarily reflecting the entire causal chain). This can be verified empirically, but it hardly seems necessary (besides, *ad casum* discussions are limited to one state – one legal system – and are not universal or global). Third, not every person held to criminal responsibility is the actual perpetrator of the offence for which he or she is punished.

One can easily see that the cases discussed above are linked to the premise of retributivism which creates an especially acute problem in relation to punishing the innocent – the proportionality rule (Alexander, 2013: 309–319). Simplifying the matter somewhat, we can say that proportionality consists in the relation of the punishment to the wrong that was done. The less severe the offense, the less severe the sanction. The relation of the punishment to the act shaped by the proportionality rule cannot exist unless the act at least constitutes *mala prohibit*, and if the one punished is the one who deserves it.

From the point of view of retributivism, punishing the innocent constitutes a colloquial generalization resulting from the characteristics of the way truth is determined in criminal proceedings or failures in establishing the facts of the case (Cf. L. Laudan, 2011:195–227), either resulting from a person's failure to properly perform his or her duties (e.g. a judge's negligence) or from circumstances over which those in charge of the proceedings have no control (e.g. an innocent person taking the responsibility for an offence, the imperfection of the methods that may be employed to arrive at the truth). Proponents of retributivism do not ascribe axiological significance to it in the sense that it does not lead them to modify their ideas regarding punishment. They do, however, formulate a certain optimization directive according to which one ought to strive not to punish the innocent and only punish those who deserve it. It is worth noting that some assert that one cannot speak of criminal punishment *per se* when an innocent person is punished (Quinton, 1969: 55-64). The rationale behind it is that punishment is understood as administration of justice. Punishing an innocent person will not constitute administration of justice. It is a rather marginal

opinion, however, and to some degree contrafactual, for, as a rule, legal and philosophical language does not distinguish between punishment for a crime and punishment resulting from a trial error.

One must, however, distinguish between two dimensions: the normative and the descriptive one. The first stipulates that only guilty persons should be punished, and the innocent should not be punished. The second entails an analysis of the reality of the criminal justice system. The retributive approach to punishment is normative.

Retributivism, thus, gives certain reasons for considering punishment necessary both from the social and the axiological point of view. Yet, is this statement enough? Retributivism as a theory of punishment asserts that the duty to punish the offender, and only the offender, is absolute (Dolinko, 1991: 541-542; Talbott, 1993: 151-168). It is not an idea remote from a certain philosophical and legal reality, considering that the answer Herbert L.A. Hart gives to the question "who can be punished" is: "only the perpetrator of an offence for that particular offence" (Hart, 1968: 11).

For retributivists, justice is a value in itself (Cf. Burgh, 1982: 193ff.). We also know the Pharisee maxim, in principle directed against retributivism: "it is better that one man should die than for the whole nation to be destroyed"; in turn, Immanuel Kant commented that it is better for mankind to be destroyed than for it to neglect the demands of justice. However, it seems that retributivists do not believe that this value (justice) is absolute. Retributivism is limited by the imperfection of human justice (which is why Kant had to assume there is a God and an afterlife), as well as considerations of criminal policy nature and several other factual factors discussed above. It seems that retributivists are not opposed to Voltaire's statement that it is better for a guilty man to escape justice than to punish an innocent man (Voltaire, 1962: 20). A similar idea was voiced by the Englishman Blackstone (Blackstone, 1844: 358).

PRIMA FACIE RETRIBUTIVISM

Retributivists declare that it is a duty of society or the state to repay for a wrong (offence) by means of punishment. In principle, they also oppose punishing the innocent (Tebbit, 2015:155-230). The problem is that insistence on not punishing the innocent is one of the important arguments against utilitarianism. Retributivists believe that disregarding offence and guilt manifests unjustified objectivization of the offender. The symmetrical opposite of the right to be punished is the right not to be punished. It is, however, impossible to avoid punishing the innocent, at least in the real world. Classical (retributive) criminal law, both modern and ancient, while treating punishment as vengeance (in its unrefined, primitive form) or repayment (proportional repayment), attempted to reduce the problem of punishing the innocent by not considering guilt a necessary condition of criminal liability or by justifying group responsibility or objective responsibility based on the most elementary factual connections (someone being closest to the victim of a murder, to the shore of a lake where a corpse was found etc.). The historical process of subjectification of criminal responsibility, whose core became the perpetrator's subjective guilt, excludes such methods or mechanisms by virtue of its nature.

There is, however, a certain way to defend retributivism and make it more realistic. Importantly, it does not mean that one would have to develop a mixed theory, which would include the teleological aspect of punishment (on the one hand) and the duty to repay (on

the other hand). Considering the problem of punishing the innocent and all its implications (and causes) may lead to accepting a certain normative correction of the retributive theory that makes it more realistic. Every penal theory constitutes a model which, as an idealization, enables the study or analysis of punishment. It does not reflect reality, but may respond to its challenges. Taking the axiological standpoint, one may think of W.D. Ross' theory of *prima facie* duties.

In W.D. Ross's ethical system, rightness is identified with moral duty. A right act is an act that ought to be performed or morally binding (Ross, 1930: 3, 91–93). Yet, Ross introduces the concept of *prima facie* duty. He suggests the name "*prima facie* duty" or "conditional duty" as "a brief way of referring to the characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g. the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant." Farther on we read: "We have to distinguish from the characteristic of being our duty that of tending to be our duty. Any act that we do contains various elements in virtue of which it falls under various categories. In virtue of being the breaking of a promise, for instance, it tends to be wrong; in virtue of being an instance of relieving distress it tends to be right" (Ross, 1930: 19; Ross, 1926-1927: 127, Ross, 1928: 95- 96).

Besides characterizing *prima facie* duty, Ross proposes a list of certain fundamental *prima facie* duties. These are: 1) the duties of fidelity, 2) the duties of reparation (of a wrong), 3) the duties of gratitude (to others for services done by them to one), 3) the duties of justice, 4) the duties of beneficence, 5) the duties of self-improvement, 6) the duty of non-maleficence" (Ross, 1930: 21–27; Johnson, 1969:9). Ross says that one principle can always be abandoned for another, in the sense that some departures from the rule are permitted.

The chapter of *The Right and the Good* dealing with the relationship between the duties of the state and the rights of the citizens in the context of punishment is well-known. According to Ross the state has the duty to protect the innocent. It ought to do everything in its power in order to prevent citizens' rights from being violated, but those who do not respect others' right to life, freedom or possession lose (or limit) their own right to these goods. Therefore, the state does not have a *prima facie* obligation to protect offenders. The conclusions Ross draws are incompatible with retributivism; also, the fluid character of the principle of justice, as it were (its *prima facie* character), seems to contradict modern retributivist thought inspired by Kant's ethics. Ross states that society's interest may be great enough to justify the right to punish an innocent individual, so as to prevent the destruction of the whole nation (Ross, 1930: 56-64).

Ross' theory, from the point of view of retributivism, is only a kind of guideline. The essence of retributivism is its clear opposition to sacrificing an individual for the common good as principle of criminal responsibility. Otherwise, retributivism would become a supplement to utilitarianism reduced to the requirement to consider guilt a premise of responsibility and moral condemnation of crimes, while accepting the possibility to make exceptions for the sake of special considerations, such as public interest.

Retributivism claims that offenders ought to be punished because of the demands of justice - because they deserve to be punished. The modification would consist in attributing the *prima facie* character not to the duty to punish the offender but to the duty to serve justice. The duty to serve justice is a *prima facie* duty, which should be understood in a very specific way.

First, it means that there is no norm (moral, legal, natural etc.) that would prohibit punishing the offender in the form of repayment for the wrong he or she had done, and that there is no norm that would obligate to accomplish any objectives through punishment.

Second, the state has the duty to protect the innocent. This is, however, an optimization norm, which can be fulfilled only to some extent. It does not mean that the state may punish the innocent in the interest of society (i.e. there is no norm that prohibits punishing the innocent as a means to a goal or, all the more so, a duty to do so); but, it ought to do everything in its power not to punish the innocent. If perceived as a gradual achievement, this goal cannot be fully achieved or not achieved at all. The duty to punish the guilty also has a *prima facie* character.

Third, proportionality of the punishment to the guilt (severity of the offence) is also an optimization norm (directive), a certain principle of punishment.

These three elements, taken together, characterize retributivism as a *prima facie* duty to administer justice. The first one is fundamental, however, as it defines retributivism in a negative way. They outline the core of retributivism in relation to utilitarianism or penal abolitionism. The claim that there is no norm prohibiting criminal punishment as repayment for a wrong, nor a norm requiring that instrumental results be obtained through punishment, is in opposition to the programme of penal utilitarianism, which sees punishment as a means to certain social or personal ends, as prevention, resocialization etc. (Kaufman, 1960: 49-53). It is also a conclusion incompatible with the abolitionist or minimalist approach, which sees punishment as conditionally permitted or prohibited for moral reasons (Christie, 1977:1-15; Peno, 2016: 28-38). They do not provide an answer to the question about the reason for punishing; yet, if we eliminate the utilitarian value, justice considerations stand out from among other possibilities. Supplementing the acceptance of punishment as repayment for an offence are three farther duties, which are optimization norms, meaning that they do not have a fundamental character. Rather, they must be performed in the highest possible degree. Violating them is not permissible as a matter of principle.

The vision of *prima facie* duty depends on interpretation. *Prima facie* duty is only an apparent but not a real duty; or a real duty that can be outweighed by more stringent considerations but continues to survive even when outweighed. The second interpretation seems to be better suited to the retributivism idea of punishment. There is a real obligation or duty to punish, but there is not the obligation that can be either fulfilled or not. It can be assumed that the society or the state has the obligation to do as much as possible to punish only the offenders and to protect the innocent

One can hardly miss the link between the outline of criminal justice presented above and Robert Alexy's understanding of principles. According to Alexy, principles are optimization requirements. They can be fulfilled only to some extent (See: Alexy, 2000:294-304). This is also how a principle of retributivism can be formulated. It would assert that the state ought to realize justice in the highest possible degree. It seems that this approach is not only compatible with the essence of retributivism but also remains in opposition to penal utilitarianism.

CONCLUSION

How does the outlined theory solve the problem of punishing the innocent? Accidental punishing of an innocent individual results in improving the criminal justice system as a mechanism functioning in a certain state or society. The argument that just repayment does not exist, because in reality punishment is an outcome of many factors differentiating the situation of individuals in the same position, does not weaken the outlined retributive concept because the only thing it entails is that the rule to punish only the guilty should be respected as much as possible, and mechanisms helping the pursuit of this goal should be created. Thus, the presence of injustice in the relationship between the state and the citizen becomes apparent. Yet, It is not an argument against retributivism *per se.*

The retributive character of the outlined concept is manifested by the three following characteristics (Cf. Radzik, 2017: 164): first, the assertion that punishment can only constitute repayment (which ought to be understood in a normative sense); second, justice remains a value that must be pursued in the highest possible degree; a just repayment is thus the value and the goal that ought to be pursued; third, the assertion that punishment should not constitute (only) a means to achieving certain goals and should not be inappropriate to the degree of guilt and the severity of the offence.

It seems that retributivism, having undergone various changes, has gradually adopted a mixed form, essentially combining utilitarianism with certain justice-oriented considerations. It is therefore worthwhile to consider such approaches to retributivism which, while modifying the classical, formal and fundamental (and thus contrafactual) idea of justice, remain in acute opposition to the utilitarian programme in criminal law. The conception outlined here embraces this idea of just punishment.

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PRIMA FACIE RETRIBUTIVIZAM: O DUŽNOSTI SPROVOĐENJA PRAVDE

Opravdavanje kazne je ozbiljan zadatak. U radu se istražuje i sagledava normativna perspektiva retributivizma u nastojanju da se prodre u strukturu osnovnih premisa i teza retributivizma. Retributivizam pretpostavlja da je kazna pravedna, u najširem smislu te reči, dok u realnosti kazna zapravo nije pravedna. Model retributivne kazne je suprotan činjenici pravednosti, što se pre svega ogleda u problemu kažnjavanja nevinih. Pravilna modifikacija normativnih premisa retributivizma (tj. kako i zašto ljude treba kažnjavati, itd.) počiva na tome da ove premise ne treba posmatrati kao bezuslovno obavezujuće zakonske pretpostavke već kao pravila optimizacije, kao neku vrstu prima facie dužnosti. To uglavnom podrazumeva etičke dužnosti države, posmatrane sa stanovišta kriminalne politike. Zapravo, moguće je formulisati nefunkcionalističku (ne-idealističku) varijantu retributivizma, koja bolje odgovara društvenoj stvarnosti. Suština rada sastoji se u izlaganju tog koncepta. Ovaj rad je prvenstveno inspirisan idejama V.D. Rosa i R. Aleksija.

Ključne reči: *V.D. Ros, unutrašnja struktura retributivizma, prima facie dužnosti, kažnjavanje nevinih, krivičnopravne teorije.*

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THE INTEROPERABILITY OF EUROPEAN INFORMATION SYSTEMS FOR BORDER AND MIGRATION MANAGEMENT AND FOR ENSURING SECURITY

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Abstract. *In recent years, the European Union has been exposed to an increase in illegal migration. With migration, the threat of terrorist acts increased, which contributed to reducing the sense of internal security of citizens. The EU citizens expect more effective external border controls and more efficient migration management. Such challenges are addressed by the interoperability of European information systems for border management and migration, as well as ensuring security of the EU. A key element of interoperability is the adaptation of current systems and the development of new ones, especially in the technical aspect. In addition to legal, organizational and logistic activities, it is a key element of the entire system of activities of European institutions and agencies.*

Key words: *interoperability, migration, border management, sense of security, EU information systems.*

INTRODUCTION

When considering the issues of interoperability of European databases, their functioning and role in creating a sense of security resulting from social migrations to and within the European Union (EU) should be considered. These migrations are attributed to various negative phenomena in social perception. The threats associated with migration include, among others: (1) formation of criminal groups, (2) increase in crime, (3) human smuggling, drug trafficking, smuggling of weapons and tangible goods, (4) human and organ trafficking, (5) terrorist attacks, (6) spread of infectious diseases, (7) radicalization of social life, (8) fundamentalism, (9) jihad, (10) disturbance of the labor market, (11) creating enclaves within the country of destination[1]. Regulatory authorities of the power elite play a

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[1] K. Tomaszycki, *Proces migracji - realne czy wirtualne zagrożenie?,* [w:] S. Gwoździewicz, K. Tomaszycki, *Prawne i społeczne aspekty cyberbezpieczeństwa,* Międzynarodowy Instytut Innowacji «Nauka – Edukacja – Rozwój» w Warszawie, Warszawa 2017, s. 196.

leading role in creating a sense of security not only at the level of individual member states of the European Union (EU MS) but also at the level of EU structures. In order to indicate not only the speech act[2] of the ruling elite, but also the actual actions at the European level, we need to look at the decisions on methods and means of control of third-country citizens arriving in the EU and protection of its external borders.

In this respect, an important element is the use of modern technologies - European databases, including biometric systems operating at national and international level. Databases and communication and information systems collecting data on persons crossing the EU external borders may use this information in their operation and monitor migration flows at the EU's external borders through functional mechanisms. Due to their nature, they have been called large-scale systems, and their role in raising the sense of security in the European area of freedom, security and justice is a leading one. Existing EU-wide systems operate autonomously, and the data collected in them often duplicate. Strengthening of cooperation between the EU member states in the field of controlling the migration of people from outside the Union and providing information that may foil terrorist attacks, reduce the terrorist threat or prevent cross-border organized crime requires taking measures in the field of integration and interoperation of already existing systems (Fig. 1.) and development and implementation of new information and communication solutions.

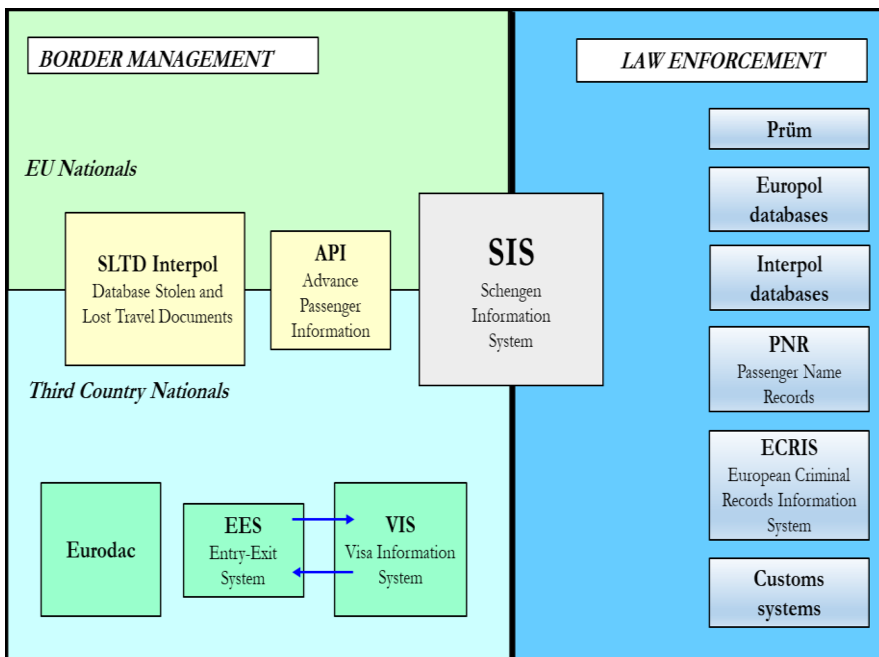

Fig.1 Schematic overview of the main information systems for border management and law enforcement
Source: own work, based on: Commission Communication to the European Parliament and the Council. *More efficient and more intelligent information systems for border management and security*, (COM (2016) 205 final of 06.04.2016).

[2] Speech *act - any of the acts that may be performed by a speaker in making an utterance, considered in terms of the content of the message, the intention of the speaker, and the effect on the listener*.

Systems and Databases Currently Operating in the Field of Border Management and Law Enforcement

Systems and databases existing in the European Union operate within the scope of: (1) border management and border traffic control in relation to European Union citizens and third-country nationals, and (2) law enforcement. Below I present a brief description of individual systems and databases.

Schengen Information System (SIS)[3]

It is the largest and most widely used information exchange platform on migration and law enforcement. It is a large-scale centralized information system used by 25 EU Member States[4] and 4 Schengen-associated countries[5]. Access to information input and processing is carried out by competent authorities responsible for maintaining public safety and order: the police, border control authorities and immigration authorities. It has information on third-country nationals who are forbidden to enter the Schengen area or to stay in the Schengen area, as well as information on EU citizens and third-country nationals who are sought or missing (including children) and information about sought items (firearms, vehicles, identity documents, industrial equipment, etc.). A characteristic feature of SIS is that, in case of obtaining specific information, instructions on a specific action to be taken on the spot (arrest or seizure of things) are obtained in relation to persons or things. The data controller of the data processed in the Schengen Information System in Poland (national database N-SIS) is the Chief Commander of the Police[6]. From April 9, 2013, Poland uses the second generation Schengen Information System - SIS II[7], which has a larger catalog of data categories compared to SIS, including biometric data. SIS II allows the creation of alerts in order to refuse entry or stay of third-country nationals. Since 2013, the responsibility for the operational management of SIS II rests with the European eu-LISA agency, which deals with the management of large-scale IT systems in the area of freedom, security and justice.

In terms of border management, the following systems and databases exist:

Data on stolen or lost travel documents (SLTD)

A database created in 2002 regarding passports, identity documents and visas that have been reported to Interpol by issuing authorities as stolen or lost. Details on stolen and lost travel documents are transferred directly to the STLD database by the National Bureau of INTERPOL and law enforcement authorities via the secure global police communication

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[3] Legal basis: Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the Second Generation Schengen Information System (SIS II) (EU DU L 381/4 of 28.12.2006), Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 on the access of the services responsible in the Member States for the issuance of vehicle registration certificates to the second generation Schengen Information System (SIS II); Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (DU UE L 205/63 from 07.08.2007).

[4] All EU Member States except Ireland, Cyprus and Croatia.

[5] Switzerland, Liechtenstein, Norway, Iceland.

[6] Act of 24 August 2007 on the *participation of the Republic of Poland in the Schengen Information System and the Visa Information* System (Law Gazette of 2018 r. item 134, 138).

[7] https://mswia.gov.pl/pl/aktualnosci/10771,System-Informacyjny-Schengen-II.html, [access: 11/07/2018].

system INTERPOL I-24/7. Authorized officers at airports and border crossings can check a travel document and receive feedback within a few seconds, which is an opportunity to take an appropriate action. A total of 174 countries enter alerts in STLD and over 68 million pieces of information on stolen or lost travel documents have been entered. To help identify and stop criminals from using lost or stolen travel documents long before reaching an airport or a border, the INTERPOL developed *I-Checkit*. Thanks to this initiative, selected airlines may send information on the travel document in order to verify it in the SLTD database the moment the client starts booking an airline ticket. Presenting the effectiveness of this database, we can use the statistics of verifications for the period from January to September 2016, where 1,243000,000 searches were made, thereby yielding over 115,000 positive indications[8].

Advance Passenger Information (API)[9]

The API system is intended to gather information on the identity of a person before they take a flight to the EU and to identify irregular migrants at the time of their arrival. API data include information contained in the travel document of the traveler, such as full name, date of birth, nationality, number and type of travel document and information on the border inspection post where the person crossed the border (place of departure and entry), and also transport information. API data is collected during check-in.

Eurodac (European Dactyloscopy)[10]

The European Automated Fingerprint Recognition System contains biographical and biometric data. It has been operating since 2000 in the field of processing fingerprints of third-country nationals: asylum seekers, illegally crossing the external borders of the Schengen area or staying on the premises of an EU MS without any valid residence documents. Currently, its main purpose is to make it possible to determine which EU country, in accordance with the Dublin Regulation,[11] is responsible for examining the application for asylum. The Eurodac system consists of: (1) a central unit (fingerprint

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[8] https://www.interpol.int/en/INTERPOL-expertise/Border-management/SLTD-Database,[access: 11/07/2018]

[9] Legal basis: Council Directive 2004/82 / EC of 29 April 2004 *on the obligation of carriers to provide passenger data* (Law Gazette EU L261/ 24 of August 6, 2004).

[10] Legal basis: Council Regulation (EC) No 2725/2000 of 11 December 2000, *concerning the establishment of Eurodac for the comparison of fingerprints for effective application of the Dublin Convention* (Law Gazette EC-L 316/1 of 15/12/2000), The European Parliament and of the Council (EU) No. 603/2013 of 26 June 2013 *on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Regulation (EU) no 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, and on the presence of a comparison with the Eurodac data by Member States' law enforcement authorities and Europol for law enforcement, and amending Regulation (EC) no 1077/2011 establishing a European Agency for Operational Management of Large Scale Information Systems in the Area of Freedom, Security and Justice*, (Law Gazette UE L 180/1 of 29/06/2013).

[11] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 *on establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (Dublin III), (Law Gazette UE L 180/31 of 2013) - amending the Council Regulation (EC) No. 343/2003 of 18 February 2003 *establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (Dublin II), (Law Gazette EU L 50/1 of 2003).

recognition system), (2) a central database in which data specified in the Eurodac Regulation is processed for the purpose of comparing fingerprints, and (3) measures for transferring data between EU MS and the central database. Registering fingerprints of asylum seekers or migrants with an irregular status in a centralized system makes it possible to detect and monitor their secondary movements within the EU until an application for international protection is made or until a decision is issued ordering the person to return to the country from which they came to the EU. Since 2013, responsibility for the operational management of Eurodac rests with eu-LISA, the EU agency dealing with the management of large-scale IT systems in the area of freedom, security and justice.

Entry/exit system (EES)[12]

The EES is a communication and information system registering identity of third-country nationals (biographical (alphanumeric) and biometric data (fingerprints and face image)) together with detailed data of travel documents. The main functional objective of the system will be to combine these data with electronic entries on entry and exit and information on the reason for refusal of entry along with data of the body that issued it. All third-country nationals who cross the border (entry and exit) arriving in the Schengen area as part of a short-term stay (maximum 90 days in a 180-day period) will be subject to registration, both for travelers subject to visa obligation and for travelers exempted from the visa obligation, or as a part of a stay on the basis of a new traveling visa (up to one year). The objective of the EES system is to: (1) improve the management of external borders, (2) reduce illegal migration by preventing unlawful prolonging of stay, and (3) support the fight against terrorism and serious crime, which as a result will contribute to increasing the level of internal security. The central registration will enable detection of persons who prolong their stay excessively and identification of persons without documents staying in the Schengen area.

Visa Information System (VIS)[13]

The Visa Information System is a centralized short-term visa information exchange system between Member States was created in 2004. It is used to process data and make decisions regarding applications for short-term visas allowing individuals to stay in the Schengen area or transit through it. All consulates of Schengen countries (around 2,000) and all border crossings at the external borders of these countries (around 1,800) are connected to the VIS. Every third-country visa applicant must provide detailed biographical information and biometric data (face photo in digital format and 10 fingerprints). At border

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[12] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 *establishing an Entry / Exit System (EES) to record data on entry and exit of third country nationals crossing the external borders of the Member States and entry refusal data with regard to such citizens and defining the conditions for access to the EES for law enforcement purposes and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011,* (Law Gazette EU L 327/20, 2017).
[13] Council Decision 2004/512 / EC of 8 June 2004 *establishing the Visa Information System (VIS) (Law* Gazette UE L 213/5 2004), Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July *2008 on the Visa Information System (VIS) and exchange of data between Member States on short-stay visas (VIS Regulation) (Law Gazette EU L 218/60 from 2008)* , Regulation of the European Parliament and of the Council (EC) No 810/2009 of 13 July 2009 *establishing a Community Code on Visas* (Law Gazette UE L 243/1, 2009) and Commission Decision 2010/49 /EC of 30 November 2009 *determining the first regions in which the Visa Information System (VIS) will be launched* (Law Gazette UE L 23/62 Z 2010).

crossing points or in the EU MS, the VIS is used to verify the identity of the visa holder by comparing his fingerprints with fingerprints registered in the system. This action guarantees verification of the person concerned based on biometric data at the border crossing point or inside the EU MS. The data collected in VIS also allow the identification of a person who applied for a visa in the last 5 years and who may not have identification documents with them. Since 2012, the operational management of VIS has been carried out by the EU agency eu-LISA.

Within the scope of compliance with legislation, the following systems and databases operate in the European Union:

Exchange of information under the Prüm Decision[14]

It aims to strengthen cross-border cooperation in combating terrorism, cross-border crime and illegal migration. Exchange of several types of data: automatic transmission of DNA profiles, fingerprint data, some data related to national vehicle registration and data related to events with a large cross-border dimension (e.g. sports events, European Council meetings) is based on a multilateral agreement between the EU MS. Law enforcement officers in one EU MS who need information to perform their duties may obtain it from another MS in the declared purpose for criminal proceedings. The data is stored in anonymous profiles and only after finding a "match" between the profiles you can request personal data, taking into account the limitations imposed by the national legislation in the field of data protection. DNA and fingerprint data exchange is based on a "match / no match" approach, which means that DNA profiles or fingerprints found at the crime scene in one EU MS can be automatically compared to profiles stored in databases of other EU countries. In a situation where the search finds a "match" in the database of another EU MS, the so-called "second step" follows and detailed information about that match is exchanged via bilateral exchange mechanisms. The Prum Treaty has not yet been fully implemented and is not consistently applied. Not all articles have been implemented by all Member States. In addition, not all Member States are interconnected for the purpose of automated data exchange regarding the three types of data mentioned above.

Europol Information System (EIS)[15]

It is the center of information on crimes in the EU and supports the exchange of information between national police authorities. The EIS is a centralized ICT system containing a database of suspected and convicted persons, criminal structures, crimes and measures to commit them on territory of the EU MS. EU Member States are able to collect, store, process and search crime (cross-border, organized and serious crime) and terrorist activities data. According to law, data are entered and downloaded to the EIS by national units, liaison officers, director, deputy directors and authorized Europol employees. Data exchange takes place through the Europol Information System - SIENA. This system

[14] Council Decision 2008/615/JHA of 23 June 2008 *on the intensification of cross-border cooperation, in particular in combating terrorism and cross-border crime* (Law Gazette L 210, 2008).

[15] Legal basis: Article 6 of the Convention drawn up on the basis of art. K.3 of the Treaty on European Union, on the establishment of the European Police Office (Europol Convention) (Law Gazette EC C 316/2 of 1995), Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the establishment of a European Police Office (Europol Convention), drawn up in Brussels on July 26, 1995. In the name of Republic of Poland, the President of the Republic of Poland (Law Gazette 2005 No 29, pos. 243).

guarantees a fast, secure and user-friendly exchange of information between the EU MS and Europol or with third parties that have concluded cooperation agreements with the Europol. The Europol shall maintain cooperation in the field of information exchange in accordance with the role assigned with: (1) the Eurojust[16]; (2) the European Anti-Fraud Office (OLAF)[17]; (3) the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)[18]; (4) the European Police College (CEPOL)[19]; (5) the European Central Bank; and (6) the European Monitoring Center for Drugs and Drug Addiction[20]. In the scope of performing its activities, the Europol may also cooperate with third countries, international organizations or the International Criminal Police Organization (Interpol).

Interpol Information System (IIS)[21]

The International Criminal Police Organization (Interpol) is an organization that improves global police cooperation by providing technical and operational support. Interpol maintains databases accessible to members via the National Central Bureaus (NCB) in real time via the Interpol I-24/7 network. Data collected in the Interpol databases concern: fingerprints, DNA profiles of perpetrators and victims of child molestation, stolen and lost travel documents, forged documents, stolen administrative documents, registration data of motor vehicles, motor boats and vessels, works of art, data on weapons (ballistics data, data on lost and illegally possessed weapons), data on radiological and nuclear materials, and data on sea piracy.

In addition to databases, the Interpol also supports the system of notices, the so-called wanted notices used to identify and locate persons or objects. Wanted notices are an international request for cooperation or a warning about sharing critical information. There are six categories that are published by the Secretariat-General. The six categories of wanted notices are: (1) Red – search in order to arrest wanted persons and extradite them; (2) Yellow – search for missing persons or in order to identify individuals who cannot provide their identity; (3) Blue – obtaining additional information about people or about illegal activity concerning crime; (4) Black – obtaining information about unidentified corpses; (5) Green – warnings and intelligence information about persons who have

[16] Eurojust was established by Council Decision 2002/187 / JHA of 28 February 2002 *establishing Eurojust in order to reinforce the fight against serious crime* (Law Gazette L 63 of 2002), as amended by Council Decision 2009/426/JHA of 16 December *2008 on the strengthening of Eurojust and amending Decision 2002/187 / JHA establishing Eurojust in order to reinforce the fight against serious crime* (Law Gazette EU L 138/14 of 2009).

[17] Commission Decision 1999/352/EC of 28 April 1999 establishing the *European Anti-Fraud Office (OLAF)* (Law Gazette EC L 136/20, 1999).

[18] Council Regulation (EC) No 2007/2004 of 26 October 2004 *establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (Law Gazette EU L 349 2004), as amended by Regulation (EC) No 863/2007 of the European Parliament and Council of 11 July 2007 (Law Gazette UE L 199/30 of 2007), Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 (Law Gazette UE L 304/1, 2011) The amendment, introduced by Regulation (EU) No 656/2014, *establishes rules for the protection of the EU's external sea borders in the context of operational cooperation coordinated by Frontex*.

[19] Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 *on the European Police College (CEPOL) and replacing and repealing Council Decision 2005/681 JHA* (Law Gazette EU L 319/1, 2015).

[20] Regulation (EC) No 1920/2006 of the European Parliament and of the Council of 12 December 2006 *concerning the European Monitoring Center for Drugs and Drug Addiction* (Law Gazette EU L376/1, 2006).

[21] Interpol - International Criminal Police Organization founded in 1923

committed a crime and are likely to repeat these crimes in other countries; (6) Orange – warnings about people or events that due to their nature pose a serious and immediate threat to public safety.

Passenger Name Record (PNR)[22]

The PNR is a database containing a data set for each passenger's travel which contains the information necessary for allowing the processing and verification of bookings by air carriers operating the reservation and flight with regard to each flight booked by any person or on their behalf, regardless of whether the set is located in reservation systems, passenger check-in systems or equivalent systems performing the same functions. Each carrier would be required to provide relevant authorities with data on persons entering or leaving the European Union, and Member States would have to set up national passenger data systems based on common EU rules. The transferring passenger flight data system is being successively implemented in individual EU MS. The effectiveness of this system depends on the exchange of information (contained within it) between individual countries. Although PNR data were originally introduced for airlines, they can also be used for hotel reservations, car rentals, airport transfers and train travel. Following the terrorist attacks in Brussels in March 2016, Belgian authorities adopted a law transposing the European directive into the Belgian legislative frameworks, which indicates the need to introduce PNR data on train passengers.

European Criminal Records Information System-Third CountryNational (ECRIS-TCN)[23]

The ECRIS-TCN is an information exchange system regarding previous convictions passed against a specific person by criminal courts in the EU MS. These data concern EU citizens as well as third-country nationals and stateless persons. The central authorities designated in each EU MS are contact points in the ECRIS network; they perform tasks such as: providing information from criminal records, storing them, requesting them and sharing them. The system was launched in 2012 and operates in a decentralized architecture, which means that data is stored in national databases, and the exchange takes place between these systems. Currently, 25 EU MS exchanges data on convictions, while Malta, Portugal and Slovenia currently do not participate in the exchange of data using the ECRIS.

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[22] Directive of the European Parliament and of the Council (EU) 2016/681 *of 27 April 2016 on the use of Passenger Name Record (PNR) data to prevent and detect terrorist offenses and serious crime, investigate and prosecute them* (Law Gazette EU L 119/132 of 04/05/2016).

[23] Council Framework Decision 2009/315/JHA of 26 February 2009 *on the organisation of the exchange of information extracted from criminal records between the Member States and the content of this information* (Law Gazette L 93/23 from 07.04.2009), Council decision 2009/316/JHA of 6 April *2009, on the establishment of the European criminal records information system* (Law Gazette L 93/33 from 07.04.2009), regulation of the European Parliament and of the Council *establishing a centralized system for the identification of Member States information on convictions passed against third-country nationals and stateless persons on the need to complement and support the European criminal records information system (ECRIS-TCN) and amending Regulation (EU) no 1077/2011,* (2017) 344 of 29.06.2017 r.

Code Information Systems (CIS)[24]

They play an important role in interdisciplinary cooperation at the EU's external borders. EU MS customs authorities hold various IT systems and databases containing data on the movement of goods between EU MS and third countries and the identification of economic operators. Thanks to these systems, customs authorities have information about possible threats that can be used to ensure the sense of internal security. The development of CTI technologies is accompanied by harmonization and unification of customs procedures in the EU MS. An important element of operation of these systems is the ability to cooperate with other CTI systems in order to manage EU borders and undertake customs operations. Customs IT systems have their own controlled, limited and secured infrastructure (common communication network), proper functioning of which is guaranteed by law. In order to minimise the risk to the Union, its citizens and its trading partners, the harmonised application of customs controls by the Member States should be based upon a common risk management framework and an electronic system for its implementation.

MANAGEMENT OF EXTERNAL BORDERS OF THE EUROPEAN UNION

Management of the EU's external borders concerns efficient deployment of people and goods to its area with an appropriate level of security risks. Mass migration of people from third countries to the European Union has shown that existing security measures at EU's external borders are not sufficient. As a result of acts of terror and increased illegal migration, some of the EU MS (Austria, Belgium, Denmark and Sweden) have since September 2015 restored control at the internal borders of the Schengen area. Adoption of this measure results from Article 23 of the Schengen Borders Code[25], and was a necessity due to issues of internal security and law enforcement. Mass illegal migration pushed EU institutions and agencies to take action aimed at more effective external border protection. The result of these activities was the creation of the European Border and Coast Guard[26]. *The objective of the Union's policy in the area of management of the EU's external borders is to develop and implement a European integrated border management system that goes beyond the national level to the EU level, which is an unavoidable consequence of the free movement of people within the EU and a fundamental element in the area of freedom,*

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[24] Customs information systems cover all systems created under the Community Customs Code (Council Regulation (EEC) No 2913/92 of 12 October 1992 *establishing the Community Customs Code* (Law Gazette EC L 302/1 of 1992)) and the Union Customs Code (Regulation European Parliament and Council (EU) No 952/2013 of 9 October 2013 *establishing the EU Customs Code* (Law Gazette EU L 269/1 from 2013)) and the decision on elimination of paper documents in the customs and trade sectors (Decision No. 70 / 2008 / EC) and the Customs Information System (CIS) established under the 1995 CIS Convention. They are intended to help combat customs crime by facilitating cooperation between European customs authorities.

[25] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 *on the EU Code on the rules governing the movement of persons across borders* (EU Border Code) (Law Gazette EU L 77/1, 2016), as amended by the Regulation of the European Parliament and Council (EU) 2017/458 of 15 March 2017 with *regards to the intensification of border checks at external borders using appropriate databases* (Law Gazette EU L74 / 1 from 2017).

[26] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 *on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No. 863/2007 of the European Parliament and Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC* (Law Gazette EU L 251/1, 2016).

security and justice. European integrated management of external borders is a key element to improving migration management. The aim of such an approach is to effectively manage border traffic at external borders and to address challenges related to migration and accompanying threats, thereby contributing to combating serious cross-border organized crime and contributing to ensuring a high level of internal security in the EU MS. At the same time, efforts should be made to ensure that the actions taken are carried out with full respect for fundamental rights and in a manner that guarantees the free movement of people in the EU.[27] The appointment of another EU agency does not guarantee protection from acts of terror caused by assassins crossing the borders of the Union; however, it may be necessary to improve the effective management of border-crossing by people and goods.

An important element of all measures aimed at improving the management of external borders is the collection of data, their proper analysis and use at the EU level. The development of the presented CTI systems and introduction of new ones is based on the assumption that the EU MS will use the data collected and/or generated in these systems for more efficient border management. In addition, these data must be verified against data collected in national systems. An important factor is also the assumption that EU MS enter appropriate data into EU systems (e.g. SIS II), so that they are relevant and, therefore, that automatic matching with data already collected in other European border management systems can be carried out. The effectiveness of all initiatives in the area of management of the EU's external borders depends on the assessment of migration risk and from inter-agency cooperation and information exchange between border management agencies, customs authorities and other EU MS bodies, as well as at EU, national and bilateral level. The development of concepts increasing the security of external borders must be directed at the possibility of comprehensive downloading and processing of not only biographical data but also biometric data (fingerprints, facial image). As Włodzimierz Fehler points out, important elements affecting the elimination of multidimensional threats to the internal security of the EU are activities aimed, inter alia, at: wide application of preventive measures, including those based on intelligence data, use of a comprehensive information exchange model, operational cooperation, cooperation between criminal justice authorities and integrated border management[28]. In this context, improving the management of external borders should be based on the introduction of new technologies combined with a comprehensive exchange of information on migratory flows at external borders and within the EU, in individual Member States. In line with the expectations of EU citizens, checks on persons at external borders and controls within the Schengen area should be effective, allow effective management of migration and borders, and contribute to internal security. These challenges have drawn special attention to the urgent need to combine and comprehensively reinforce EU's information tools for border and migration management as well as internal security. ICT systems currently functioning at EU level may provide border guards and law enforcement officers and immigration officials with relevant information about persons. For this support to be effective, information provided via EU information systems must be complete, accurate and reliable. However, there are many imperfections and structural flaws in the EU's information management structure. The border and security

[27] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016. Art. 2

[28] W. Fehler, *Poprawa bezpieczeństwa UE przez zarządzanie granicami*, [in:] W. Fehler, K. P. Marczuk (red.), *Polityka Unii Europejskiej w zakresie bezpieczeństwa wewnętrznego. Uwarunkowania, realizacja, wyzwania w drugiej dekadzie XXI wieku*, Wydawnictwo Difin, Warszawa 2015, p. 192.

data management structure is fragmented, as information is stored separately in unrelated systems, despite collecting and processing the same data categories. In its actions, the EU aims to create a data exchange system based on interoperability, so that the appropriate border guards, migration and law enforcement authorities and the judiciary authorities have access in a given time and place to data allowing effective management of external borders, migration and strengthening internal security.

Interoperability of EU IT Systems in the Field of Security, Border Management and Migration

In order to move on to the issue of interoperability of EU information systems in the fields of security, border management and migration, the term 'interoperability' should first be clarified. Interoperability is the ability of various systems and organizations to engage in an effective cooperation based on: (1) technical standards, (2) legal regulations, and (3) organizational measures. In terms of EU activities, the term 'interoperability' means the ability of information systems to exchange data and enable information exchange to increase the efficiency and effectiveness of pan-European information exchange tools, providing technical processes, standards and tools that enable better interoperability of EU information systems in security, external border management and migration. This means that authorized users (police and border guards, migrant officers and employees responsible for internal security) have faster, easier and more systematic access to the information they need to do their job. In the field of border management and migration, interoperability will consist in the targeted use of existing data in various ICT systems, their aggregation and connections between systems based not only on biographical data but also on biometric data. The example of a Berlin bomber (December 19, 2016), who carried out a terrorist attack by using a stolen truck (killing 12 people on the scene and the driver of the stolen truck), indicates that despite the police and special services' prior interest in him, he was able to freely move around the EU using many documents issued for different identities. "He was listed as a person with as many as 14 different identities," said Dieter Schuermann, Head of the State Criminal Police Service in North Rhine-Westphalia.[29] This example shows that lack of biometric data made it impossible to effectively control the movement of this assassin and, thus, to counteract his terrorist activity. Despite many ICT systems, there are loopholes that allow third-country nationals to move across the EU without any control or supervision. Effective border management and law enforcement requires legislative and organizational work to ensure the use of existing ICT systems, create new ones and ensure convergence between the systems and the existing communication infrastructure between individual EU MS. This will ensure synergy of data usage and its quality in terms of biography and biometrics.

[29] http://l24.lt/pl/swiat/item/166992-zamachowiec-z-berlina-mial-14-tozsamosci, [online access: 10/08/2018].

Removal of the information gap in the field of combining biographical and biometric data in the most widely used system - SIS - comes to the fore. These activities were supported by the establishment of the High Level Expert Group on Information Systems and Interoperability[30]. The final report published in May 2017 sets out a series of recommendations that remove information loopholes and reinforce actions to develop EU systems and their interoperability. The basis for the activities will be the full centralization of EU ICT systems. Respect for fundamental rights has become an overriding priority of these activities. An expression of the efforts made in terms of interoperability was a proposal amending the Regulation of the European Parliament and the Council on establishing a framework for interoperability between EU information systems sent in June 2018 by the European Commission[31]. The proposal includes the following objectives:

1. ensuring that end users have fast, efficient, systematic and controlled access to the information they need to perform their official tasks;
2. providing a solution to detect different identities associated with the same biometric data (improving identification of bona fide travelers and combating identity fraud);
3. facilitating the control of the identity of third country nationals on the MS territory by authorized services; and
4. facilitating and improving law enforcement access to information systems not related to the prosecution of crimes at EU level, if necessary, for the purpose of preventing, investigating or prosecuting serious crimes and terrorism.

Achieving these objectives will be possible by centralizing existing pan-European systems (SIS (including SIS II), Eurodac, and VIS) and creating new centralized pan-European systems (Entry/Exit System (EES), European Travel Information System and travel permits (ETIAS), and a European system for transferring information on third-country nationals from criminal records (ECRIS-TCN system)). This concept focuses on the processing of personal data from the so-called third countries (except SIS). The indispensable element that determines the effectiveness of this concept is the elaboration of technical intentions on the basis of which it will be possible to achieve full interoperability of EU ICT systems. Technical assumptions for interoperability are presented in Fig. 2.

[30] Commission Decision of 17 June 2016 *setting up the High Level Expert Group on Information Systems and Interoperability* - (Law Gazette UE C 257/3 of 15/07/2016).

[31] Proposal from the European Commission amending the *REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an interoperability framework between EU information systems (police and judicial cooperation, asylum and migration) and amending [Regulation (EU) 2018/XX [Eurodac Regulation], Regulation (EU) 2018/ XX [SIS Regulation regarding the prosecution], Regulation (EU) 2018/XX [ECRIS-TCN Regulation] and Regulation (EU) 2018/XX [the eu-LISA Regulation*] -COM (2018) 480 final from 13/06/2018 rf.

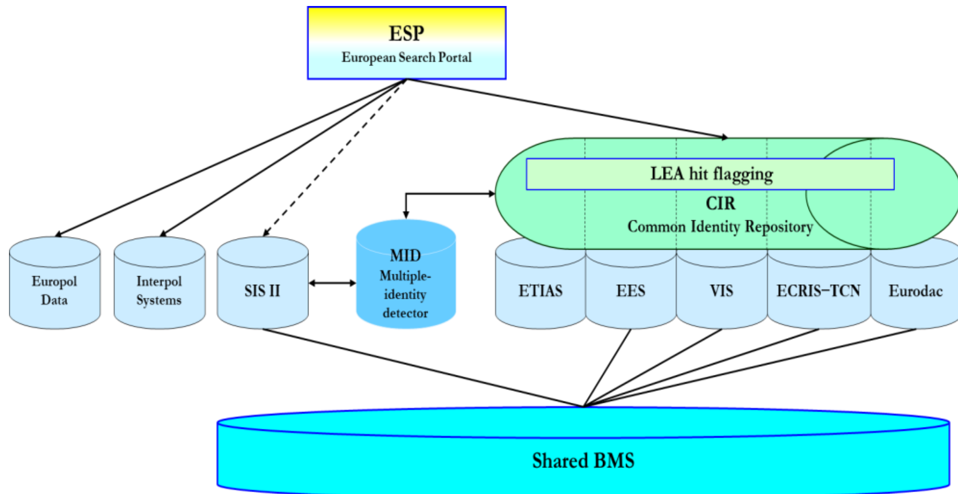

Fig. 2 Technical assumptions of interoperability
Source: own study; based on: Commission proposal to the European Parliament and the Council: *REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL establishing the interoperability framework between EU information systems (in the area of borders and visa policy) and amending Council Decision 2004/512 / EC, Regulation (EC) No. 767/2008, Council Decision 2008/633 / JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226*, (COM (2017) 793 final of 12.12.2017)

Technical Elements of Interoperability

European Search Portal (ESP)

It is an essential element for viewing different systems: central Schengen information system (C.SIS and SIS II), Eurodac, VIS, future EES, proposed ETIAS and ECRIS-TCN systems, as well as relevant Interpol and Europol databases. Identity search operations will be based on both biographical and biometric data. This will provide services responsible for border protection and migration management with fast, efficient, effective, systematic and controlled access to all information necessary to perform their tasks. This provides the ability to address one query and, as a result, to check on many systems and get answers from many systems in real time without unnecessary delay. The ESP would be an "intermediary" in searching for the necessary data in various systems. This portal does not collect any data (new or existing) and does not process new data. It uses data (biographical and biometric) that are already collected in other systems.

Shared biometrics matching service (Shared BMS)

It is an essential element enabling consultation and comparison of biometric data (fingerprints and face images) from various central systems (especially SIS, Eurodac, VIS, future EES and the proposed ECRIS-TCN system), in addition to the ETIAS system, which will not contain biometric data, will not be therefore associated with a common website for the association of biometric data. Today, every central system uses its biometric search engine, while a common biometric matching service would provide a common platform for simultaneous viewing and comparison of these data. Biometric data (fingerprints and face

images) are stored only in basic systems. In the proposed solution, the BMS would be an essential element im detecting links between different sets of data and different identities assumed by the same person and registered in different central systems.

Common Identity Repository (CIR)

It is a common component for the collection of biographical and biometric data on the identity of third-country nationals registered in the Eurodac, VIS, future EES and in the proposed ETIAS and ECRIS-TCN systems. Each of these five central systems registers or will register biographical data of specific people for specific reasons. The relevant identity data would be stored in a common identity repository, but they would still "belong" to the relevant core systems in which they were registered. The common identity repository will not contain data collected in the SIS. The main objective of CIR is to facilitate the biographical identification of third-country nationals. The result of a carried out check will be presented in the function "result / no result". Out of the five systems that would be covered by the common identity repository, the future EES and the proposed ETIAS and ECRIS-TCN are new systems that still need to be developed. Currently, Eurodac does not include biographical data, so new legal provisions have to be developed in order to use it.

Multiple Identity Detector (MID)

It is an element used to check that consulted identity data is present in more than one of the systems connected to it. The module includes identity data collection systems in the common identity repository (CIR) (Eurodac, VIS, future EES and proposed ETIAS and ECRIS-TCN systems) and SIS. It would provide for detecting the multiplication of identity associated with the same set of biometric data, which would serve the dual purpose of correctly identifying people traveling in good faith and combating identity fraud. This solution is an innovation in regard to effectively resolving the problem of using false identities, which is a serious security breach. The module would only show biographical entries concerning identities to which there are links in different central systems. Such links would be detected using a common biometric matching site based on biometric data, and would require confirmation or rejection by the authority that registered this data in the information system that led to the creation of the link. The connections will be presented in four categories:

- yellow connection - the possibility of differing biographical identities belonging to the same person;
- white connection - confirmation that different biographical identities belong to the same person traveling in good faith;
- green connection - confirmation that different people traveling in good faith have the same biographical identity;
- red connection - the suspicion that the same person unlawfully uses different biographical identities.

CONCLUSION

In recent years, threats to internal security in individual EU MS have taken different forms and have been very visible. Spectacular examples of an increase in the level of threats were acts of terror, which made not only the public opinion of the European Union Member States but also the involved EU institutions and bodies pay more attention to security issues. While the general public expresses its concern over the increase of threats resulting from mass migration, including illegal migration, EU institutions and bodies have made efforts to counteract these threats. The challenges associated with migration have highlighted the urgent need for more effective use of ICT tools possessed by EU. These activities are aimed at making more effective use of existing information systems, addressing loopholes and using data collected in these systems intelligently to protect the EU's external borders in a better way, managing borders and migrations more effectively, and enhancing internal security. The proposed interoperability solutions must comply with respect for fundamental rights and protection of personal data.

Currently used central EU ICT systems have many loopholes and are not technically coupled with each other. This results in introduction of the same data into different systems by various entities responsible for public security and border surveillance. Ensuring public security requires the ability to check real-time (biographical and biometric) data on persons that cross the EU borders and move around its territory. The interoperability of ICT systems proposed by the European Commission is a response to the challenges of illegal migration and threats arising from it. Consultations in individual EU MS enabled development of assumptions that will meet these challenges. Interoperability of EU information systems is essential for internal security, common high standards of border management, prevention of cross-border crime and acts of terror, and providing security authorities with systematic, efficient, fast and controlled access to necessary information.

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INTEROPERABILNOST EVROPSKIH INFORMACIONIH SISTEMA U UPRAVLJANJU GRANICAMA I MIGRACIJAMA, I OBEZBEĐIVANJE SIGURNOSTI

Evropska unija se poslednjih godina suočava sa porastom ilegalnih migracija. Porast migracija doveo je do povećane opasnosti od terorističkih akata, što je doprinelo smanjenju osećaja sigurnosti građana Evropske unije. Građani EU očekuju efikasniju kontrolu spoljašnjih granica kao i efikasnije upravljanje migracijama. Odgovor na ove bezbednosne izazove može se naći u interoperabilnosti evropskih informacionih sistema koji se koriste za upravljanje granicama i migracijama, kao i za obezbeđivanje sigurnosti Evropske unije. Ključni element interoperabilnosti je adaptacija postojećih sistema i razvoj novih, posebno u tehničkom smislu. Pored pravnih, organizacionih i logističkih aktivnosti, to je ključni element čitavog sistema aktivnosti evropskih institucija i agencija.

Ključne reči: *interoperabilnost, migracije, upravljanje granicama, osećaj bezbednosti, informacioni sistemi EU.*

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Review Paper

CIVIL LIABILITY OF MINORS

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Abstract. *Damage caused to another person assumes tort liability, providing that all the conditions specified by the law are met. National law stipulates that children under 7 years of age are not liable for damage they have caused, while minors over 7 years of age, if capable of reasoning, can be held liable for damage compensation. A minor attains general tort liability at the age of 14. Considering the fact that minors can be held liable for damage caused to another, the Serbian Obligations Act ("Law on Contracts and Torts") makes a justifiable distinction between minors of different age regarding their individual liability. This distinction is not common in other European legal systems. Yet, the author concludes that it would be sensible to postpone the process of establishing tort liability of a minor for a later period, when the minor attains full contractual capacity. The conclusion is based on two main reasons. The first one is the fact that parental right, which last until the said age, implies the parents' obligation to take care of their underage child. The second reason is the financial situation of the child that prevents him/her from compensating the damage s/he has caused to another person.*

Key words: *damage, minor, parents, joint and several liability*

1. INTRODUCTION

Regardless of the fundamental principle of prohibition of causing damage, which implies that one must refrain from actions that may cause damage to other persons,[1] causing damage to to another person has been a common phenomenon leading to the establishment of the institute that would provide the plaintiff with an opportunity to rectify damage incurred by the tortfeasor's acts. This has led to the formulation of Civil Right principles that regulate infliction of damage and enable the aggrieved person to repair his/her status – the legal status enhancement function (Vodinelić V., 2012: 484).

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[1] Art. 16 of the Obligations Act (OA) on Contracts and Torts, *Official Gazette SFRY*, no. 29/78, 39/85, 45/89-decision by CCY and 57/89, *Official Gazette* SRY, no. 31/93 and *Official Gazette of Montenegro, no*. 1/2003-Constitutional Charter.

Both in theory and practice, there is no dilemma on who will bear the consequences for the damage if done by a person with full capacity. Consequently, the tortfeasor shall be responsible for the damage and shall, when all legal conditions are fulfilled, compensate the damage from his/her own property (by giving an item to replace the damaged one, or repairing the damaged item, or paying the monetary compensation, etc.) or by non-monetary compensation (apology, declaration withdrawal, etc. (Vodinelić V., 2012: 485).

Dilemmas and different opinions exist in such situations where the tortfeasors are the minors whose parents are still obliged to look after them within the exercise of their parental right.[2] Nowadays, it is obvious that minors enter the world of adults early. They come into contact with negative influences, values, patterns of behavior and upbringing at much earlier age through social networks, media and the environment. Considering that they are still in the process of maturation and personality development, they are often unable to distinguish acceptable from unacceptable behavior. Depending on the circumstances of each case, this can be attributed to a previous lack of good upbringing, a lack of adequate supervision, or the personality of the minor. Therefore, bearing in mind the aforementioned, it is completely reasonable to question whether it is justified that people who are responsible for the supervision of a minor shall be held responsible for the compensation of damage caused by the minor, or whether juvenile tortfeasors shall bear a certain degree of responsibility.

In the event of accepting the first solution, the person responsible for the incurred damage would not be the minor but some other person: for example, the parents (who are are responsible for the damage caused to another by their minor child), or the guardian, school or other institution while the child is under their supervision. Most international laws (as well as our legislation) provide that, under certain conditions (such as age and ability to reason), a minor can still be considered responsible towards the plaintiff, but in most cases the responsibility is placed on the parents or person supervising the minor at the time of causing the damage. These persons are most commonly charged according to the principles of subjective responsibility, which they can be absolved from if they prove that "the damage was incurred without their fault"[3] or that "they performed the supervision in the manner they were obligated to, and that the damage would have been caused even under a carefully conducted supervision."[4] Our legal system is an exception because it distinguishes the damage incurred by a child under the age of 7 and establishes the objective responsibility of the parents regardless of fault.[5] By enacting this legal solution, the legislator is generally believed to have given priority to the interests of the social environment, which is to protect itself from the increased risk of damage; given the fact that people are difficult to deter from the idea of having their own children, or to be forced to exercise responsible parenting, such strict responsibility for damage caused by a minor will not discourage the potential parents (Karanikić-Mirić, 2013: 228.)

[2] See Article 68 Family Act (FA), *Official Gazette RS*, no. 18/2005, 72/2011-other law and 6/2015.
[3] See Article 165 para. 4 of the Obligations Act (OA)
[4] See Article 167 para. 1 of the Obligations Act
[5] See Article 165 para. 1 of the Obligations Act

2. MINOR'S RESPONSIBILITY FOR THE DAMAGE

2.1. The Obligations Act (on Contracts and Torts)

The specificity of damage caused to another person by a minor stems from the dilemma concerning the age when a person can be considered capable of committing a civil delict (tort), and who should be held responsible for the damage caused by a child who obviously cannot be held liable in tort because s/he does not understand the serious consequences of the performed actions. Prior to the adoption of the Obligations Act (on Contracts and Torts), there was also a dilemma in court practice whether the same rules should apply to the parents of all minors, or only to those with children of a certain age (Draškić, 1988: 600).

The Obligations Act regulates the responsibility of minors in the section dealing with liability based on fault (culpability). This type of civil liability for damage is always established when the requisite conditions are fulfilled: the damage exists; it has been a result of an unlawful harmful action; there is a causal link between the illicit actions and the resulting damage; and there is a casual link between the tort capacity and the tortfeasor's culpability (Vizner, 1978: 678). What causes doubts about the responsibility of the minor for damage is precisely the fulfillment of the condition regarding the existence of a normal psychological disposition (capacity) of a minor to comprehend the causal link between the harmful action s/he takes and the consequences in terms of the damage that will occur from such an action (Subić, 1992: 1272).

As for the opinions on tort liability of minors found in theory, some authors suggest that attaining tort capacity is not related to certain age but it should be determined in each individual case, and if the minor responsible for the damage is proved to be capable of reasoning then s/he shall bear all the responsibility for the incurred damage. For example, Milošević believes that when damage is caused by a minor who has reached such a mental phase of development at which s/he can understand the significance of her/his actions, then s/he alone should take the responsibility regardless of whether it is a younger or older minor. He also states that the liability of a minor for the caused damage should be assessed in each particular case, based on the minor's ability to reason, by comparing her/his behavior with the one of a reasonable minor rather than the one of an adult. Furthermore, he thinks that tort liability needs to be proven separately, apart from the minor's criminal responsibility, because the conditions generating those two types of responsibilities are different, and the minor's ability to cause damage should not be equated with the minor's limited contractual capacity (Milošević, 1964: 262-263). This author also believes that efficiency-related reasons justify the aim to identify the liability of minors as the liability based on the principle of proven culpability, regardless of whether the tortious act has been committed by a minor between 7 and 14 years of age or a minor who has already turned 14, since the tortuous act committed by a minor is an expression of insufficient care of parents or other persons for a minor who is still at the stage of maturing and developing (Milošević, 1984:78).

In his work "*Obligations and Contracts: A Draft for the Obligations and Contracts Code*", Konstantinović suggested that minors capable of reasoning should also be held liable for the incurred damage (Konstantinović, 1996: 80). This solution does not assume the minor's age as a relevant element for proving tort liability but the fact that the minor is capable or incapable of reasoning, which is determined in each individual case.

On the one hand, the stated attitudes assume the existence of responsibility of the minor whenever it is established that he is capable of reasoning at the moment the damage was incurred, whereby the minor's age is irrelevant; on the other hand, the Obligations Act (on Contracts and Torts) regulates the minor's responsibility by considering the age only as the starting criterion which distinguishes 3 periods. More precisely, national law regulates a minor's responsibility for damage by stipulating that a minor cannot be held responsible for the damage s/he causes until s/he turns seven.[6] During this period of life, there is a legal presumption of minor's incapacity to commit torts, and the possibility of proving the opposite is excluded. Until the age of 7, minors are represented by their parents in all legal affairs. When the damage is caused by a minor between 7 and 14 years of age, s/he is not responsible for the damage unless it is proven that s/he was capable of reasoning at the time of causing the damage.[7] Thus, in this period, incapacity is still presumed, but there is possibility of proving the opposite. Finally, a minor who has turned 14 may be held responsible for damage according to the general rules on liability for damage,[8] on the basis of presumed guilt (culpability), i.e. regardless of guilt in the cases stipulated by the law.

Thus, depending on the minor's age, the law distinguishes three relevant periods in determining the responsibility of minors. While the possibility of proving the opposite is completely excluded in the first period (until the age of 7), the legal presumption of incompetence for reasoning in the second period (age 7-14) and the legal presumption of the ability to reason in the third period (after turning 14) are refutable (Vizner, 1978: 689). If the damage is caused by a child who is between 7 and 14 years of age, or by a child aged over 14, there is a possibility of proving the opposite. As for the first case, the burden of proof is on the plaintiff (i.e. the person who invokes the minor's liability), who has to prove the minor's capacity to reason at the time of causing damage. In the second case, the burden of proof falls on the party that claims that the minor was incapable of reasoning at the time of causing the damage. In case it has been successfully proven that the minor was capable of reasoning at the time of causing damage, the minor aged between 7 and 14 will be held liable for the damage.

Having in mind the analyzed regulation of the Serbian Obligations Act, national law prescribes that the acquisition of tort capacity, as the capacity of an entity to be responsible for damage (Vizner, 1978: 684), at the age when parental right is still exercised, which entails the right and obligation of parents to, among other, look after, raise and educate their child,[9] as well as at the age which precedes the attaining of full contractual capacity,[10] as a capacity to produce legal effects through one's own action (Vizner, 1978: 685). Minors who turned 14 and are capable of committing a tortious act have attained only partial capacity in that stage of life; thus, they can consciously undertake only a limited number of legal transactions recognized in the legal system. They can independently undertake[11] legal transactions in order to obtain exclusive rights, or to perform some activities by which they obtain neither rights nor obligations, and perform legal transactions of minor importance. In order to undertake all other legal transactions, minors need the consent of their parents, or

[6] See Article 160 para. 1 of the Obligations Act
[7] See Article 160 para. 2 of the Obligations Act
[8] See Article 160 para. 3 of the Obligations Act
[9] See Articles 67, 68 and 84 of the Family Act (FA)
[10] See Art. 11 FA.
[11] See Art. 64 FA.

the guardianship authority in case of disposal of immovable property or movable property of great value.

Although this may lead to a conclusion that tort liability is impossible without tort capacity, the Obligations Act envisages such a possibility if it is required by the principle of fairness.[12] The elements for establishing such liability are as follows: the damage was caused by an incompetent person (lacking legal capacity) who cannot be held liable; the compensation cannot be obtained from the person responsible for the supervision of an incompetent person; the request for compensation of damage caused by the incompetent person is assessed as fair and justified, and the incompetent person can compensate for the incurred damage (Carić *et al.*, 1980: 518). The law leaves it to the court to assess the fairness and justifiability of the request for damage compensation by the incompetent minor who caused the damage by his/her actions, taking into account two essential circumstances: the financial situation of both the tortfeasor and the plaintiff.

On the one hand, considering these cases, there is practically a tortfeasor whose lack of capacity to reason makes him/her incompetent and thus not liable for the damage caused to the plaintiff; he is also in a better financial situation as compared to the plaintiff. On the other hand, the factual tortfeasor (who is considered incapable of committing a tortious act) is supervised by a person who is legally responsible for the damage caused to the plaintiff (as a presumptive torfeasor) but who cannot pay the compensation for the incurred damage. The assessment of fairness and justifiability of the compensation request represents an exceptional deviation in the case adjudication based on relevant and full application of positive regulations; the possibility of such adjudication is explicitly prescribed and allowed by the law in case when the present circumstances of the case lead to a conclusion and belief that the standard application of relevant provisions would be incompatible with the society's current ideas about fairness and justice (Vizner, 1978: 713-714).

2.2. Joint and several liability of parents and children for damages

According to the prescribed rules, a tortfeasor and his/her parents may be held liable for rectifying the damage caused by a minor. Thus, the question is raised as to whether they may be held jointly and severally liable. In Serbian legislation, parents and children may be held jointly and severally liable if, apart from parents, a child is also found to be responsible for the damage.[13]

In our legal system, there are two types of joint and several liability: joint and several liability between parents, and joint and several liability between parents and a child. Joint and several liability of parents arises from their failure to exercise the legal duty of mutual control over the minor, and the joint and several liability of parents and their child to the plaintiff is actually a tort liability, that is, joint and several liability of several persons for the same damage envisaged in Articles 206-208 of the Obligations Act (Vizner, 1978: 709). The share of each party that is jointly and severally liable for damage is commonly determined on the basis of the degree of their faults and the seriousness of consequences of their acts; in case it is impossible to determine the share of each party, each of them shall bear an equal share unless the principle of fairness requires a different decision on the merits of a specific case.[14]

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[12] See Art. 169 of the Obligations Act (OA)
[13] See Article 166 of the Obligations Act
[14] See Article 208 of the Obligations Act

In such situations, when the plaintiff claims compensation for damage from both parents and the minor, the minor shall be held liable on the grounds of subjective liability and fault, and the parents shall be liable on the grounds of liability for others. Considering that the Obligation Act has accepted the criteria of presumed fault and not proven guilt (culpability), in case of liability on the grounds of personal fault and liability for others, the burden of proof does not rest on the plaintiff but on the tortfeasor who has to prove that s/he is not liable (Vizner, 1978: 709).

By analyzing our national legislation, it is clear that the applicable Obligations Act (on Contracts and Torts) stipulates that parents are liable for the damage caused by a child under the age of 7. At this age, children can never be jointly and severally liable with their parents for compensation for damage caused to the aggrieved party.

This joint and several liability of parents and minor can only be established if the child causing the damage is between 7 and 14 years old, who was proven to be capable of reasoning at the time of causing the damage, and if it is a minor who reached the age of 14 and who is responsible for the damage according to the general rules on tort liability.[15]

It can be concluded that there are two possibilities when the damage is caused by a minor between 7 and 14 years of age. In case the child has tort capacity (ability to reason), both parents and the child shall be severally and jointly liable for the damage. Parents can be exonerated from this liability if it is proven that the damage was caused without their fault. However, in case the child at the mentioned age had no tort capacity (ability to reason), the parents shall be solely liable for the damage.

In theory, perceptions about joint and several liability of both parents and a 14-year-old minor who inflicted the damage are different. Some authors (such as Vizner) deny such a possibility because they believe that parents and children should be jointly and severally liable for the damage only if the damage is caused by a minor under the age of 14, given the fact that minors who are over 14 can be solely responsible for the damage without holding their parents liable for their acts and on the assumptions that they are capable of reasoning (Vizner, 1978: 709).

On the other hand, Stanišić holds the opposite view; he believes that parents should be liable for the damage caused by their minors until they reach the age of 18 based on the principle of objective liability. This can be supported by the fact that parents are connected with their children by nature and can constantly have influence on their actions and decisions. The constitutional and legal duty of parents is to take care of property and personality of their children, to educate and supervise them. As a rule, children's bad behavior is the result of lack of control or poor education by parents themselves. There are rare cases when bad behavior of children is not the result of their parents' incorrect supervision and upbringing. Even in those cases, there is a justification for the liability of parents because the society has no conditions to otherwise provide the plaintiff with compensation for damage. Considering the living conditions in our country, he emphasizes that parents do not have means to fully compensate the plaintiff for the loss and the liability to the other person has been established in order to provide compensation for the aggrieved party (Stanišić, 1997: 23).

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[15] Thus, as stated in the judgment rendered by the High Court in Valjevo 353/16 on September 01, 2016 (*Ingpro paket 10+* database), parents and a child were jointly and severally liable for damage the child inflicted to the other person when s/he was at the age of 17. The Court upheld that the tortfeasor was liable on the grounds of fault in accordance with Article 154 para. 1 of the Obligations Act (OA) and Articles 158 and 160 para.2 of the OA, while the parents were liable based on the provisions in Article 165 para. 4 of the OA.

Although there are different opinions in theory regarding the joint and several liability of parents and minors over the age of 14, the court practice is unified about this joint and several liability and supports its existence. This is based on the point that the liability of parents in such cases arises from the fact that parents have not proved that the damage was caused without their fault; so, they neglected taking care of their minor and, consequently, this has led to causing damage (Šemić, 1999: 92).

2.3. The Draft Civil Code of the Republic of Serbia

In addition to the applicable Obligations Act, the liability of minors for causing damage is regulated in the working draft of the Civil Code of the Republic of Serbia,[16] Chapter 2, Section 2 regulating Liability on the grounds of fault (Articles 299-305). There are three age groups relating to liability of minors, and the age limits between the groups has not been changed.[17] Minors who have not reached the age of 7 cannot be held liable for the damage they have caused. Minors who are 7 to 14 years old are generally not liable for the damage they have caused. The difference between this working draft and the effective regulations is that, in case a minor causes damage to another person in this period of life, the burden of proving the liability of the minor, i.e. the burden of proving the minor's ability to reason at the time of causing the damage, shall be borne by the opposite party/plaintiff ('unless the opposite party proves that the minor was capable of reasoning when causing the damage').[18] Finally, a minor who is 14 years old may be liable for the caused damage according to the general rules on tort liability.

The Draft Civil Code also includes a provision on joint and several liability of both parents and children,[19] without introducing any changes as to the applicable Obligations Act (on Contracts and Torts). Thus, except for the provision that explicitly stipulates that the burden of proof of the minor's ability to reason when causing the damage shall be borne by the opposite party (plaintiff), there are no other changes in the working draft of the Civil Code.

2.4. Overview of Comparative Law

Comparative legislation also suggests similar solutions, stipulating that both minors and people in charge of their care and supervision may be held responsible for the damage caused by minors. When it comes to the European legal systems, different solutions are suggested regarding the responsibility of a child.

One of the solutions implies setting the age limit under which the child cannot be held liable for causing damage to another person. This age limit at which children are not considered liable for their tortious acts differs from one country to another. For example, The German Civil Code (*BGB),*[20] in Article 828, stipulates that a minor who has not turned 7 yet is not responsible for damage caused to another person, while a minor at the age between 7 and 10 is not responsible for damage in an accident involving a motor vehicle or

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[16] Draft Civil Code of the Republic of Serbia (working draft, 29 May 2015), retrieved on 3 April 2018 from *https:// www.mpravde.gov.rs/files/nacrt.pdf,*

[17] See Article 301 of the Serbian Draft Civil Code (Draft CC)

[18] See Article 301 of Draft CC

[19] See Article 308 of Draft CC

[20]German Civil Code (*BGB)*, available at *https://www.gesetze-im.internet.de/englisch_bgb/englisch_bgb.html#p3501*, April 06, 2018.

railway, provided that s/he did not cause the damage intentionally. The same provision stipulates that a minor who has not reached the age of 18 is not responsible for damage cause to another person if s/he is not aware of her/his responsibility. Therefore, it can be concluded that the liability of the child over the age of 7 (i.e. the age of 10 ten in case of damage in an accident involving vehicle or railway) or a minor under the age of 18 depends on her/his ability to reason.[21] The age of 7 is also a limit in Portuguese law, according to which the children who are 7 years old or older are responsible for the damages caused to other persons (Pereira, 2005: 638). It is believed that this age has been chosen based on the German law since it does not comply with the educational system of Portugal, where children start elementary school at the age of six (Veroso, 2006: 312). This age limit is increased in Austrian law system since it is a general rule for the minors under 14 not to be responsible for damage caused to another person but there is still a possibility for the opposite party to prove the contrary.[22] Even if the minor is found liable (culpable) for damage, the court can only oblige her/him to bear a fair share of responsibility for damage. The first reason for such a legal solution would be the fact that mental abilities of a minor have not been developed yet; so, given the same circumstances, the courts are more lenient in sentencing a minor in comparison to sentencing an adult. The second reason would be the fact that, in case of determining the liability and compensation for damage, the financial situation of both the plaintiff and the tortfeasor should be taken into account, which can result in reduction of compensation due to poor finances of the minor. Nevertheless, the minor's liability is subsidiary to the liability of the parents or other persons who are obliged to exercise care and supervision over the minor (Hirsch, 2006:7-8).

On the other hand, some legal systems do not set this age limit. Italian law, for instance, does not set the minimum age at which a child should be held liable for the incurred damage, which further means that minors can be held responsible for damage based on the general provisions of the Italian Tort Law, provided that they were capable of understanding the consequences of their acts or failures at the time of causing the damage (Comande, Nocco, 2006: 267-268). The child's responsibility is assessed with respect to the type of case. Whereas criminal legislation explicitly specifies the reasons for non-culpability, in civil law it is the discretionary authority of the judge to assess the merits of the case and form his/her opinion based on intellectual and physical abilities of a child, his/her behavior, education and similar criteria that are taken into account in determining the child's civil liability. Therefore, in order to be held liable for damage, the child should be able to act reasonably, to understand the risk of her/his actions or to manage her/his behavior towards achieving some goals. However, in practice, children who have not reached the age of 6 yet are not usually held responsible for damages. For this reason, the Italian Supreme Court of Cassation pointed out that, in case of determining the child's responsibility, it was not enough for the Court to take into account the child's age and caused damage in assessing his/her liability; besides the intellectual capacity and physical abilities, personality characteristics and development, the court should also consider the ability of a child to understand the illegal nature of his/her acts and the ability to make sensible choices (Comande, Nocco, 2006: 269-270).

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[21] Miguel Martin-Casals, Children in Tort Law Part 1: Children as tortfeasors, Comparative report 2005*, civil.udg.edu/children/Reports.htm,* accessed June 30, 2018;

[22] Children in Tort Law, available at http://civil.udg.edu/children/project02.htm (accessed April 03, 2018)

Just like the Italian legislation, the Spanish Civil Law does not set the age limit below which the children cannot be held responsible for causing damage, nor does it set the age limit above which they can be held liable for their tortious acts. The liability is determined based on the type of case, which implies that in case of determining the liability on the grounds of fault, the child's tort capacity should be assessed first. The child's tort capacity entails the ability to understand and wish to commit a tortious act, but it depends on the child's ability to understand what it means to do harm to another (from the perspective of his/her intellectual characteristics). In the event that tort capacity of a child is determined based on these criteria, the child will be held liable damage caused by his/her torious act (Martin-Casals, Ribot, Feliu, 2006: 369-370).

In France, after a series of decisions in 1984,[23] it was decided that children were responsible for their torts irrespective of the lack of ability to reason. Minors are always held responsible for damage they cause regardless of their age and abilities. Their ability to distinguish right from wrong is of no relevance.[24]

Despite obviously different legal solutions on children's civil liability in tort, the common characteristic in a vast majority of legal systems is the establishment of tort liability on the grounds of fault, based on the child's ability to reason. However, opinions differ regarding the understanding of what the said ability to reason actually implies. In some legal systems, it refers to the ability to act voluntarily, while in other legal systems it also implies the child's ability to recognize responsibility for his/her dangerous actions.[25]

In addition to the ability to reason, the other question that arises is the applicable standard of care in their behavior that children have to meet in order to avoid liability. In some legal systems, the burden is placed on minors because their behavior is assessed according to the general standard of reasonable behavior that is required from an adult. In other systems, such as the English one, the children's behavior is assessed on the basis of the standard of care that has to be met by a child of a similar age and acting in similar circumstances.[26]

3. CONCLUSION

This paper analyzes the possibility and conditions under which minors can be held liable for causing damage to others. Although most legal systems allow this possibility, provided that the necessary requirements are fulfilled, persons who are most often held liable for damage caused by minors are those who are supposed to supervise and/or take care of them, primarily their parents. Assigning responsibility to parents and other guardians for damage cused by minors in their care is justifiable because Tort Law is primarily aimed at defending the interest of the aggrieved party and mitigating the consequences of damage caused by the tortfeasor. Considering the minors' financial situations, iIt may be difficult to fulfill this aim if the damage has to be rectified by minors

[23] Miguel Martin-Casals, Children in Tort Law Part 1: Children as tortfeasors, Comparative report 2005, *civil.udg.edu/children/Reports.htm,* June 30, 2018

[24] In the cases of Derguini, Lemaire and Gabillet, the Court held that judges should not take into account whether a child was able or not to understand the consequences of his/her acts. France-Decisions regarding children in tort law, *civil.udg.edu/children/Decisions.htm,* June 30, 2018

[25] Children in Tort Law, *civil.udg.edu/children/project02/,* May 03, 2018

[26] *Ibid.*

alone. On the other hand, bearing this responsibility has a preventive impact on the aforementioned persons, reminding them of the fact that they are obliged to provide proper care and supervision of minors.

The effective Obligations Act (on Contracts and Torts) and the working draft of the Civil Code of the Republic of Serbia justifiably make a distinction between minors of different age in terms of their tort liability for caused damage. This is necessary because there is no dispute that the liability of a 5-year-old child cannot be equated and treated in the same manner as the liability of a 13-year-old child. However, it seems right to change the current age limit at which tort liability is attained, and to equalize it with the age of maturity or the age when full contractual capacity is attained before maturity. The parental rights and obligations, which imply the parents' responsibility to look after their children and consequently their liability for failure to supervise the child who caused damage to another, typically end when a child reaches the age of maturity, or when s/he attains full contractual capacity before the maturity age. In addition, although assuming tort liability in younger ages and before attaining the full contractual capacity can be justified from the aspect of prevention and raising minors' awareness of the need to take responsibility for their actions, this responsibility can be of little practical significance for the aggrieved party and for rectifying the damage. In the majority of lawsuits over damage indemnification, the tortfeasor is obliged to compensate the damage financially, which a minor is unable to do due to the lack of financial means.

It seems unjustifiable to accept the standpoints articulated in legal theory according to which tort liability should be determined in each particular case, without setting the age limit below which the minor cannot be held responsible for the damage or the age over which s/he can be held liable for damage. Such a solution would often result in long evidentiary hearing procedure aimed at determining whether the minor was capable of reasoning or not at the time of causing damage to another person, that is, whether s/he may be held liable in tort or not. Even if the minor were considered capable of reasoning and making judgment and held liable for the incurred damage, the proceeding would result in a final (binding) decision which would be difficult to enforce in practice for the previously stated reasons regarding the minor's financial standing.

In addition, it seems unjustifiable to accept the view that parents should not be held jointly and severally liable for damage caused by minors who have turned 14 due to the fact that these minors can be fully responsible for the committed torts. In this case, the counterarguments are the parental right, which still has not ended in that period of child's life, as well as the financial standing of the minor, who is still at school in the period from the age of 14 to 18. It seems that the court practice has reached the most appropriate solution by deciding that the minor's parents may be held jointly and severally liable with the minor for the damage caused to the plaintiff, even when the minor has already turned fourteen.

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GRAĐANSKOPRAVNA (DELIKTNA) ODGOVORNOST MALOLETNIKA ZA ŠTETU

Prouzrokovanje štete drugom, uz ispunjavanje zakonom propisanih uslova, vodi građanskopravnoj odgovornosti za štetu. Domaće pravo propisuje da deca mlađa od sedam godina ni u kom slučaju ne mogu biti odgovorna za štetu koju prouzrokuju, dok se maloletnici stariji od sedam godina ukoliko su sposobni za rasuđivanje mogu pojaviti kao odgovorna lica za naknadu štete. Sa navršenih četrnaest godina maloletnik odgovara prema opštim pravilima o odgovornosti za štetu. Kada je već prihvaćeno da maloletnici mogu da odgovaraju za štetu koju su prouzrokovali drugom, Zakon o obligacionim odnosima opravdano pravi razliku u uzrastu maloletnika prilikom uređivanja njihove odgovornosti. Pravljenje ovakve razlike nije karakteristično za prava drugih evropskih zemalja. Ipak, autor zaključuje da bi bilo mesta odlaganju sticanja deliktne sposobnosti na kasniji period, odnosno period kada se stiče potpuna poslovna sposobnost. Dva su glavna razloga za ovakav zaključak. Prvi bi bio taj što do tog doba traje roditeljsko pravo iz kog proističe pravo i dužnost roditelja da se staraju o svom maloletnom detetu. Drugi bi bile materijalne prilike maloletnika zbog kojih on teško da može udovoljiti obavezi naknade štete koju je pričinio drugom.

Ključne reči: *šteta, maloletnik, roditelji, solidarna odgovornost*

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Review Paper

LEGAL PROVISIONS ON VIOLENCE IN SPORTS AND DISPUTABLE ISSUES IN COURT PRACTICE

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Abstract. *The Act on the Prevention of Violence at Sports Events, which regulates the behaviour of participants in sports events, contains numerous novelties related to this form of criminal offences. Large sports events are frequently tarnished by serious violence, such as property damage and intentionally harmful physical assaults with occasional fatal consequences, which call for an adequate response from the state authorities responsible for this form of criminal behaviour. This paper discusses the most relevant legal provisions related to violence in sports, and analyzes certain disputable issues and the existing case law, with specific reference to particular problems arising in judicial practice.*

Key words: *sport, violence, legal regulations, practical issues*

1. INTRODUCTION

Fair-play is presumed in sports. The rules of fair-play are supposed to be observed and practiced in sports events. However, for years, sport has been closely linked to violence, not only abroad but also on the territory of former SFRY, its former constituent republics and the Republic of Serbia.

Violence is visible in all sports, both team and individual ones, but football appears to be the sport in which it is most frequently demonstrated. Most of the European countries have been combating violence in sports for more than thirty years. The seriousness of this issue may be illustrated by the Heysel Stadium disaster in Brussels in 1985, which occurred just before the start of the 1985 European Cup Final between the football clubs *Juventus* from Turin and *Liverpool* from Liverpool, when 39 people, mostly Italians and Juventus fans, were killed in the riot leading to the stadium wall collapse. In the aftermath of this tragedy, the international community responded to this violence previously unrecorded at sports events by adopting the 1985 European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches.

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Various instances of violence at sports events were also recorded in the former SFRY. One particular incident of sports violence has remained in the collective memory as a symbolic forewarning of the impending dissolution of the SFRY. Namely, in the Yugoslav Cup Final, the football match between FC *Dinamo* from Zagreb and FC *Red Star* from Belgrade was not played due to the mayhem caused by a number of fights between Dinamo and Red Star fans which started in the streets prior to the match but later continued at the Maksimir Stadium (Zagreb) and in the playground, resulting in mutual clashes between the players and direct confrontation with the law enforcement authorities.[1]

Sports violence has become a global phenomenon, which may be illustrated by numerous incidents at sporting events in other European countries. In a recent incident in Greece, for example, a football match between FC *Paok* Salonika and *AEK* Athens was interrupted by the- *Paok* owner who stormed onto the pitch armed with a gun after the referee disallowed his team a goal; as a result, the Greek Superleague was suspended by the Greek government.[2]. Following violent behaviour of disappointed fans of the British football club West Ham United, the club management decided to ban a certain number of its fans from the stadium for life.[3]

2. International and National Regulations:

Legal Documents on Sports Violence

The Heysel Stadium disaster led to the adoption of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, adopted by the Council of Europe, as the oldest European political organization, on 19 August 1985.[4] Article 1 of this document states that the Convention is aimed at "preventing and controlling violence and misbehaviour by spectators at football matches", by coordinating the policies and actions of government departments and other public agencies (Article 2), ensuring the implementation of relevant measures to prevent misconduct (Article 3), and promoting international cooperation between national sports authorities (Article 4). The Convention was ratified by the Republic of Serbia on 28 February 2001, and it came into force on 1 April 2001. The Convention was ratified by 40 European states (Stepanović, 2011: 81).

This international document is closely related to some other documents regulating behaviour in various sports, especially in football. Of particular significance are the regulations adopted *Fédération Internationale de Football Association* (FIFA), and the Union of the European Football Associations (UEFA). The statutes and particularly the disciplinary regulations of these football associations determine preventive and repressive

1 Vreme, *Slučaj "Maksimir" – dvadeset godina posle, by Zoran Majdin, br. 1011, 20 maj 2010; available at http://www.vreme.co.rs/cms/view.php?id=931952, accessed on 20 March 2018.*

2 *The Guardian*, Greek Superleague suspended after team owner invades pitch with a gun, by Helena Smith,12 March 2018; available at https://www.theguardian.com/football/2018/mar/12/greek-football-match-stopped-after-team-owner-invades-pitch-with-a-gun, accessed on 20 March 2018.

3 *The Guardian*, West Ham promise to ban fans for life after Upton Park violence, by A. Smith, D. Hytner, 11 May 2016, available at https://www.theguardian.com/football/2016/may/11/west-ham-ban-fans-for-life-upton-park-violence-manchester-united, accessed on 20 March 2018.

4 CETS 120 European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, Strasbourg, 19.VIII.1985; available at https://rm.coe.int/168007a086

measures to be taken. They include fines to be paid by football clubs and football associations, playing of a match behind closed doors or in a third country, suspension of a football stadium and exclusion from international competitions organized by the aforementioned federations. The world and European football union have been combating racism in football and other forms of discrimination in sports (Dimovski, Ilić, 2015: 122).

The 1985 European Convention on Violence at Sports Events represents the basis of criminal legislation in sports (penal and misdemeanour law) for all the states that ratified it. Moreover, the ratification presupposed the passing and enforcement of national laws. Whereas the Convention lists neither the criminal offences which are to be regulated by national laws nor the elements constituting the character of these criminal offences, it indisputably demands from the countries that ratified it to enact and enforce their own functional mechanisms of legal protection against violence at sports events (Jašarević, Samouk-Jašarević, 2016: 653).

In compliance with the obligation assumed under the 1985 Convention, the Republic of Serbia adopted a special legislative act on the protection of sport and sports events, the Act on the Prevention of Violence and Misconduct at Sports Events (hereinafter: the PVMSE Act) of 2003,[5] which contains articles on specific criminal offences and criminal law protection. The PVMSE Act prescribes diverse measures aimed at preventing violence and misconduct at sports events and gatherings, as well as penalty measures for the criminal act of violent behaviour at sports events and numerous provisions related to the criminal offences committed by certain public officials or authorized persons.

At the time when this Act still included the criminal offence of violent behaviour at sports events as a special criminal act, the Government of the Republic of Serbia adopted the National Youth Strategy (2008)[6]. Among other things, this document stated that the data provided by the Ministry of Internal Affairs of the Republic of Serbia showed a constant increase in the violent spectator incidents at sports events on the territory of the Republic of Serbia. According to these data, 159 cases of serious violation of public peace and order at sports events were reported in 2006, in which 13 individuals were seriously injured and 156 persons sustained minor injuries. During the first ten months of the year 2007, there were 87 cases of serious violation of public peace and order, in which 23 persons sustained serious injuries and 172 individuals had minor injuries. Although it might not have been a crucial factor, the legislator responded by introducing changes in the criminal law provisions on to this matter, which were subsequently followed by relevant amendments and supplements to Criminal Code of the Republic of Serbia (hereinafter: the CC).[7] Consequently, the criminal offence of violence at sports events, which was initially prescribed in the PVMSE Act, was now transferred to the Criminal Code and included in the section on "Criminal acts against Public Peace and Order" as a special criminal offence

[5] The Act on the Prevention of Violence and Misconduct at Sports Events, (*Official Gazette of the Republic of Serbia,* No. 67/03 from July 1, 2003, *Official Gazette RS*, No. 101/2005, *Official Gazette RS*, No. 90/2007, *Official Gazette RS,* No. 72/2009*, Official Gazette RS*, No. 111/2009, and *Official Gazette RS,* No. 104/2013)
6 National Youth Strategy, (*Official Gazette of the Republic of Serbia*, No. 55/2008)
7 Criminal Code of the Republic of Serbia (*Official Gazette RS,* No. 65/05 from 10 Oct. 2005, altered and amended: *Official Gazette RS*, No. 88/05,*Official Gazette RS*, No.107/05, *Official Gazette RS,* No. 72/2009, *Official Gazette RS,* No. 111/2009, *Official Gazette RS*, No. 121/2012, *Official Gazette RS, No*. 104/2013, *Official Gazette RS*, No. 108/2014, and *Official Gazette RS*, No. 94/2016)

titled as "Violent Behaviour at Sport Events" (Article 344a CC)[8]. After this alteration, the provisions of the PVMSE Act continued to regulate only misdemeanour offences.

Since the date of its enforcement, 11 September 2009 up to date, this criminal offence (Article 344a CC) was amended only once, on 6 January 2010. Compared to the original text of the CC, this amendment prescribes that it is **mandatory** to impose the security measure by which the court bans the perpetrators of the criminal offences from attending certain sports events and gatherings for a period of one to five years; this mandatory measure has been applied ever since, and it was amended only once in 2016.[9] This security measure is imposed only on the perpetrators of criminal offences related to violence at sports events (Article 344a CC), whenever such prohibition is necessary for the protection of public safety. As prescribed, before the beginning of certain sports events, the perpetrator is obliged to personally report to the authorized official of a local police department in the area of his current residence or to the police station where he will be kept during the sports event.

In 2013, the Government of the Republic of Serbia adopted the National Strategy for Combating Indecent Behaviour at Sports Events (hereinafter: the National Strategy)[10]. It is a strategic document that determines the basic principles and policies of security and safety aimed at combating violence and misconduct at sports events. Besides the National Strategy, the Serbian Government also adopted the Action Plan for the Implementation of the National Strategy. The aforementioned documents constitute the basis for establishing an efficient mechanism for the prevention of indecent behaviour at sports events and gatherings, achieved by coordinated work of responsible state authorities. Their primary goal is to increase security at sports events and to devise security mechanisms for the prevention of violence, in accordance with the European standards. The Government specified that these changes have contributed to establishing an efficient mechanism which is to be applied in the process of charging the perpetrators of these criminal offences; another significant feature is that this mechanism provides for banning some high-risk groups or individuals from attending sports events.

The Government also formed the Action Team for the development and implementation of the Strategy and Action Plan for Combating Violence and Indecent Behaviour of Spectators at Sports Events. Moreover, in 2017, the Government issued the Decision on establishing the National Council for the prevention of negative phenomena in sports.[11]

All things considered, it may be concluded that the prevention of violence and indecent behaviour of spectators at sports events and gatherings includes numerous state authorities of the Republic of Serbia: the National Assembly, the Government of the Republic of Serbia, the Ministry of Internal Affairs, the Ministry of Youth and Sports, as well as the Public Prosecutor's Office, misdemeanour courts and sports associations (Milenković, Todorić, 2011: 25).

8 The Act on Amendments and Supplements to the Criminal Code RS (*Official Gazette* RS, No. 72/2009); the criminal offence of violence at sports events was regulated in Article 344a CC RS.

9 The Act on Amendments and Supplements to the Criminal Code (*Official Gazette RS*, No. 94/2016)

10 The National Strategy for Combating Indecent Behaviour at Sports Events for the period 2013-2018 (*Official Gazette of the Republic of Serbia,* No. 63/2013).

11 Decision on establishing the National Council for the prevention of negative phenomena in sports (*Official Gazette RS*, No. 79/2017).

3. Official Data on Sports Violence

The official data related to violence in sports and at sports events show a stable decrease in the number of criminal charges and convictions for the criminal offence of violent conduct at sports events or public gatherings (envisaged in Article 344a CC). This fact is confirmed both by the Serbian judiciary and by the police.

According to the data in the Bulletin of the Ministry of Internal Affairs of the Republic of Serbia published in April 2015, a total of 50,571 sports events were secured by the police forces in 2013 (in comparison to 47,081 events in 2012), 20% of which occurred on the territory of the City of Belgrade Police Directorate. Moreover, despite a greater number of sports events in 2013 compared to that number in 2012, the statistics prove that these sports events were better secured in 2013 since the number of incidents decreased by one quarter, the number of injured persons was lower by 16%, the number of damaged vehicles was reduced by 20%, and the number of assaults on referees was reduced by 8%. These data also show that there were fewer charges for the criminal offence of violent behaviour at sports events and gatherings, but that there were charges for other types of criminal offences at sports events, particularly the ones related to drug abuse. On the other hand, there was a dramatic increase in the offence of the violation of public peace and order, the offence envisaged in Article 23 of the Act on the Prevention of Violence and Misconduct at Sports Events (the PVMSE Act), but also a considerably smaller number of sanctioned offences envisaged in Article 21 of this Act.[12]

The latest Bulletin of the Ministry of Internal Affairs of the RS, published in April 2016, provides similar data, emphasizing that 61,781 public gatherings were successfully secured in 2015 (in comparison to 60,337 public gatherings in 2014), around 80% of which were sports events and gatherings (a total of 49,927 in 2015 and a total of 48,620 in 2014).[13]

The data obtained from the Ministry of Internal Affairs RS show a decrease in the number of criminal offences of violent behaviour at sports events or gatherings (Article 344a CC). These findings are confirmed by the latest official data published in 2016 by the Statistics Office of RS including statistics on reported, prosecuted and convicted cases involving adult criminal offenders.

Based on the data provided by the Ministry of Internal Affairs of the RS in 2016, a total of 3,201 adult individuals were reported for the commission of the criminal offence of violation of public order and peace, while only 108 perpetrators were reported for the criminal offence of violent behaviour at sports events (under Article 344a CC), which is approximately 3% of all reported criminal offences from this group of offences. Out of this number, a total of 39 individuals were reported for the commission of this criminal offence on the territory under the jurisdiction of the Appellate Court in Niš (covering the southern and eastern part of Serbia) or higher courts in this region, which comprises 35% of the total number of reported offenders for this criminal offence in the year 2016. In the same year, 2,274 individuals were charged with the offence of violation of public order and peace, but only 168 perpetrators were charged with the offence of violent behaviour at sports events (Article 344a CC). From the total number of 168 offenders charged with this offence, a total of 126 individuals were found guilty and sentenced in court. Except for one female

12 Bulletin of the Ministry of Internal Affairs of the Republic of Serbia, April 2015, p 87-88, available at: http://arhiva.mup.gov.rs/cms_lat/sadrzaj.nsf/arhiva-informator.h, accessed on 30 March 2018.

13 Bulletin of the Ministry of Internal Affairs of the Republic of Serbia, April 2016, p. 114, available at: http://arhiva.mup.gov.rs/cms_lat/sadrzaj.nsf/arhiva-informator.h, accessed on 30 March 2018.

offender, all the other convicted offenders were male. As for the awarded sanctions, 20 offenders were imprisoned (most commonly for a period of up to 2 months, or 3-6 months, while only one offender was imprisoned for 2-3 years); fine was awarded in 12 cases (most commonly from 10,000 to100,000 RSD); suspended sentence was awarded in 18 cases; house arrest was imposed in 12 cases; ancillary penalty was awarded in 91 cases, and community service was awarded in only one case. In a total of 118 cases, the Serbian courts imposed the security measure banning the perpetrators from attending certain sports events.[14]

4. Disputable Issues in Judicial Practice

Some disputable issues related to the criminal offence of violent behaviour at sports events or public gatherings (envisaged in Article 344a CC) may be illustrated by the description of the aspect of this criminal offence that has caused the greatest amount of controversy in judicial practice. The basic form of this criminal offence is defined in Article 344a CC, paragraph1, as follows: "Whoever physically assaults or engages in an affray with participants in a sporting event or public gathering; perpetrates violence or causes damage to property of substantial value while coming to or leaving a sporting event or a public gathering; brings into a sports facility or throws onto sports grounds, into a group of spectators or people attending a public gathering objects, fireworks, or other explosive, flammable or harmful substances which might cause bodily injuries or endanger the health of those partaking in the sporting event or public gathering; enters sports grounds or the section of the grandstand intended for supporters of the opposing team without authorization and precipitates violence, damages the sporting facility, its equipment, devices, and installations; behaves in such a way or shouts slogans or carry placards at a sporting event or public gathering as to provoke national, racial, religious, or some other type of hatred or intolerance based on some discriminatory reason which results in violence or a physical altercation with people partaking in the event or gathering, shall be punished with imprisonment of six months to five years and fined".

There is no dispute in judicial practice that the immediate participants in sports events (players, coaches and referees) are frequently affected by the commission of this criminal offence. However, the most frequently disputed issue is whether players, coaches and referees can be the perpetrators of this criminal offence in general, and particularly in case of their mutual confrontation at a sports event or gathering. As it has been a subject matter of a long-standing judicial argument, the Appellate Court in Niš as well as other appellate and higher courts in Serbia has changed their attitudes towards this dilemma. Namely, a number of judges used to defend the view that, in case of a physical confrontation among the participants on the playground and in the course of a sports event or gathering previously schedulled by the Sports Association of Serbia, the acts of violence and physical confrontation between the participants could not be treated as an act of commission of this criminal offence, nor could the participants be treated as the object of assault (Cvetković, 2011: 2).

[14] The Statistics Office of the RS, Bulletin 629: Adult Criminal Offenders in RS, 2016– Statistics on reported, prosecuted and convicted criminal cases, 2016; (pp. 13, 42, 64- 65, 72-73, 77); retrieved 26.03.2018 from http://www.stat.gov.rs/WebSite/repository/documents/00/02/72/06/SB-629-Punoletni_2016.pdf

This standpoint was prominent in court practice on the territory under the jurisdiction of all appellate courts in Serbia until 2012. Thus, the Appellate Court in Niš observed this principle in individual decisions, considering that the criminal offence of violence at a sports event or gathering defined in Article 344a para.1 of the Criminal Code does not refer to the immediate participants in a sports event (players, coaches and referees) but to the spectators and fans[15].

In 2012, acting upon the request of the Public Prosecutor's Office for the protection of legality, the Supreme Court of Cassation in Belgrade accepted the Prosecutor's complaint related to the judgment of the Appellate Court in Belgrade by which the defendants had been exonerated from all charges relating to the criminal offence of violent behaviour at a sports event or gathering, defined in Article 344a, para. 1 CC. The Supreme Court of Cassation proclaimed that the judgment of the Appellate Court in Belgrade, ruling in favour of the defendants, constituted a violation of Article 369 para.1 of the Criminal Procedure Code (CPC) in conjunction with Article 344a, para. 1 CC.[16]

In the justification of its ruling, the Supreme Court of Cassation stated the reasons for overturning the Appellate Court judgment: "The defendants D.N. and Z.V. were charged with and convicted of the criminal offence of violent behaviour at a sports event or public gathering, defined in Article 344a para. 1 of the CC. The judgment was rendered by the Trial Court for the defendants' involvement in the physical confrontation with each other in the course of the sports event as participants in that sports event, i.e. handball team coaches."

In its review of the contested Trial Court judgment, the Appellate Court in Belgrade explained its decision to overturn and modified the Trial Court judgment in this particular case and to exonerate the defendants of all criminal charges. The Appellate Court stated that the defendants, who were the participants in the sports event acting in the capacity of handball team coaches, could not be the perpetrators of the aforesaid criminal offence since the participants in sports events, who are regarded as obligatory and authorized participants in a sports event by the Sports Association Statute, could be neither passive nor active subjects in committing this criminal offence. The Appellate Court justified its review by referring to Article 1 of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, according the which the goal to be achieved by the Convention is the prevention and suppression of violence and indecent conduct of spectators at football matches and other sports events, as well as by referring to Article 1 of the Act on the Prevention of Violence and Misconduct at Sports Events in the Republic of Serbia, which states that this Act determines the measures for the prevention of violence and indecent behaviour at sports events, as well as the responsibility of organizers and authorized officials for their enforcement. Based on these documents, the Appellate Court concluded that, since the conduct of the participants in a sports event (players, coaches and referees) was regulated by the Sports Association Statute, it meant that in case of the demonstration of violence among the participants in the sports playground, they had to be sanctioned as prescribed by the Statute or other legal acts of the Association.

The Supreme Court of Cassation dismissed this order of the Appellate Court as wrong. Article 344a para. 1 CC[17] prescribes various alternative ways of committing this particular

15Judgment of the Appellate Court in Niš, Kž. No. 2037/11 of 10 January 2012 - unpublished
16 Judgment of the Supreme Court of Cassation, Kzz. No. 24/12 from 11 April 2012
17 Article 344a para. 1 of the CC (*Official Gazette of the Republic of Serbia* , No. 111, of 12 December 2009)

criminal offence, without putting any restrictions on the circle of potential perpetrators, provided that they are present at a sports event. The first of the prescribed alternative ways of committing this offence states that a perpetrator is the individual who physically assaults or uses violence to physically confront other participants in a sports event or public gathering, which is precisely the criminal offence for which the defendants N. and V. were found guilty as charged by the Trial Court. Article 2 para. 5 of the Act on the Prevention of Violence and Misconduct at Sports Events[18] states that the participants in a sports event are all individuals present at that sports event. Therefore, a perpetrator of the criminal offence defined by Article 344a para. 1 CC and committed as determined by the Trial Court order (as a physical assault and physical confrontation) can be any individual who commits this offence against any other individual present at a sports event, or participating in it, regardless of their role in that sports event. Thus, the Supreme Court of Cassation held that the Appellate Court ruling, by which the players, coaches and referees were exonerated from charges as being neither passive nor active subjects in the criminal offence, was wrong because the provision in Article 344a, para.1 CC entails that that they were also considered participants present at the sports event.

As regards the legal documents of the Sports Association that the Appellate Court referred to in its judicial decision, Article 36 of the Sports Act[19], which was effective at the time of commission of the criminal offence, as well as Article 102 of the Sports Act (2011),[20] which came into force after the commission of this criminal offence, state that the branch sports associations shall adopt regulatory acts prescribing the sports rules to be respected in a particular sports branch. Among other things, these rules shall prescribe the measures for the prevention of negative phenomena in sports, as well as disciplinary proceedings and disciplinary sanctions for the violation of these prescribed rules. In particular, Article 35 of the Statute of the Serbian Handball Association prescribes that the members of the Handball Association of Serbia who act in contravention of the Statute and other general acts of the Handball Association of Serbia shall be subject to disciplinary measures and may be sanctioned in compliance with the rules prescribed in the Disciplinary Rules of the Handball Association of Serbia.

The European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches,[21] which the Appellate Court referred to in its ruling, is a legal framework that is binding on the Convention state parties and signatories, which are required to undertake relevant measures within the national legal framework to implement the Convention provisions; however, this treaty regulates only one segment of violence and misconduct at sports events – violence committed by spectators. As the Serbian Act on the Prevention of Violence and Misconduct at Sports Events[22] defines the measures for the prevention of violence and misconduct of all persons attending a sports event, it implies that this Act regulates the behaviour of a wider circle of individuals, which is certainly not contrary to the provisions of the European Convention. Article 23 of this

[18] Article 2 para. 5 of the Act on the Prevention of Violence and Misconduct at Sports Events (*Official Gazette RS*, No. 67/2003, 101/2005, 90/2007, 72/2009 and 111/2009)
[19] Article 36 of the Sports Act (*Official Gazette RS*, No. 52/96 and 101/2005)
[20] Article 102 of the Sports Act (*Official Gazette RS*, No. 24/2011 и 99/2011)
[21] The European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (*Official Gazette of the SFRY* – international treaties, No. 9/90)
[22] Act on the Prevention of Violence and Misconduct at Sports Events (*Official Gazette* of the Republic of Serbia, No. 67/2003, 101/2005, 90/2007, 72/2009 и 111/2009)

Act prescribes a misdemeanour liability of natural persons for misdemeanour offences committed at a sports event, but none of the prescribed misdemeanour offences includes the acts committed by the defendants D.N. and Z.V.; yet, physical assaults and physical confrontation among the individuals present at a sports event are prescribed (along with other alternative criminal acts) as a criminal offence in Article 334a para. 1 of the CC.

The application of the Criminal Code provisions in assessing who can be the perpetrator of the criminal offence defined in Article 344a para.1 of the CC and whether this criminal offence has been committed is not precluded by the fact that certain individuals present at a sports event have been previously sanctioned for disciplinary misdemeanour, defined by the relevant legal documents of the sports association.

Considering the aforesaid, it may be concluded that the provisions of the 1985 European Convention and the provisions of the Serbian Act on the Prevention of Violence and Misconduct at Sports Events do not preclude the application of Article 344a of the CC to all persons present at a sports event who commit any of the alternatively prescribed criminal acts envisaged in Article 344a para. 1 of the CC. For this reason, the Appellate Court ruling, which excluded all other persons present at the sports event (other than the spectators) from the circle of perpetrators of this offence, is unacceptable.

The judgment rendered by the Supreme Court of Cassation was highly significant for the national judicial practice because it clarified the disputable issue concerning whether the immediate participants in sports events (players, coaches and referees) could be the perpetrators of the criminal offence of violent behaviour at a sports event or public gathering, envisaged in Article 344a of the CC. For this reason, acting upon the appeal of the Higher Public Prosecution Office, the Appellate Court in Niš changed its stance by the judgment rendered in December 2012 and, referring to the cited judgment of the Supreme Court of Cassation (Kzz. No. 24/12), reversed and modified the Trial Court decision to exonerate the defendant, found the defendant guilty of violent behaviour, and imposed an appropriate sentence in accordance with the law[23].

This appears to have been the most serious issue in court practice in the previous period, which was finally resolved by the cited judgment of the Supreme Court of Cassation in the judicial review procedure initiated by lodging a complaint for extraordinary legal remedy on a matter of law. Substantively, this judgment entailed the judicial interpretation of Article 344a para. 1 of the CC, which prescribes several alternative forms of commission of this criminal offence, without placing any restrictions on the circle of possible perpetrators of this criminal offence, provided that they are present at a sports event.

Concerning the perpetrators of this criminal offence, the judicial practice has encountered some other disputable issues, such as:

a) whether the club financier, who enters the sports field without authorization and assaults another participant in the sports event, is an authorized official of the club he finances and thus permitted to enter the field; the court practice indisputably established that the person is not an authorized club official because he attended the sports event as a spectator[24];
b) whether the unregistered football players (not officially registered as team members for the game), who threaten and insult the referee, throw half-empty beer cans and hit the referee, and swing metal bars at the referee, are considered to be the football team

[23] Judgement rendered by the Appellate Court in Niš, Kž 1, No.1360/12 from 13 December 2012- unpublished
[24] Judgement rendered by the Appellate Court in Niš, Kž 1, No. 306/17 from 19 May 2017 - unpublished

members/players even though they acted in the capacity of spectators, observing the football match from the stadium stands; in this case, the court practice indisputably established that they are not to be treated as players but as spectators[25].

In the judicial practice of the Appellate Court in Niš, judges have encountered another disputable issues pertaining to Article 344a paragraph 4 of the CC, which includes a qualified form of the criminal offence: “If the commission of the offence referred to in paragraph 1 of this Article has led to a public disorder, whereby a person has sustained a grievous bodily injury or substantial damage to property, the offender shall be punished by a term of imprisonment ranging from two to ten years” (Article 344a para. 4 CC). The point of argument here is whether there is a qualified form of this criminal offence if the consequence of the offence is absent, i.e. if the commission of the offence does not lead to causing public disorder but the defendant has caused a serious bodily injury to another person.

This issue was resolved in a judgment of the Appellate Court in Niš, which reasoned that: “For the qualified form of the criminal offence of violent behaviour at a sports event prescribed in Article 344a, para. 4 of the CC to exist, it is essential that the consequence of causing public disorder a sports event has occurred, for which reason another individual has sustained serious bodily injury; in case of the absence of consequence (i.e. if the defendant caused a serious bodily injury to another without causing a public disorder), such an act has all the legal elements of the criminal offence of grievous bodily injury prescribed in Article 121 paragraph 1 of the Criminal Code”[26].

5. Conclusion

Violence in sports and in sports playgrounds has become a global phenomenon, which is present in all countries worldwide. This paper provides an overview and discusses the most significant international and national legal documents, which are important sources of law aimed at providing relevant legal protection of all participants in sports events. In particular, the paper focuses on examining and discussing the national legislative framework related to violence in sports in the Republic of Serbia. In Serbian legislation, this subject matter is regulated both by misdemeanour law and criminal law. Thus, in addition to numerous misdemeanour penalties, the legislator has envisaged a special criminal offence of violent behaviour at sport events, in Article 344a of the Criminal Code, which prescribes relevant sanctions for the criminal offence of violence in sports and/or sporting events.

The paper also indicates the most significant issues that have been observed in judicial practice regarding the criminal offence of violent behaviour at sports events (Article 344a CC), the change of attitude in the judicial practice related to perpetrators of this criminal offence (in particular, concerning the issue whether players, coaches and referees are to be treated as potential perpetrators of this offence), as well as some landmark judicial decision regarding some debatable issues generally encountered in the Serbian judicial practice and particularly in the judicial practice the Appellate Court in Niš and higher (district) courts in

[25] Judgement rendered by the Appellate Court in Niš, Kž 1, No. 1888/11 of 13 October 2011 - unpublished
[26] Judgement rendered by the Appellate Court in Niš, Kž. 1, No. 1041/14 of 23 October, 2014, published in the Bulletin of the High Court in Niš, No. 33/2015, Intermex, Belgrade

this region (as first-instance courts for adjudicating the criminal offence of violence in sports)..

This paper may be beneficial to foreign experts in the field who may be interested in examining the problems encountered in practice in terms of implementing the envisaged national legislative framework. On the other hand, it may be useful to Serbian law experts, legal practitioners and the judiciary in general who may be thus introduced to the current stance of the judicial practice towards this criminal offence.

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ZAKONSKA REGULATIVA NASILJA U SPORTU I SPORNA PITANJA KROZ ANALIZU SUDSKE PRAKSE

Zakon o sprečavanju nasilja i nedoličnog ponašanja na sportskim priredbama, reguliše ponašanje učesnika sportskih priredbi i sadrži brojne novine u vezi sa ovim oblikom kriminalne delatnosti. Na velikim sportskim događajima neretko dolazi do ozbiljnog ispoljavanja nasilja, uništavanja imovine i nanošenja telesnih povreda, nekada i smrtnog ishoda, kao posledica nasilja na koje su nadležni državni organi obavezni da reaguju. U ovom radu predstavićemo najvažnije odredbe koje se odnose na važeću zakonsku regulativu koja reguliše ovaj oblik nasilja uz analizu određenih spornih pitanja i deo dosadašnje sudske prakse. Posebno, ukazaćemo na određene probleme u praksi sudova.

Ključne reči: *sport, nasilje, zakonska regulativa, problemi u praksi*

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