UNIVERSITY OF NIŠ

ISSN 1450-5517 (Print)
ISSN 2406-1786 (Online)
COBISS.SR-ID 138066439
UDC 34+32

FACTA UNIVERSITATIS

Series
LAW AND POLITICS
Vol. 19, N° 1, 2021

Scientific Journal **FACTA UNIVERSITATIS**
UNIVERSITY OF NIŠ
Univerzitetski trg 2, 18000 Niš, Republic of Serbia
Phone: +381 18 257 095 Telefax: +381 18 257 950
e-mail: facta@ni.ac.rs http://casopisi.junis.ni.ac.rs/

Scientific Journal FACTA UNIVERSITATIS publishes original high scientific level works in the fields classified accordingly into the following periodical and independent series:

Architecture and Civil Engineering
Automatic Control and Robotics
Economics and Organization
Electronics and Energetics
Law and Politics
Linguistics and Literature
Mathematics and Informatics
Mechanical Engineering
Medicine and Biology
Philosophy, Sociology, Psychology and History
Physical Education and Sport
Physics, Chemistry and Technology
Teaching, Learning and Teacher Education
Visual Arts and Music
Working and Living Environmental Protection

SERIES **LAW AND POLITICS**

Editor-in-Chief: **Dejan Vučetić**, e-mail: *fulaped@junis.ni.ac.rs*
University of Niš, Faculty of Law
Republic of Serbia, 18000 Niš, Trg Kralja Aleksandra 11
Phone: +381 18 500 235, Fax: +381 18 4523 747

Technical Assistance: **Vladimir Blagojević**, **Nenad Milošević**, e-mail: *fulapts@junis.ni.ac.rs*
University of Niš, Faculty of Law
Republic of Serbia, 18000 Niš, Trg Kralja Aleksandra 11

EDITORIAL BOARD:

Michael Geistlinger, Salzburg, Austria
Miodrag Simović, Banja Luka, Republic of Srpska
Darko Trifunović, Belgrade, Serbia
Edyta Krzysztofik, Lublin, Poland
Gorazd Meško, Maribor, Slovenia
Vitomir Popović, Banja Luka, Republic of Srpska
Željko Bartulović, Rijeka, Croatia
Goce Naumovski, Skopje, North Macedonia
Dragiša Drakić, Novi Sad, Serbia
Damjan Tatić, Belgrade, Serbia
Ivana Stevanović, Belgrade, Serbia
Dejan Janićijević, Niš, Serbia
Aleksandar Mojašević, Niš, Serbia

UDC Classification Associate: **Vesna Stojanović**, University of Niš, Library of Faculty of Law
English Proofreader: **Gordana Ignjatović**, University of Niš, Faculty of Law
Secretary: **Olgica Davidović**, University of Niš, e-mail: *olgicad@ni.ac.rs*
Computer Support: **Mile Ž. Ranđelović**, University of Niš, e-mail: *mile@ni.ac.rs*
The Cover Image Design: **Vladimir Blagojević**, University of Niš, Faculty of Law
Publication frequency – one volume, two issues per year.
Published by the University of Niš, Republic of Serbia
© 2021 by University of Niš, Republic of Serbia
Printed by ATLANTIS DOO, Niš, Republic of Serbia
Circulation 70

ISSN 1450-5517 (Print)
ISSN 2406-1786 (Online)
COBISS.SR-ID 138066439
UDC 34+32

FACTA UNIVERSITATIS

SERIES **LAW AND POLITICS**
Vol. 19, N° 1, 2021

UNIVERSITY OF NIŠ

FACTA UNIVERSITATIS
Series: Law and Politics (M53)

GUIDELINES FOR AUTHORS

General notes	The paper shall be processed in *MS **Word*** (*doc, docx*) format: paper size A4; font ***Times New Roman*** **(*Serbian-Cyrillic***), except for papers originally written in *Latin* script; font size 12 pt; line spacing 1,5.
Paper length	The paper shall not exceed 16 pages. **An article** shall not exceed 40.000 characters (including spaces). **A review** shall not exceed 6.000 characters (inclusing spaces).
Language and script	Papers may be written in English, Russian, French and German.
Paper title	**The paper title** shall be formatted in font ***Times New Roman***, font size **14 pt, bold.** The title shall be submitted in Serbian aswell.
Author(s)	After the title, the paper shall include the name and surname of the author(s), the name and full address of the institution affiliation, and a contact e-mail address (font size 12 pt). The data on the author(s), academic title(s) and rank(s), and the institution shall be provided in English as well.
Data on the project or program* (*optional*)	In the footnote at the bottom of the first page of the text shall include: the project/program title and the project number, the project title, the name of the institution financially supporting the project.
Data on the oral presentation of the paper* (*optional*)	In case the paper has already been presented under the same or similar title in the form of a report at a prior scientific conference, authors are obliged to enter a relevant notification in a separate footnote at the bottom of the first page of the paper.
Abstract	The abstract shall comprise 100 - 250 words at the most The abstract shall be submitted in both Serbian and English.
Key words	The list of key words following the abstract shall not exceed 10 key words. The key words shall be submitted in both Serbian and English.
Text structure	1. Introduction 2. Chapter 1 Section 2 Subsection 3 3. Chapter 2 4. Conclusion All headings (Chapters) and subheadings (Sections and Subsections) shall be in *Times New Roman*, font 12 pt, **bold.**
References	At the end of the submitted text, the author(s) shall provide a list of References. All entries shall be listed in alphabetical order by author's surname, and each entry shall include the source and the year of publication. When referring to the same author, include the year of publication (from the most recently dated backwards). Please, see the table at the end of the ***Guidelines for Authors***.
Summary	The summary shall be included at the end of the text, after the References. The summary shall not exceed 2.000 characters (including spaces) and it shall be submitted in both Serbian and English.
Tables, graphs, figures	Tables shall be prepared in *MS Word* or in *Excell*. Photos, graphs or figures shall be in **jpg.** format (maximum quality).
Electronic submission	Papers for consideration should be submitted to the Series Editor in electronic form via the Journal's home page: http://casopisi.junis.ni.ac.rs/index.php/FULawPol.

Citation Guidelines

The citations should be included in the text, in line with the guidelines provided below. Footnotes shall be used only for additional explanation or commentary and for referring to the specific normative act, official journals, and court decisions.
In-text citations and reference entries shall fully comply with the list of bibliographic units in the References, provided at the end of the paper. Each in-text citation and reference entry shall be clearly cross-referenced in the list of bibliographic units and, vice versa, each bibliographic unit shall be entered in the text of the submitted paper.

Type of work	**References**	**In-text citation**
Book (a single author)	Goldstein, A., (1994). *The ecology of aggression*, Plenum Press, New York.	(Goldstein, 1994:80)
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)
Institution (as an author)	Statistical Office of the Republic of Serbia, Monthly statistical bulletin, No. 12 (2013)	(Statistical Office RS, 2013)
Legal documents and regulations	Execution of non-custodial sanctions and measures Act, Official Gazette RS, No. 55 (2014)	Footnote: Article 1. Execution of non-custodial sanctions and measures Act, Official Gazette RS, 55/2014
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)

FACTA UNIVERSITATIS

Series

Law and Politics

Vol. 19, Nº 1, 2021

Contents

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, No 1, 2021, pp. i - iii

EDITORIAL

Dear Readers,

As a new editor-in-chief, I would like to welcome you to the first issue of the scientific journal ***Facta Universitatis:*** **Law and Politics** for the year 2021. This issue contains papers covering various fields of legal scholarly research. While some authors have used traditional legal research methods, we commend the endeavour of two authors who have taken the empirical research approach.

Dejan Janićijević, LL.D., Full Professor of the Faculty of Law, University of Niš (Serbia), submitted the paper titled „*The Role of the European Court of Human Rights in the Legal Recognition of Same-Sex Couples"*. Relying primarily on the normative and case law research method, the author presented the historical changes in the legal concept of family, with reference to the legal treatment, recognition and protection afforded to unmarried couples, single parents, couples without children, and same-sex partners. As a result of policy changes at the EU level, the issue of "same-sex partnerships" was brought into legal life by changing relevant legislation, rather than by the activities of court jurisprudence, which was largely the case in common law systems. The activities of the European Court of Human Rights (ECtHR) have significantly contributed to changing the traditional concept of the family and adjusting the law to the contemporary family life. The ECtHR has long had the position that the issue of same-sex partnerships enjoys a wide margin of appreciation. In the landmark case *Schalk and Kopf v Austria*, the ECtHR decided that same-sex couples enjoy the right to "respect for family life" protected by Article 8 of the European Convention on Human Rights (ECHR). This case has provided the opportunity to analyze the ECtHR case law in this field, but it also opened the door for legal recognition and regulation of same-sex partnerships by all ECHR contracting states.

Aleksandar S. Mojašević, LL.D., Associate Professor, Faculty of Law, University of Niš, and **Aleksandar Jovanović,** PhD Student, Faculty of Law, University of Niš, submitted the paper titled "*Reasonable Time and Bankruptcy of Socially-Owned Enterprises*". The authors examine the implications of bankruptcy proceedings involving socially-owned enterprises on the budget of the Republic of Serbia and its taxpayers. After presenting the World Bank indicators of efficient bankruptcy procedure, the authors use the research method of descriptive statistics to analyze the differences between the Commercial Courts in Belgrade, Niš and Kragujevac in terms of the length of bankruptcy proceedings, the length of individual cases, and the percentage of cases pending over four or three years. In that respect, the analyzed statistical data indicate that there are no significant differences between the three commercial courts. The findings show that the huge number of bankruptcy cases involving socially-owned enterprises and the unreasonable length of bankruptcy proceedings have a strong negative impact on the budget of the Republic of Serbia. The paper points to the eternal "conflict" between the intensity of legal protection prescribed by relevant legislation and the efficiency and effectiveness of legal proceedings. In terms of bankruptcy procedure, the authors recommend some legislative changes, the use of "pilot judgments" in cases involving claims of employees of insolvent socially-owned enterprise, and some alternative solutions for paying off debts owed to bankruptcy creditors.

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

Miloš Prica, LL.D., Assistant Professor, Faculty of Law, University of Niš, submitted the paper titled "*Legal Principles as Teleological Legal Attitudes in the Legal Order of a State of Law*", where the author discusses numerous issues related to legal science. The paper was originally published in Serbian language but the English version aims to make the author's viewpoint available to a broader academic audience, given that these scientific issues have not been sufficiently addressed in Serbian legal literature. Based on the distinction between regulatory, systemic and teleological legal attitudes in the legal order of a state of law, the author discusses the difference between legal norms and legal principles as radiating legal attitudes. Legal principles have a circular flow in the legal order, which is determined by the complementary roles of the institutional order of public authority, the institutional order of state authority, and the institutional order of a territorial community. Thus, the author differentiates two kinds of legal principles: the fundamental legal principles of a legal order and the legal principles governing different areas of a legal order. Considering the distinctive nature of legal principles as sources of law, the author analyzes the aspects of systemic and teleological understanding of legal principles as "canons" directly developed by jurisprudence.

Miljana Todorović, LL.D., a post-doc Scientific Researcher, Department of Interdisciplinary Study of Law, Private Law and Business Law, the University of Ghent (Belgium), submitted an interesting paper titled "*Converting DIFC Judgments into Arbitral Awards: Practice Direction No. 2 of 2015 and its Controversies"*. The author presents the latest developments in ADR law by examining the DIFC Practice Direction No.2, instituted by the Dubai International Financial Center (DIFC) in 2015. The possibility of converting judgments into arbitral decisions is a novelty in the theory and practice of Arbitration Law. The paper analyzes the legal mechanism that allows for the 'conversion' of a judgment into an arbitral award according to the rules established in the DIFC Practice Direction No.2 of 2015, provided that the parties in the DIFC Court litigation agree to refer a 'judgment payment dispute' to arbitration under the DIFC-LCIA arbitration rules. An arbitral award rendered in such proceedings could be enforced abroad by application of the New York Convention. After providing a detailed analysis of the DIFC Practice Direction No.2, the author discusses the controversies and the negative effects of this mechanism on the due process review and public policy.

Bojana Arsenijević, LL.M., Teaching Assistant, Faculty of Law, University of Niš, submitted the paper titled "*Exercising the Right to Maintenance between Spouses and Extramarital Partners in the Case Law of the Basic Court in Niš"*. The author discusses the efficiency of the established family-law mechanism by examining the case law of the Basic Court in Niš and presenting the results of empirical research on maintenance litigation proceedings conducted and finished by the end of 2018. The subject matter of analysis are cases involving the right to maintenance between spouses and extramarital partners. The author examines the adequacy of applying relevant legislation and the efficiency of legal protection mechanisms established by those rules. The research findings reveal the inefficiency of maintenance litigation proceedings, particularly in terms of access to court, lengthy proceedings and fair trial standards, as well as inadequate citizens' awareness of procedural opportunities in maintenance lawsuits.

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 and committed to publishing scientific articles across a wide range of social sciences and humanities. In that context, we invite you to

submit research papers on topics of your professional interest. We look forward to our prospective cooperation.

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 this scientific journal.

Editor-in-Chief
Prof. Dejan Vučetić, LL.D.

Niš, 21st August 2021

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, Nº 1, 2021, pp. 1-9
https://doi.org/10.22190/FULP2101001J

Review Paper

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE LEGAL RECOGNITION OF SAME-SEX COUPLES *

UDC 341.645
340.134:347.628-055.3

Dejan Janićijević

Faculty of Law, University in Niš, Serbia

Abstract. *Legal treatment of family relations was long based on the traditional concept of family, as a union of two people of different gender, who raise children while married. Hence, the legal protection mechanisms were focused only on such unions while others, like same-sex partnerships, unmarried couples, couples without children and single parents, were left aside legal recognition and protection. This was reflected in not recognizing the right to private life, provided by Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), to these untraditional unions. Notably, in the last decades, there has been a significant progress in overcoming the traditional concept of family and adjusting the law to the contemporary reality of family life. The activities of the European Court of Human Rights (ECtHR)are largely contributing to these efforts.*

Key words: *marriage, registered partnership, homosexual relations, recognition*

INTRODUCTION

The legal regulation of family relationships has long been based on a "traditional" notion of the family as a unit comprising a heterosexual married couple and their children. Therefore, the legal protection mechanisms were focused on such family units, while other family forms, such as same-sex couples, unmarried couples, couples who are unable to conceive naturally and single parents, were not adequately recognized and protected by the law. However, in recent decades, there has been a significant progress in adapting the law to the modern realities of family life. One example of such progress relates to the legal status of homosexual couples in Europe.

Until the end of the 1980s, there was simply no legal recognition of same-sex relationships in the European jurisdictions. The situation has fortunately changed largely due to the

Received June 30th, 2021 / Accepted July 14th, 2021
Corresponding author: Dejan Janićijević, LL.D., Faculty of Law, University in Niš, Trg Kralja Aleksandra 11, 18000 Niš, Serbia. E-mail: djanicijevic@prafak.ni.ac.rs
* This paper is a result of research financially supported by the Ministry of Education, Science and Technological Development of the Republic of Serbia, under the contract registration number 451-03-68/2020-14/200120.

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

efforts and persistence of many organizations and individuals. Today, even marriage is an option open to same-sex couples in an increasing number of countries; in others, there are registered partnerships or the recognition of *de facto* relationships of same-sex couples. Yet, even in Europe, particularly Eastern and South-Eastern Europe, there are still many jurisdictions that do not recognize same-sex relationships.

However, in *Schalk and Kopf v Austria,*[1] the European Court of Human Rights (ECtHR) decided that same-sex couples enjoy the right to "respect for family life" protected by Article 8 of the ECHR. This article holds that this decision requires legal recognition of same-sex relationships by all contracting states of the ECHR.

1. The Forms of Legal Recognition

Legal recognition of same-sex relationships in Europe began in the Nordic Countries.[2] In 1987, *de facto* cohabitation relationships of same-sex couples were given a similar legal status to those of opposite-sex couples in Sweden. The formalization of same-sex relationships began in 1989, with the introduction of the registered partnership for same-sex couples in Denmark.[3]. Other jurisdictions followed, although the approaches to the registered partnership regimes that were and are different. The next step was the opening up of marriage, which first happened in the Netherlands in 2001,[4] and then in Belgium (2003),[5] Spain (2005)[6], Norway (2009),[7] Sweden (2009),[8] Iceland (2010)[9] Portugal (2010),[10] etc.

In many European countries, there is still a strong opposition to the legal recognition of same-sex relationship but the traditional "dividing lines" no longer exist. Spain and Portugal have opened up marriage to same-sex couples. Likewise, traditionally more conservative Catholic countries, such as Spain, Portugal, Belgium and the Republic of Ireland, recognize same-sex couples.

---

[1] *Schalk and Kopf v Austria,* Application No. 30141/04, 24 June 2010, (2011) 53 EHRR 20.

[2] See: Dopffel, P. and Scherpe, J., "Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder", in Basedow, J., Hopt, K. and Zimmermann, R. (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012.

[3] Broberg, M., "The registered partnership for same-sex couples in Denmark", *Child and Family Law Quarterly*, 1996, pp. 149-156.

[4] See the amended Article 1:30 of the Dutch Civil Code ("A Marriage can be contracted by two people of different or the same sex.").

[5] Pintens, W., "Belgien: Öffnung der Ehe für gleichgeschlechtliche Paare", *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2003, pp. 658-659.

[6] Ferrer Riba, J., "Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law", *International Family Law* 139, 2006; García Cantero, G., "Family Law Reform in Differing Directions", *The International Survey of Family Law* 139, 2006, pp. 431-438.

[7] Frantzen, T., "Same-Sex Marriages in Norway", *International Family Law*, 2009, pp. 220-222*;* Aslan, J. and Hambro, P., "New developments and expansion of relationships covered by Norwegian Law", *The International Survey of Family Law*, 2009, pp. 375-384.

[8] Jänterä-Jareborg, M., "Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion", *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010, pp. 1505-1508; Singer, A., "Equal Treatment of Same-Sex Couples in Sweden", *The International Survey of Family Law*, 2010, pp. 393-399.

[9] Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög), No. 65 of 2010.

[10] Lei Nº9/2010 de 31 de Maio - Permite o casamento civil entre pessoas do mesmo sexo.

Outside Europe, there is a similar diversity in the recognition of same-sex relationships. In Canada (2005),[11] Argentina (2010),[12] several US states,[13] Mexico City (2010) and the Mexican state of Quintana Roo (2011), same-sex marriages are allowed, and in many other jurisdictions registered partnerships are provided for. However, several jurisdictions have changed their statutes and constitutions to the effect that marriage is only possible between a man and a woman.

It is interesting that in Europe[14] the broader legal recognition of same-sex couples was generally brought about as a result of the efforts of NGOs and political parties.[15] By contrast, outside of Europe, litigation based on constitutional and human rights was the predominant way that the legal recognition of same-sex couples was effected (in many US states, Brazil,[16] Canada, Columbia,[17] and South Africa[18]).

The approaches to the legal recognition of same-sex couples can be divided into three categories: 1) same-sex relationships are treated as being "inferior" to marriage; 2) they are viewed as being "functionally equivalent" to marriage; and 3) marriage is available to same-sex couples.

2. The Role of the ECHR

As mentioned above, where same-sex couples were legally recognized on a broader scale, in Europe this generally happened through legislation rather than litigation. In court proceedings, the litigants often relied on non-discrimination and equality provisions in national constitutions and statutes, but also on Article 14 of the ECHR, which prohibits discrimination against a person on the ground of a personal characteristic in the exercise of their rights, including the right to respect for family life under Article 8 of the ECHR. While Article 14 does not list sexual orientation explicitly as one of the protected grounds, the Court took a strict position on this issue in its decision in *Dudgeon v United Kingdom*[19].

2.1. Private Life

In *Niemietz v Germany*[20], the ECtHR expressly refused to define private life, stating that it would be neither possible nor necessary to do so. But, in a later decision, the Court

[11] Cf. Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 2004 SCC 79; *M v H* [1999] 2 SCR 3; *Halpern v Canada (Attorney General)* (2003), 65 O.R. (3d) 16; and finally the Civil Marriage Act (full title: "An Act respecting certain aspects of legal capacity for marriage for civil purposes", s.c. 2005, c. 33). On the development, see Davies, C., "Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy", *University of Toronto Faculty of Law Review*, 66, 2008, pp. 101-136.

[12] Grosman, C. and Herrera, M., "Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law", *International Survey of Family Law*, 2011, pp. 27-50.

[13] Connecticut, District of Columbia, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont and Washington.

[14] But also, for example, in Argentina, New Zealand and Uruguay, as well as in some of the US states (e.g. District of Columbia, New York, Maine, Maryland, New Hampshire, Vermont and Washington).

[15] However, partial recognition (e.g. for succession to tenancies, etc.) was often achieved through litigation.

[16] Brazilian Supreme Court, ADI 4277/ADPF 132.

[17] Constitutional Court, decisions of 7 February 2007, 29 January 2009 and 26 July 2011.

[18] *Minister of Home Affairs v Fourie*, 2006(3) BCLR 355 (CC). On this case, see De Vos, P., "A judicial revolution? The court-led achievement of same-sex marriage in South Africa", *Utrecht Law Review*, 2008, pp. 162-174.

[19] *Dudgeon v United Kingdom*, Application No. 7525/76, 22 October 1981, (1982) 4 EHRR 149, see Para. 52.

[20] *Niemietz v Germany*, Application No. 13710/88, 16 December 1992, (1993) 16 EHRR 97, Para 29.

made it clear that the right to respect for private life certainly comprises the right to establish and develop relationships with other human beings.[21]

In *Bensaid v United Kingdom*,[22] "gender identification, name and sexual orientation and sexual life" were held to be protected by Article 8 of the ECHR as part of "private life". Concerning same-sex relationships, in the case of *Mata Estevez v Spain*,[23] the ECtHR stated: "With regard to private life, the Court acknowledges that the applicant's emotional and sexual relationship related to his private life within the meaning of Article 8.1 of the Convention." Thus, the ECtHR held that a same-sex relationship, whether formalized or not, could be protected by the right to respect for private life under Article 8 of the ECHR.

With regard to "family life", in *Mata Estevez*, the Court held: "As regards establishing whether the decision in question concerns the sphere of' family life' within the meaning of Article 8 § 1 of the Convention, the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention (...) The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation."[24]

It should be noted that this case concerned a *de facto* same-sex relationship and not a formalized one. Hence, the question as to whether formalized same-sex relationships could be considered to have "family life" and thus enjoy this protection under Article 8 of the ECHR was not answered in the case.

2.2. Family Life

The issue whether same-sex couples have "family life" arose in the case of *Burden v United Kingdom*.[25] In this case, two spinster sisters claimed that they were being discriminated against because they were precluded from entering into a civil partnership since they were sisters.[26] This prevented them from benefitting from the inheritance tax bonuses available to civil partners.

The ECtHR stated: "The Grand Chamber commences by remarking that the relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners under the United Kingdom's Civil Partnership Act. The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close

[21] Cf. *Botta v Italy*, Application No. 21439/93, 24 February1998, (1998) 26 EHRR 241, Para. 32, referring to *Niemietz v Germany*.
[22] *Bensaid v United Kingdom*, Application No. 44599/98, 6 February 2001, (2001) 33 EHRR 205, Para 59.
[23] *Mata Estevez v Spain*, Application No. 56501/00, 10 May 2001.
[24] In this paragraph the ECtHR referred to the previous Commission decisions regarding admissibility of complaints in *X. and Y. v the United Kingdom*, Application No. 9369/81, 3 May 1983, (1986) 8 EHRR CD298, and *S. v the United Kingdom*, application No. 11716/85, 14 May 1986. This passage was also referred to by Sir Mark Potter in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), Para 45.
[25] *Burden v United Kingdom*, Application No. 13378/05 (Grand Chamber decision, 29 April 2008), (2008) 47 EHRR 38, noted by Sloan, B., "The benefits of conjugality and the burdens of consanguinity", *Cambridge Law Journal*, 2008, p. 484; see also the judgment of the 4th section of 12 December 2006, (2007) 44 EHRR 51 noted by Sloan, B., "The Burden of Inheritance Tax", *Cambridge Student Law Review*, 2007, p. 114.
[26] The civil partnership was introduced for same-sex couples by the Civil Partnership Act 2004, and the same prohibited degrees of relationship apply to both marriage and civil partnership.

family members (…) The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship."

Interestingly, the Court went on to differentiate between formalized family relationships and *de facto* ones: "Moreover, the Grand Chamber notes that it has already held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences."

Since the coming into force of the Civil Partnership Act (2004) in the United Kingdom, a homosexual couple now also has the choice to enter into a legal relationship designed by Parliament to correspond as far as possible to marriage.

As with marriage, the Grand Chamber considers that the legal consequences of civil partnership under the 2004 Civil Partnership Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of co-habitation. "Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on the one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand (…), the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple."

The Court, therefore, drew a clear dividing line between formalized and *de facto* relationships and equated marriage and civil partnership. This position was confirmed in *Courten v United Kingdom*[27]: "The Court would note that, while the Grand Chamber equated civil partnerships between homosexual couples with marriage, this was on the basis that in both situations the parties had undertaken public and binding obligations towards each other."

In the eyes of the ECtHR, this means that opposite-sex marriage and same-sex civil partnership are to be considered the same *type* of relationship; since a married couple undoubtedly enjoys "family life", equating marriage with civil partnership inevitably had to mean that civil partners do, too. However, there was no express statement to that effect in either *Burden* or *Courten*.

This question was finally resolved in *Schalk and Kopf v Austria*.[28] In this case, Mr Schalk and Mr Kopf claimed that they were discriminated against because they were denied the opportunity to marry or have their relationship otherwise recognised by law in Austria. They argued that the usage of the terms "men and women" in the relevant provisions of the law did not imply that men and women merely have the right to marry someone of the opposite sex, but that the provision could and should be interpreted more widely to comprise the right to marry a person of the same sex.[29] The Austrian government argued that "the right to marry was by its very nature limited to different-sex couples"[30] and, while some contracting states had allowed same-sex marriages, there was no European consensus on the matter. The applicants argued

[27] *Courten v United Kingdom*, Application No. 4479/06, 4 November 2008, decision on admissibility.
[28] Henrich, D., *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010, p. 1525.
[29] By contrast, Article 9 of the Charter of Fundamental Rights of the European Union, mindful of the issue of same-sex marriages, was drafted as follows: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." (See above, note 2, Paras. 24-25, where the commentary to the Charter is reproduced, as well as Para. 60.)
[30] It is interesting to note that the current government seems to be of a completely different view.

that: "[I]n today's society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element. As the institution of marriage had undergone considerable changes there was no longer any reason to refuse same-sex couples access to marriage…."

In its decision, the Court recognized that in light of recent developments the right to marry enshrined in Article 12 cannot "in all circumstances be limited to marriage between two persons of the opposite sex" and, consequently, it could not "be said that Article 12 is inapplicable to the applicants' complaint". But, the decision on whether or not to allow same-sex marriage was to be left to the individual contracting states; the Court, therefore, unanimously held that there was no violation of Article 12 because the applicants were not allowed to marry. The Court's central argument was that: "[M]arriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."

It was hardly a surprise that the Court found that there was no obligation of the contracting states to allow same-sex marriage, as it is perfectly in line with the cautious approach the Court takes in socially and culturally sensitive areas, and particularly family law.[31]

The second complaint of the applicants was raised under Article 14, taken in conjunction with Article 8 of the Convention; the applicants claimed to have been discriminated on the basis of their sexual orientation. Ruling on the issues of private and family life, the Court stated: "[T]he Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes 'private life' but has not found that it constitutes 'family life', even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (…)). In the case of *Karner* (...), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of 'home', the Court explicitly left open the question whether the case also concerned the applicant's 'private and family life'.

The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (…). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of 'family'.

In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."

---

[31] After all, as Wikely put it, the ECHR is an international instrument which provides "a floor of rights but not a ceiling". (See: Wikely, N., "Same sex couples, family life and child support", *Law Quarterly Review*, 122, 2006, pp. 542-547.) See also: Scherpe, J., "Family and private life, ambits and pieces", *Child and Family Law Quarterly*, 2007, pp. 390-403.

Thus, while dismissing the complaints in the following paragraphs, the Court expressly departed from its previous position in *Mata Estevez* and now fully accepted that same-sex couples enjoy the right to respect for their family life.

3. Steps towards Equality

While Mr Schalk's and Mr Kopf''s complaints were nominally rejected, they actually won a fundamentally important victory. The decision undoubtedly is a landmark for the rights of same-sex couples and as such will have significant impact on the future development of European family law. Since same-sex couples are now considered to have "family life" and are therefore protected by Article 8 of the ECHR, the decision obliges the contracting states to provide at least some form of legal recognition for same-sex couples and their family life. More importantly, every differential treatment of same-sex and opposite-sex couples is now subject to the Court's scrutiny to a much broader level.

It has long been established in case law that all contracting states must have particularly serious reasons for a differential treatment based on sexual orientation. The Court has consistently held that: "[A] difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[32]

Generally, the "justification" for treating same-sex and opposite-sex couples differently was found in the need to protect the "traditional" family, and the Court still does hold it a valid aim. However, the Court has made it very clear in *Karner* that: "[The] aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance, persons living in a homosexual relationship."

Consequently, the differential treatment of same-sex and opposite-sex couples must be *necessary* to protect the family in the traditional sense. This is a very high standard, as it means that without the measure in question such protection cannot be achieved; it needs to be proved that allowing same-sex couples the right to enter into a meaningful legal relationship would endanger the "traditional family". It is obvious that granting such right and benefits deriving thereof to another group does not result in the groups that have already had those rights and benefits losing them, nor do they become "diluted" or less valuable simply because someone else has them. As Baroness Hale stated: "No one has yet explained how failing to recognize the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protecting or encouraging the marriage of people who are quite capable of marrying if they wish to do so."[33]

---

[32] See also *Petrovic v Austria,* Application No. 20458/92; 27 March 1998, (2001) 33 EHRR 14, Para 30.
[33] In *M v Secretary of State for Work and Pensions,* [2006] UKHL 11 at Para. 113.

Therefore, it is almost certain that we will see many more successful challenges of differential treatment of same-sex couples and opposite-sex couples in the future in national courts and ultimately in the ECtHR. The German experience is an excellent example for this.

The German *Eingetragene Lebenspartnerschaft* (a registered partnership exclusively for same-sex couples) was introduced in 2001[34] but, originally, there were some significant substantial differences in the legal consequences of marriage and the *eingetragene Lebenspartnerschaft*.[35] Many of those were challenged successfully, both politically and in courts, particularly in the German Constitutional Court[36] and even the European Court of Justice.[37]

CONCLUSION

It should be expected not only that all contracting states of the ECHR will provide a legal framework for same-sex couples but also that any such framework will for the most part have to be a true and full functional equivalent of marriage. Otherwise, the national legal provisions may fail to meet the ECHR requirements. The easiest way to achieve this would be to open up marriage to same-sex couples, as more and more jurisdictions in Europe and beyond do. But, whatever approach a contracting state chooses to take, it is obvious that after *Schalk and Kopf* non-recognition of same-sex couples is no longer an option.

REFERENCES

Basedow, J., Hopt, K. and Zimmermann, R. (eds.) (2012). *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012.

Dopffel, P. and Scherpe, J. (2012). "Gleichgeschlechtliche Lebensgemeinschaften im Recht der nordischen Länder", in: Basedow, J., Hopt, K. and Zimmermann, R. (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012.

Broberg, M. (1996). "The registered partnership for same-sex couples in Denmark", *Child and Family Law Quarterly*, 1996.

Pintens, W. (2003). "Belgien: Öffnung der Ehe für gleichgeschlechtliche Paare", *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2003.

Ferrer Riba, J. (2006). "Same-sex Marriage, Express Divorce and Related Developments in Spanish Marriage Law", *International Family Law* 139, 2006.

García Cantero, G. (2006). "Family Law Reform in Differing Directions", *The International Survey of Family Law* 139, 2006.

Frantzen, T. (2009). "Same-Sex Marriages in Norway", *International Family Law*, 2009.

Aslan, J. and Hambro, P. (2009). "New developments and expansion of relationships covered by Norwegian Law", *The International Survey of Family Law*, 2009.

[34] *Lebenspartnerschaftsgesetz* (LPartG; Act on life partnerships) which was introduced by the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Lebensgemeinschaften: Lebenspartnerschaften* (LPartDisBG) of 16 February 2001, BGBl. I 2001, pp. 266 ff.

[35] For an overview of the legal development and the LPartG in general, see: Scherpe, J., The Legal Status of Same-sex Relationships in Germany, in Basedow, J., Kischel, U. and Sieber, U. (eds.), *German National Reports to the 18th International Congress of Comparative Law*, Mohr Siebeck, 2010, pp. 75-107; and Scherpe, J., National Report Germany, *American University Journal of Gender, Social Policy and the Law*, Vol. 19:1, 2011, pp. 151-186.

[36] See, e.g. Bundesverfassungsgericht (BVerfG) 21.7.2010, Entscheidungssammlung des Bundesverfassungsgerichts (BVerfGE) 126, 400 (on inheritance tax) and BVerfG 7.7.2009, BVerfGE 124, 199 (on social security law/ pensions); and most recently BVerfG 19.2.2013, 1 BvL 1/11 and 1 BvR 3247/09 (on step-child adoption).

[37] *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, 1 April 2008, [2008] E.C.R. I.-1757.

Jänterä-Jareborg, M. (2010). "Sweden: The Same-Sex Marriage Reform with Special Regard to Concerns of Religion", *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010.
Singer, A., "Equal Treatment of Same-Sex Couples in Sweden", *The International Survey of Family Law*, 2010.
Davies, C. (2008). "Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy", *University of Toronto Faculty of Law Review*, 66, 2008.
Grosman, C. and Herrera, M. (2011). "Family, Pluralism and Equality: Marriage and Sexual Orientation in Argentine Law", *International Survey of Family Law*, 2011.
Sloan, B. (2008). "The benefits of conjugality and the burdens of consanguinity", *Cambridge Law Journal*, 2008.
Sloan, B. (2007). "The Burden of Inheritance Tax", *Cambridge Student Law Review*, 2007.
Henrich, D. (2010). *Zeitschrift für das gesamte Familienrecht (FamRZ)*, 2010.
Wikely, N. (2006). "Same sex couples, family life and child support", *Law Quarterly Review*, 122, 2006.
Scherpe, J. (2007). "Family and private life, ambits and pieces", *Child and Family Law Quarterly*, 2007.
Scherpe, J. (2010). "The Legal Status of Same-sex Relationships in Germany", in Basedow, J., Kischel, U. and Sieber, U. (eds.).*German National Reports to the 18th International Congress of Comparative Law*, Mohr Siebeck, 2010.
Scherpe, J. (2011). "National Report Germany", *American University Journal of Gender, Social Policy and the Law*, Vol. 19:1, 2011.

ULOGA EVROPSKOG SUDA ZA LJUDSKA PRAVA U PRAVNOM PRIZNANJU ISTOPOLNIH ZAJEDNICA

U ovom radu autor sagledava razvoj evropskih pravnih sistema koji se odnosi na priznavanje zajednica lica istog pola i uočava njegove tendencije. Posmatraju se i različita zakonodavstva, ali i praksa nacionalnih sudova, a posebno praksa Evropskog suda za ljudska prava koji na ovom planu ima veoma važnu ulogu.

Ključne reči: *brak, registrovano partnerstvo, istopolne zajednice, priznanje*

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, Nº 1, 2021, pp. 11-25
https://doi.org/10.22190/FULP2101011M

Original Scientific Paper

REASONABLE TIME AND BANKRUPTCY OF SOCIALLY-OWNED ENTERPRISES *

UDC 334.72
347.932

Aleksandar S. Mojašević, Aleksandar Jovanović**

Faculty of Law, University in Niš, Serbia

Abstract. *The subject matter of this paper is the bankruptcy of socially-owned enterprises. The aim is to examine the implications of bankruptcy proceedings against socially-owned enterprises on the budget of the Republic of Serbia and its taxpayers. The starting hypothesis is that the bankruptcies of socially-owned enterprises will have a significant negative impact on the budget of RS and its taxpayers. In order to test this hypothesis, we used the technique of descriptive statistics to determine the differences between the Commercial Courts in Belgrade, Niš and Kragujevac in terms of the average duration of bankruptcy proceedings, the maximum and minimum duration of cases, and the percentage of cases pending over four or three years. In addition, we provide a hypothetical calculation of the costs of the bankruptcy proceedings of all socially-owned enterprises in the three commercial courts in case the objection for the protection of the right to a trial within a reasonable time has been affirmed. The results show that there are no significant differences between the three commercial courts in the time dimension of the bankruptcy of socially-owned enterprises, given the fact that the vast majority of cases exceed the reasonable time limits and that such lengthy proceedings will significantly burden the RS budget.*

Key words: *reasonable time, bankruptcy, social enterprises, costs*

Received June 23th, 2021 / Accepted July 12th, 2021
Corresponding author: Aleksandar S. Mojašević, LL.D., Faculty of Law, University in Niš, Trg Kralja Aleksandra 11, 18000 Niš, Serbia. E-mail: mojasevic@prafak.ni.ac.rs
* The paper is the result of research within the project "*Responsibility in the Legal and Social Context*", funded by the Faculty of Law, University of Nis, in the period 2021-2025.
** PhD Student

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

1. INTRODUCTION

In the past few decades, bankruptcy matter in our country has been regulated by three special legislative acts: the 1989 **Compulsory Settlement, Bankruptcy, and Liquidation Act**[1], the 2004 **Bankruptcy Procedure Act** (**BP Act**)[2], and the currently valid 2009 **Bankruptcy Act** (**BA**)[3], which was amended three times (in 2011, 2014 and 2018). The evolution of bankruptcy legislation and bankruptcy procedure followed the changes in the socio-economic and political system, in an attempt to provide the best possible answers to the existing problems in practice. At first glance, this evolution may be assessed as positive. Under the Bankruptcy Act (2009), the goal of bankruptcy procedure is to ensure *the most favorable collective settlement of bankruptcy creditors by achieving the highest possible value of the bankruptcy debtor's property* (Article 2 BA). Yet, as this goal is measurable, its important aspect refers to the issue of efficiency. Unlike the 2004 BP Act, the introductory articles of the 2009 Bankruptcy Act provide the governing principles of bankruptcy proceedings, including (*inter alia*) the **principle of efficiency** (cost-effectiveness) and the **principle of urgency** (Article 5 and Article 8 BA).

The BP Act was applied from 2 February 2005 to 23 October 2010, when the new Bankruptcy Act entered into force. As more than ten years have passed since the Bankruptcy Act became applicable, it is sufficient time to draw conclusions about the efficiency of the bankruptcy procedure in Serbia.[4] According to the World Bank methodology,[5] the efficiency of the bankruptcy procedure is most frequently operationalized through the following indicators: 1) the duration of the bankruptcy procedure, 2) the costs of the bankruptcy procedure, and 3) the settlement rate of creditors in this procedure (World Bank, 2021). The latest World Bank report (World Bank, 2020)[6] indicates that Serbia does not stand well in terms of these indicators compared to other countries; in terms of creditors' settlement rate and bankruptcy costs, it is below the average value of these indicators for European and Central Asian countries and significantly below OECD countries in terms of all performance indicators. It is interesting that in terms of time to complete the bankruptcy proceedings, Serbia has a better score than the countries of Europe and Central Asia (2 years as compared to 2.3 years, respectively), but a worse score as compared to OECD countries (1.7 years).

The length of bankruptcy proceedings in Serbia deserves special attention. Some authors[7] point out to numerous factors that have a decisive impact on the duration of the bankruptcy procedure.[8] In a nutshell, these factors are: 1) previously initiated (enforcement and litigation) proceedings; 2) the number of creditors in bankruptcy proceedings; 3) the value of company property; 4) unresolved property issues and initiated litigation proceedings during bankruptcy proceedings; 5) circumstances in the work of other related bodies, such as: the

[1] Zakon o prinudnom poravnanju, stečaju i likvidaciji (Compulsory Settlement, Bankruptcy, and Liquidation Act), *Službeni list SFRJ, br. 84/89 i Službeni list SRJ, br. 37/93 i 28.*

[2] Zakon o stečajnom postupku (Bankruptcy Procedure Act), *Službeni glasnik RS*, br. 84/04 i 85/05. The BP Act still applies to bankruptcy proceedings opened before 2009.

[3] Zakon o stečaju (Bankruptcy Act), *Službeni glasnik RS*, br. 104/2009, 99/2011–drugi zakon, 71/2012–odluka US, 83/2014, 113/2017, 44/2018 i 95/2018.

[4] For more, see: Obućina 2019; Mojašević, Jovanović, 2021a.

[5] See: the World Bank (2021): Doing Business, Resolving Insolvency Methodology; available at https://www.doingbusiness.org/en/methodology/resolving-insolvency (accessed 22.2.2021.)

[6] World Bank (2020). Doing Business: Serbia, available at https://www.doingbusiness.org/en/data/exploreeconomies/serbia#DB_ri, (accessed 22.2.2021.)

[7] See: Radović, 2017; Mojašević, Jovanović, 2021b.

[8] The complexity of bankruptcy proceedings has also been confirmed in the judgments of the Supreme Court of Cassation. See, for example, the Decision of the Supreme Court of Cassation, Rž gp-22/2014 of 18.12.2014.

Republic Geodetic Authority – Real Estate Cadastre (RGA-REC), the Restitution Agency (RA), Bankruptcy Supervision Agency (BSA); and 6) other factors. However, the distinctive feature of the Serbian bankruptcy system is that these factors are most frequently (but not exclusively) related to a special form of enterprise, which still exists in our economic system – **socially-owned enterprises** (**SoE**).[9] The bankruptcy of socially-owned enterprises is the subject matter of this research but, before explaining the research methodological framework, it is necessary to summarize the most important provisions of the 2016 **Act on the Protection of the Right to Trial within a Reasonable Time** (hereinafter: **RT** Act).[10] Given that this Act applies to the bankruptcy procedure, its application has generated numerous negative consequences in practice and alerted the professional public to think in the direction of amending this Act.

2. Protection of the Right to Trial within a Reasonable Time in Bankruptcy Proceedings

The basic provisions of the RT Act state that it "regulates the protection of the right to a trial within a reasonable time", and that it aims "to provide judicial protection of this right and thus prevent violations of the right to a trial within a reasonable time" (Article 1, paras.1 and 2 RT Act). The RT Act also envisages legal remedies for the protection of this right:

1) filing an objection in order to expedite the procedure (hereinafter: *objection*),
2) filing an appeal, and
3) filing a claim for just satisfaction (Article 3 RT Act).

The procedure for protecting the right to a trial within a reasonable time begins by filing an *objection*. Article 6 of the RT Act prescribes the obligatory content of the objection. In case the objection is rejected, or in case the president of the court does not decide on it within two months from the day the objection is received, the injured party has the right to appeal. Article 14 of the RT Act stipulates the reasons for filing an *appeal*. Under Article 5 of this Act, an objection and an appeal may be filed at any time before closing the proceeding. If the objection is upheld (or if the appeal is rejected along with confirming the first instance decision upholding the objection, or if the appeal is upheld), the party acquires the right to *just satisfaction* (Article 22 RT Act). In that case, the party is entitled to: 1) monetary compensation for non-pecuniary damage caused by violation of the right to a trial within a reasonable time; 2) the right to obtain a written statement establishing a violation of the right to a trial within a reasonable time from the Public Defender's Office and have it published; and 3) the right to have the judgment establishing a violation of the right to a trial within a reasonable time published (Article 23 RT Act).

The RT Act also envisages *the criteria* on the basis of which the court will decide whether there has been a violation of the right to a trial within a reasonable time. Article 4 stipulates that the court shall take into account all the circumstances of case at issue:

---

[9] This especially refers to the number of creditors and the value of property although there are still unresolved property issues in the field of restitution (return of confiscated property and compensation). See: Zakon o vraćanju oduzete imovine i obeštećenju (Property Restitution and Compensation Act), *Službeni glasnik RS*, br. 72/2011, 108/2013, 142/2014, 88/2015–odluka US, 95/2018 i 153/2020.

[10] Zakon o zaštiti prava na suđenje u razumnom roku (Act on the Protection of the Right to Trial within a Reasonable Time), *Službeni glasnik RS*, 40/2015.

1) the complexity of factual and legal issues;
2) the overall duration of bankruptcy proceedings and the actions of the court, public prosecutor's office or other state bodies;
3) the nature and type of the subject matter of adjudication or investigation;
4) the significance of the case or investigation for the injured party;
5) the parties' conduct during the procedure, including respect for procedural rights and obligations; and
6) the court observance of the order in resolving cases, and statutory time limits in scheduling hearings and the main trial, and in drafting decisions (Article 4 RT Act).

In case a violation of the right to a trial within a reasonable time is established, the injured party is entitled to receive **pecuniary damages** (e.g. in the amount of the claim recognized in bankruptcy proceedings) and **non-pecuniary damages** (the Act provides for a range of EUR 300 to EUR 3,000 for monetary compensation).[11] Since the compensation for damage is pursued in civil proceedings, it may give rise to other costs, such as lawyer fees, enforcement costs, and other costs and expenses. This Act envisages that a party does not pay a court fee in proceedings involving the protection of the right to a trial within a reasonable time, and stipulates that such cases are urgent and have priority in decision-making (Article 3, para. 2, RT Act). The Republic of Serbia (defendant) is obliged to pay damages and costs in cases where the right to a trial within a reasonable time has been violated.[12] In cases involving a claim arising from the bankruptcy proceeding, the Republic of Serbia undertakes to pay the injured party (plaintiff) the amount of uncollected recognized claim in that proceeding, and assumes the role of the bankruptcy creditor for the amount of that claim (*subrogation*).[13] The subrogation is established by the decision of the competent commercial court. Monetary compensation for non-pecuniary damage and compensation for pecuniary damage are paid by the court from the budget of the Republic of Serbia, i.e. from the funds intended to cover the current court expenses, except for the expenses pertaining to employees and current maintenance of facilities and equipment (Articles 32 and 33 RT Act).

3. METHODOLOGICAL FRAMEWORK OF THE RESEARCH

In this paper, we explore the bankruptcy of socially-owned enterprises and the implications it generates for the budget of the Republic of Serbia. In this endeavor, we start from the following general hypothesis: *bankruptcy proceedings opened against socially-owned enterprises have or will have a significant negative impact on the RS budget and its taxpayers.* In order to put our research in a certain methodological framework, we used the technique of descriptive statistics to determine the differences between certain parameters of active bankruptcies of socially-owned enterprises in the three largest commercial courts in Serbia:

[11] The RT Act allows for the payment of monetary compensation for non-pecuniary damage (Art. 23, para. 1 RT Act) in the amount of EUR 300 to EUR 3,000 (Art. 30 para. 1 RT Act), or compensation for pecuniary damage caused by a violation of the right to a trial within a reasonable time within one year from the day when the injured party acquired the right to just satisfaction (Art. 31, para. 1 RT Act).
[12] In both cases, the Republic of Serbia has *objective responsibility* (Art. 23, para.2 and Art. 31, para.3. RT Act).
[13] See: Article 300 of the Obligations Act; Zakon o obligacionim odnosima (Civil Obligations Act), *Službeni glasnik SFRJ*, br. 29/78, 39/85, 45/89–odluka USJ i 57/89; *Službeni glasnik SRJ*, br. 31/93; *Službeni glasnik SCG*, br. 1/2003–Ustavna povelja, *Službeni glasnik RS*, br. 18/2020.

the Commercial Court in Belgrade (CCBg), the Commercial Court in Niš (CCNi). and the Commercial Court in Kragujevac (CCKg). These observed parameters are as follows:

1) *the average duration of bankruptcy proceedings,*
2) *the average maximum and minimum duration of individual cases,*
3) *the percentage of cases pending for over four or three years.*

The reason for choosing four or three years, as a reasonable time limit, stems from the stance set out in the judgment of the Supreme Court of Cassation (SCC).[14] Therefore, if a bankruptcy proceeding lasts over three, and especially *four* years, its length will be considered "unreasonable".[15] If the research results prove that this is true in cases involving the bankruptcy of socially-owned enterprises, which is the anticipated outcome, it raises the issue of a negative impact of lengthy bankruptcy proceedings and the excessive burden they impose on the RS budget and taxpayers. Therefore, based on the available data, we conducted a hypothetical calculation of the costs of bankruptcy proceedings of socially-owned enterprises in the three aforesaid commercial courts, in cases where the objection for the protection of the right to a trial within a reasonable time has been affirmed.

The data on bankruptcy of socially-owned enterprises under the jurisdiction of the three commercial courts (the number of cases, duration of proceedings, average number of creditors, average amount of claims) were found in the statistical data kept by the Bankruptcy Supervision Agency (BSA)[16] and then, for research purposes, processed by using the descriptive statistics method.[17]

4. Statistics on Active Bankruptcy of Socially-Owned Enterprises

4.1. Active bankruptcies of socially-owned enterprises in the Commercial Court in Kragujevac

Table 1 shows the results of descriptive statistics on active bankruptcies of socially-owned enterprises in the Commercial Court in Kragujevac. There was a total number of **49** active bankruptcies of socially-owned enterprises (active SoE bankruptcy cases; A (SoE)) initiated in the period from 2001 to 2019. Their average duration is about **seven years**. The shortest proceeding takes 22 months,[18] while the longest proceeding takes 232 months[19] (Table 1).[20] The findings show that the vast majority of these cases (about 82%) last longer than four years, while about 90% of cases last longer than three years (Table 2).

Table 1 Descriptive statistics on A(SoE) cases in CCKg (2001-2019)

Sample (N)	Mean (M)	Median (Med)	Standard deviation (SD)	Standard error of the mean (SEM)	Confidence interval (CI) – 95%	Min	Max
49	**83,84**	67	42,09	6,01	71,75–95,93	**22** m.	**232** m.

[14] See: Decision of the Supreme Court of Cassation Rž gp-22/2014 (cited).
[15] Due to the complex nature of lengthy bankruptcy proceedings, this position should be taken provisionally.
[16] See: Agencija za licenciranje stečajnih upravnika-ALSU (Bankruptcy Supervision Agency, BSA), https://alsu.gov.rs/stecaj/statistika-stecajnih-postupaka/ (accessed 22.2.2021.).
[17] The statistical program SPSS (version 25) was used for data processing.
[18] The case was initiated on February 26, 2019.
[19] The case was initiated on August 17, 2001.
[20] December 31, 2020 was taken as the upper limit of the duration of active SoE bankruptcy cases.

Table 2 Time dimension of A(SoE) cases in CCKg

Total A(SoE) cases	**Average duration**	**Over 48 months**	**Under 48 months**	Over 36 months	Under 36 months
49	**83,84 m. or 6,9 years**	**40 or 81,6%**	**9 or 18,3%**	44 or 89,8%	5 or 10,2%

Table 3 provides an overview of active bankruptcies of socially-owned enterprises initiated under the former 2004 BP Act and the new 2009 Bankruptcy Act (BA). **The number of active bankruptcies of socially-owned enterprises initiated under the new Bankruptcy Act is significantly higher than the number of proceedings initiated under the former BP Act (43 versus 6 cases,** respectively). Table 3 also shows the **average number of creditors (NC)** and the **average amount of claims (AC)** in the observed period. Based on the available data,[21] the average number of creditors is **240**, while the average amount of claims is **731,807,679.43 RSD** (or **6,224,442.28 Euros**).[22]

Table 3 Active SoE cases in CCKg (under BP Act, BA), with total NC and AC

Active SoE cases	BP Act (2004)	BA (2009)	Total
Number of cases	**6**	**43**	**49**
Average number of creditors (NC)	**/**	**/**	**240**
Average amount of claims (AC in dinars)	**/**	**/**	**731.807.679,43 RSD**

Source: Statistical data on active SoE cases compiled from the Commercial Court in Kragujevac (2020).

4.2. Active bankruptcies of socially-owned enterprises in the Commercial Court in Niš

Table 4 shows the results of descriptive statistics on active bankruptcies of socially-owned enterprises in the Commercial Court in Niš. There was a total of **72** active SoE bankruptcy cases initiated in the period from 2009 to the end of 2020. Their average duration is about **seven years and three months**. The shortest proceeding takes 24 months,[23] while the longest one takes 140 months[24] (Table 4). The vast majority of these cases (over 90%) last longer than four or three years (Table 5).

Table 4 Descriptive statistics on A(SoE) cases in CCNi (2009-2020)

Sample (N)	Mean (M)	Median (Med)	Standard deviation (SD)	Standard error of the mean (SEM)	Confidence interval (CI) – 95%	Min	Max
72	**87,93**	86	33,32	3,93	80,10–95,76	**24** m.	**140** m.

[21] Data are available for 25 cases out of a total of 49. The same applies to the amount of bankruptcy claims.
[22] The amount is calculated on the basis of the official Middle Exchange Rate of the National Bank of Serbia (NBS) applicable on May 28, 2021.
[23] The case was initiated on December 4, 2018.
[24] The case was initiated on April 1, 2009.

Table 5 Time dimension of A(SoE) cases in CCNi

Total A(SoE) cases	**Average duration**	**Over 48 months**	**Under 48 months**	Over 36 months	Under 36 months
72	**87,93 m. or 7,3 y.**	**66 or 91,6%**	**6 or 8,4%**	66 or 91,6%	6 or 8,4%

Table 6 provides an overview of active bankruptcies of socially-owned enterprises initiated under the former 2004 BP Act and the new 2009 Bankruptcy Act (BA). **The number of active bankruptcies of socially-owned enterprises initiated under the new BA is significantly higher than the number of cases initiated under the former BP Act (63 versus 9 cases**, respectively). Table 6 also shows the **average number of creditors (NC)** and the **average amount of claims (AC)** in the observed period. Based on the available data,[25] the average number of creditors is **185**, while the average amount of claims is **299,334,578.49 RSD** (or **2,546,011.55 Euros**).

Table 6 Active SoE cases in CCNi (under BP Act, BA), with NC and AC

Active SoE cases	BP Act (2004)	BA (2009)	Total
number of cases	**9**	**63**	**72**
Average number of creditors (NC)	/	/	**185**
Average amount of claims (AC in dinars)	/	/	**299.334.578,49**

Source: Statistical data on active SoE cases compiled from the Commercial Court in Nis (2020).

4.3. Active bankruptcies of socially-owned enterprises in the Commercial Court in Belgrade

Table 7 presents the results of descriptive statistics on active bankruptcies of socially-owned enterprises in the Commercial Court in Belgrade. There was a total of **138** active bankruptcies of socially-owned enterprises initiated in the period from 2001 to the end of 2020. Their average duration is about **seven years and three months**. The shortest proceeding takes **25** months,[26] while the longest one takes **237** months[27] (Table 7). The vast majority of these cases (about 92%) last longer than four or three years (98%) (Table 8).

Table 7 Descriptive statistics on A(SoE) cases in CCBg (2001-2020)

Sample (N)	Mean (M)	Median (Med)	Standard deviation (SD)	Standard error of the mean (SEM)	Confidence interval (CI) – 95%	Min	Max
138	**88,05**	66	46,04	3,92	80,30–95,80	**25** m.	**237** m.

Table 8 Time dimension of A(SoE) cases in CCBG

Total A(SoE) cases	**Average duration**	**Over 48 months**	**Under 48 months**	Over 36 months	Under 36 months
138	**88,05 m. or 7,3 g.**	**127 or 92,02%**	**11 or 7,97%**	136 or 98,55%	2 or 1,44%

[25] Data are available for 63 cases out of a total of 72. The same applies to the amount of claims.
[26] The case was initiated on November 22, 2018.
[27] The case was initiated on March 13, 2001.

Table 9 provides an overview of active bankruptcies of socially-owned enterprises initiated under the former 2004 BP Act and the new 2009 Bankruptcy Act (BA). **The number of active bankruptcies of socially-owned enterprises initiated under the new BA is significantly higher than the number of cases initiated under the former BP Act (122 versus 16 cases**, respectively**)**. Table 9 also shows the **average number of creditors (NC)** and the **average amount of claims (AC)** in the observed period. Based on the available data,[28] the average number of creditors is **247**, while the average amount of claims is **1,376,698,075.44 RSD** (or **11,709,603.43 Euros**).

Table 9 Active SoE cases in CCBg (under BP Act, BA), with total NC and AC

Active SoE cases	BP Act (2004)	BA (2009)	Total
Number of cases	16	122	**138**
Average number of creditors (NC)	/	/	**247**
Average amount of claims (AC in dinars)	/	/	**1.376.698.075,44**

Source: Statistical data on active SoE cases compiled from the Commercial Court in Belgrade (2020).

4.4. Comparative overview of active bankruptcies of socially-owned enterprises in the Commercial Courts in Kragujevac, Niš and Belgrade

Table 10 provides a comparative overview of the time dimension of active bankruptcies of socially-owned enterprises in the Commercial Courts in Kragujevac, Niš and Belgrade, including as follows: 1) the average duration of bankruptcy proceedings (in years); 2) the average maximum and minimum duration of individual cases (in months); and 3) the percentage of cases lasting over four or three years.

Table 10 Comparative overview of time dimension in A(SoE) cases in CCKg, CCNi, and CCBg

Commercial Court	Average duration (in years)	Maximum duration (in months)	Minimum duration (in months)	Over 4 years (%)	Under 3 years (%)
CCKg	6,9	232	22	81,6	89,8
CCNi	7,3	140	24	91,6	91,6
CCBg	7,3	237	25	92,02	98,5

Regarding the average duration of bankruptcy proceedings involving socially-owned enterprises, it is obvious that there are no significant differences between the three courts as the overall average is about seven years. The situation is similar when it comes to the maximum and minimum duration of individual cases, as well as to the recorded percentages of cases lasting over four or three years. The findings indicate that ***the vast majority of cases in all three courts last beyond a reasonable time limit***. Notably, two cases (one from the Commercial Court in Kragujevac and one from the Commercial Court in Belgrade) have been pending for over 19 years.

Table 11 provides a comparative overview of the total number of bankruptcy proceedings involving socially-owned enterprises. As anticipated, the largest number of cases were initiated in the Commercial Court in Belgrade, followed by the Commercial Court in Niš and, finally, the Commercial Court in Kragujevac. The number of active bankruptcies of socially-owned

[28] Data are available for 89 cases out of a total of 138. The same applies to the amount of claims.

enterprises initiated under the new BA is substantially higher than the number of cases initiated under the former BP Act: ***in all three courts there are seven times more cases initiated under the BA.*** The average number of creditors (NC) is similar in the Commercial Courts in Belgrade and Kragujevac (247 and 240, respectively), while it is somewhat lower in the Commercial Court in Niš (185). The average amount of claims (AC, in Euros) is 1.8 times higher in CCBg than in CCKg, and 4.6 times higher than in CCNi.

Table 11 Comparative overview of A(SoE) cases in CCKg, CCNi, and CCBg under the BP Act and BA, with the average NC and AC

Socially-owned enterprises (SoE)	Total number of SoE cases	Number of SoE cases (BP Act)	Number of SoE cases (BA)	Average number of creditors (NC)	Average amount of claims (AC) in EUR
CCKG	49	6	43	240	6.224.442
CCNI	72	9	63	185	2.546.011
CCBG	138	16	122	247	11.709.603

Source: Statistical data on active SoE cases compiled from CCKg, CCNi, and CCBg (2020).

5. Bankruptcy of Socially-Owned Enterprises and Repercusions on the Budget of the Republic of Serbia

In order to determine the implications of upholding the objections aimed at protecting the right to a trial within a reasonable time for the (state) budget of the Republic of Serbia, we started from two possible scenarios. The first scenario entails a situation when the court awards the amount of *300 Euros*, which is designated as the minimum amount of compensation for non-pecuniary damage (Article 30, para.1 RT Act). The second scenario entails the situation when the court awards the amount of *800 Euros*.[29] Further on, we present the calculation of costs for the two scenarios in all three commercial courts separately, starting from the average amount of claims and the average number of creditors in bankruptcy cases involving socially-owned enterprises.

5.1. Cases before the Commercial Court in Niš

In the period under observation, a total of **72** bankruptcy proceedings have been instituted against socially-owned enterprises before the Commercial Court in Niš. Based on the available data (a total of **63** cases), the average amount of claims is **299,334,578 RSD (**or **2,546,011 Euros)**, while the average number of creditors is **185** (Table 11).

Scenario 1: In case the court awards the amount of 300 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

[29] The amount was determined by the Serbian Constitutional Court in the case Už-277/2017, where the Court was requested to rule on the constitutional complaint for compensation of non-pecuniary damage. Under the impact of the case law of the European Court of Human Rights, the Court determined the right of the applicants to compensation for non-pecuniary damage in the amount of EUR 800. In our calculation of costs, we started from the fact that the court will award this amount as the "upper limit".

185 objections x [EUR 2,546,011 (pecuniary damages) + EUR 300 (non-pecuniary damages) + EUR 2,997 (attorney's fees)[30] + (EUR 87[31] + EUR 3,846[32] (enforcement costs))] = **EUR 472,349,586**

Scenario 2: In case the court awards the amount of 800 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

185 objections x [EUR 2,546,011 (pecuniary damages) + EUR 800 (non-pecuniary damages) + EUR 2,997 (attorney's fees)[33] + (EUR 123[34] + EUR 3,846[35] (enforcement costs))] = **EUR 472,448,745**

Table 12 Debt of the RS to bankruptcy creditors in all SoE cases in CCNi

All SoE cases in CCNi	*Scenario 1*: amount of compensation for non-pecuniary damages (**300 Euros**)	*Scenario 2*: amount of compensation for non-pecuniary damages (**800 Euros**)
Number of bankruptcy proceedings	63	63
Average number of creditors	185	185
Average amount of claims (in EUR)	2.546.011	2.546.011
The RS debt to creditors (average in EUR)	**472.349.586**	**472.448.745**

Source: Authors' calculation based on the available data compiled from CCNi (2020)

[30] To increase fees, an lawyer may file two separate complaints: a complaint for pecuniary damages and a complaint for non-pecuniary damages. In this case, the calculation of lawyer costs includes: a) drafting two complaints: 2 x 58,200.00 RSD = 116,400.00 RSD or 990 Euros; b) legal representation at two hearings: 2 x 59,700.00 = 119,400.00 RSD or 1,016.00 Euros; c) drafting two enforcement motions: 2 x 58,200.00 RSD = 116,400.00 RSD or 990 Euros. The total lawyer costs amount to 352,200.00 RSD or **2,997.00 Euros**.

[31] These are the actual enforcement costs incurred before the public enforcement officer, and calculated on the minimum amount of compensation for non-pecuniary damage (300 Euros). These costs include: a) enforcement costs for preparing, managing and archiving the case (3,621.6 RSD); b) postal delivery of submissions to the parties, participants in proceedings and the court (1,800 RSD); c) drafting an enforcement decision (658.91 RSD); d) drafting a conclusion on advance payment (658.91 RSD); e) transfer of funds from the designated account of the public enforcement officer (288.00 RSD); f) fee for efficient enforcement (3,169.63 RSD). The total amount of actual enforcement costs is 10,197.05 RSD or **87 Euros**. The calculation of costs is based on the actual case from the practice of an enforcement officer and adapted for illustration purposes, considering that the type and amount of costs may vary from case to case depending on many factors: the conduct of legal representatives, the number of necessary procedural actions, the calculation of the interest rate, etc.

[32] Enforcement costs incurred before the enforcement officer were calculated by simulating the costs based on the amount of 2,546,011 Euros for compensation of pecuniary damage.

[33] The lawyer's costs are identical as in the previous scenario.

[34] These are the actual enforcement costs incurred before the public enforcement officer, and calculated on the maximum amount of compensation for non-pecuniary damage (800 Euros). These costs include: 1) costs for preparing, managing and archiving the case (4,796.40 RSD); 2) postal delivery of submissions to the parties, participants in proceedings and the court (1,800 RSD); 3) drafting an enforcement decision (959.28 RSD); 4) drafting a conclusion on advance payment (959.28 dinars); 5) transfer of funds from the designated account of the public enforcement officer (288.00 RSD); 6) fee for efficient enforcement (5,637.24 RSD). In this case, the total amount of actual enforcement costs is 14,440 RSD or **123 Euros**. The calculation of costs was based on a real case from the practice of an enforcement officer, and adapted for illustration purposes.

[35] This costs are identical as in the previous scenario.

5.2. Cases before the Commercial Court in Kragujevac

In the period under observation, a total of **49** bankruptcy proceedings have been instituted against socially-owned enterprises before the Commercial Court in Kragujevac. Based on the available data (a total of **25** cases), the average amount of claims is **731,807,679 RSD** or **6,224,442 Euros**, while the average number of creditors is **240** (Table 11).

Scenario 1: In case the court awards the amount of 300 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

240 objections x [EUR 6,224,442 (pecuniary damages) + EUR 300 (non-pecuniary damages) + EUR 3,142 (attorney's fees)[36] + (EUR 87 + EUR 17,881[37] (enforcement costs))] =
EUR 1,499,004,480

Scenario 2: In case the court awards the amount of 800 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

240 objections x [EUR 6,224,442 (pecuniary damages) + EUR 800 (non-pecuniary damages) + EUR 3,142[38] (attorney's fees) + (EUR 123 + EUR 17,881 (enforcement costs))] =
EUR 1,499,133,120

Table 13 Debt of the RS to bankruptcy creditors in all SoE cases in CCKg

All SoE cases in CCKg	*Scenario 1:* amount of compensation for non-pecuniary damages (**300 Euros**)	*Scenario 2:* amount of compensation for non-pecuniary damages (**800 Euros**)
Number of bankruptcy proceedings	25	25
Average number of creditors	240	240
Average amount of claims (in EUR)	6.224.442	6.224.442
The RS debt to creditors (average in EUR)	**1.499.004.480**	**1.499.133.120**

Source: Authors' calculation based on the available data compiled from CCKg (2020).

5.3. Cases before the Commercial Court in Belgrade

In the period under observation, a total of **138** bankruptcy proceedings have been instituted against socially-owned enterprises before the Commercial Court in Belgrade. Based on the available data (a total of **89** cases), the average amount of claims is **1,376,698,075 RSD** or **11,709,603 Euros**, while the average number of creditors is **247** (Table 11).

[36] Bearing in mind that the average claim (in the example above) is over 300,000,000.00 RSD, the cost of drafting a complaint will be 61,080.00 RSD, while the cost of drafting two complaints will be 122,160.00 RSD. Provided that the scheduled hearings are not to be delayed, the lawyer will attend at least one hearing per complaint. Under the current lawyer's tariff, the appearance in a hearing costs 62,580.00 RSD, i.e. 125,160.00 RSD for two hearings. If the plaintiff wins the case, the next step is drafting a motion for enforcement of claims, which costs 61,080.00 RSD per motion (i.e. 122,160.00 RSD for two motions). In this case, the total lawyer costs (122,160.00 dinars + 125,160.00 dinars + 122,160.00 dinars) amount to 369,480.00 RSD or **3,142 Euros**.

[37] Enforcement costs incurred before the enforcement officer were calculated by simulating the costs based on the amount of 6,224,442 Euros for compensation of pecuniary damage.

[38] The lawyer's costs are identical as in the previous scenario.

Scenario 1: In case the court awards the amount of 300 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

247 objections x [EUR 11,709,603 (pecuniary damages) + EUR 300 (non-pecuniary damages) + EUR 3,363 (attorney's fees)[39] + (EUR 87 + EUR 17,881[40] (enforcement costs))] = **EUR 2,897,614,789**

Scenario 2: In case the court awards the amount of 800 Euros for compensation of non-pecuniary damage, the debt of the RS to bankruptcy creditors will be (on average):

247 objections x [EUR 11,709,603 (pecuniary damages) + EUR 800 (non-pecuniary damages) + EUR 3,363 (attorney's fees)[41] + (EUR 123 + EUR 17,881 (enforcement costs))] = **EUR 2,897,747,190**

Table 14 Debt of the RS to bankruptcy creditors in all SoE cases in CCBg

All SoE cases in CCBg	*Scenario 1* – amount of compensation for non-pecuniary damages (**300 Euros**)	*Scenario 2* – amount of compensation for non-pecuniary damages (**800 Euros**)
Number of bankruptcy proceedings	25	25
Average number of creditors	240	240
Average amount of claims (in EUR)	11.709.603	11.709.603
The RS debt to creditors (average in EUR)	**2.897.614.789**	**2.897.747.190**

Source: Authors' calculation based on the available data compiled from CCBg (2020).

6. CONCLUSION AND RECOMMENDATIONS

The main findings of this research can be summarized in several points. First, regarding the key parameters of the time dimension of bankruptcy proceedings: the average duration of bankruptcy proceedings and the duration of bankruptcy cases exceeding the time frame of four or three years (reasonable time limit), there are no significant differences between the Commercial Court in Belgrade, the Commercial Court in Niš and the Commercial Court in Kragujevac. ***The average length of bankruptcy proceedings involving socially-owned enterprises in all three courts is about seven years, and the vast majority of cases exceed the reasonable time limit;*** notably, two cases in the Commercial Court in Kragujevac and the Commercial Court in Belgrade have been pending for **over 19 years**. At the same time, we emphasize that these are *active bankruptcy cases,* i.e. cases that have not yet been completed

[39] Considering that the average claim (in the example above) is over 1,300,000,000.00 RSD, the cost of drafting a complaint will be 65,400.00 RSD (i.e. 130,800.00 RSD for drafting two complaints). Provided that the hearings are not to be delayed, the lawyer will appear at least one hearing per complaint. Under the lawyer's tariff, the appearance in a hearing costs 66,900.00 RSD (i.e. 133,800.00 RSD for two hearings). If the plaintiff wins the case, the next step is drafting a motion for enforcement of claims, which amounts to 65,400.00 RSD per motion (i.e. 130,800.00 RSD for two motions). In this case, the total lawyer costs (130,800.00 RSD + 133,800.00 RSD + 130,800.00 RSD) amount to 395,400.00 RSD or **3,363 Euros**.

[40] Enforcement costs incurred before the enforcement officer were calculated by simulating the costs based on the amount of 11,709,603 Euros for compensation of pecuniary damage.

[41] The lawyer's costs are identical as in the previous scenario.

(concluded or suspended), which additionally speaks in favor of the unreasonable duration of bankruptcy proceedings involving socially-owned enterprises in the Republic of Serbia.

Although the remaining findings shed additional light on the bankruptcy of socially-owned enterprises, they have largely been anticipated. First of all, given the territory for which the courts were established, the number of bankruptcies of socially-owned enterprises initiated before the Commercial Court in Belgrade is significantly higher than the number of such cases before the Commercial Court in Niš and the Commercial Court in Kragujevac. Notably, in all three courts, the number of active bankruptcy case involving socially-owned enterprises initiated under the new 2009 Bankruptcy Act is substantially higher than the number of cases initiated under the former 2004 Bankruptcy Procedure Act; thus, ***in all three courts, there are seven times more cases initiated under the new BA***.

Finally, due to the incomplete statistical data available at the official database of the Bankruptcy Supervision Agency (BSA), the comparative findings on the average number of creditors in the commercial courts in Belgrade (247), Kragujevac (240) and Niš (185), as well as the average amount of bankruptcy claims (which are 1.8 times higher in CCBg than in CC Kg, and 4.6 times higher than in CCNi) have to be taken with some reservation. However, the lack of data was not an impediment in conducting a hypothetical calculation of costs of bankruptcy cases involving socially-owned enterprises and determining the implications for the budget of the Republic of Serbia, provided that the objections (filed by the average number of creditors) for protection of the right to trial within a reasonable time are upheld. This part of the research has yielded the most interesting findings. Thus, provided that the objections are upheld, the results unequivocally indicate that the RS budget will be significantly burdened by the RS duty to compensate the injured parties, and the fiscal position of the Republic of Serbia will be significantly "shaken". The debt of the RS to the bankruptcy creditors of socially-owned enterprises will amount to almost ***five billion Euros***.[42] If we include the costs of objections for the protection of the rights of bankruptcy creditors of private enterprises which have not been covered by our analysis, it clearly shows the extent of this burning problem that calls for "urgent measures".

In that context, we make a few recommendations. First, there is **an urgent need to enact a special legislative act which would resolve the burning issue of bankruptcy of socially-owned enterprises**.[43] In this regard, the Republic of Serbia cannot bypass the formerly affirmed objections and established claims of bankruptcy creditors; thus, it is necessary to consider some alternative approaches to paying off the debt, for example, by **converting it into public debt and issuing government bonds**. Secondly, the problem of bankruptcy creditors of insolvent socially-owned enterprises can also be resolved through the so-called **"pilot judgments"**, which are an integral part of the case law of the European Court of Human Rights.[44] Pilot judgments are an instrument for solving systemic or structural problems, such as problems related to unpaid claims of employees of insolvent socially-owned enterprises.[45] Third, it is necessary **to reduce the frequency of filing and affirming future objections to protect the right to a trial within a reasonable time**, particularly in view of the right to file new objections envisaged in Article 13 of the Act on Protection of the Right to Trial within a Reasonable Time (RT Act). In that context, it is necessary to amend the RT Act and the "disputed" Article 13. By allowing the bankruptcy creditors to file new

[42] Our calculation amounts to 4,868,968,855 Euros.
[43] For more on this idea, see: Obućina, 2019; Mojašević, Jovanović, 2021a.
[44] See: *Case of Broniowski v. Poland*, Application no. 31443/96, dated 28 September 2005; *Case of Suljagic v. Bosnia and Herzegovina*, Application no. 27912/02, dated 3 November 2009.
[45] For more on this idea, see: Mojašević, Jovanović, 2021a.

objections, the legislator has demonstrated an intention to "meet" the creditors' needs in terms of protecting their right to a trial within a reasonable time. Yet, the application of this article seems to have led to *unintended consequences* in terms of imposing a significant burden on commercial courts judges, the RS budget and taxpayers. Above all, the legislator seems to have neglected *the number of bankruptcy creditors of socially-owned enterprises*, who in some cases exceeds a thousand people. The legislator also seems to have neglected the *rational behavior of lawyers*, who recognized the possibility of additional earnings in their clients' endeavour to protect their right to a fair trial within a reasonable time.

On the whole, our research shows that the existing institutional framework for exercising the right to trial within a reasonable time generates numerous negative consequences in terms of bankruptcy of socially-owned enterprises. Therefore, there is a need for a systemic change, primarily in the field of legislation, which would contribute to shifting the incentives of key actors (bankruptcy creditors and their attorneys) in this "bankruptcy game". However, as a consequence of the shortcomings in the institutional structure, the taxpayers will not be able to avoid paying the existing debt incurred in the past years. In this paper, we have provided some recommendations which would facilitate the payment of that debt and its minimization *pro futuro*.

REFERENCES

Advokatska tarifa: tabelarni prikaz nagrada sa započetim satom (Lawyers' Tarriff: costs and fees), available at https://www.paragraf.rs/propisi/advokatska_tarifa_tabelarni_prikaz_nagrada_sa_zapocetim_satom.html

Agencija za licenciranje stečajnih upravnika (Bankruptcy Supervision Agency), accessible at https://alsu.gov.rs/stecaj/statistika-stecajnih-postupaka/ (accessed 22.2.2021)

Javnoizvršiteljska tarifa (Enforcement Officers' Tariff), *Službeni glasnik RS*, br. 93/2019.

Mojašević, A., Jovanović, A. (2021a). Razumni rok u stečajnom postupku: analiza i preporuke (Reasonable Time in Bankruptcy Proceedings), *Izveštaj Svetske banke* (to be published in 2021).

Mojašević, A., Jovanović, A. (2021b). Razumni rok u stečajnom postupku: analiza predmeta Privrednog suda u Nišu (Reasonable Time in Bankruptcy Proceedings: Analysis of cases before the Commercial Court in Niš), *Zbornik radova Pravnog fakulteta u Nišu*, br. 90/2021.

Obućina, J. (2019). *Povreda prava na suđenje u razumnom roku u stečajnim postupcima* (Violation of the Right to Trial within a Reasonable Time in Bankruptcy Proceedings), based on "*Izveštaj o stanju i problemima u sprovođenju Zakona o zaštiti prava na suđenje u razumnom roku pred privrednim sudovima;* available at http://www.alsu.gov.rs/bap/upload/documents/seminari/novembar2019/Sudjenje%20u%20razumnom%20roku,%20referat%20J.Obucina.doc

Radović, M. (2017). Zaštita prava na suđenje u razumnom roku u stečajnom postupku (Protection of the Right to Trial within a Reasonable Time in Bankruptcy Procedure). *Zbornik radova "Nacionalno i međunarodno pravo – aktuelna pitanja i teme",* vol I, Kosovska Mitrovica.

World Bank (2021). Doing Business, Resolving Insolvency Methodology; available at https://www.doingbusiness.org/en/methodology/resolving-insolvency, (accessed 22.2.2021.)

World Bank (2020). Doing Business: Serbia, available at https://www.doingbusiness.org/en/data/exploreeconomies/serbia#DB_ri, (accessed 22.2.2021.)

Zakon o obligacionim odnosima (Civil Obligations Act), *Službeni glasnik SFRJ*, br. 29/78, 39/85, 45/89–odluka USJ i 57/89; *Službeni glasnik SRJ*, br. 31/93; *Službeni glasnik SCG*, br. 1/2003–Ustavna povelja, *Službeni glasnik RS*, br. 18/2020.

*Zakon o prinudnom o poravnanju, stečaju i likvidaciji (*Compulsory Settlement, Bankruptcy, and Liquidation Act), *Službeni list SFRJ, br. 84/89 i Službeni list SRJ, br. 37/93 i 28.*

Zakon o stečaju (Bankruptcy Act), *Službeni glasnik RS*, br. 104/2009, 99/2011–drugi zakon, 71/2012–odluka US, 83/2014, 113/2017, 44/2018 i 95/2018.

Zakon o stečajnom postupku (Bankruptcy Procedure Act), *Službeni glasnik RS*, br. 84/04 i 85/05.

Zakon o vraćanju oduzete imovine i obeštećenju (Property Restitution and Compensation Act), *Službeni glasnik RS*, br. 72/2011, 108/2013, 142/2014, 88/2015–odluka US, 95/2018 i 153/2020.

Zakon o zaštiti prava na suđenje u razumnom roku (Act on the Protection of the Right to Trial within a Reasonable Time), *Službeni glasnik RS*, 40/2015.

Case law

Case of Broniowski v. Poland, Application no. 31443/96, dated 28 September 2005.
Case of Suljagic v. Bosnia and Herzegovina, Application no. 27912/02, dated 3 November 2009.
Odluka Ustavnog suda Republike Srbije (Constitutional Court judgment), br. Už – 277/2017, dated 4.6.2020.
Odluka Vrhovnog kasacionog suda RS (Supreme Court of Cassation judgment), Rž gp-22/2014, 18.12.2014.

RAZUMNI ROK I STEČAJ DRUŠTVENIH PREDUZEĆA

Predmet ovog rada jeste stečaj društvenih preduzeća. Cilj je ispitati implikacije stečajnih postupaka otvorenih nad društvenim preduzećima na budžet Republike Srbije i njene poreske obveznike. Pošli smo od toga da će stečajevi društvenih preduzeća imati značajan negativan uticaj na budžet RS i njene poreske obveznike. U svrhu provere ove hipoteze, tehnikom deskriptivne statistike utvrdili smo razlike u pogledu prosečnog trajanja stečaja, maksimalne i minimalne dužine stečaja i procenta predmeta koji traju preko četiri, odnosno tri godine između Privrednog suda u Beogradu, Nišu i Kragujevcu. Osim toga, sproveli smo i hipotetičku kalkulaciju troškova stečajnog postupka svih društvenih preduzeća u tri privredna suda u slučaju usvajanja prigovora za zaštitu prava na suđenje u razumnom roku. Rezultati pokazuju da između tri privredna suda ne postoje značajne razlike u vremenskoj dimenziji stečaja društvenih preduzeća – ogromna većina predmeta traje preko granice razumnog roka, kao i da će njihovo dugo trajanje značajno opteretiti budžet RS.

Ključne reči: *razumni rok, stečaj, društvena preduzeća, troškovi*

Proofreading/Copy-editing: Gordana Ignjatović

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, Nº 1, 2021, pp. 27-54
https://doi.org/10.22190/FULP2101027P

Original Scientific Paper

LEGAL PRINCIPLES AS TELEOLOGICAL LEGAL ATTITUDES IN THE LEGAL ORDER OF A STATE OF LAW

UDC 340.12

Miloš Prica

Faculty of Law, University in Niš, Serbia

Abstract. *This article presents the difference between legal norms and legal principles. The author's viewpoint is based on the differentiation between regulatory, systemic and teleological legal attitudes in the legal order of a state of law (Rechtsstaat). The conceptual framework of legal principles entails constituent laws and different areas of a legal order. Unlike legal norms (as subject-specific regulating legal attitudes) and legal standards (as the most general legal attitudes), legal principles are radiating teleological legal attitudes. Moreover, being the result of systemic and teleological concretisation of written law, legal principles as basic teleological legal attitudes are shaped as bundles of teleological legal attitudes and legal conceptions. In the order of a legal state, legal principles have a circular flow in the operation of the legal order, which is determined by the complementary roles of the institutional order of public authority, the institutional order of state authority, and the institutional order of a territorial community. It necessarily brings to light the difference between the fundamental legal principles of a legal order and the legal principles governing different areas of a legal order. This article analyzes the aspects of systemic and teleological understanding of legal principles, particularly considering the distinctive nature of legal principles as sources of law. Legal principles are also viewed as canons directly developed in jurisprudence, within the framework of the "internal legal system" based on legal forms.*

Key words: *legal principles, legal grounds, cause and purpose of legal regulation, legal standards, legal norms, legal situations, "internal legal system"*

Received May 5th, 2021 / Accepted July 16th, 2021
Corresponding author: Miloš Prica, LL.D., Assistant Professor, Faculty of Law, University of Niš, Serbia, e-mail: pricamilos@prafak.ni.ac.rs

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

1. INTRODUCTION

Roman law is the cradle of legal principles, which are embodied in the attainments of Roman legal jurisprudence as the most brilliant form of teleological jurisprudence in the history of law.[1] Relying on the knowledge of the legal method employed by Roman jurists, it is important to emphasise at the very outset of this article that the destiny of legal principles in a specific legal area is determined by the development and direct presence of jurisprudence in a legal order, which is primarily embodied in the understanding and conceptualization of legal principles in the process of creation and concretisation of written law.

Despite the fact that legal principles have strongly contributed to the constitution of contemporary European legal systems, as well as to the creation of the state of law (*Rechtsstaat)* doctrine in general, the independent legal nature of legal principles has been generally disputed in Serbian legal literature. Such an understanding of legal principles is inconsistent with the development of legal consciousness in the period after the French Revolution to the present day. Taking a glance at the legal history of European legal systems, one may learn that quite a few legal principles have been unambiguously formulated in judicial practice, as an expression of legal consciousness that required the court jurisprudence to ensure a simultaneous preservation of public policy and legitimacy of statutory law! In these cases, the process of shaping legal principles in judicial practice provided a direction for the development of legal consciousness and ensured the compliance of legal institutes with the "spirit of the time" and the "nature of things". Hence, the judicial formulation of legal principles was often designated as "discretionary law-making authority", considering that it departed from the framework of possible interpretations of legal norms under the impact of moral perceptions, the objective spirit of a territorial community, or philosophy-of-law doctrines.[2]

The insufficient presence of legal principles in Serbian jurisprudence and legal literature is undoubtedly a consequence of the general acceptance of normativism (the normativist concept of law *stricto sensu*),[3] where law is viewed as a process of creating and applying legal norms as

[1] The legal thought of Roman jurists focused on establishing the legal grounds for legal issues under consideration, as the cornerstone for the most valuable expression of the Roman legal method - the legacy on legal principles related to subject-specific legal regulation. Notably, Savigny said: "[...] in our science, everything depends on the possession of the leading principles, and it is this very possession which constitutes the greatness of the Roman jurists. The notions and axioms of their science do not appear to have been arbitrarily produced; these are actual beings, whose existence and genealogy have become known to them by long and intimate acquaintance. For this reason, their whole mode of proceeding has a certainty which is found no where else, except in mathematics; and it may be said, without exaggeration, that they calculate with their notions. But this method is by no means the exclusive peculiarity of one or a few great writers; on the contrary, it is common to all and, although a very different measure of felicitous application falls to the lot of each, still the method is universally the same" (Savigny, 1998: 34). For more on the legal method of Roman jurists in Serbian legal literature, see: Sič, 2015: 617-633.

[2] For example, it may be indicative to mention the origin of the principle of objective liability for damage in French law. Originally, the French Civil Code did not envisage the objective liability as a legal institute and a separate legal principle; there was only subjective liability (based on individual culpability). Relying on the *Code Civile* and taking into consideration the emerging changes in the society, French courts took the legal stand that it would be proper to establish objective liability for damages caused irrespective of culpability. French courts found the legal grounds for establishing objective liability in the French Civil Code, by using linguistic flexibility of legal formulations, although such a conclusion could not be reached by applying a subjective interpretation - "the will of the legislator", nor an objective interpretation of the "spirit of the Code". It means that the introduction of objective liability for damage implied bringing the legal institute of liability for damage in compliance with the "spirit of time", which was necessary for preserving the public order and the legitimacy of statutory law! For more on the development of the idea of objective liability for damage during the 19th century, see: Popović, 1984: 97-101.

[3] For more on the conceptual framework of normativism, see: Hasanbegović, 2015: 69-74.

"formal sources of law".[4] In this paper, the author aims to present the arguments proving the independent legal nature of legal principles and the theoretical grounds of differentiation between legal principles and legal norms in legal logic. To that effect, the starting premise is that the legal order of a state of law *(Rechtsstaat)* encompasses regulating legal attitudes, systemic legal attitudes, and teleological legal attitudes. Unlike legal norms (as regulatory legal attitudes) that directly regulate individual rights and legal duties of the subjects of a legal order, legal principles are radiating teleological legal attitudes; by expressing the basic legal ideas, they give direction to legal consciousness and inspire the basic legal regulation in the legal order of a state of law, thus laying grounds for the development of legal norms and activities of the subjects of a legal order. Legal principles are the basic canons that are woven into the *causa* of law-making sources, legal acts and actions, legal relationships and legal forms. It means that legal principles have a distinctive feature of constituent laws of a legal order and different areas of legal order.

2. TELEOLOGICAL, SYSTEMIC AND REGULATING LEGAL ATTITUDES

The author's standpoint on the distinction between a legal order and a legal system was presented in earlier papers (Prica, 2018: 103-113; Prica, 2016: 20-82). On this occasion, we shall revisit the main postulates of that viewpoint, considering that they contain the theoretical grounds for discussing the subject matter of legal principles. Whereas normative legal theories posit that there is no law outside normativism, the author's standpoint is that law is primarily a categorically (conceptually) determined order, governed by the legal subject-matters and their immanent law-making sources; a legal norm is one of many elements of a legal order. As a categorically (conceptually) determined order, law is indeed a result of the existence of different institutional orders established within the framework of a state (as a legal and political community), where an inextricable bond between the legal order and the institutional orders comes to light.[5] Generally speaking, a legal order implies the establishment of a legal and political community and the presence of legally

[4] Here, we may refer to the conception that legal principles are derived from legal norms, which means that legal principles are "abstract norms composed of norms of a lower degree of generality" (Lukić, 1995a: 222-223). In this paper, the author endeavours to prove the opposite: it is in the nature of things that legal norms are derived from legal principles.

[5] A state is a trinity of a territorial community, the basic institutional order of public authorities, and the respective territory. In terms of international relations, territoriality is an important feature of every state, bearing in mind that a state (as the basic territorial order) only exists in the form of as a sovereign state (as the basic institution), which has the supreme authority in the given territory. As for internal relations, the relationship between the distinctive identity of a state as an institution and a state as a territorial community is even more important; this relationship is primarily recognised through a spiritual and teleological content of a legal order, expressed in the unity and overarching power of the objective spirit. The starting premise should be that the state (as the basic territorial order) is embodied in the territorial community, which is shaped by the activities and the spirit of its subjects. That community has its constituent subjects (man as a holder of freedom, nation, family, civil society, etc.), which are all interconnected by historical predicament and a permeating effect of the objective spirit, which is the foundation for the development of a spiritual and teleological content of the public order of a territorial community. It entails the idea of historical endurance, the idea of a state as the subject of history. Therefore, to understand and properly establish the legal state doctrine *(Rechtsstaat)*, the presence of three institutional orders must be presumed: 1) a territorial community as an institutional order; 2) an institutional order of state authorities; and 3) an institutional order of public authorities (institutional public order as an embodiment of the rule of law). A state as an institution (a political and legal community) is a trinity of the aforesaid institutional orders (Prica, 2016: 23-26; 33-40).

regulated relations between subjects of different institutional orders; their relations are governed by legal principles and legal norms, regulating the activities of the subjects of a legal order. The basic purpose of a legal order is to prevent any arbitrariness of the subjects of institutional orders, whereas the creation of legal orders cannot fully represent a concretisation of general legal norms, considering that subject-specific legal regulation (in a substantive sense) may be both beyond the law and above the law.

In terms of legal science, a legal order contains integral constituent entities (elements), without which the in-depth analysis of the creation and concretisation of law is inconceivable in legal science. In the author's opinion, a legal order has the following structure:

1) ***basic (constituent) entities of a legal order***, including: a) a legal subject; b) subjective rights; c) a legal duty; d) a legal object (subject-matter); e) a legal act; f) state action; g) legal action; and f) legal facts; all these elements have an equal (constitutive) significance in a legal order, and it would be entirely wrong to put them in a hierarchical chart;[6]

2) ***the subject matter of legal regulation***, including: legal goods (assets) and legal interests;

3) ***the law-making sources,*** including: rational interpretation of legal norms and legal principles, political assessment of expediency, and free will and administrative assessment of expediency;

4) ***the forms of legal regulation***, including: a) *direct dynamic forms*: general legal acts, individual legal acts, state actions, and legal actions; b) *direct static forms:* legal principles, legal norms and legal standards; and c) *higher static (legal-science) forms:* legal matters, legal situations and legal institutes.

In the legal order of a *Rechtsstaat*, the rule of law is anchored in-between the general and private interests, publicity and privacy, interventionism of the state authority and civil society, institutional order of public authorities and institutional order of a territorial community. It aims to establish a balance between various legal goods, interests and goals of a legal order. In that sense, a legal state governed by the rule of law is an embodiment of the public interest as a static expression of the common good;[7] naturally, the exercise of the rule of law in a legal order is conditioned not only by well-developed written law but also by the need of attain a high degree of publicity and development of virtue in a legal order.

Essentially, the formation and the functioning of a legal order (in the above sense) is to ensure a minimum of public interest as a static expression of the common welfare, while the rule of law under the auspices of the legal order is instituted and strengthened by developing written laws, the general public as the "judiciary" of a territorial community, and virtue (of judges, public attorneys, political officials, public servants, subjects of institutional order of a territorial community, etc.). Thus, it would be important to make a clear distinction between a legal order an embodiment of a legal state (in a formal sense) and the rule of law as an expression of a moral and spiritual progress of a legal and political community.

Legal principles as the radiating teleological legal attitudes and general legal norms as systemic legal attitudes have a decisive importance for the existence of a legal order (in the above sense), whereby various systems of legal norms (as regulating legal attitudes) are developed under the auspices of a legal order. Bearing all this in mind, the development of

[6] By analogy, it would be like giving priority to the blood system over the nervous system, or the right hand over the left hand.

[7] In the author's opinion, general interests represent the dynamic expressions of common good; private interests represent the dynamic expressions of individual legal goods of citizens as subjects of a legal order and holders of freedom, while the public interest represents a regulatory determinant of the legal and public order, and a static expression of common welfare (Prica, 2016: 211-229; 269-280).

a legal order is conditioned by the development of the so-called "internal legal system", which occurs at the points of encounter of opposed entities and systems within a legal order. An internal legal system is mainly developed in judicature as a system embodied in legal attitudes and legal conceptions having a radiating effect on legal consciousness in a legal order.[8] *An internal legal system* is a sum of legal attitudes, legal conceptions and legal concepts adopted in (spiritual) areas of a legal order. The relationship between a legal order and an internal legal system depends on the nature and the scope of direct presence of legal science in the process of creation and concretisation of law. Being a product of direct legal-science activity in a legal order, an internal legal system can ensure a high degree of development of written law and a stable legal consciousness; consequently, an internal legal system is established as a hard core of a legal state and a legal order.

What is the difference between teleological legal attitudes, systemic legal attitudes and regulating legal attitudes? **Teleological legal attitude**s express basic legal ideas and give direction to legal consciousness in the legal order of a state of law, thus determining the legal grounds of legal norms as regulating legal attitudes and the legal grounds for the activities of subjects of a legal order. **Systemic legal attitudes** regulate mutual relationship of constituent entities of a legal order and legally regulate the course, volume and extent of legal regulation and the activities of subjects of a legal order. **Regulating legal attitudes** directly regulate subjective rights and legal duties of subjects of a legal order.[9]

Thus, given their intrinsic (legal-logic) structure, legal norms and legal principles are **legal attitudes**,[10] but they are legal attitudes of distinctive properties. Legal principles are radiating teleological legal attitudes, while legal norms represent systemic and regulating legal attitudes. Systemic legal attitudes exclusively have a form of general legal norms with a general legal effect, while regulating legal attitudes have a form of legal norms with an *erga omnes* effect and legal norms with an *inter partes* effect. We will see later that legal norms as regulating legal attitudes necessarily represent subject-specific legal attitudes, regardless of whether they are legal norms with an *erga omnes* effect or legal norms with an *inter partes* effect! Legal principles as basic teleological legal attitudes have general legal character, whereby systemic and teleological concretisation of written law results in

[8] The development of European-continental legal orders in the period after the French Revolution was marked by an endeavour to develop jurisprudence, which was actually an expression of the need to enhance the creation and application of law by legal thought, to promote the understanding of the general above the individual, i.e. to expose the constituent elements of the whole behind the particularities. These constituent elements of the whole are, in fact, legal concepts. The direct presence of legal thought in the process of creation and concretisation of law is the foundation for developing the conceptual framework of theoretical jurisprudence. Legal thought does not have to be directly present (to a significant extent) in legal regulation. Internal law may also entail ongoing formation and application of legal norms, but the postulate on the significance of legal thought in the process of legal regulation reflects the endurance and stability of law and, thus, its further development. Nowadays, German and French laws are often designated as "radiating continental legal orders"; to a lesser extent, it is the result of the direct impact of substantive and procedural law on other legal orders but, to a much greater extent, it is the result of the strength of German and French jurisprudence, particularly the one developed in the judicature of courts, which is a clear indicator of the significance of legal consciousness and the conceptual legal framework.

[9] In Serbian legal literature, the expression "norms on behaviour" has become common (Lukić, 1995b, 84-85). In that context, regulating legal attitudes do not take into account only the behaviour of natural persons (individuals) but also the activities of state authorities and other subjects of a legal order.

[10] Petrović noted: "Legal attitudes (German: *Rechtssatz*) and a legal act are the final embodiment of law. All law-related content is contained in or correlated with either the former or the latter; yet, a legal attitude is an intentional expression of legal statics (where law i.e. legal though actually "stands still"), whereas a legal act is an element of legal dynamics, legal reality and movement" (Petrović, 1981: 75). Toma Živanović also supported the view on a legal norm as a legal attitude (Živanović, 1997: 60; 65, etc.).

the development of legal principles as bundles of general and subject-specific teleological legal attitudes. In that sense, legal principles as teleological legal attitudes determine the legal ground of legal norms as regulating and systemic legal attitudes. We may examine the difference between teleological, systemic and regulating legal attitudes by referring to some examples.

(1) In a typical civil law contract, legal norms with an *inter partes* effect (regulating legal attitudes arise from the free will of contracting parties; the dispositive statutory general legal norms (regulating legal attitudes) have a secondary character; but, in terms of this contract, general legal norms are primarily valid as systemic legal attitudes[11] and legal principles as teleological legal attitudes.[12] Therefore, regulating legal attitudes contained in these contracts emanate from the consent of free wills of the parties as the basic law-making sources in one area of a legal order, provided that legal regulation at issue does not jeopardise the preservation of the legal order as a whole.

(2) In police activities aimed at preserving public order and peace, statutory norms are valid as systemic legal attitudes which determine the course and limits of physical activities of the police; however, the course of these activities cannot be precluded by statutory norms because it entails physical action of the police strengthened by the assumption of legality and the assessment of expediency, including the possibility of direct enforcement. In this case, legal principles are primarily valid as basic teleological legal attitudes,[13] whereas statutory norms as systemic legal attitudes[14] prevent the arbitrariness of the police, thus preserving the public order. It means that the content of physical activities of the police (as their regular and primary function in a legal order) cannot be regulated by statutory norms as regulating legal attitudes; yet, they can regulate the requirements and limits of a specific activity, as well as the consequences of undertaking the activity, in order to preserve the legal order.[15]

---

[11] Article 10 of the Obligation Relations Act (*Official Gazette of the SFRY*, no. 29/78 [...]) states: "The parties in obligation relations are free, within the limits of compulsory legislation, public order and good faith, to arrange their relations as they please". Art. 20 of the ORA specifies:"The parties may regulate their relations in a different way from the one specified by the law, unless a specific provision of this law or its meaning provides otherwise." To confirm the justification of distinguishing systemic legal attitudes from regulating legal attitudes, we may refer to Vodelinić's understanding of the introduction to civil law. Vodelinić states: "Unlike the specific part and the general part of civil law, which constitute civil law norms, the introduction to civil law is a benchmark for legal norms which are not an integral part of civil law but they pertain to civil law, i.e.. to civil law norms. Civil law norms regulate civil law relations: rights, obligations, capacities and properties of persons involved in such relations, the acquisition, change or termination of such rights and obligations, capacities and properties. The introduction to civil law regulates various issues, pertaining to civil law norms rather than civil law relations. Norms of the introduction to civil law are norms about civil law norms (metanorms) [...]." (Vodelinić, 2014: 29).

[12] Article 11 of the ORA (*Official Gazette of the SFRY*, no. 29/78 [...]): "Parties to obligation relations shall be equal in terms of law". Art. 12 of the ORA: "In establishing obligation relations and exercising rights and duties from these relations, the parties shall adhere to the principles of good faith and honesty."

[13] Art. 31 of the Police Act (*Official Gazette of the RS*, no. 6/2016 and 18/2018): "The Police shall perform police duties with the aim and in such a manner as to provide for an equal protection of security, rights and freedoms, by implementing the law and the constitutional principle of the rule of law." On the basis of this general teleological legal stance, Art. 32 of the Police Act envisages the legal principles for performing police duties: professionalism, depoliticization, cooperation, cost-effectiveness and efficiency, legality of work and proportionality.

[14] The police legislation contains a myriad of systemic legal attitudes (either restricting and not restricting the police powers), which is the consequence of the primary and regular functions and physical activities of the police in a legal order. See: Art. 65-128 of the Police Act, *Official Gazette of the RS*, no. 6/2016 and 18/2018.

[15] Physical activities of the police, as the primary and regular function of the police in a legal order, are also reflected on the spiritual (intellectual) activities of the police, bearing in mind the possibility of rendering an oral decision, which is regulated by the General Administrative Procedure Act (*Official Gazette of the RS*, no.

(**3)** When the President of the Republic and the Government decide on appointing an ambassador of the Republic of Serbia in another state, the process entails a political assessment of the expediency of competent decision-makers, which is by no means limited by statutory norms as regulating legal attitudes. The assessment involves only a statutory norm as a systemic legal position;[16] teleological legal attitudes are also not applicable in this legal matter. Therefore, the proposed decision of the aforesaid supreme state authorities can only by challenged by the public (as the "judiciary" of the institutional order of a territorial community), for the purpose of achieving public interest as a static expression of general welfare.

(4) A decision on an administrative matter, rendered in the administrative procedure, is an expression of a reasonable interpretation of general legal norms and an administrative assessment of expediency (as law-making sources); the decision-making process is governed by the legal principles envisaged in the General Administrative Procedure Act (GAPA) and the legal principles of the applicable substantive law. Notably, like other procedural laws, the GAPA encompasses myriads of systemic legal attitudes.

(5) In criminal offences, the factual being (essential factual ground) is a constituent element of the legal being (the body of crime in substantive law) as a completed spiritual construct (criminal offence as a legal concept), whereas a legal rule of the Criminal Code is a general legal situation (as a regulating legal form). A general legal situation arises from a reasonable interpretation of the constitution and a political assessment of expediency (as law-making sources); it is a complete legal being (entity), whose content encompasses the primarily factual being (negative and positive duties) and the secondary factual being (commission of an illicit act or omission resulting in a criminal offence). Hence, the subject-matter of criminal procedure is the assessment of legal facts related to the primary and the secondary being; a criminal offence is a legal fact that does not constitute a law-making source. Therefore, criminal procedure is inconceivable without legal principles, including not only the basic principle of legality *stricto sensu* but also other legal principles (e.g. *in dubio pro reo*, presumption of innocence, etc.).

In these examples, we may observe the presence of various dynamic forms of legal regulation (contract, material act, governmental act, administrative act, court judgment), as well as the existence of various law-making sources (internal conception of legal acts, state and legal actions), free will, administrative assessment of expediency, political assessment of expediency and reasonable interpretation of legal norms as regulating legal attitudes.[17]

18/2016). Article 143 of the GAPA envisages as follows: (1) In the event of extremely urgent measures taken for the maintenance of public order and safety, or elimination of direct threats to human lives and health or property, the authority may adopt a decision orally. (2) At the request of a party, if submitted within 60 days from the date of adoption of the oral decision, the authority shall be obliged to issue and deliver it to the party in writing not later than 8 days from the submission of such request."

[16] Article 15 of the Foreign Affair Act (*Official Gazette of the RS*, no. 116/2007).

[17] Law-making sources reflect the subject-matter of a legal order in the process of the creating and applying the law, determining the *causa* (rationale) of its action. They reveal the internal conception of comprehensive spiritual and physical activities in a legal order, in terms of both formal legal sources and all legal and material acts, affairs and actions in a legal order. In that context, we are in the area of material sources of law. Yet, we should bear in mind that law-making sources determine the *causa* of both spiritual and physical activities in a legal order; consequently, law-making sources should be differentiated from material sources of law related to a legal being (e.g., the objective spirit and legal consciousness as a material source of law). In the author's opinion, the meaning of creation and application of law should be inspired by the endeavour to establish fair (just) and steadfast law, which can be achieved by establishing the basic legal principles, the "nature of things" of legal subject-matter, and legal rules as a measure of justice and fairness in typical legal subject-matters. Consequently, the material source of law in the legal order of a state of law would be a trinity of the said legal principles, legal matters and legal rules, including well-shaped legal consciousness; thus, the formal sources of law would necessarily emanate from the material sources of law (in the aforesaid sense). It would

We may also conclude that the functioning of a legal order cannot be precluded by a pyramidal course of creation and application of general legal norms as "formal legal sources", bearing in mind that the principle of legality in material sense is a dominant principle in all areas of a legal order. Substantive law may also be created outside the institutional order of public authorities, as an activity that does not represent a concretisation of legal norms as regulating legal attitudes, in the area of free will and private interest in absolute sense. On the other hand, the institutional order of public authorities is necessarily broader in relation to substantive (statutory) law, bearing in mind the political activities of state authorities that can also be above the law. But, it is important to point out that the coordinates of a legal order are not exceeded in either case, and it is the essence of their existence. In view of the aforesaid, the principle of legality has various forms in different areas of a legal order, including the legality *stricto sensu* (retention of legal norms as regulating legal attitudes), the prohibition of unlawful effect in civil law transactions, and the political assessment of expediency of the supreme state authorities (which can also be above the law, e.g., in case of concluding an international agreement). Yet, in all areas of a legal order, legal principles are valid (applicable) as basic teleological legal attitudes and general legal norms are valid as systemic legal attitudes. The constitution (as a basic law of a legal and political community) primarily contains basic teleological and basic systemic legal attitudes, while any area of a legal order contains the systemic (basic) law which regulates the basic teleological, systemic and regulating legal attitudes currently applicable in the specific area of a legal order.

Amongst various strands of legal thought on the character of a legal norm in legal literature, the criterion for differentiating between the legal norms as systemic legal attitudes and legal norms as regulating legal attitudes may be observed in the discussion on primary and secondary legal norms. The discussion on primary and secondary legal norms undoubtedly has a character of an insightful scientific thought; but, given that the discussion is anchored in the normativist strands of legal thought, it has only reached the point of differentiation between a legal order and various systems of regulating legal attitudes developed within the framework of a legal order. It seems to have been the guiding idea of Jhering, who has to be credited for being the first to underscore the significance of the distinction between the norms on behaviour and the norms on sanctions, as the existence of a legal order is inconceivable without the latter (Jhering, 1998: 152-153). Hart's discussion on the concept of law is also significant as he elaborates on the "rules of recognition, rules of change and rules of adjudication", thus underscoring the significance of the existence of a legal order. Hart says: "[...] the complexity of a legal system calls for differentiating between two different yet related types of legal rules. The rules of the first type, which are also called primary or basic rules, require people to do something or to refrain from action, whether they want it or not. Another group of rules rest and depend on the basic rules and they are secondary to them because they confer powers enabling people to create new primary rules, to abolish or change the existing ones, to impact their application in various ways, or to determine their outreach." (Hart, 2013: 140-141). Here, we may also refer to Bobbio's standpoint on the rules on identification of systemic norms: "Upon initial consideration, we can say that [the rules of identification...] include three different types of norms, which emerge at the point of transition from a primitive order to a developed one: a) the norms on legal sources or norms indicating facts or acts that are given the power to produce systemic norms; b) norms

certainly mean that the constitution (as the basic law of the state) has to be in compliance with the constitution of civil society and the constitution in absolute sense.

establishing spatial or time limits (the rules on the validity of laws in time and space) within which the rules produced by authorised sources may be considered to belong to the system of norms; c) norms on interpretation and application of rules which are considered to belong to the legal system according to the criteria under a) and b)" (Bobbio, 1988: 69).

The discussion on the relationship between the primary and the secondary norms in a legal order is appropriate only if that relationship is considered from its functional aspects, without evaluating what is more important for a legal order. A functional analysis of the relationship between the primary and the secondary norms can only be consistent if it takes into account all the constituent elements of a legal order as the subject-matter, not only legal norms. In that sense and for the sake of an example, general legal situations on absolute legal duties are primary; criminal matter as a subject-matter of criminal proceedings is secondary, but the norms of the Criminal Procedure Code are of primary significance for the existence of a legal order. Likewise, subject-specific legal situations of private law are primary, litigation matter is secondary, but dispositive norms of obligation legislation have primary importance for the existence of a legal order; etc. In terms of the constituent entities (elements) of a legal order, it follows that the weight on the balance scale measuring the relationship between primary and secondary norms shifts to either side, depending on the area of a legal order and the nature of the subject-specific legal regulation. As a matter of fact, general legal situations (envisaged in the Criminal Code) on absolute legal duties (legal protection of basic legal goods) and general legal situations (direct application of constitutional norms) as basic legal statuses and guaranteed substance of subjective rights are equally valid for a legal order; the norms on sanctions for the violation of absolute legal duties and the norms on sanctions for the violation of guaranteed subjective rights are of equal validity as well. For this reason, instead of discussing primary and secondary norms, it may be more appropriate to examine the difference between legal norms as systemic legal attitudes and legal norms as regulating legal attitudes. In light of the legal thought pursued in this discussion, Hart's norms of recognition, norms of change and norms of adjudication, as well as Bobbio's norms of identification of systemic norms, undoubtedly correspond to the concept of legal norms as systemic legal attitudes. Moreover, legal principles serve as proof of the impossibility of considering the relationship between primary and secondary norms in a legal order only in the light of legal norms, bearing in mind that legal principles as teleological legal attitudes are primary in relation to legal norms as regulating legal attitudes, which we will endeavour to prove further on in this discussion.

Now, we have reached the point where we may examine the relationship between legal principles as teleological legal attitudes and legal norms as regulating legal attitudes. To that effect, we should first address the issue of a conceptual framework of teleological legal attitudes. Teleological legal attitudes are not equivalent to the purpose of legal regulation, bearing in mind that purpose does not cover the entire legal ground of legal regulation. What is the relationship between a legal ground and a purpose in law?

According to Jhering, there is the law of causality and the law of purpose: "Only one of the two is possible: either cause or purpose is the moving force of the world" (Jhering, 1998: 17). Jhering finds that purpose is the moving force in the of law. Yet, to what extent is purpose actually the moving force in the world of law if we are fully aware of the powerful impact of free will and interests? Thus, in addition to purpose, the world of law also includes causes, reasons, terms and conditions for accomplishing the purpose (goals) of legal regulation. Hegel addressed the dichotomy within internal law, when elaborating on the identity of *being-in-itself* (*Ansichsein*) and *positedness* (*Gesetzsein*): "Through this

identity of abstract or implicit with what is actually constituted, only that right is binding which has become law. But, since to constitute a thing is to give it outer reality (*Dasein*), there may creep into the process a contingency due to self-will and other elements of particularity. Hence, the actual law may be different from what is in itself right" (Hegel, 1911: § 212; Petrović, 1981: 54). This further implies that teleological legal attitudes do not only express the purposes of legal regulation; their ultimate meaning is manifested in linking the grounds and the grounded, being-in-itself (substance) and positedness (constructed reality), being and needing, purpose and cause of legal regulation. Therefore, legal principles as teleological legal attitudes express the basic legal ideas which serve as legal grounds for regulating the activities of the subjects a legal order and legal norms as regulating legal attitudes; thus, teleological legal attitudes give direction to legal consciousness in a legal order.

In view of the above, the relationship between legal principles as teleological legal attitudes and legal norms as regulating legal attitudes is determined by a "type" as a methodological category, which is embodied in the synthesis of the general and specific. As noted by Dilthey, it entails "regular linking of different individual characteristics into the basic forms of mental life" (Dilthey, 1924: 241). Dilthey concludes: "In such a type, a number of features, parts or functions are interconnected in a regular manner. These interconnected features, which constitute a type, stand in such a relationship that the presence of one trait allows for making a conclusion about the others, a variation in one facilitates a variation in another. These typical interconnected features are strengthened in the universe, in an ascending order of life forms, and reach their ultimate point first in organic and then in spiritual life" (Dilthey, 1924: 270). Hence, it can be concluded that legal norms as regulating legal attitudes are derived from legal principles as teleological legal attitudes, but it does not imply their concretisation; instead, legal norms are shaped by perceiving legal principles as a synthesis of elements constituting teleological legal attitudes.

Duguit's viewpoint on "normative legal rules" is consistent with the presented understanding of the relationship between legal principles and legal norms (Duguit, 1927: 109; Petrović, Prica, 2014: 39). Analysing the French Civil Code, Duguit came to the conclusion that the Code included only three normative legal rules (the right of ownership, freedom of contract, and liability for damages); Duguit subsumed all other provisions of the Napoleonic Code into "constructive legal rules", which seem to be close to the concept of systemic legal attitudes presented in this article. It gives rise to an important conclusion: the methods of concretisation and subsumption cannot be applied to the relationship between legal principles and legal norms! The reason may be found in the conflicting nature of elements constituting the substance of the subject-matter of legal regulation, which also affects the structure of legal principles as teleological legal attitudes. Thus, to understand legal principles, the relationship between legal principles and legal norms may be rightly subjected to a teleological interpretation of the ultimate degree, which spiritually stands above interpretation and concretisation inherent in the mutual relationship between legal norms as regulating legal attitudes![18]

Notably, Kant's thought that "antagonism is the means used by nature to further the development of all human talents" (Kant, 1974: 32) reflects the nature of the subject-matter

[18] Traditionally, the interpretation of legal norms is viewed as a means of understanding legal norms. Heidegger introduces an inversion of relations between interpretation and understanding, where understanding as "original comprehension" precedes interpretation as "its self-illumination" (Heidegger, 2007: 184; Bovan, 2013: 83-84). Legal principles are not interpreted but comprehended, bearing in mind that understanding of legal principles exceeds the frameworks of logical conclusion and reasonable interpretation; it is primarily due to the processes of comparing and weighing, which are predominantly used in the assessment of legal principles.

of legal regulation. Consequently, legal principles as teleological legal attitudes should allow for linking, balancing and guiding the conflicting legal goods, legal interests, legal goals, and entities of a legal order in the direction of progress of a legal and political community. Both in life and in legal order, conflict and counter-positions are a chance for advancement and progress. In this regard, Bobbio says: "[...] conflict [...] is a necessary condition of humanity's technical and moral progress. This progress is viewed as something that takes place through conflicts of different opinions and interests, conflicts which open the path to truth in the field of argumentation, conflicts which aspire to ensure the greatest possible social welfare through economic competition, conflicts which through political struggle lead to the selection of the most capable individuals for government.[...] Individual freedom[...] is viewed as the essential condition for developing a 'variety' of individual personalities which is construed as being compatible with conflict, [19] while the conflict itself is viewed as promoting the perfection of all" (Bobbio, 1995: 42).

The term "legal teleology" very rarely appears in legal literature, which comes as no surprise if we look at the rare endeavours to analyse the grounds of legal regulation of legal subject-matter and legal relationships in positive law. Legal scholars are not unfamiliar with the so-called value-based consideration of law; but, without a sufficiently clear legal expression in positive law, such consideration fails to gain the character of a clear and effective legal understanding.[20] In the legal order of a state of law, legal teleology is the totality of teleological legal attitudes, legal goods and legal interests (as a trinity of co-conditioned and opposed entities in a legal order), and legal regulation should be aimed at balancing and correlating them. As legal regulation does not necessarily have to be part of the public order, the relationship between legal principles as teleological legal attitudes and legal norms as regulating legal attitudes entails a clear differentiation between the public and the private interest; in fact, it is the boundary line that delineates freedom and autonomy (on the one side), the public order (on the other side), and the interventionism of public authorities (on the third side).

This certainly means that different legal principles necessarily converge in the process of legal regulation, whereby the opposed legal principles are subjected to mutual balancing and correlation, unlike the hierarchical structure of legal norms in resolving incompatibility

[19] Legal principles *per se* are not sufficient for advancement of a legal and political community. In this regard, virtues (of judges, political officials, public servants, subjects of institutional order of a territorial community) are the basic, dynamic expressions of progress of a legal and political community; it follows that virtues are necessary for establishing the real grounds of legal principles in a legal order. Here, we may quote Ulpian's wonderful thought: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere* (The basic principles of law are: live honourably, cause no harm to another, and give everyone his due).

[20] We should certainly commend the endeavours to observe positive law in a wider context, beyond the legislative framework and general legal norms, as a way of thinking that considers an issue from the standpoint of legal ethics. But, the problem occurs when the justified criticism of positive law yields no solution for the observed problem. In this regard, the aforesaid value-based consideration of positive law is problematic because it is mainly performed outside the boundaries of legal science, generally as a current strand of ethical understanding of a legal phenomenon. In terms of legal doctrine, the major downside of the doctrinal "value-driven orientation of positive law" lies in the fact that "values" assimilate goals and interests in law, and that there is no clear-cut method of entering "values" into positive law. Moreover, viewed in terms of concrete legal objects and legal matters, the doctrine of "value-driven orientation of positive law" does not establish a clear correlation between the subject matter of legal regulation and the method of legal regulation. Namely, the subject matter of legal regulation is composed of legal goods (as static statements) and legal interests (as their dynamic expressions), whereas a regulation method is determined by the rationale of legal regulation (legal ground), the purpose of legal regulation (legal teleology), and the necessary conditions for adjusting the legal regime (envisaged in positive law) to the legal ground and the legal purposes.

of legal norms as regulating legal attitudes.[21] For example, establishing a judicial control of legality of administrative acts (the so-called administrative dispute) is undertaken as a guarantee of exercising the principle of legality and the protection of subjective rights, which at first sight constitutes a departure from the principle of the separation of powers. However, it would not be right to conclude that an administrative dispute constitutes a departure from the principle of the separation of powers, bearing in mind that the essence of the principle of the separation of powers is not in full separation, but in cooperation and balance of the functions of state authorities. In an administrative dispute, the balance is established by court which assesses the legality of an administrative act but not its expediency; consequently, it can be concluded that an administrative dispute aims to connect and balance the principle of legality, the protection of subjective rights and the separation of powers. For example, contesting voidable legal acts can be undertaken within a legally prescribed time limit; after the expiry of the envisaged time limit, the invalid legal act is convalidated in order to safeguard the principles of legal security and protection of acquired rights. Yet, it would be unjustified to conclude that the principles of legal security and protection of acquired rights have a stronger legal force than the principle of legality, given that convalidation of a voidable legal act is actually a way of achieving a balance between legal principles in question.

If basic legal goods, legal interests and basic legal principles are viewed from the pinnacles of a legal order, we may observe the purpose of the principle of justice (fairness) as a "relational category". Namely, the purpose of justice as the most general legal principle is to balance the basic legal goods, basic legal interests and basic teleological legal attitudes. To understand the idea of justice as a "relational category", we refer to Petrović: "The legislator is authorized to harmonise these principles (basic legal principles, M.P.) and to determine which one has priority in a given case. The assessment of priorities calls for establishing solid boundaries. The legislator must never completely disregard any of these principles in favour of one or another. Should this happen, the law would be clearly unjust. [...] Justice is, therefore, the fourth principle among the basic legal principles, and it is the most sublime among them as it governs their mutual relations and dimensions. There is no end to discussions on the concept of justice. It is largely due to inobservance of the specific nature of this principle in relation to other legal principles. Other legal principles always have specific content that distinguishes them from others and constitutes their peculiarity. Justice has no such content; its content is volatile and it is made up of the content of that principle which takes precedence over others in a given situation. It is not a "substantial" but "relational" category, like categories of logics and mathematics. It is a category of social balance and harmony, of "societal beauty", as ancient Greeks would say (Petrović, 1987: 322-323).[22]

[21] In this regard, Canaris says: "Principles are not applicable without exceptions; they may conflict or contradict each other; they do not tend to be exclusive; they develop their legal meaning in mutual correlations, by supplementing and limiting each other; finally, in the process of shaping legal principles, they do not have to be specified by referring to lower principles and individual valuations with independent real content" (Canaris, 1969: 46). For more on the understanding of legal principles in foreign legal literature, see: Spaić, 2017: 109-130.

[22] This understanding of justice is present in judicature and legal literature but under different designations (proportionality, balance of interests, weighing interests, etc.); it is as if there is fear of the radiating effect that might be produced with the term "justice". For, justice is much more than balance and harmonisation; it is an embodiment of spirit and faith in a moral potential of man. It means that justice does not display all its beauty when it is an expression of pure opportunism, stemming from the need to preserve the public order. Justice shows all its beauty and significance when the tidal wave of justness (justice as fairness) rises from moral and spiritual depths, from the sense of justice as the embodiment of the highest moral and divine image in man.

In a legal order, there are objective and subjective legal purposes (goals). Subjective legal purposes are woven into private interests and represent a *causa* of free will. On the other hand, the existence of internal law cannot be conceived without objective legal purposes, whose subject-matter are legal goods and legal interests, and their mutual relationship. When considering all manifestations of law in different areas of a legal order, the objective purposes of legal regulation should be differentiated from teleology of legal regulation, as well as from the *causa* of legal relationship and the *causa* of law-making sources.[23] The presence of legal principles in all aspects of legal regulation is crucial. Legal principles are part of the *causa* of law-making sources, the *causa* of legal relationships, and teleology of a legal order; ultimately, legal principles contribute to establishing a hierarchy and balance in accomplishing the objective and subjective purposes (goals) in a legal order.

The most difficult issue to be addressed in this discussion is the distinction between legal principles and legal standards. As the author's viewpoint on the relationship between legal principles and legal standards is in line with the distinction between teleological legal attitudes (legal principles) and regulating legal attitudes (legal standards), it is first necessary to test the nature of general legal norms as regulating legal attitudes. For, content-wise, unlike legal principles as general teleological legal attitudes, general legal norms as regulating legal attitudes are subject-specific legal attitudes!

A legal norm is designated as "general" because of the nature of a legal object it regulates, not because of the content of legal position by means of which the legal object is regulated. The legal nature of a general legal norm is a consequence of the circumstance that general legal norms as regulating legal attitudes express typical (distinctive) characteristics of a person, event, action and relationship as the object of legal regulation; consequently, in general legal norms, the legal object is abstract while their content is subject-specific. By the nature of things, a general legal norm is (content-wise) a subject-specific regulating legal attitude, which does not call into question its capacity to produce a general legal effect. Therefore, in terms of legal logic, general legal norms are subject-specific legal attitudes arising from legal provisions (constitutional, legislative, regulatory), which apply to an indefinite number of cases and indefinite number of persons.[24] The essence of imperative validity of general legal norms as regulating legal attitudes is the need to protect the core tenets of general welfare in imperative norms by applying the principle of legality (*stricto sensu*), and to preserve a legal order in dispositive norms which, regardless of their secondary application, are a primary guarantee of the public

[23] For example, in order to determine the concept of a contract in a material sense, it is necessary to consider the elements of the legal regime governing contracts, including: law-making sources, subject-matter of contract, legal being, *causa* , and objective purpose. The significance of these elements is not the same in all contracts. In contracts where the principle of legality in a material sense does not apply, the objective purpose is stipulated in negative terms, envisaging that the contract shall not be contrary to the imperative norms, public order and good customs (good faith and fair dealing). In some contracts, the objective purpose is expressed in positive terms (e.g. exercising a specific common interest in the contract dealing with compensation for expropriated real estate, or family protection based on consanguinity in the contract on assignment and distribution of property in one's lifetime). Regardless of the manner of designating the purpose of a contract, legal principles constitute an integral part of any contract: of its objective element, of the *causa* of the contractual relationship, and of the *causa* of law-making sources (Prica, 2016: 249-255).

[24] In Serbian legal literature, general legal acts (as formal sources of law) have the greatest significance for understanding the law due to their general legal effect. In this regard, Marković says: "[...] only general acts may be formal sources of law because law may originate only from them, regardless of the number of cases where they are applied. By being applied to specific cases, individual legal acts cease to exist in a legal sense because their binding nature is exhausted upon their application to the case they refer to"(Marković, 2008: 19-20).

interest as a static expression of general welfare. Hence, content-wise, general legal norms need to be subject-specific regulating legal attitudes; otherwise, the reason of their existence in a legal order would be meaningless. In addition to content-related issue, the concretisation of a general legal norm also refers (to some extent) to the legal object which is regulated by such a norm. Thus, the degree of concretisation determines whether a general legal norm as a regulating legal position will be a complete and precisely defined legal being. In most cases, general legal norms as regulating legal attitudes are not such, but it does not call into question general legal attitudes. It actually means that a general legal norm should be further specified in terms of the legal subject-matter, or that a subject-specific regulating legal attitude of a general legal norm should be further specified by a general legal norm, or when resolving an individual legal case. Therefore, legal norms as regulating legal attitudes exist as general legal norms and as individual legal norms;[25] content-wise, general legal norms as regulating legal attitudes are subject-specific legal attitudes with a general legal effect. Furthermore, according to the degree of concretisation of an object of legal regulation, general legal norms as regulating legal attitudes can be "more general" and "more specific".

In terms of the distinctive legal nature of general legal norms, it is highly important to take into account the nature of the relationship between general legal norms as regulating legal attitudes and legal objects which are regulated by such general legal norms. In other words, general legal norms as subject-specific regulating legal attitudes may (but do not necessarily have to) represent a complete and precisely defined legal being (entity). In some legal objects, general legal norms appear as a complete and precisely defined legal being; thus, subjective rights and legal duties emanate directly from general legal norms; these are general legal situations. On the other hand, there is quite a number of legal objects where general legal norms as a legal attitude of necessity do not represent a complete and precisely defined legal being. It follows from the above that a legal rule as a precisely defined and subject-specific legal attitude ("legal being") related to a legal object may arise from a general legal act but also from an individual legal act, which is the basis for disclosing and shaping legal situations as legal forms expressing complete and precisely defined legal beings in a legal order.

Legal situations are legal forms based on legal rules (in the above sense), which give rise to subjective rights, legal duties, and activities of subjects of a legal order. There are two important features of legal situations, without which the understanding of law and the

[25] Considering the difference between general and individual acts, Petrović says that the concepts of individuality and generality may refer to a number of addressees as well as to the subject matter regulated by a legal act. Thus, "[...] if the act refers to one or more explicitly specified persons, that is to say, if the circle of addressees is closed and determined by the act in an exclusive and definite manner, such an act will always be an individual administrative act, regardless of the manner in which it regulates numerous behaviours of a single person. In effect, the singularity of a person is such a powerful element of individualisation that the entire situation necessarily attains quite individual features. [...] In case of an open circle of addressees, an individual legal act will exist if it regulates a single behaviour, i.e. if its content is fully singular, regardless of the open or closed circle of addressees in the act. For example, if a legal act prohibits a public assembly which is to be held at a specific time and venue, it is an administrative act, regardless of the fact that the circle of addressees is unspecified; the same situation would exist in case of a ban on damaging a specific poster, or in case of an order to all fruit-tree owners to white-wash them on a specific day, etc. On the other hand, an act prohibiting swimming in a river or crossing a bridge would not be an administrative act but a normative measure, although the content of such an act is also specific. But, in this case, the issuance of the act is triggered by specific pre-existing circumstances; the ban on swimming in the river was imposed due to water pollution, while a dilapidated bridge was the reason for the ban on crossing the bridge. This act (normative measure) regulates conduct which can be repeated in an indefinite number of cases, while the subject matter of the former (administrative) act is a single behaviour" (Petrović, 1981: 135-136).

existence of objective rights are not possible. First, given that legal situations are precisely defined (complete) legal beings, the only proper path to be pursued in the systematisation of law is the one based on legal situations, not on legal norms. Second, legal situations only enable setting of the limits of the legislator's power, in terms of the direct effect of the law and particularly in view of the ban on the retroactive effect of the law.

Based on their content, legal situations are classified into general, specific, and individual legal situations. The content of a general legal situation is regulated by a general legal act, precisely defining the subjective rights, with direct legal effects and a general legal effect in a legal order. For instance, all drivers of passenger cars are in a general legal situation, given that their subjective rights and legal duties arise directly from the law, and it is up to the police to check their behaviour in a specific situation by referring to relevant material (substantive) acts.[26] General legal situations are general and permanent; they are fully governed by the general legal act where they are envisaged.

Specific legal situations may be temporary (e.g., by enforcing a tax decision, the specific legal situation ceases to exist) and permanent (e.g., lease as a legal institute). In essence, specific legal situations are constituted by individual legal acts, which means that these situations have an independent legal character, even when they are based on general legal norms as regulating legal attitudes. In that sense, it is important to bear in mind that individual legal situations occur as a result of specific legal situations; it follows that the law-making process in a legal order actually involves cross-referencing of general, specific and legal situations, which ultimately generates legal institutes as a form of a direct systematisation in a legal order. For instance, a decision on the request (application) for Serbian citizenship implies the adoption of a constitutive individual legal act, which is based on a reasonable interpretation of legal norms and an administrative assessment of expediency (as law-making sources). If the competent decision-maker issues a positive legal act (approving the request), it first gives rise to an individual legal situation while, in terms of content, citizenship implies is a myriad of general legal situations, not a single general legal situation. Similarly, basic proprietary powers and basic real-property authorisations represent a general legal situation; but, the right of ownership to the real estate of a John Doe, arising from a purchase agreement, is an individual legal situation, whereby a legal regime of ownership over a specific real estate implies a bundle of general and individual legal situations. For example, *habitatio* (personal servitude) is established on the basis of a purchase agreement, bringing the *habitatio* holder in an individual legal situation; the content of this situation is regulated by the law and it is a general legal situation. In this case, the individual legal situation of the *habitatio* holder has a general legal effect; a legislative act can change the content of the concerned situation, but it cannot abolish a legal situation, which is the proof of its individual character. Besides, the change of the right of ownership over a real estate will not affect the change of the legal situation, but the law allows the titleholder of the right of ownership and the holder of servitude to arrange the termination of servitude; it means that a specific legal situation is in action in the described case. In the presented examples, citizenship and private property are perceived as legal institutes directly present in a legal order (Prica, 2016: 78-82).

[26] The legal situations of the greatest significance in a legal order are general legal situations envisaged in the Constitution (regulating the substance of the guaranteed human rights) and general legal situations envisaged in the Criminal Code (stipulating the absolute legal duties in a legal order).

In legal literature, there are standpoints on provisional acts. Thus, although certain general legal situations arise from the law (legislative act) which determines their reach and scope, they come into play provided that individual legal acts are invoked (Duguit, 1927: 308). The standpoints on provisional acts are unjustifiable because of the failure to recognise legal institutes as distinctive wholes (entities) composed of general, specific and individual legal situations. It is ungrounded to say that a constituent individual legal act represents a condition for entering into a statutory legal situation, bearing in mind that an individual legal act establishes a legal institute as a bundle of individual and general legal situations. In case a general legal situation is applicable to a specific individual case, by issuing a declarative administrative act (e.g., on renouncing or relinquishing the citizenship of the Republic of Serbia), it gives rise to an individual legal situation but the situation in question implies the individualisation of a general legal situation. However, the issuance of a constitutive individual legal act (on the basis of legal norms as regulating legal attitudes) does not result in the individualisation of a general legal situation. An individual legal situation is constituted on the basis of legal norms as regulating legal attitudes; content-wise, such situation may be governed by statutory norms (a general legal situation).

Additionally, the autonomy of individual and specific legal situations is confirmed by the circumstance that, in terms of their establishment and duration. they do not have to be necessarily related to the completion of regular legal proceedings. nor to the existence of a legal act they are established by. For instance, instituting a regular legal proceeding is obligatory in criminal procedure, where a specific legal situation is established by initiating criminal proceedings, while an individual legal situation (e.g., pertaining to a person sentenced to pay a fine) is established upon the completion of a regular legal proceeding, i.e. upon declaring a judgment final and enforceable. By contrast, in administrative procedure, a specific legal situation is established by initiating an administrative proceeding but, as a rule, an individual legal situation is established prior to the completion of a regular legal proceeding, in compliance with the rule that the final decisions have to be declared enforceable, even though an administrative dispute may be instigated against a final decision (as part of the regular procedure). In administrative procedure, an individual legal situation may also appear prior to declaring the finality of an administrative act, in cases where the an act is enforceable even before it is declared final (e.g. a non-suspensive effect of appeal). Thus, in administrative procedure, an individual legal situation may be established in various phases of a regular legal proceeding but, as a rule, prior to the completion of regular legal proceedings. In line with the aforesaid, it is important to conclude that both specific and individual legal situations have a character of separate (autonomous) legal situations; it should limit the direct effect of a legislative act to the regime of specific legal situations so that the established legal situations should be permanently subject to the statutory regime which was applicable at the moment when they were established.[27] The limitation of a direct effect of a legislative act is certainly applicable to individual legal situations, regardless of the legal effect of these situations. Moreover, the possibility of establishing individual legal situations with a general legal effect by means of an individual legal act is actually the best proof of non-viability of the

[27] Considering the possibility of using extraordinary legal remedies (e.g., repetition of an administrative procedure in an objective 5-year time limit), it is important to bear in mind that a specific legal situation does not perish/from the legal order upon the completion of a regular legal proceeding and declaring the finality of an individual legal act. Besides, there are specific legal situations which, given the nature of things, remain at a stand-still for a period of time after the completion of a regular legal proceeding (e.g., de-expropriation of real estate within a 3-year period if no significant work was done on the expropriated estate within the 3-year period).

normativist conception where law is perceived as the creation and application of general legal norms as formal sources of law. For, if individual legal situations of private law (e.g. *habitatio*) can also produce a general legal effect, it means that a legal order resembles a multitude of watercourses originating from different sources and that it entails a constant criss-crossing and intertwining of general, specific and individual legal situations (Prica, 2016: 66-78).

The diversity of law-making sources and directions in a legal order calls for establishing legal standards as regulating legal attitudes. The difference between legal principles and legal standards actually corresponds to the difference between teleological legal attitudes and regulating legal attitudes, bearing in mind that legal standards are the most general regulating legal attitudes in a legal order. On the one hand, legal standards are legal attitudes enabling the regulating legal function to reach all aspects of factual considerations, given that a legal norm as a regulating legal position cannot encompass the world of facts in its totality.[28] On the other hand, a more important reason for the necessary existence of legal standards in a legal order is the need to establish harmony between a free will as a law-making source and the public interest as a regulating determinant and a static expression of general welfare. In some areas of the legal order, there is a strong conflict between legal goods and legal interests; the presence of free will as a law-making source in these areas necessarily determines the presence of legal standards as instruments for achieving the public interest as a regulating determinant and a static expression of general welfare. In view of the above, it is understandable that civil law is an area of the legal order with a substantial number of legal standards, particularly pertaining to property (neighbour) law, family law and inheritance law issues (e.g., observance of local customs, collective and individual prior possession, unworthiness to inherit, the best interest for the child, etc.).

Considering the conceptual framework of legal standards, there is a significant standpoint of German theoretician Jesch, which was originally aimed at establishing the distinction between the binding effect of law and the assessment of expediency; however. it actually reflects the essential function of legal standards in a legal order. It is the viewpoint on the meaning of a concept core (*Begriffskern*) and the penumbra or periphery of its meaning (*Begriffshof*): "The structure of indefinite legal concepts is characterised by the fact that the vestibule of the concept is unusually vast and diffuse, whereas the nucleus of the concept is extremely small. A solid concept core can only be formed by the judiciary, in the course of permanent judicial practice" (Jesch, 1957: 177, 182). Analysing Jesch's viewpoint, Petrović concludes: "[...] the vestibule of a concept is a "diffuse area" that begins "at the edge of the concept nucleus". Outwardly, it is not firmly limited; it is more closely defined by a subsumption or an exception in pertinent places. The vestibules of concepts may also be cross-referenced so that the same state of affairs (circumstance) can be attached to one concept in one situation and to another concept in another situation [...] In the vestibule area, the one who applies the law has the freedom of choice between two or more options. Regardless of whether the standpoint is based on legal or non-legal measures, once chosen position represents a concretisation of a concept; it may also lead to expanding the concept core and narrowing its vestibule." (Petrović, 1981: 40).

[28] By analogy, the *intra legem* in criminal law is the evidence that the factual being cannot be fully encompassed by a legal norm, although its application does not prejudice the principle of strict legality, as the governing principle of criminal law (Đurđić, Trajković: 2011: 1-22).

Considering the above, legal standards are general regulating legal attitudes; by their concretisation (as a form of direct legal regulation of the encompassing legal subject-matter), a general clause is turned into an individual legal attitude. There are legal standards as factual concepts[29] and legal standards as value-based concepts.[30]

Prima facie, there are two distinctive traits of the legal nature of legal principles and legal standards. First, legal standards as regulating legal attitudes directly regulate the legal subject-matter in a legal order; legal principles as teleological legal attitudes primarily do not do that. Second, legal standards have a limited scope of application in a legal order; thus, a branch of one area of the legal order is usually the broadest area of their application.

As already noted, legal principles as teleological legal attitudes are applicable in the legal order as a whole or in one area of legal order. Essentially, there are another two important characteristic features distinguishing legal principles from legal standards. First, in legal standards as regulating legal attitudes, there is the concretisation of a general legal attitude and the qualification of an individual legal subject-matter; as we know, these features are not present in legal principles. This can be best seen when an individual legal attitude is assessed in relation to a legal standard and a legal principle; in terms of a legal principle, instead of examining the compliance of a subject-specific individual attitude with a legal standard, we can only examine the effect of an individual legal attitude upon a teleological legal attitude, but we cannot assess the (non)compliance of an individual legal attitude with a legal principle. Legal principles as teleological legal attitudes also have a significant role in establishing the core meaning (nucleus) of a legal standard as a regulating legal attitude.

Second, in legal standards as regulating legal attitudes, we can observe a correlation and balancing of the constituent elements of the subject-matter of legal regulation (facts, legal goods, and legal interests); such correlation results in the formation of an individual legal attitude. On the other hand, given that the entities of a legal order are connected and balanced by teleological legal attitudes, legal principles are developed as bundles of teleological legal attitudes and legal understandings, it is the result of a systemic and teleological concretisation of the written law, which is a characteristic of legally developed legal orders. The stated characteristic of legal principles may be best illustrated by referring to constitutional principles as the basic legal principles of a legal order, considering that legal principles in the jurisprudence

[29] To illustrate a legal standard as a factual concept, we may refer to the obligation of a car driver to adjust driving speed to the specific "conditions and characteristics of the road", which is a significant circumstance in criminal proceedings in criminal offences against traffic safety. "Speed limit" is a concept prescribed by the law but observing the prescribed speed limit does not necessarily entail observing the legal standards on adjusting the driving speed to the road conditions; on the basis of findings and expert opinions, the court is obliged to assess the driver's behaviour against these standards and the essential elements of the criminal offence.

[30] To illustrate a legal standard as a value-based concept with a clearly defined core, we may refer to the concept of "unworthiness to inherit", envisaged in the Inheritance Act (*Official Gazette of the RS*, no. 46/95). The concept includes a solid core meaning and a narrow periphery (penumbra). Article 4 stipulates the circle of persons who are considered unworthy of succession, either on the basis of statutory law (intestate succession) or on the basis of the last will (testamentary succession); it includes: "1) anyone who intentionally killed or attempted to kill the deceased or testator; 2) anyone who, by use of coercion, threat or fraud, induced the testator to make or revoke a will or some of its provisions, or prevented him from doing so; 3) anyone who destroyed, concealed of forged a will with intention to prevent the testator's last will; 4) anyone who seriously violated his legal obligation to support the deceased/ testator, or deprived him/her of necessary aid." Article 5 of the Inheritance Act envisages the possibility that the deceased/testator may forgive the unworthiness, but the act of forgiveness must be executed in a form which is required for a testamentary document. The "best interest of the child" (as a general clause applicable in family law) may illustrate a legal standard as a value-based concept with indefinite nucleus. *Inter alia*, a legal order also includes legal standards referring to the conduct of the subjects of the legal order (good administration, honesty and mutual trust, acting with due care/diligence, acting as a good host, a good businessman or a good expert, etc.).

of constitutional judiciary are formed as bundles of teleological legal attitudes and legal understandings. Anyway, from the point of view of the constitution in a formal sense and according to the letter of the constitution, constitutionality (as the supreme and most fundamental legal principle) represents a bundle of constitutional principles and constituent systemic legal attitudes which are not only developed but also formed in the jurisprudence of the constitutional judiciary. The legal attitudes of the constitution are of special importance for the principle of constitutionality (as the basic legal principle in a legal order); due to their prominent radiating effect, these legal attitudes are the cornerstone of the constitutionality of the legal order. In that context, we may refer to Article 18 of the Serbian Constitution, which provides for the direct implementation of the guaranteed substance of human and minority rights. as well as to Article 198 of the Constitution, which guarantees judicial control of individual legal acts. Additionally, legal attitudes (which serve as the basis for constitutionality as a legal principle) are also formed in the jurisprudence of the constitutional court. Thus, the Constitutional Court of the Republic of Serbia introduced the so-called interpretative decisions, by means of which the validity of contested legal provisions is recognised, upon the interpretation of their contents (Stojanović, 2016: 37-54).[31] The method of forming a constitutional principle (as a bundle of teleological legal attitudes engendered in the jurisprudence of the constitutional judiciary) clearly illustrates the unity of the legal order as a constitutional principle in Serbian law. In the given example, the starting point of the Constitutional Court of Serbia is Article 4 (para.1) of the Serbian Constitution, which provides that the legal system is unitary. Taking this legal position as a starting point, the Constitutional Court of the Republic of Serbia formed and developed a legal principle of the unity of a legal order as a bundle of teleological legal attitudes. Thus, the basic legal position of the Constitutional Court of the Republic of Serbia reads as follows: "The Constitutional Court points out that, **although the current legal system in the Republic of Serbia does not make a distinction between the so-called organic, basic or other laws which have a stronger legal force than other "ordinary" laws** (emphasis added by M.P.), as a consequence of which the Constitutional Court does not have jurisdiction to assess mutual compatibility of laws (under Article 167 of the Constitution), the constitutional principle of the unity of the legal order dictates that the fundamental principles and legal institutes provided in legislative acts systemically regulating an area of social relations shall also be observed in subject-specific legislative acts, unless a systemic legislative act explicitly prescribes the possibility of regulating these issues in a different manner."[32] On the basis of this legal position, the Constitutional Court formulated the unity of the legal order as a constitutional principle and, within its framework, further developed bundles of teleological legal attitudes and legal understandings (Prica, 2018: 113-123). All in all, the development of legal principles as bundles of teleological legal attitudes and legal understandings, brings to light the distinctive feature of legal principles as constituent laws of a legal order and canons of "the internal legal system".

[31] Jurisprudence of the Constitutional Court of the Republic of Serbia may also be credited for establishing and developing a fair trial as a constitutional principle, based on the guaranteed substance of the right to fair trial envisaged in Article 36 of the Constitution. Thus, for example, the Constitutional Court found that "arbitrary application of substantive law to the detriment of the applicant of a constitutional appeal may lead to the violation of the constitutionally guaranteed right to a fair trial; thus, in the course of the procedure on a constitutional appeal, in specific situations (primarily depending on the facts and the circumstances of a specific case as well as on the constitutional-law reasons stated in the constitutional appeals) there is a legal ground to assess the violation of the right referred to in Article 32 (para.1) of the Constitution) from the standpoint of application of substantive law." Decision of the Constitutional Court, no. Už-3263/2010, dated 25 September 2013.

[32] The Decision of the Constitutional Court Už-231/2009, dated 22 July 2010 (*Official Gazette of the RS*, 89/10).

3. Legal Principles as Constituent Laws of the Legal Order and Canons of "The Internal Legal System": Circular Flow of the Legal Order and the "Internal Legal System

From the perspective of the states of the European-continental legal tradition, the circular flow of a legal order rests on the basic legal principles having a character of constituent laws.[33] These principles are: national sovereignty, parliamentary representative democracy, rule of law, separation of powers, law as an expression of general will, justice (as the balance of interests of the subjects of an legal order), solidarity, citizens' freedom and autonomy of will in a civil society, equality before the law, legal security, and the imperative preservation of the public order.

Legal principles of substantive law should be differentiated from the legal principles of a legal order. For example, the separation of the state law from the church law is a generally accepted legal principle in substantive law of European countries, unlike the separation of the state from the church as a legal principle which has different significance and validity in the orders of these states. Due to the complementary nature of the institutional order of public authorities, the institutional order of state authorities and the institutional order of a territorial community, the difference between the basic legal principles of a legal order and the legal principles governing in specific areas of a legal order necessarily comes to light. In that regard, the strongest evidence is the difference in the application of the principle of legality in specific area of a legal order, including the principle of legality *stricto sens*u, the prohibition of an unlawful effect of legal transactions, and the area of a legal order where the activity of a subject of a legal order is above the law. Moreover, there are legal principles that are only valid in individual areas of a legal order (e.g., *in dubio pro reo* in criminal law, proportionality in administrative law, acting in good faith/conscientiousness and honesty in civil law, etc.). Considering the existence of different institutional orders, internal law cannot be formed as a closed system of teleological and regulating legal attitudes; consequently, the principle of justice is re-illuminated as a "relational category"; it is aimed at adjusting intrastate substantive law to the unpredictability of daily life and the objective spirit of the subjects of a territorial community. It means that the course and boundaries of relations between legal goods and legal interests of constituent subjects of a legal and political community are necessarily determined by the principle of opportunity; it implies that legal regulation and actions of state authorities must not excessively disrupt the balance of interest of constituent subjects of a territorial community, nor excessively interfere with their views on the world; otherwise, it may call into question the preservation of public order and peace and, thus, the public order as a whole. The objective spirit of a territorial community is the central blood vessel ("the carotid artery") of the institutional order of public authorities, the legal order and the intrastate substantive law; for this reason, public order has to exist as a general clause, and intrastate law cannot be established as a fully closed system.

In terms of legal regulation of individual legal subject-matters, the direct legal effect of legal principles is not equal in all areas of a legal order. Thus, legal principles have the most distinctive effect in civil law, due to free will as a law-making source and a pervasive impact of regulating legal attitudes; thus, when examining the validity of legal transactions, the courts have to access their effect on legal principles of civil law (e.g., abuse of rights, equal value of received assets, reciprocity, etc.). Direct effect of legal principles in legal regulation of

[33] In his doctoral dissertation, Petrović elaborated on the constituent laws immanent to the institutional order (Petrović, 1981: 17-20).

individual legal matters is most insubstantial in the areas of a legal order under the rule of imperative legal norms (criminal and administrative law). There is no uniform answer to the question whether, in regulating individual legal matters, it would be correct to recognize the possibility that a legal principle might have a stronger legal force than an imperative legal norm. In that regard, the praetorian jurisprudence (*ius praetorium)* of French judicature advocates for allowing the primacy of a legal principle in relation to an imperative legal norm in resolving individual legal matters.[34] In the Serbian legal order, the answer to this question must be negative because, in legal terms, the principles of a democratic society in the law-making process and the principle of a law as an expression of general will prevail over the authority of courts or other decision-makers to determine (in the name of justice and fairness) the prevalence of a legal principle over an imperative legal norm.[35] Moreover, when addressing the above question, we should bear in mind the principle of the separation of powers, particularly in light of constitutional principles, constitutionality, the authority of the constitutional judiciary and its exclusive function to examine the mutual relations between teleological and regulating legal attitudes. Finally, in terms of addressing the above question, it is essential to take into account the general public as a "judiciary" of an institutional order of a territorial community. On the one hand, in the sphere of the irrational and unforeseeable in a legal order, judicial control of the activities of state administration bodies is narrowed down or reduced to a formal and legal minimum, which does not call into question either the legitimacy of a legal state or the preservation of a legal order. On the other hand, in the sphere of rational and foreseeable in a legal order, the competence of courts is limited by the principle of democracy and the principle of law as an expression of general will in a democratic society; hence, the court competence to directly regulate legal goods and legal interests in a legal order is not legitimate. In both presented situations, the rule of law is determined by the general public as a "judiciary" of the institutional order of a territorial community, whose activity entails: (1) participation in shaping the general will (e.g. passing and amending laws); (2) participation in resolving specific legal

[34] For example, in case of abuse (or exceeding the given authorities), the State Council took the stand that there is the right to appeal even if an appeal is not envisaged by the law (Braibant, 2002: 96).

[35] Yet, it should be borne in mind that the relationship between legal principles and imperative norms is determined by the complexity of a process of interpreting these norms, particularly due to the characteristic of general legal norms as an incomplete legal being. Hasanbegović says: "Legal reasoning is primarily problem-based, and only then system-based (under specific conditions). A specific legal case can be given a syllogistic form only after it has been solved as a legal problem. A legal problem cannot be solved with a syllogism; once resolved, it can be included into the system, whereby neither its syllogistic form nor its inclusion into the system have any logical or social value *per se*. There is no logical value because it cannot be a necessary but only a probable conclusion; there is no social value because the value of a legal order cannot be logically but only historically based" (Hasanbegović, 1988: 232). Given the nature of things, legal principles have the application *secundum legem* and *praeter legem* in relation to imperative legal norms, whereas there is not a single justifiable reason to apply *contra legem* adjudication in relation to an imperative legal norm by calling upon a legal principle. Starting from the "Radbruch formula" on statutory lawlessness and supra-statutory law, Bydlinski points out: "[...] the obligation to abide by the law ceases to exist when laws whose content, whereas grossly inhumane in a democratic legal state, is explicitly unjust or otherwise contrary to the idea of law; it deprives them of their legal character in a substantive sense although they were created in a formally correct procedure" (Bydlinski, 2011: 101). In no way could we agree with the presented standpoint. For, the rejection of substantive law character of a legal norm due to the violation of a legal principle is justified only if the effect of the legal norm calls into question the public order of a legal and political community. The assessment of likelihood of jeopardising the public order in the designated sense is not equally applicable to all legal orders, including the European-continental legal orders. Moreover, if an imperative legal norm is formally correct, its gross unjustness ought to be taken into consideration by the general public as a "judiciary" of an institutional order of a territorial community, including the right to resistance as the strongest power of such "judiciary".

issues (e.g. establishing public interest for expropriation, considering urban-planning projects, etc.); and (3) public surveys, public criticism, protest, and resistance against the activities of the subjects of the institutional order of public authorities (as the most important activity). Therefore, instead of having an artificially shaped publicity as an instrument of governing powers, a strong presence of spontaneously shaped publicity is essential in a legal order.

The internal legal system emerges as a result of direct presence of jurisprudence in the process of creation and concretisation of the written law, as a system of legal attitudes, legal understandings, and the presence of legal concepts in court jurisprudence and in the legal consciousness of the subjects of a legal order. When the creation of legal rules reflects the continuous endeavours of legal professionals and legal scholars aimed at systemic and teleological understanding of law (as a feature of legally developed legal orders), then legal forms may be seen as a higher degree of legal regulation. The creation of legal concepts pertaining to a legal order is a result of the activities of legal scholars (on the one side), the activities of university legal education (on the other side), and the activities of legal professionals in the regulating legal order (on the third side). In that context, it is very important to make a clear distinction between the methods and goals of academic legal disciplines in understanding legal concepts and the methods and goals of understanding legal concepts in legal science (Prica, 2018: 111).

Calling upon the judiciary (judges) to be agents of direct (court) jurisprudence in a legal order is the cornerstone for constructing an internal legal system. In particular, the foundations for such a structure are laid down in places where prominent counter-position is observed between the entities of a legal order; it further ensues that the meaning of legal conceptions adopted in such places exceeds the frameworks of resolving individual legal subject-matters and spreads its radiating effect to legal consciousness of the subjects of a legal order. The knowledge of comparative law enabled Popović to learn the meaning of court jurisprudence: "The doctrine of judicial precedent is usually viewed as a product of the Anglo-Saxon legal system, but the precedent method primarily originates from an elementary sense of justice, which postulates equal treatment for all. If a judge establishes that the case at issue is equivalent to a formerly decided case, the judge naturally feels bound by the former decision" (Popović, 2005: 157-158). Popović concludes: "Yet, it would be incorrect to say that the precedent method finds its application in Anglo-Saxon system only. European-continental law has largely accepted this method; today, the significance of a court judgement is much greater in the countries of the European-continental legal tradition than it could have been assumed at the time of enacting significant legal codes, when the delivery of judgments was considered mostly a mechanical act of applying the law. More recent schools of interpretation of law in France, Germany and in other countries have changed the understanding of the relationship between the law and a court judgment. Nowadays, it is highly different than the one that prevailed at the time of big codifications in continental law. [...] In this regard, France was a very prominent example because entire branches of law are largely the product of case law. Administrative law is mainly based on the State Council decisions, while civil law largely rests on judgments of the Court of Cassation, whose creative jurisprudence adapted the norms of the old code to modern times" (Popović, 2005: 82-83; 2009: 221).

In the designated sense, court jurisprudence necessarily rests on legal principles since the legal ground of individual legal cases is determined by the understanding of teleological legal attitudes. Given that legal principles as bundles of teleological legal attitudes are formed and developed in court judgments, these legal attitudes are (*de rerum natura*)

expected to be enriched with legal conceptions, ranging from the justification of a teleological legal position to legal maxims as an expression of law-creating wisdom. On the other hand, in addition to presenting the rationale for a legal attitude in the disposition of the judgment and the assessment of evidence, the rationale of a court judgement is expected to contain the legal conceptions which served as the basis for understanding the legal nature of the legal issue that was the subject-matter of a particular case. Notwithstanding to what extent the judge is bound by legal norms as regulating legal attitudes, creativity of a judicial ruling leads to shaping an internal legal system based on legal forms.

Given the scope of this discussion, we may briefly refer to some examples of legal forms of an internal legal system. In terms of the legal subject-matter as a legal form, the essence is that a concrete legal subject-matter may also be observed as a typical legal subject-matter. It may directly occur when resolving the issue of qualification of a legal issue under consideration (e.g. whether a legal act in the specific case has characteristics of an administrative act in order to be the subject-matter of administrative court control; whether a legal act is an administrative act or an administrative contract, etc.). By contrast, when speaking about court jurisprudence, such consideration has to take place irrespective of whether the judicial assessment is necessary in the specific case for resolving the issue of qualification of the subject-matter.[36] The structure of subject-specific legal regulation includes a legal subject-matter, a law-making source, the legal being, and the *causa*; legal matters entail the compliance of the legal subject-matter (legal issue in a substantive sense) and the method of its legal regulation (legal issue in a formal sense). In the legal regulation of a legal subject-matter, legal form may change but a tidal wave of formal features reflects its legal character. In effect, court jurisprudence should be used for establishing the legal ground and the nature of the legal subject-matter pertaining to a legal issue in a substantive and formal sense.[37] Additionally, the rationale of a court judgment may also include the features of theoretical jurisprudence, which is the case when court jurisprudence calls upon general conceptions on legal matters and legal situations, disclosing legal institutes as narrower or broader wholes (entities) in legal forms. The disclosure of legal institutes comes as a consequence of the functional analysis of legal grounds, which ultimately contributes to disclosing the correlation of legal grounds between legal regimes in different areas of a legal order. For example, starting from the right of ownership as a legal object, deprivation and restriction of the right of ownership as a legal subject-matter, and on the basis of the principle of balance of legal interest (principle of excessive sacrifice)[38] as an

[36] Yet, it is completely ungrounded to represent the qualification of a legal subject-matter as a pure subsumption of a minor premise under a major premise of a general legal norm. Perelman says: "What is specifically legal in judicial reasoning is by no means a formally correct deduction of a conclusion based on the premises – according to which deduction in law is nothing special – but the reasoning that leads to establishing such premises within the framework of the current legal system" (Perelman, 1983 :95). In his inspirational monograph, while discussing a minor premise, Bovan develops a thesis on the interpretation of law which entails "filling out the necessary part of a legal norm with content, starting from the explanation of case facts and proceeding to their interpretation in a narrower or wider social context", which is an inductive logic operation (Bovan, 2016: 16; 18; 112-113; 127).

[37] Legal matter includes civil, political, legal, administrative and judicial subject-matter (Prica, 2016: 52-66).

[38] In the author's opinion, the principle of sacrifice embodies justice, i.e. a balance between legal goods, legal interests and purposes (goals) of a legal order. A legal order is like the scales, balancing order and peace on one side and chaos on the other side. For this reason, the principle of opportunity constantly surfaces in a legal order and a public order, given the need to ensure the balance of the two sides of the scales, which is actually a precondition for the existence of legitimacy of a legal state. Petrović says: "There are, indeed, two ideas of legal equality. One form of equality (equality *stricto sensu*) is an absolute arithmetic, democratic and egalitarian equality, the Greek *isonomia*, which can be designated both as equal rights and equal laws. Another form of equality is "good equality", the already

identical legal ground, in his doctoral dissertation the author of this paper presented his standpoint on the legal institute of expropriation as an entirety of legal matters and legal situations in different areas of a legal order (Prica, 2016: 83-365). The legal reasoning pursued in the doctoral dissertation presents a systematic and teleological conception of legal matters and their correlation based on legal grounds, which could not have been achieved solely by interpreting their legal grounds.[39]

To conclude, the significance of court jurisprudence is determined by the existence of numerous law-making sources in a legal order and the distinctive feature of a general legal norm (regulating legal attitude) as an incomplete legal being (entity). As a result, legal conceptions emanated from the systemic and teleological understanding of legal principles in the judicature develop as an attainment of direct consideration and deliberation on the correctness and fairness of written law. In that regard, the development and consistency of court jurisprudence, including legal principles as teleological legal attitudes that guide legal awareness in the direction of a moral and spiritual progress of a legal and political community, are a necessary condition for the establishment and development of the rule of law.

4. CONCLUSION

In conclusion, taking into account the flow of thought pursued in this discussion, we should draw attention to a circumstance of key significance for directing legal consciousness in a legal order. It concerns an intellectual activity and an eternal mission of intellectuals, focused on disclosing and opposing the "secret ruler", in the name of freedom, truth, and justice. Bearing in mind all the *aporias* of positive law in a tragic historical situation, Radbruch said: "There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. These principles are generally called natural law or the law of reason. They certainly raise certain dilemmas, but centuries of human endeavour have given them such a solid core, while a far-reaching consensus of opinions brought them together in the declarations of rights of man and citizen, that only a deliberate sceptic can still entertain doubts about some of them" (Radbruch, 1980: 267). An important observation should be added to the noteworthy opinion of this respectable intellectual: the "law of reason" is not effective without the history of law. Anyone who has dared to study law of religion understands very well the meaning of history of law versus the "law of reason", but religious law focuses on the relationship between the historical and the divine as an eternal and immutable law. In this sense, Christian canon law shaped at the councils of the Ecumenical Church expressed the need to adapt the God-man mission of the Church to a historical situation, without questioning the validity of the *dogmata* as an eternal and immutable law. For, that which is given as eternal is also given for time!

---

mentioned Solon's "*eunomia*" (good balance). It entails good and valid allocation and settlement in city states, "a policy of proper balance of equal and unequal". Unlike *isonomia, w*hich is static and abstract, *eunomia* is concrete and dynamic, related to a specific situation. It embodies the primordial social and protective functions of law" (Petrović, 1981: 264). Thus, a fee for expropriation in a formal sense and quasi-expropriation is an example of Solon's *eunomia* (Prica, 2016: 174-178).

[39] Here, we may briefly refer to the form of legal reasoning in English law, which is based on the distinction between *ratio decidendi* and *obiter dictum*. The former implies the reasons constituting the rationale of the decision; the latter entails a legal understanding focused on theoretical consideration of a legal matter, its comparison with other legal matters, and its "systemic comprehensiveness" (Bydlinski, 2011: 133).

On the other hand, if there are eternal and immutable legal principles in life of a legal and political community, these principles must be considered in line with the actual historical situation, for the purpose of guiding legal consciousness in the direction of moral and spiritual progress of such a community. In the legal order of a contemporary pluralistic state of law *(Rechtsstaat)*, a transition of economic and political power from states to multinational corporations is in full swing. The ruling method of the powerful elite holding large financial capital is undoubtedly aimed at destroying the rule of law and democracy, and putting them under complete control. In effect, the art of ruling actually implies that the "empty shell" of a legal state and parliamentary representative democracy modelled through the power of money is used by the financial elite as an ideal "cloak of legitimacy". In light of formally recognised individual rights and freedoms, it is highly important in this ruling method to create an illusion of the existence of citizens, voters and consumers' sovereignty.. Concurrently, having patronage over the state and its democratic political system, the powerful financial elite endeavours to establish an order where the freedoms of an individual are recognised but there is no collective power; it ultimately leads to a complete subordination of workers to their employers, consumers to manufacturers, voters to political parties, and autonomy (privacy) of an individual to state interventionism.

Nowadays, a process of formal observance but substantial obstruction of a legal state seems to be underway in the legal orders of a large number of contemporary European states; this process is reflected in making legal principles meaningless, suppressing virtue and controlling the (general) public by shaping the public opinion in an artificial way. The paradigm of making legal principles and a legal state meaningless could be depicted as follows: human rights without actual freedom, a party-based representative democracy without a democratic society, and the rule based on enacted laws without the rule based on law. Hence, there is a need for the resurrection of legal principles in the legal order of a contemporary legal state, both in formal (legal) sense and in historical and political sense. In that context, in the name of the *Rechtsstaat* doctrine, legal scholars have to consider all the *aporias* underlying the conceptual framework of a legal state in the current historical situation. Otherwise, we are most likely to observe with increasing clarity the insightful depths of Rousseau's standpoint that "laws and the judiciary are only a skill, shielding the powerful and the rich from just reprisals of the poor."

REFERENCES

Alexy, R. (2015). *Teorija pravne argumentacije, teorija racionalnog diskursa kao teorija pravnog utemeljenja*, (A Theory of Legal Argumentation: The Theory of Rational Discourse as a Theory of Legal Justification), Naklada Breza, Zagreb.

Bydlinski, F. (2011). *Pravna metodologija, osnovi nauke o pravnim metodima*, (Legal Methodology and Legal Concept), CID, Podgorica.

Bobbio, N. (1988). *Eseji iz teorije prava* (Essays in the General Theory of Law), Logos, Split.

Bobbio, N. (1995). *Liberalizam i demokratija* (Liberalism and Democracy), Zavod za udžbenike i nastavna sredstva, Beograd.

Bovan, S. (2012). "Tumačenje prava kao vrednovanje na osnovu konteksta –prilog konstruktivnoj teoriji tumačenja" (Interpretation of Law as Context-based Evaluation: Contribution to the Constructive Theory of Interpretation), *Anali Pravnog fakulteta u Beogradu*, no. 1, 83-106.

Bovan, S. (2016). *Pravna hermeneutika između filozofije i logike, sociološki metod u tumačenju i primeni prava* (Legal Hermeneutics between Philosophy and Logic: the Sociological Method in the Interpretation and Application of Law), Pravni fakultet, Univerzitet u Beogradu.

Braibant, G. (2002). *Administrativno pravo Francuske* (French Administrative Law), CID, Podgorica. Službeni list SRJ, Beograd.

Canaris, C. W. (1969). Systemdenken und Systembegriff in der Jurisprudenz, Duncker und Humblot, Berlin.

Dilthey, W.(1924). Beiträge zum Studium der Indiviualität, in: *Die geistige Welt*, Gesammelte Schriften, V, Verlag B. G.Teubner, Leipzig, Berlin

Duguit, L. (1927). *Traité de droit constitutionnel*, I, 3-e éd., E. de Boccard, Paris.

Djurdjić, V.,Trajković, M. (2011). "Da li je dopuštena analogija u krivičnom pravu?" (Is Analogy Allowed in Criminal Law?), *Zbornik radova Pravnog fakulteta u Nišu*, br. 58, 1-22.

Hart, H. (2013). *Pojam prava* (The Concept of Law), Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, Beograd.

Hasanbegović, J. (1988). *Perelmanova pravna logika kao nova retorika* (Perelmans's Legal Logic as New Rhetoric), Istraživačko-izdavački centar SSO Srbije, Beograd.

Hasanbegović, J. (2014). "Normativista bez normi? - Radomir D. Lukić u sistemu filozofije prava" (A Normativist without Norms? - Radomir D. Lukić in the System of Philosophy of Law), *Zbornik radova sa naučnog skupa "Naučno nasleđe Radomira D. Lukića",* održanog 11-12. decembra 2014, SANU, Beograd, 2015, 69-81.

Hegel, G.W.F. (1911). *Grundlinien Philosphie des Rechts:* Naturrecht und Staatswissenschaft im Grundrise, Verlag von Felix. Meiner, Leipzig.

Heidegger, M. (2007). *Bitak i vreme* (Sein und Zeit), Službeni glasnik, Beograd.

Hefe, O. (2008). *Pravda: Filozofski uvod* (Justice: a philosophical introduction), Akademska knjiga, Novi Sad.

Jhering, R. (1998). *Cilj u pravu (The Goal in Law*), CID Podgorica.

Jesch, D. (1957). "Unbestimmter Rechtsbegriff und Ermessen in rechtstheoretischer und verfassungsrechtlicher Sicht*", Archiv des öffentlichen Rechts*, Bd. 82, 163-249.

Jovanović, N. (2008). *Ključne razlike engleskog i srpskog ugovornog prava* (Major Differences between English and Serbian Contract Law), Pravni fakultet u Beograd. Beograd.

Kant, I. (1974). *Um i sloboda (*Reason and Freedom), Časopis „Ideje",.Beograd

Lukić, R. (1995 a). *Metodologija prava (*Methodology of Law*)*, BIGZ, Beograd.

Lukić, R. (1995 b). *Teorija države i prava I. Teorija prava* (Theory of State and Law II. Theory of Law), Zavod za udžbenike i nastavna sredstva, BIGZ, Beograd

Marković, R. (2008). *Ustavno pravo i političke institucije* (Constitutional Law and Political Institutions), Službeni glasnik i Pravni fakultet Univerziteta u Beogradu.

Perelman, Ch. (1983). *Pravo, moral i filozofija* (Droit, morale et philosophie), Nolit, Beograd.

Petrović, M. (1981). *Pravna vezanost i ocena celishodnosti državni vlasti i organa* (The Binding Effect of Law and Assessment of Expediency of State Authorities and Bodies), Savremena administracija, Beograd.

Petrović, M. (1987). "K pitanju sukoba zakona u vremenu" (Towards the Issue of Conflict of Laws in Time), *Otisak iz Zbornika za teoriju prava, III, (Iz teorije prava, knj. 7)*, Srpska akademija nauka i umetnosti, Beograd, 307-324.

Petrović, M. (2013). "K pravnoj prirodi crkvenoga prava. Ujedno zasnivanje trijalističke teorije prava" (Towards the Legal Nature of Church Law, concurrently setting up the Trialistic Theory of Law), *Zbornik radova: 1700 godina Milanskog edikta*, Pravni fakultet Univerziteta u Nišu, Niš, str.167-208.

Petrović, M. (2015). "Prilog učenju o osnovnim pojmovima trijalističke teorije države i prava*" (*A Contribution to the Study of Basic Concepts of Trialist Theory of Law), *Zbornik radova fakulteta u Nišu*, no. 70, 195-227.

Petrović, M. (2015). „Pravni poredak u poimanju Radomira D. Lukića i utemeljenje trijalističko-teleološke teorije prava" (Legal Order as Conceived by Radomir D. Lukić and the Establishment of Trialist and Teleological Theory of Law), *Zbornik radova: Naučno nasleđe Radomira D. Lukića*, SANU, Beograd, 135-157.

Petrović, M. u saradnji sa Prica, M. (2014). *Posebno upravno pravo sa međunarodnim upravnim pravom* (Special Administrative Law with International Administrative Law), Niš.

Petrović, M. u saradnji sa Prica, M. (2015). *Uvod u velike pravne i upravne sisteme sa evropskim upravnim pravom* (Introduction to Large Legal and Administratice Systems, including European Administrative Law), Sven, Niš.

Popović, D. (1984). *Odstupanje od krivice kao osnova vanugovorne odgovornosti za štetu u francuskome i nemačkomu pravu (1838-1943)* (Departure from Culpability as a Basis for Non-contractual Liability for Damage in French and German Laws), doctoral dissertation, Pravni fakultet u Beograda.

Popović, D. (2005). *Uvod u uporedno pravo* (Introduction to Comparative Law), Fakultet za poslovno pravo, Beograd.

Popović, D. (2009). "Pilot presude Evropskog suda za ljudska prava*"* (Pilot Judgments of the European Court of Human Rights), *Bilten Vrhovnog suda Srbije*, no. 1, 220-237.

Prica, M. (2014). "O pojmu i pravnom karakteru održivog razvoja: da li postoji ekološko pravo" (On the Concept and Legal Nature of Sustainable Development: Does "environmental law" exist?), *Zbornik radova Pravnog fakulteta u Nišu*, no. 67, 291-318.

Prica, M. (2016). Eksproprijacija kao pravni institut, doktorska disertacija (Expropriation as a Legal Institute)", Pravni fakultet Univerziteta u Nišu.
Prica, M. (2018). "Jedinstvo pravnog poretka kao ustavno načelo i zakonsko uređivanje oblasti pravnog poretka" (The Unity of Legal Order as a Constitutional Principle and Statutory Regulation of the Legal Order), *Zbornik radova Pravnog fakulteta u Nišu,* no. 78, 103-126.
Prica, M. (2018). Pravni principi u poretku pravne države: kanoni pravnog poretka i "unutrašnjeg pravnog sistema" (Legal Principles in the Order of a Legal State: Canons of the legal order and the "iinternal legal system), *Zbornik radova Pravnog fakulteta u Nišu,* no. 80, 135-180.
Radbruh, R. (1980). *Filozovija prava* (Philosophy of Law), Nolit, Beograd.
Savigny, F.C. (1998). *Zakonodavstvo i pravna nauka* (Legislation and Legal Science), CID, Podgorica.
Sič, M. (2015) "Tumačenje prava u skladu sa pravičnošću u rimskom pravu" (Interpretation of Law in line with the Principle of Fairness in Roman Law), *Zbornik radova Pravnog fakulteta u Novom Sadu*, no. 2, 617-633.
Spaić, B. (2017). "Dva poimanja pravnih principa" (Two Conceptions on Legal Principles), *Anali Pravnog fakulteta u Beogradu*, no. 1, 109-130.
Stojanović, D. (2016). "Ustavni sud u svetlu interpretativnih odluka u normativnoj kontroli" (The Constitutional Court in light of Interpretative Decisions in Normative Control Proceedings), *Zbornik radova Pravnog fakulteta u Nišu*, no. 72, 37-54.
Schmidt, K. (2001). *Legalnost i legitimnost, Karl Šmit i njegovi kritičari* (Legality and Legitimacy, Karl Schmidt and his Critics), Filip Višnjić, Beograd.
Schmidt, K. (2003). *Tri vrste pravnonaučnog mišljenja* (Three Types of Thinking in Legal Science), Dosije, Beograd.
Vodinelić, V. (2014). *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava* (Civil Law, Introduction to Civil Law and General Part of Civil Law), 2.izdanje, Pravni fakultet Univerziteta Union/,, Beograd
Živanović, T. (1997). *Sistem sintetičke pravne filozofije, sintetička filozofija prava I (*A System of Synthetic Legal Philosophy, Synthetic Philosophy of Law), *Službeni list* SRJ, Beograd.

Legal acts

Ustav Republike Srbije (The Constitution of the Republic of Serbia**),** *Službeni glasnik RS*, br. 98/2006
Zakon o obligacionim odnosima (Obligation Relations Act), *Službeni list SFRJ*, br. 29/78, I 39/85, 45/89, "*Službeni list SRJ*" br. 31/93)
Zakon o opštem upravnom postupku (General Administrative Procedure Act), *Službeni glasnik RS,* br. 18/2016).
Zakon o policiji (Police Act), *Službeni glasnik RS,* br. 6/2016 i 18/2018):
Zakon o spoljnim poslovima (Foreign Affairs Act), *Službeni glasnik RS, b*r. 116/2007

Case law

Odluka Ustavnog suda Republike Srbije (Decision of the Constitutional Court of the Republic of Serbia), Už-3263/2010, dated 25. September 2013.
Odluka Ustavnog suda Republike Srbije (Decision of the Constitutional Court of the Republic of Serbia), Už-231/2009, dated 22 July 2010; *Službeni glasnik RS,* br. 89/10

PRAVNI PRINCIPI KAO TELEOLOŠKI PRAVNI STAVOVI U PORETKU PRAVNE DRŽAVE

U članku se izlaže razlika između pravnih normi i pravnih principa. Naše gledište zasnovano je na razlikovanju regulativnih, sistemskih i teleoloških pravnih stavova u poretku pravne države. Pod pravnim principima podrazumevamo gradivne zakone pravnog poretka i oblasti pravnoga poretka. Pri tome, za razliku od pravnih normi kao konkretizovanih regulativnih pravnih stavova i pravnih standarda kao najopštijih regulativnih pravnih stavova, pravni principi su zračeći teleološki pravni stavovi. Uz to, kao rezultat sistemsko-teleološke konkretizacije pisanog prava, pravni principi kao osnovni teleološki pravni stavovi bivaju obrazovani kao snopovi teleoloških pravnih stavova i pravnih shvatanja. Pravni principi u poretku pravne države slede kružnu liniju funkcionisanja pravnog poretka, opredeljenu komplentarnošću institucionalnog poretka javne vlasti, institucionalnog

poretka državne vlasti i institucionalnog poretka prostorne zajednice, sledstveno čemu nužno na videlo izlazi razlika između osnovnih pravnih principa pravnoga poretka i pravnih principa vladajućih u oblastima pravnoga poretka. U članku se analizuju vidovi sistemsko-teleološkog poimanja pravnih principa, osobito u odnosu na svojstvo pravnih principa kao izvora prava. Povrh toga, pravni principi su sagledani i kao kanoni neposredno zastupljene jurisprudencije u pravnom poretku, pod okriljem "unutrašnjeg pravnog sistema" zasnovanog na pravnim oblicima.

Ključne reči: *pravni principi, pravni osnov, razlog pravnog uređivanja, cilj pravnog uređivanja, pravni standardi, pravne norme, pravne situacije, "unutrašnji pravni sistem"*

Proofreading/Copy-editing: Gordana Ignjatović

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, Nº 1, 2021, pp. 55-69
https://doi.org/10.22190/FULP2101055T

Original Scientific Paper

‘CONVERTING’ DIFC JUDGMENTS INTO ARBITRAL AWARDS: PRACTICE DIRECTION No. 2 OF 2015 AND ITS CONTROVERSIES

UDC 347.918
339.52

Miljana Todorović

Department of Interdisciplinary Study of Law, Private Law and Business Law, University of Ghent, Belgium

Abstract. *This paper examines the DIFC Practice Direction No.2 of 2015, which provides a possibility of judgment conversion into an arbitral award. In certain cases, this mechanism allows a judgment to become the basis of an arbitral award if parties agree to refer a 'judgment payment dispute' to arbitration. As a result, it would be possible to enforce an award rendered in this procedure under the New York Convention. In the beginning, a short overview is given of the organisation of the DIFC Courts and the Arbitration Center, their main features, and the enforcement of the DIFC judgments and arbitral awards abroad. Following is a detailed interpretation of Practice Direction No.2, the suggested arbitration clause and the referral criteria, their evolution, and the drafter's intention hidden in its wording. The last part deals with controversies in the use and the effect of Practice Direction No. 2, especially the negative effect of the elimination of the review of a judgment, the possibility of the arbitral tribunal to rehear the dispute, and the risk of double recovery. Notwithstanding the feasibility of the application of the New York Convention to enforce an arbitral award resulting from the use of the arbitral clause recommended in Practice Direction No. 2, the use of this mechanism would have an eliminating effect on the review of due process and public policy, which would normally be performed in a court exequatur.*

Key words: *Dubai International Financial Center (DIFC), arbitration, judgment, arbitral award, enforcement*

Received June 20th, 2021 / Accepted July 14th, 2021
Corresponding author: Miljana Todorović, LL.D., a post-doc Scientific Researcher, Department of Interdisciplinary Study of Law, Private Law and Business Law, the University of Ghent, Belgium

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

1. INTRODUCTION

Arbitration and litigation, as the two main facilities for dispute resolution, have been developing in parallel but not without mutual influence. The disadvantages of litigation sparked the growth of arbitration and steered its development. Procedural flexibility, party autonomy, choice of arbitrators with needed expertise, confidentiality, and finality - these are some of the main advantages that arbitration can offer to the parties to a dispute in comparison with court litigation. On the other hand, despite its qualities, arbitration may not always be a possible or preferable way of dispute resolution. That can be due to a nonarbitrable subject matter, a multi-party dispute involving parties who have not contested to arbitration, or high costs of arbitration.

However, in this competitive game, arbitration holds one tool that gives it an undisputable comparative advantage: the 'precious Ring' of arbitration - enforceability under the New York Convention.[1] While the New York Convention offers enforceability for an arbitral award in 163 contracting states, for court judgments there is no comparable multilateral instrument. The Hague Convention[2] is an important step in that direction, but still with a disappointing popularity.

Winning is not enough – this simple dictum hides the main reason for the growth of popularity of arbitration over litigation in resolving international commercial disputes. However, is it possible to take the best from both worlds? To use the mechanism that would in certain cases allow court judgments to by-pass available enforcement tools for court judgments and to use the successful widespread system of the New York Convention?

This paper aims to give answers to these questions in scrutinising an 'experiment without parallel in arbitration history' (Hwang, 2014: para. 5) made by the Dubai International Financial Center (DIFC) in 2015. The DIFC created Practice Direction No.2 of 2015 (hereinafter: Practice Direction 2) that allows a judgment to become the basis of an arbitral award if the parties in the DIFC Court litigation agree to refer a 'judgment payment dispute' to arbitration under the DIFC-LCIA arbitration rules. In other words, it is the mechanism that allows 'conversion' of judgments into arbitral awards.

Before proceeding to the mechanism prescribed by Practice Direction 2, let us have a look at the short overview of the basic DIFC judicial framework.

2. THE DIFC COURTS AND THE ARBITRATION CENTRE

The Dubai International Financial Centre (DIFC) aspires to be among the top ten global financial centres and the leading financial hub for the Middle East, Africa and South Asia.[3] Its creation began with the Constitutional change in the United Arab Emirates (UAE) and a set of regulatory enactments[4], followed by the establishment of the financial free zone in

[1] UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (hereinafter: The New York Convention, 1958).

[2] HCCH Convention on Choice of Court Agreements of 30 June 2005.

[3] In 2019, the DIFC rose up the ranks to 8th position of the Global Financial Centers Index (Emirates News Agency, 14.10.2019, DIFC celebrates top ten global ranking; https://wam.ae/en/details/1395302794629). Since then, the position has worsened (Long Finance.net: GFCI 29 Rank, https://www.longfinance.net/programmes/financial-centre-futures/global-financial-centres-index/gfci-29-explore-data/gfci-29-rank/): accessed 15/06/2021.

[4] For more, see: Carballo, 2007, and DIFC Selected documents 2007-2008.

Dubai, with the UAE Federal Decree No.35 of 2004.[5] The DIFC is an independent jurisdiction within the UAE, with its own regulatory and legal framework.[6]

The DIFC Courts can be characterized as international courts. Their jurisdiction was originally limited to civil or commercial claims which involved *nexus* with the DIFC territory. With the changes of 2011[7], the opt-in jurisdiction is allowed for parties around the globe if the written jurisdiction agreement in that sense is provided (Alustath, 2016: 187-188). The former Chief Justice, Michael Hwang, has famously said that the DIFC is 'a common law island in a civil law ocean' (Hwang, 2015: 201). This mesmerizing statement has a grounded legal background.[8]

Arbitration is regulated by DIFC Law No.1 of 2008 which governs the arbitration proceedings and the enforcement of awards within the DIFC.[9] New Arbitration rules were adopted in 2016,[10] and the newest version entered into force on 1 January 2021.[11] In establishing itself as a hub for international commercial arbitration, the UAE made an important step by arranging a joint venture between the DIFC and the London Court of International Arbitration (LCIA). The DIFC-LCIA Rules are mirroring the LCIA Rules, based on the UNCITRAL Model Law.[12] All the administrative decisions under the DIFC-LCIA Rules, such as the challenge of arbitrators, are taken by the LCIA Court in London.

Looking at the organisation and law of the DIFC-LCIA Centre, it is understandable why it presents itself as a combination of the international best practices and reputation of the LCIA, with a unique understanding of the local and regional legal and business cultures in the Gulf and wider MENA region. The independence of the DIFC from the UAE legal system, the autonomy to build its own legal system, and the choice to do that in a manner of a peculiar transplantation of English common law proved to be a fortunate formula.

Although the DIFC Courts promised to investigate the possibility of the UAE to sign the Hague Convention on Choice of Courts Agreements[13] in order to further increase the enforceability of its judgments, it has not happened yet. Consequently, they cannot benefit from it. Instead, the territory where the judgment has to be enforced importantly determines which rules are to be applied (in Dubai but outside of the DIFC, in the UAE, or outside of the UAE).

In the course of creating a more arbitration-friendly environment, the United Arab Emirates has signed the New York Convention.[14] For the purposes of international enforcement under

---

[5] Federal Decree No.35 of 2004.
[6] See: the Law of Dubai International Centre, No.9 of 2004.
[7] See: Article 5, Law No.16 of 2011.
[8] The DIFC Courts system operates as common law bench trials. The practices and procedures of the DIFC Courts are largely based on the English Civil Procedure Rules, particularly the Rules of the English Commercial Court, which are generally accepted as being the most effective set of rules to apply in resolving complex commercial cases (Hwang, 2015: 202). Moreover, a number of DIFC laws have been based to some extent on UK statutes. Other DIFC laws codify general principles of common law, like the body of tort law that is part of the DIFC's Law of Obligations. Additionally, there is a certain American legal influence. For example, certain provisions in the DIFC's Implied Terms in Contracts and Unfair Terms Law are either identical or very similar to the corresponding text in the UK's Unfair Contract Terms Act. An example of American influence is the proposed DIFC Electronic Transactions Law which is based upon the Uniform Electronic Transactions Act of 1999, which was developed in the United States (Horigan, 2017)
[9] Arbitration law No. 1 of 2008.
[10] Arbitration Rules of 2016.
[11] Arbitration Rules of 2021.
[12] Different than in the LCIA Arbitration Rules, the default seat of arbitration is the DIFC and not London.
[13] DIFC Courts Strategic Plan 2016-2021, point 9.
[14] UAE signed the New York Convention on 26 August 2006, http://www.newyorkconvention.org/countries (15/06/2021). The Convention was adopted into UAE law by Federal Decree No. 43 of 2006. However, there

the New York Convention, an award issued from a DIFC-seated arbitration will be treated as an award made in a contracting state (the DIFC Courts being Courts of the UAE).[15]

3. PRACTICE DIRECTION NO. 2 OF 2015

The lack of an enforcement mechanism for judgments that would correspond to the efficiency of the New York Convention for arbitral awards motivated the DIFC to invent a novel, unique enforcement mechanism. Instead of enhancing the enforceability of judgments with the existing tools of bilateral or multilateral conventions, they have tried to merge two worlds by making a tool for enforcement of arbitral awards accessible for judgments.

The new mechanism is based on the idea that parties who fall under the jurisdiction of the DIFC Courts or choose for it, may include in their contract an agreement that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts shall be referred to and be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre. This type of "mutually beneficial interaction between the courts and arbitral institutions" (Hwang, 2015: 193) would allow successful parties to convert court judgments into arbitral awards, consequently allowing them to enforce their court judgments through arbitration.

The first Practice Direction draft was made available prior to its official launching in February 2015. Its content, including the suggested arbitration clause and the referral criteria, provoked many discussions (Hwang, 2015: 203). The results of a public opinion test were taken seriously and appropriate changes have been made, with the aim to clarify the manner in which it should be applied by the parties. As a result, Practice Direction No.2 was brought to light[16], followed by the Amended Practice Direction No.2 several months later, in May 2015 (hereinafter: Practice Direction 2).[17]

> "If parties who have submitted (or have agreed to submit) to (or are bound by) the jurisdiction of the DIFC Courts wish further to agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor (shall be referred, in the February 16 version[18]) (as defined below), be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, they may to that end adopt an arbitration clause in the terms of the recommended arbitration agreement set out below by reference to the Referral Criteria as defined." (Amended DIFC Court Practice Direction 2, 2015).

The small changes in the text made it clear that the existence of an agreement to refer a dispute is not an obligation for the parties, but only a recommendation, a given possibility that they might use. Practice Direction 2 thus does not affect the validity of the opt-in jurisdiction of the DIFC Courts even in the absence of adoption of the recommended

were numerous problems with the application of the New York Convention in the UAE after the ratification. These problems were sufficient for the creation of a certain negative reputation of "judicial hostility" still present in reports on the arbitration in the UAE. (Birt, Omran, 2019: 3)

[15] DIFC/LCIA Arbitration Center: What are the other advantages of the DIFC-LCIA? http://www.difc-lcia.org/other-advantages-of-the-difc-lcia.aspx (15/06/2021)

[16] Practice Direction No.2 of February 2015.

[17] Amended Practice Direction No.2 of May 2015.

[18] Cursive added by the author.

arbitration agreement. It is possible to have opt-in jurisdiction for the primary dispute to be referred to the DIFC Courts without the add-on submission to arbitration for post-judgment disputes (Hwang, 2014: 7).

Although Practice Direction 2 mentions only DIFC-LCIA Arbitration, it was clarified that following a money judgment of the DIFC Courts, the judgment creditor would be able to refer the enforcement dispute to arbitration at the DIFC-LCIA Arbitration Centre, or indeed any other arbitration centre (Hwang, 2015: 205). The Procedural Order 2 is not confined within the borders of the Dubai International Financial Centre, but stays open for the parties' autonomy and the freedom to choose the jurisdiction of another arbitration centre. The non-compulsory character of Practice Direction 2 further allows parties to choose a different set of arbitration rules.

3.1. The Recommended Arbitration Clause

Practice Direction 2 contains a recommended arbitration clause for parties who wish to refer a 'judgment payment dispute' to arbitration. The originally drafted arbitration clause differs significantly in several aspects. Most importantly, a broadly defined 'enforcement dispute', a dispute that can be referred to arbitration, has been changed into a 'judgment payment dispute'.

A comparative review of the original and the latest version of the recommended clause is provided in Table 1 below, including the changes in bold.

Table 1 Comparative review of the original and the latest version of the arbitration clause

Arbitration clause draft	**Recommended arbitration clause in the Amended Practice Direction No.2, May 27 2015**
Any dispute arising out of or in connection with the **enforcement of any judgment** given by the Dubai International Financial Centre, **including any dispute as to the validity or enforceability of the said judgment**, and satisfying all of the Referral Criteria... shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The **number of arbitrators shall be (one/three).** The seat, or legal place of the arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.	Any **Judgment Payment Dispute** (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration by the judgment creditor[19], and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. There shall be a **single arbitrator** to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.

Source: Hwang, 2015: 204: Amended DIFC Court Practice Direction 2, 2015

There are no strict requirements regarding the time when the parties have to reach an agreement to refer a judgment payment dispute to arbitration. They can enter into an agreement together with the selection of the forum, before the release of the judgment or

[19] This is added in the Amended version of May 2015. The previous one, of February 2015, does not contain the formulation 'by the judgment creditor'.

after the judgment is rendered, and the dispute has occurred. Thus, even after the judgment on merits has been issued, the parties have an option to subsequently agree in writing to resolve the judgment payment dispute and to use the new mechanism. However, it is not very likely that the parties will reach an agreement once a judgment payment dispute has occurred because the judgment debtor would not have any interest to accept such an agreement.

3.1.1. The effects of the recommended arbitration clause

The Amended version, unlike the one of February 2015, contains an explanation of the effect of such an arbitration clause. In order to avoid any doubt, it is clarified that the existence of the arbitration clause does not affect the regular enforcement possibilities. Here, we do not have "a fork in the road" situation for a judgment creditor. The judgment creditor may ask the enforcement of the judgment and, in having done so, he is not waiving the right to use the pre-existing written agreement on the referral on payment judgment dispute to arbitration. The arbitration clause, as prescribed in the Procedural Directive 2, does not represent a limitation to the judgment creditor in any sense. It is an additional but not an alternative option.

The single arbitrator will be appointed by the LCIA Court, not by the DIFC Court, although Dubai is the seat or the legal place of the arbitration. That conforms with the LCIA-DIFC Arbitration Rules, under which the LCIA Court is marked as the competent Court for all the administrative decisions. The *LCIA-DIFC Arbitration Rules are deemed to be incorporated by reference into this clause*. That is a recommended clause, but not the only possible one. Parties are free to choose another seat and/or another set of rules (Hwang, 2015: 205). However, this autonomy is not without consequences. A differently seated tribunal could have different rules of arbitrability which can lead to the rejection of an arbitral clause prescribed in Procedural Direction 2.

3.1.2. The governing law of the arbitration agreement

The recommended clause includes a part concerning the governing law. The agreement to refer a 'judgment payment dispute' to arbitration is governed by the laws of the Dubai International Financial Centre. That applies to (but is not limited to) its existence, validity, interpretation, performance, discharge, and applicable remedies. This is, however, only a recommended option. As for the arbitration rules, parties can agree to choose a law other than the law of the DIFC. That option is not explicitly provided as an alternative one in the amended version, as it was in the draft, but nevertheless exists.

It would be against the nature of arbitration to restrain parties' autonomy. Parties' freedom to agree on another governing law could, however, jeopardise the validity of the arbitral agreement, given somewhat dissonant interpretations on the legal nature of a 'dispute' in a 'judgment payment dispute'.[20] In line with the *Kompetenz-Kompetenz* doctrine, the seized tribunal would, if an arbitration clause is challenged, rule itself on its validity. In the absence of designation in the clause itself, it would be necessary to identify the law that should govern the question of separability. Depending on the outcome of that determination, the governing law for the validity of the clause might be a law whose provision would endanger the clause itself. Therefore, the recommended clause from the amended Practice Direction 2, with the designation of the DIFC laws, is surely the safest option.

[20] That because one of the necessary requirements for arbitration agreements to fall within the scope of the New York Convention is the existence of a dispute between the parties that the court should verify. (ICC's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, 2011: 65)

At the end of the amended Practice Direction 2, for the purpose of clarification, it is further specified that: "Nothing in this Practice Direction shall be taken to rescind, vary, curtail or suspend the effect or operation of any judgment of the DIFC Courts save as expressly provided in the Rules of the DIFC Courts as they may be amended from time to time."

3.2. Referral Criteria in the model clause

Practice Direction No.2 also stipulates which criteria have to be fulfilled in order to refer a 'judgment payment dispute' to arbitration. They are called Referral Criteria. First, the judgment must take effect following Rule 36.30,[21] which states that "a judgment or order takes immediate effect from the time on the day when it is given or made, or such later time or date as the Court may specify". Next, the judgment should not be in respect of an employment contract or consumer contract which is subject to Article 12(2) of the Arbitration Law 2008. That article precludes arbitration in respect of such contracts. Further, it is necessary that the judgment is not subject to any appeal, and that the time permitted for a party to the judgment to apply for permission to appeal has expired.

It is also specified that Practice Direction 2 can apply only if there is a judgment payment dispute, meaning any dispute, difference, controversy, or claim between a judgment creditor and judgment debtor with respect to any money (including interest and costs) due under an unsatisfied judgment. That includes two possibilities. 1) a failure to pay on demand any sum of money remaining due under a judgment on or after the date on which that sum becomes due under Rule 36.34; and/or 2) the inability or unwillingness of the judgment debtor to pay the outstanding portion of the judgment sum within the time demanded. Nevertheless, any dispute about the formal validity or substantive merits of the judgment is excluded from the definition of a judgment payment dispute.

Finally, there has to be an agreement in writing between the judgment creditor and judgment debtor that any Judgment Payment Dispute between them shall be referred to arbitration under this Practice Direction.

3.3. The presumed effect of Procedural Direction No. 2

The immediate result of the use of the referral of a judgment payment dispute to arbitration would be the acquiring of an arbitral award. In other words, it would lead to the 'conversion' of the judgment into an arbitral award. The obvious envisaged benefit from it would be the enhanced enforceability of the award under the New York Convention. As a secondary objective, it is pointed out in literature that the Practice Direction can encourage settlement of payment disputes prior to the escalation to arbitration in view of the deterrent effect of the enhanced global enforceability of a DIFC judgment converted award (Blanke, 2015).

Nevertheless, although the term 'conversion' of a judgment into an arbitral award gained wide acceptance, it is a misnomer. This process enables a judgment creditor to have an additional option for securing the payment of his judgment while the judgment remains intact and fully enforceable, without regard to the progress of the arbitration. That is why the term 'convert' represents a metaphor (Hwang, 2014: 3). In realising the enforcement of his judgment he may decide not to commence the arbitration, or, if there are no available assets of the judgment debtor within the DIFC and in the Gulf countries, to use the possibility from

[21] The Rules of the Dubai International Financial Centre Courts of 2014.

the arbitration clause (Hwang, 2015: 208).[22] The judgment debtor, on the other hand, cannot use the clause to dismiss eventual enforcement proceedings in front of the national court.

The obvious advantage of the mechanism is that a judgment creditor could bypass the limitations and uncertainties that apply to the enforcement of a DIFC Court judgment outside of the UAE by relying upon the enforcement under the New York Convention. This is perceived as a step further in strengthening the DIFC enforcement regime. As stated in the DIFC Annual Review, this 'first-of-its-kind' Practice Direction could, in cases of commercial disputes, result in the judgment creditor obtaining an arbitral award that could be enforced in over 150 countries (DIFC Annual Review 2015).

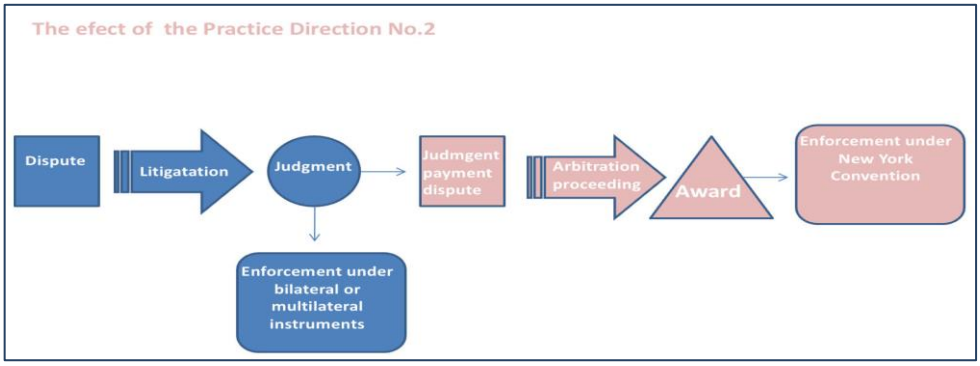

Fig. 1 The presumed effect of Practice Direction No. 2
Source: Figure created by the author (2020)

4. Overcoming the Hurdles for Enforcing Awards under the New York Convention

Practice Direction 2 has prompted a great deal of discussion among scholars and legal professionals. Several issues emerged as problematic. The most important among them was the suspicion regarding the feasibility of the very purpose of a 'judgment payment dispute' referral to the arbitration, namely, of the enforceability of the succeeding DIFC-LCIA award under the New York Convention. Article V of the New York Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked.[23] In this regard, a few possible obstacles can emerge to the enforcement of the DIFC-LCIA award made under Practice Direction No.2. First, there is a question if the DIFC-LCIA arbitral award can be considered as an award for the purposes of the New York Convention? Further, is the abrogation of the 'double exequatur' in the Convention not detrimental for enforcement of a DIFC-LCIA award? Finally, is a 'judgment payment dispute' arbitrable as understood under Art V (II)(a)? These questions will be examined in a separate paper.

[22] Thus, judgment creditor will opt to litigate if the judgment debtor has assets in Dubai, a common law country, a GCC country and/or another country with which the UAE has a treaty providing for mutual recognition and enforcement of judgments. If not, the judgment creditor would commence arbitration.
[23] Notably, the reasons laid out in Article V are exhaustive and have to be narrowly interpreted (Wheeless, 1993: 808). It was confirmed in an often cited case *Parsons & Whittemore v. Societe Generale De L'industrie Du Papier*.

5. Controversies in the Use and the Effect Of Practice Direction No. 2

The use of Practice Direction 2 could have several controversial outcomes that require separate analyses. Some of the possible outcomes are: the possibility of the arbitral tribunal to rehear the dispute, the rights of third parties, the risk of double recovery, and the most important, the undesirable effect of elimination of the review of a judgment.

5.1. Possibility of the arbitral tribunal to rehear the dispute

In the creation of Procedural Direction 2, two possible solutions could have been taken regarding the possibility of the arbitral tribunal to rehear the dispute that preceded the judgment: to allow the tribunal to verify the grounds of the judgment giving rise to the 'judgment payment dispute', or to take the stand that the tribunal cannot enter into the merits of the original dispute.

The critique addressed to the first possibility was focused on the utility of the eventual power of the tribunal to conduct a hearing relating to the judgment debtor's financial circumstances. That would ask for additional costs and time, making the recommended clause a less attractive solution. Next, the hypothetical possibility to rehear a dispute would compromise the finality of the judgment if the tribunal issues an award that is inconsistent with the underlying national court judgment (Tan, 2018: 430-431). In line with the aforesaid, it was undoubtedly stated by former Chief Justice M. Hwang that it is not an intention to give the arbitral tribunal power to rehear the dispute or entertain challenges to the DIFC Courts' judgment on any ground that could have been raised in an appeal. The tribunal has to apply the doctrine of *res judicata* or issue estoppel (Hwang, 2015: 208).

Therefore, the arbitral tribunal has a very limited power regarding the judgment upon which a judgment payment dispute is based. Possible options are to refuse the judgment payment dispute in the absence of a judgment, or in the case that the identity of the parties is not the same as the ones from the judgment (Demeter, Smith, 2016: 460-461). This type of limited options motivated many to call the arbitral procedure under Practice Direction 2 a 'rubber-stamping exercise' (Hwang, 2015: 205).[24]

Nevertheless, there is a possibility that the parties reach an agreement on their dispute after the arbitration has commenced. In the event of any final settlement of the parties' dispute, the DIFC-LCIA Arbitration Rules allow the Arbitral Tribunal to decide to make an award recording the settlement if the parties jointly request so in writing (Art. 26.9).[25] The judgment creditor and the judgment debtor could agree upon the manner of paying the judgment sum. For instance, they could agree upon an installment payment plan. This type of agreement would not be in breach of the principle *res judicata;* therefore, it would be theoretically possible.[26] Nevertheless, if the judgment debtor does not do the payment installments accordingly, the judgment creditor could still benefit from the enforcement of this 'consent award' under the New York Convention.

[24] Of course, a 'judgment payment dispute based on a judgment sum which could not be disputed raises a discussion about whether the award 'resolving' such a dispute qualifies for enforcement under the New York Convention.
[25] Article 26.9, Arbitration Rules, DIFC-LCIA, 2021.
[26] Judgment creditor could find this settlement more desirable if the judgment debtor is, for example, a regular business partner, if installment payments are more attainable, or if the value of the debtor's assets is not sufficient to cover the total sum rendered in the judgment.

5.2. Rights of third parties

In public discussion provoked by the Practice Direction draft, one of the raised questions has been whether third-party challenges should be provided in it. In general, the prevailing view in jurisprudence is that third parties bear no relevance to arbitration, which naturally leaves their interests unprotected (Brekoulakis, 2009: 1171). The main reason for that lies in the consensual nature of arbitration. Only parties to the arbitration agreement may participate in the arbitration proceeding. Consequently, the binding power of an arbitral award extends only over them.

However, it does not mean that third parties cannot be affected by it. On the contrary, modern business transactions often involve many parties. Regardless, this issue is not addressed in international conventions or in the UNCITRAL Model Law. Available procedural options in arbitration include a joinder, which is subject to consent of all parties.[27]

The question of the rights of the third parties to challenge the award is, however, more complex. In principle, only a person or an entity that was a party to the original arbitration proceedings may request the annulment of the arbitral award. A third party can challenge an arbitral award only if the award undermines its rights. This is typically the case where two parties have fraudulently colluded to obtain an award that prejudices the rights of a third party.[28]

Limited third-party protection is a general weakness of the arbitration procedure. Practice Direction 2 does not make any additional difficulties in that sense. The subject matter of the procedure in front of the DIFC-LCIA is a payment dispute based on an existing judgment. It is, thus, unlikely that a third party could be affected by it. If their financial or legal interest was affected, it had to happen regarding the judgment underlying the payment dispute. If a judgment is set aside, the basis of the demand for payment of the judgment sum will disappear (Hwang, 2015: 209).

5.3. The risk of double recovery

The existence of an agreement between the parties for a referral of a 'judgment payment dispute' to the DIFC-LCIA arbitration does not affect the judgment which is the basis for a dispute. That opens a controversy of possible double recovery.

For the sake of clarification, it should be noted that an arbitral procedure will not lead to the stay of the judgment enforcement procedure; nevertheless, once the judgment is enforced, there is no 'judgment payment dispute' to be resolved in front of the DIFC-LCIA arbitration. Thus, judgment enforcement would hinder the arbitration proceeding.

But, is there some other hidden danger? If a judgment creditor decides to use his right from a referral clause and commence an arbitration proceeding for a 'judgment payment dispute', the result will be the existence of two titles because the judgment will always remain in full force. What would happen if a judgment creditor decided to use both of them? In other words, what would happen if he decided to enforce both his court judgment and the arbitral award, in one or possibly two countries (in case the debtor has assets in both)? However, this situation is very hypothetical because the entire purpose of the

[27] Joining third parties in DIFC-LCIA is made available in Art. 22(x) of the Arbitration Rules of 2021.

[28] However, in a judgment dated 16 February 2017, the Belgian Constitutional Court decided that third parties aggrieved by an arbitral award should be able to exercise recourse against that award by way of third party opposition proceedings instituted before domestic courts. (Arrest nr. 21/2017 of 16 February 2017, https://www.const-court.be/public/n/2017/2017-021n.pdf?fbclid=IwAR1D5RQ_KTrRiITc2EFG2hmY0-KCC7WYTGH3O-fDgwuCtEPS8V1h2eAU-Q8

additional arbitration procedure is to enhance the chances for enforcement. It is difficult to imagine a creditor who will expose himself to substantial costs of arbitration just for a theoretical possibility of a prospective double recovery from two titles.

For the sake of intellectual curiosity, these hypothetical scenarios may be developed to the end. In a situation where a judgment is already enforced and the debt paid, but a creditor nevertheless commences an enforcement procedure for the arbitral award, the debtor could use the possibility of Art. V(1)(e), V(2)(b) and Art. VI of the New York Convention. Hence, he would be able to ask a court to stay an enforcement procedure while having a set-aside procedure in the country of a seat of arbitration. The enforcement of such an award would amount to a double recovery, which conflicts with public policy. On the other hand, if the arbitral award is enforced first and the debtor subsequently asks for enforcement of a court decision, the debtor could use procedural tools of the civil procedure law of the country where the judgment enforcement is sought, and thus prevent a situation where he would pay twice while the creditor would benefit from unjust enrichment.

Therefore, the existence of two titles is not likely to prompt a situation where a double recovery could occur. If that happened, it would mean that a debtor did not take reasonable measures to use available legal instruments.

This hypothetical situation should not amplify the already existing alarms against the solution provided in Practice Direction 2. While commenting on the famous *Hilmarton* case[29], Jan Paulsson lucidly compared it with a "two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work" (Paulsson, 1998: 15). Similarly, we are discussing the situation that is not likely to occur and, if it does, it will not raise greater concerns than those already existing in the contemporary world of international commercial arbitration.

5.4. The undesirable effect: Elimination of the review of a judgment

In a number of contracting states, the lack of the international enforcement mechanism for court judgments that would be comparable with the New York Convention is not a coincidence. A lack of trust in the competence and rightfulness of foreign courts is still a prevailing feeling, although the EU has shown readiness to overcome traditional distrust and abolish exequatur within its borders under the Brussels I recast[30]. The necessity for the recognizing court to review whether the rendering court observed the principles of procedural due process and to guard against violations of the forum's public policy is a consequence of such distrust.

The enforcement of a DIFC-LCIA award on a 'judgment payment dispute' creates the same undesirable situation, aimed to be avoided with the procedure of exequatur of court judgments. If such an award would be enforced under the New York Convention, the DIFC judgment of the original dispute (which served as a basis for a judgment payment dispute) would circumvent the inspection otherwise necessary to perform judgment exequatur.

The arbitral award itself has to possess all the qualities necessary to avoid refusal of the recognition and enforcement prescribed in Article V of the New York Convention. However, the preceding judgment stays completely under the radar. The award deals only with the judgment payment dispute but does not review the judgment. That was confirmed by the former Chief Justice, M. Hwang, in his answer to the question whether the arbitral tribunal would have

[29] Case 92-15.137 *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisat*ion (OTV).

[30] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

the power to entertain challenges to the DIFC Courts' judgment on any ground that could have been raised in an appeal. He said that it is certainly not the intention to do so, and the tribunal would in all probability have to apply the doctrine of *res judicata* (Hwang, 2014: 5).

Consequently, if there has been, for instance, a violation of the procedural due process in the court procedure that preceded a DIFC judgment, rendering an award on judgment payment dispute consequent to that judgment and the subsequent enforcement of the award would cut off any possibility for the review of that violation.

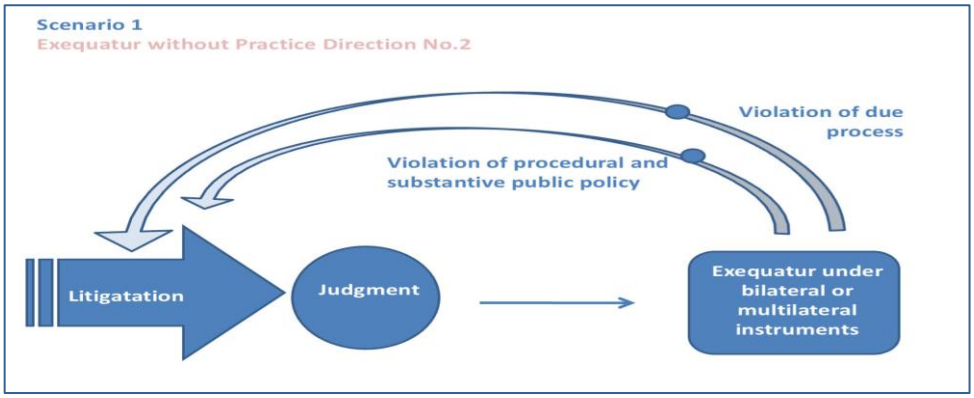

Fig. 2 Exequatur without Practice Direction No.2

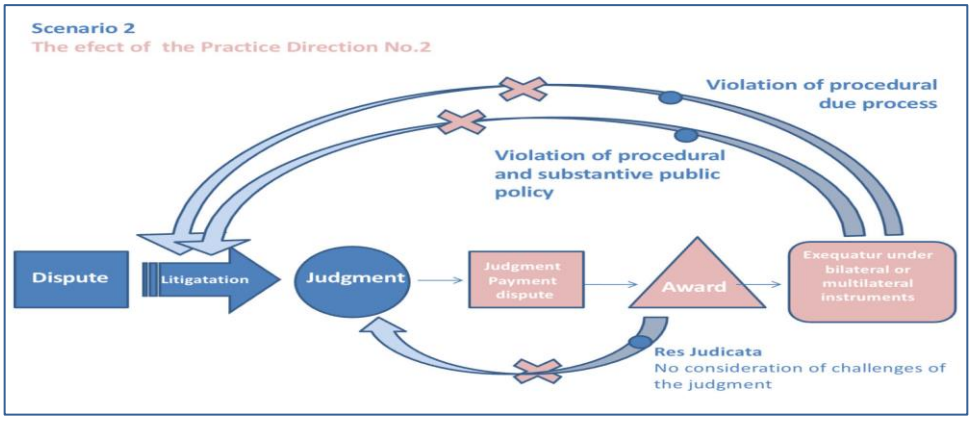

Fig. 3 The Effect of Practice Direction No. 2
Source: Figures created by the author (2020)

6. CONCLUSION

Practice Direction 2 is designed to create a possibility to overcome the deficiencies of the enforcement mechanism available for court judgments. It allows a judgment payment dispute that satisfies all of the provided Referral Criteria to be referred to arbitration by a judgment creditor, provided that an arbitration agreement in that regard exists between the

parties. This type of agreement would not affect the regular enforcement possibilities. It gives an additional option for a judgment creditor, not an alternative one. With the appropriate use of Practice Direction 2, a judgment creditor could benefit from the worldwide enforcement under the New York Convention. Such an unprecedented mechanism provoked a 'knee-jerk' opposition.

Setting aside the potential obstacles such an award would face regarding its enforceability under the New York Convention, several controversies emerged in the possible use and the effect of Practice Direction 2. Some of them, the risk of double recovery and the alleged right of an arbitral tribunal to rehear a dispute have shown to be ungrounded. However, the enforcement of a 'converted-judgment-award' under the New York Convention opens the door for an undesirable effect. The mechanism provided in Practice Direction 2 allows a judgment that precedes the 'judgment payment dispute' to evade the review of the due process or public policy that would normally be performed in a court exequatur. This could have a detrimental effect on the reliability of arbitral awards.

Conclusively, the success of this 'conversion' of a DIFC judgment into an arbitral award will depend on the receptiveness of the courts seized for enforcement of the DIFC-LCIA award resulting from the referral of a judgment payment dispute to arbitration. The famous proverb says: "The proof of the pudding is in the eating". The existence of Practice Direction 2 generated a necessity to revisit some of the basic concepts of arbitration and the exequatur, but only the practice will show its success.

REFERENCES

Alustath, H., (2016), *Choice of Law in respect of contracts in the United Arab Emirates and the EU; and related aspects of PIL in relation to the DIFC*, PhD, Retrieved 17 June 2021 from http://repository.essex.ac.uk/15979/1/Final%20Draft_Thesis.pdf

Amended Practice Direction No.2 from May 2015, DIFC-LCIA, Retrieved 15 June 2021 from https://www.difccourts.ae/rules-decisions/practice-directions/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration

Arbitration Law No. 1, DIFC-LCIA, (2008), Retrieved 15 June 2021 from https://www.difc.ae/files/9614/5448/9173/Arbitration_Law_DIFC_Law_No_1_of_2008.pdf

Arbitration Rules, DIFC-LCIA, (2016), Retrieved 15 June 2021 from http://www.difc-lcia.org/arbitration-rules-2016.aspx

Arbitration Rules, DIFC-LCIA, (2021), Retrieved 15 June 2021 from http://www.difc-lcia.org/arbitration-rules-2021.aspx

Arrest No. 21/2017 of 16 February 2017, Judgment of the Belgian Constitutional Court, Retrieved 17 June 2021 from https://www.const-court.be/public/n/2017/2017-021n.pdf?fbclid=IwAR1D5RQ_KTrRiITc2EFG2hmY0-KCC7WYTGH3O-fDgwuCtEPS8V1h2eAU-Q8

Birt, A., Omran, A., (2019), United Arab Emirates, *IBA Arbitration Committee, Arbitration Guide.*

Blanke, G., DIFC Courts Practice Direction No.2 of 2015: Adopted at Last!, Retrieved 16 June 2021 from http://arbitrationblog.kluwerarbitration.com/2015/03/31/difc-courts-practice-direction-no-2-of-2015-adopted-at-last/?doing_wp_cron=1592229685.2594530582427978515625 (16/06/2021)

Brekoulakis, S.,(2009), The Relevance of the Interests of Third Parties in Arbitration, Taking a Closer Look at the Elephant in the Room, *113 Penn St. L. Rev.*, 2009, pp. 1165-1188.

Carballo, A., (2007), The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?, *Arab Law Quarterly*, Vol. 21. No. 1, 2007, pp. 91-104.

Case 508 F.2d 969 *Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'industrie Du Papier (RAKTA), and Bank of America, Defendants, Societe Generale de L'industrie*, US Court of Appeals (Second Circuit), decided 23 December 1974.

Case 92-15.137 *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV).*, Cour de cassation (French Court of Cassation), decided 23 March 1994.

HCCH Convention on Choice of Court Agreements of 30 June 2005, Hague Conference on Private International Law; retrieved 17 June 2021 from https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf

UN Convention on the Recognition and Enforcement of Foreign Arbitral, /New York, 10 June 1958; https://www.newyorkconvention.org/english (accessed 17 June 2021)

Demeter, D., Smith, K., (2016). The Implications of International Commercial Courts on Arbitration, *Journal of International Arbitration*, Vol.33, 2016, pp. 441-470.

DIFC Annual Review (2015), https://www.difc.ae/newsroom/publications/ (17 June 2021)

DIFC Courts Strategic Plan 2016-2021, retrieved 17 June 2021 from https://issuu.com/difccourts/docs/difc_courts_strategic_plan_2016-202?e=29076707/47176868

DIFC/LCIA Arbitration Center: What are the other advantages of the DIFC-LCIA? http://www.difc-lcia.org/other-advantages-of-the-difc-lcia.aspx (accessed 15/06/2021)

Dubai International Financial Centre, Selected documents (2007-2008), *Yearbook of Islamic and Middle Eastern law*, Vol. 13, pp. 351-422.

Dubai Law No.16 (2011), Retrieved 15 June 2021 from https://www.difccourts.ae/wp-content/uploads/2017/10/Dubai_Law_No.16_of_2011_English.pdf

Federal Decree No.35 (2004), retrieved 15 June 2021 from https://www.dfsa.ae/application/files/6215/8211/4263/Federal-Decree-No-35-of-2004_1.pdf

Horigan, D., (2009), The New Adventures of the Common Law, *Pace Int'l L. Rev. Online Companion*, 2009, pp. 1-22.

Hwang, M., (2014), *The DIFC Courts Judgment-Arbitration Protocol referral of Judgment Payment Disputes to Arbitration*, retrieved 15 June 2021 from https://www.difccourts.ae/wp-content/uploads/2018/01/DIFC-Courts-CJ-Lecture-Notes2.docx

Hwang, M., (2015), "Commercial Courts and Commercial Arbitration - Competitors or partners", *Arbitration International* Vol.31, 2015, pp. 193-202.

ICC's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011), International Council for Commercial Arbitration; retrieved 17 June 2021 from https://cdn.arbitration-icca.org/s3fs-public/document/media_document/judges_guide_nyc_english_2018_reprint.pdf

ICC's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (2011), International Council for Commercial Arbitration; retrieved 17 June 2021 from https://www.arbitration-icca.org/iccas-guide-interpretation-1958-new-york-convention

Law of Dubai International Centre, No.9 (2004), Retrieved 15 June 2021 from https://www.difc.ae/files/4414/5735/7076/Dubai_Law_No_9_of_2004_-_English.pdf

Le Gal, J., Raynaud, I., (2017), The Success of the DIFC Courts: When Common Law makes its Way into a Civil Law Region, *Int'l BUs. L.J.* No.4, 2017, 289-304.

Paulsson, J., (1998). Enforcing Arbitral Awards Notwithstanding Local standard Annulments, *6 Asia Pac. L. Rev*. 1, 1998, pp. 1-28.

Practice Direction No.2 of February 2015; retrieved 15 June 2021 from https://www.difccourts.ae/rules-decisions/practice-directions/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), retrieved 17 June 2021 from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R1215-20150226

Tan, D., (2018). Enforcing national court judgments as arbitration awards under the New York convention, *Arbitration International*, Vol.34, 2018, pp. 415-443.

The Rules of the Dubai International Financial Centre Courts (2014), retrieved 16 June 2021 from http://www.wilberforce.co.uk/wp-content/uploads/2014/10/PUBLICATION-Rules-of-the-DIFC-Courts-2014.pdf

Wheeless, E., (1993). Article V(1) of the New York Convention, *Emory International Law Review*, Vol. 7, No. 2, 1993, pp. 805-846.

Emirates News Agency, 14.10.2019, DIFC celebrates top ten global ranking; https://wam.ae/en/details/1395302794629), accessed 15/06/2021.

Long Finance.net: GFCI 29 Rank, https://www.longfinance.net/programmes/financial-centre-futures/global-financial-centres-index/gfci-29-explore-data/gfci-29-rank/; accessed 15/06/2021.

KONVERZIJA PRESUDE MEĐUNARODNOG FINANSIJSKOG CENTRA DUBAI U ARBITRAŽNU ODLUKU: KONTROVERZE U PRIMENI PROTOKOLA O POSTUPANJU BR. 2

U članku se razmatra Protokol o postupanju br.2 Međunarodnog finansijskog centra Dubai (DIFC), koji otvara mogućnost za svojevrsnu konverziju presude u arbitražnu odluku. Ovaj mehanizam, u određenim slučajevima, omogućava da sudska odluka postane osnova za arbitražnu odluku, ukoliko ugovorne strane, ili stranke u postupku, arbitražnim sporazumom predvide da će spor povodom novčane obaveze biti upućen na arbitražno rešavanje. Arbitražna odluka doneta u takvom postupku bi mogla biti izvršena u inostranstvu primenom Njujorške konvencije.

Najpre je dat pregled organizacije sudova i arbitražnog centra Međunarodnog finansijskog centra Dubai, njihovih osnovnih karakteristika i pravila o izvršenju njihovih odluka u inostranstvu. Sledi detaljna analiza Protokola o postupanju br.2, predložene arbitražne klauzule i kriterijuma za upućivanje na arbitražu, njihovih prvobitnih verzija, kao i analiza namera donosioca ovih rešenja. Poslednji deo posvećen je mogućim posledicama primene ovog Protokola, koje su izazvale polemiku u literaturi. Neke od njih su: nepoželjni efekat eliminacije kontrole sudske odluke, mogućnost arbitražnog tribunala da ponovi odlučivanje o sporu koji je već okončan sudskom odlukom, kao i rizik da bi ovakav mehanizam doveo do dvostrukog izvršenja.

Ostvaljajući po strani mogućnost primene Njujorške konvencije za izvršenje arbitražne odluke do koje bi došlo korišćenjem mehanizma iz Protokola o postupanju br.2, zaključak je da bi njegova primena rezultirala u eliminaciji kontrole sudske odluke (koja je osnov spora povodom novčane obaveze koji je upućen na arbitražno rešavanje), u pogledu eventualne povrede procesnih prava i javnog poretka, a koja bi predstavljala razlog za odbijanje priznanja i izvršenja te odluke.

Ključne reči: *Međunarodni finansijski centar Dubai, sudska presuda, arbitražna odluka, izvršenje*

FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 19, Nº 1, 2021, pp. 71-82
https://doi.org/10.22190/FULP2101071A

Original Scientific Paper

EXERCISING THE RIGHT TO MAINTENANCE BETWEEN SPOUSES AND EXTRAMARITAL PARTNERS IN THE CASE LAW OF THE BASIC COURT IN NIŠ *

UDC 347.626(497.11 Niš)

Bojana Arsenijević

Faculty of Law, University of Niš, Serbia

Abstract. *The law regulates the right to maintenance between spouses and between extramarital partners, the conditions under which it can be exercised, as well as a special litigation procedure for obtaining the right to maintenance. The existential character of the right to maintenance stresses the need to examine the functional quality of the established legal mechanism. The author has conducted an empirical research on maintenance litigation proceedings between spouses and extramarital partners which were conducted before the Basic Court in Niš and finished during the year 2018. In this paper, the author presents and analyzes the results of research in litigation proceedings for establishing and varying the maintenance amount, and terminating and extending the duration of maintenance between married or unmarried, current or former partners. The aim of the research was to gain insight into the adequacy of applying relevant legal regulations in practice and the efficiency of providing legal protection in analyzed maintenance lawsuits. The research results reveal the inefficiency of maintenance litigation proceedings and a serious lack of information among citizens about the procedural possibilities in maintenance lawsuits.*

Key words: *maintenance creditor, maintenance debtor, marital and extramarital partners, maintenance litigation, duration of litigation*

1. INTRODUCTION

Demographic data show the raise of a divorce rate[1] in Serbia: in 2017, the divorce rate was 1,3 % and in 2019 it was 1,6 % (Statistical Office RS, 2020). Previous researches among the social service workers in Serbia had shown that one of the biggest crises for spouses during divorce is the inability to separate due to housing and economic problems

Received June 9th, 2021 / Accepted July 12th, 2021
Corresponding author: Bojana Arsenijević, LL.M., Teaching Assistant, Faculty of Law, University of Niš, Trg Kralja Aleksandra 11, 18000 Niš, Serbia. E-mail: a.bojana@prafak.ni.ac.rs
* This paper is a result of research within the project *Responsibility in Legal and Social Context*, financially supported by the Faculty of Law, University of Niš, in the period 2021-2025.
[1] Divorce rate is the number of divorces per 1,000 inhabitants in the observed territory in the given unit of time.

© 2021 by University of Niš, Serbia | Creative Commons License: CC BY-NC-ND

(Polovina, Žegarac, 2007: 400). These results reflect the need for a closer review on the exercise of the right to maintenance between spouses and former spouses, as well as between extramarital partners and former extramarital partners.[2] The conditions for exercising the right to maintenance between partners[3] are regulated by the Family Act.[4]

Maintenance lawsuits are litigation proceedings for resolving maintenance-related disputes (Mandić, 1991: 37–39), encompassing lawsuits for establishing maintenance, varying a support order amount, ending maintenance, and extending the duration of maintenance.[5] Maintenance litigation proceedings are conducted according to the rules of special litigation procedure.[6] An important characteristic of this special litigation procedure is the power of the court to determine the facts of the case which are not disputed between the parties or which are not brought before the court by the parties (Article 205 of the Family Act/FA). Furthermore, the importance of the principles of procedural efficiency and particular urgency is emphasized, and the stipulated procedural time limits ensure prompt decision-making (Article 280 of the FA).[7] In the special litigation procedure, the principle of disposition is narrowed: the waiver of the right to maintenance is prohibited and the parties may settle only on the mode and amount of maintenance, not on the right to maintenance itself (Stanković, 2006: 204). The court may decide *extra petitum* (Article 281 of the FA) and the public is excluded from the hearings (Article 206 of the FA). The court has discretional powers when deciding about the proceedings' costs and may take into account the reasons of fairness (Article 207 of the FA). Maintenance litigation can be conducted as the main proceeding or as an ancillary proceeding, as a part of divorce/ annulment proceedings.[8]

---

[2] The right to maintenance between spouses is stipulated in Article 28 and Article 151, with reference to Article 279 (para.3) of the Family Act, *Official Gazette RS*, 18/2005, 72/2011 – other law and 6/2015. The right to maintenance between extramarital partners is stipulated in Article 4 (para. 2) and Article 152, with reference to Article 279 (para. 5) of the Family Act. Maintenance between (former) spouses is a personal and property relationship arising from the conclusion and termination of marriage. For more on the maintenance between spouses, see: Kovaček Stanić, 2014: 109–112, and Počuča, Šarkić, 2014: 276–280.

[3] For the purpose of this paper, word "partners" will refer both to spouses and extramarital partners.

[4] Pursuant to Article 151 of the Family Act, a spouse (maintenance creditor) who lacks sufficient means of support, and who is unable to work or is unemployed, has the right to maintenance (spousal support) in proportion to the (financial) capacities of the other spouse (maintenance debtor), provided that the maintenance obligation would not represent a manifest injustice for the maintenance debtor upon examining the merits of each individual case. For more on the substantive conditions for exercising the right to maintenance between partners, see: Kovaček Stanić, 2014: 112–114, Draškić, 2011: 379–384, Ponjavić, 2011: 324–325, Panov, 2010: 302–306, Cvejić Jančić, 2009: 122–129.

[5] Whenever the maintenance-related facts and circumstances are changed, either for the maintenance creditor or for the maintenance debtor, the maintenance amount may be changed or terminated. The law limits the duration of maintenance between former spouses up to five years from the termination of marriage, which can be extended only exceptionally. The same restriction applies to the duration of maintenance between former extramarital partners (Articles 163 and 164 of the FA). See also: Ponjavić, 2011: 332, Panov, 2010: 307–308.

[6] The rules of litigation procedure are modified to meet the needs of maintenance litigation. The rules of special litigation procedure are regulated in Articles 201–208 and Articles 279–282 of the FA, with subsidiary application of the litigation procedure rules envisaged in the Civil Procedure Act. For more on the special litigation procedure, see: Mandić, 1991: 67–74.

[7] Article 280 of the FA stipulates that the first hearing is to be scheduled to take place within 8 days from the date the lawsuit was filed with the competent court, whereas the second instance court is obliged to deliver a decision within 15 days from the date of submitting the appeal.

[8] Article 279 (paras. 2 and 3) of the FA regulates that a maintenance claim may be raised until the conclusion of the main trial hearing in proceedings for dissolution or annulment of marriage. Exceptionally, the maintenance lawsuit may be filed no later than one year from the day of the termination of marriage, or from the day when the last factual payment for support was made, if the ex-spouse had justified reasons not to raise a maintenance claim in proceedings for dissolution or annulment of marriage. It follows that the maintenance litigation, as a rule, is

The effectiveness of the regulated legal mechanism is indicated by the accomplished legal protection in a specific court proceeding. This paper aims to present the results of the empirical research on maintenance litigation proceedings conducted before the Basic Court in Niš, for the purpose of gaining an insight into the performance quality of the legal mechanism for exercising the right to maintenance between married and unmarried partners. Furthermore, special attention has been given to the financial aspect of conducting maintenance litigation proceedings because the eventual obstacles in this area can jeopardize the right of access to court.[9] The provisions of the Civil Procedure Act[10] and Free Legal Aid Act[11] provide support for exercising the right of access to court.

2. Subject Matter and Description of the Research

The research included maintenance litigation proceedings between married and unmarried partners conducted (both as the main proceedings and as ancillary proceedings) before the Basic Court in Niš and finalized during the year 2018. The subject matter of the research were the records of court cases formed in proceedings for establishing or varying the maintenance amount, terminating maintenance, or extending the duration of maintenance between married or unmarried, current or former partners. The research sample comprised records of 12 cases from the database of the Basic Court in Niš.[12] Individual records of cases in the research sample were inspected and the data were collected about the litigants (maintenance creditor and maintenance debtor), the maintenance claim, and the course of litigation proceedings.[13]

---

conducted as an ancillary proceeding, alongside with the marital dispute proceeding, and only exceptionally as the main proceeding, if the ex-spouse could not file a request for maintenance in the marital dispute proceeding for justified reasons.

[9] As the right to a fair trial can be exercised only if the legal entity actually seeks judicial protection from the court, the right to access a court is a precondition for exercising the right to a fair trial. It is the duty of the state to regulate civil procedure so as to ensure that no one is prevented by economic obstacles in their efforts to exercise or defend their right before a court (Petrušić, 2007: 162, 176.)

[10] The Civil Procedure Act regulates the possibility of exemption from the previous payment of procedure costs, as well as the possibility of appointing a free proxy (Articles 151 and 170 of the Civil Procedure Act, *Official Gazette RS*, 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020).

[11] Free legal aid entails legal advice, drafting submissions, legal representation and legal defense; it is provided by lawyers and legal aid services in local governments (Articles 6 and 9 of the Free Legal Aid Act, *Official Gazette RS*, 87/2018). This Act came into force in 2018, but its implementation was postponed until 1.10.2019.

[12] Following the set criteria for the formation of the research sample, court cases were identified after the review of the electronic records of litigation case law of the Basic Court in Niš. When collecting data, the researcher encountered the problem of inaccuracy of those electronic records; namely, when entering data, it is possible to choose a data category (e.g. maintenance between spouses, maintenance between extramarital partners, maintenance between other persons, etc.) but in most cases the data were entered under one category, without respecting other differential category (e.g. data for maintenance between spouses or between extramarital partners were grouped in the category of maintenance between other persons). In a vast number of cases, electronic records failed to show data on the existence and type of partnership between the parties in a maintenance proceeding, thus making it necessary to review the paper records of all selected cases to identify a particular case as a subject matter of research. After reviewing a total of 626 cases, it was established that only 12 cases met the research criteria: P2 1250/15, P2 322/16, P2 511/16, P2 606/16, P2 1388/16, P2 405/17, P2 646/17, P2 903/17, P2 1271/17, P2 319/18, P2 949/18, and P2 970/18.

[13] The process of inspecting the case records included examining the lawsuit content: the complaint and possibly the counter-claim, the litigants' submissions, the minutes from the main court hearing, the official notes of the acting judges, court decisions and appeals. Using the content analysis method, the gathered data were entered into tailor-made questionnaires.

3. Research Results and Their Interpretation

Out of 12 cases in the research sample, only 10 cases involved litigation proceedings for establishing maintenance. Out of this number, only four proceedings were conducted as ancillary proceedings, within divorce proceedings. The statement of claim for maintenance was adopted in only one case, while it was dismissed in five other cases. In other proceedings, the court rendered a decision that the complaint was either withdrawn or considered withdrawn.

Only one claim was raised for varying the previously determined maintenance amount, but the plaintiff withdrew the complaint before the first hearing for the main trial. The statement of claim of the maintenance debtor was adopted in one claim raised for the termination of previously determined maintenance. In the research sample, there was no case for extending the duration of maintenance.

3.1. The Maintenance Creditor Profile

Out of 12 cases in total, the maintenance creditor was a woman in 75% of the cases and a man in the remaining 25% of the cases (Table 1)[14]. Such a gender structure of maintenance creditors is similar to the results of a formerly conducted research on the post-divorce maintenance between spouses conducted by examining the case law of the Basic Court in Prokuplje (Rakić, 2018: 43). Namely, in that research, the creditor was a woman in 80% of the cases. These findings warn us about the present economic dependence or, at least, the economic vulnerability of women in the 21st century living communities in the territories of the courts whose case law has been subject to research.[15]

Table 1 Gender structure of maintenance creditors

Gender	Number of maint. creditors	Percentage out of 12
Female	9	75%
Male	3	25%

The dominant age group of the maintenance creditors was over 59 (50%), followed by 42% of the creditors falling into the 39-58 age group (Table 2). The largest percentage of maintenance creditors (67%) resided in urban areas, while only 25% of them resided in rural areas (Table 3). Although there is a much smaller number of maintenance creditors in rural areas, these data in the research sample do not indicate a more stable economic position of spouses in villages. On the contrary, these data are more likely a consequence of the low level of awareness of the legal protection mechanisms in rural areas.

The education level of maintenance creditors was unknown in 75% of the cases; in the remaining 25%, the creditors had secondary school education (Table 4). It may be interesting to note that the earlier research in the Basic Court in Prokuplje revealed that 85% of the creditors had secondary school education (Rakić, 2018: 44). Taking into account the investigating principle in litigation proceedings, such a significant percentage

[14] All tables in this paper were prepared by the author on the basis of data compiled from maintenace lawsuit cases conducted before the Basic Court in Niš and finished during the year 2018.

[15] For territories falling under the jurisdiction of the basic courts of Niš and Prokuplje, see Article 3 of the Act on Registered Seats and Territories of Courts and Public Prosecutor's Offices, *Official Gazette RS,* 101/2013.

of unknown data could have been avoided by the judge's initiative aimed at collecting such data.[16]

Table 2 Age structure of maintenance creditors

Age range	Number of maint. creditors	Percentage out of 12
Up to 18 years old	-	-
19–38 years old	-	-
39–58 years old	5	42%
Older than 59 years	6	50%
Unknown	1	8%

Table 3 Domicile of maintenance creditors

Domicile	Number of maint. creditors	Percentage out of 12
Countryside	3	25%
City	8	67%
Unknown	1	8%

Table 4 Education of maintenance creditors

Level of education	Number of maint. creditors	Percentage out of 12
Elementary education	-	-
Secondary education	3	25%
Higher education	-	-
Unknown	9	75%

The maintenance creditor was unemployed in nine cases (75%), in two of which the creditors reported never being employed. In only two cases, the creditors were an employee and a pensioner (Table 5). Bearing in mind that the creditor's unemployment was a statutory requirement for exercising the right to maintenance, such results were expected. Irrespective to the employment status, general data on the occupation of maintenance creditors were available only in four cases (driver, seller, tailor, cleaning person at private households). Considering the significant percentage of unemployed creditors, general data on the occupation of the maintenance creditors were unjustifiably missing.

Table 5 Employment status of maintenance creditors

Employment status	Number of maint. creditors	Percentage out of 12
Employed	1	8%
Unemployed	9	75%
Retired	1	8%
Unknown	1	8%

[16] Article 151 of the FA stipulates a spouse who lacks sufficient means of support, and who is unable to work or is unemployed, has the right to maintenance (spousal support). When assessing incapability to work, the court takes into account one's work capacity in terms of education and former occupations. In that context, data about one's educational level and former occupation may be a useful indicator for assessing whether the requirements for determining maintenance have been met. See: Panov, 2010: 302. Cvejić Jančić, 2009: 123.

Although they do not (directly) constitute features of the maintenance creditors profile, it is important to keep in mind the data on the existence of common children and the duration of marital/extramarital union. In eight cases, the maintenance creditor and debtor had common children; in five cases, the partners had two common children (per couple); in three cases, they had one common child (per couple).[17] In the remaining cases, such data were unknown. Irrespective of whether the litigation proceeding was conducted between spouses or former spouses, marriage between the maintenance creditor and debtor lasted over 20 years in seven cases, and 18 years in one case.[18] In the remaining cases, such data were unknown. The data on duration of extramarital community of the maintenance creditor and debtor were also unknown.

3.2. The Maintenance Debtor Profile

Considering the heterosexuality as a characteristic of marital/extramarital communities in the national law, the gender structure of maintenance debtors (75% male, 25% female) is directly opposite to the gender structure of the maintenance creditors. In six cases (50%), the maintenance debtor was in the age group over 59; in four cases (33%), he/she was in the 39-58 age group; in all other cases, the maintenance debtor was over 50 (17%). The similarity between age structures of the maintenance creditors and debtors in the research sample indicates a slight difference in the age between partners. The data on residence of the maintenance debtors are identical to those of the maintenance creditors: 67% in urban areas and 25% in rural areas.

Table 6 Education of maintenance debtors

Employment status	Number of maint. creditors	Percentage out of 12
Elementary education	-	-
Secondary education	2	17%
Higher education	1	8%
Unknown	9	75%

The data on the education level of the maintenance debtors are similar to the data on the maintenance creditors: in 17% of the cases, the maintenance debtor had a high school education; only 8% of maintenance debtors had higher (college) education; in 75% of cases, the educational level of maintenance debtors remained unknown (Table 6). The lack of a more significant percentage of known data on the education level of maintenance debtors is only justified in cases where maintenance complaint was withdrawn or is considered withdrawn, provided the parties are not heard at the main trial. Education level is an important indicator for the circle of jobs that may be available to the maintenance debtor.[19]

[17] Only in one case, the maintenance creditor claimed spousal support and children's maintenance (as their legal representative) but during the proceedings the creditor withdrew the claim on the children's maintenance.

[18] Counting from the moment of entering into marriage to the moment of finality of the divorce judgment (in five out of seven cases), or to the moment of finality of the judgment adjudicating the application for spousal maintenance (in two out of seven cases), while the marriage is still ongoing.

[19] Under Article 151 of the FA, the maintenance is established in proportion to the other spouse's capacity to provide support. When assessing the maintenance debtor's capacity, the court takes into account all the circumstances that could be significant for determining the debtor's income, including the actual income and the income likely to be obtained by the maintenance debtor in regular circumstances (Draškić, 2011: 384).

As for the employment status, 75% of the maintenance debtors had regular income: in 50% of the cases, they were employed; in 25% of the cases, they were pensioners. In 8% of the cases, maintenance debtors were unemployed; the remaining 17% of cases contained no information on the debtor's employment status (Table 7). Despite the investigating powers of a judge in special litigation proceedings, the maintenance creditor should provide (or at least attempt to provide) any information on the maintenance debtor's employment, since it is a basic information affecting the establishment of maintenance. Irrespective to the employment status, the data on occupation of the maintenance debtor were only known in five cases (driver, medical professional, and tailor). In more than half of the cases the data on occupation were unknown, which seems unjustified considering the significant percentage of (un)employment data.

Table 7 Employment status of maintenance debtors

Employment status	Number of maint. creditors	Percentage out of 12
Employed	6	50%
Unemployed	1	8%
Retired	3	25%
Unknown	2	17%

3.3. Characteristics of Maintenance Litigation Proceedings

In litigation proceedings for establishing maintenance which are **conducted as main proceedings**, maintenance disputes between spouses were resolved during marriage (in 33% of cases)[20] and after the termination of marriage (in 50% of cases); maintenance disputes between extramarital partners were resolved in one case only (Table 8).

Table 8 Litigations for determining maintenance conducted as main proceedings

Maintenance litigations	Number of cases	Percentage out of 6
Maintenance between spouses	2	33%
Living community is ongoing	2	33%
Living community was previously disrupted	-	-
Maintenance between former spouses	3	50%
Marriage was dissolved during the maintenance litigation	3	50%
Marriage was dissolved before the maintenance litigation	-	-
Maintenance between extramarital partners	1	17%
Maintenance between former extramarital partners	-	-

In maintenance lawsuits which are **conducted as ancillary proceedings** to the divorce proceeding, the maintenance claim was raised by the maintenance creditor in the divorce lawsuit (in 25% of the cases) or in the counter-claim (in 75% of the cases) when the divorce lawsuit was filed by the maintenance debtor (Table 9).

[20] The results of prior research indicated the stance taken in judicial practice that the spouses could not exercise the right to maintenance (spousal support) in court proceedings in case the marriage was still ongoing (Petrušić, Konstantinović Vilić, 2012: 22). Having in mind the statutory provisions on the spouses' rights and duties to provide support, such a stance must be subjected to criticism. Otherwise, maintenance between spouses would be turned into a natural obligation, which does not correspond to the nature of legal support.

Table 9 Litigations for determining maintenance conducted as ancillary proceedings

Timing of raising the maintenance claims in proceedings	Number of cases	Percentage out of 4
Maintenance claim was raised in a marital dispute lawsuit	1	25%
Maintenance claim was raised within a complaint	1	25%
Maintenance claim was raised during the proceeding	-	-
Maintenance claim was raised in a counter-claim	3	75%

As for the type of relationship between litigants, the maintenance disputes between spouses were resolved in 17% of the cases, while disputes between former spouses were resolved in 75% of the cases. The maintenance disputes between extramarital partners were resolved just in 8% of the cases. In the research sample, there were no maintenance lawsuits between former extramarital partners (Table 10).

Table 10 Type of relation between litigants

Relation	Number of cases	Percentage out of 12
Spouses	2	17%
Former spouses	9	75%
Extramarital partners	1	8%
Former extramarital partners	-	-

3.4. Outcomes of Maintenance Litigation Proceedings

Out of 12 maintenance proceedings in the research sample, the plaintiff withdrew the maintenance complaint in three proceedings, while the complaint was considered withdrawn in two proceedings. The statement of claim was dismissed in five cases, and it was adopted only in two cases.

In two of the three cases where the **complaint was withdrawn**, insufficient financial assets for lawyer representation were stipulated as reason for withdrawal. It opens the issue of a ratio between the parties' economic (in)capacity and the lawyer services' tariff. The reasons for non-appearance of the duly summoned litigants at the trial proceeding were not known but there were no appeals against the decision that the **complaint was considered withdrawn**.

The court judgments on **dismissal of the statement of claim** were based on various reasons. The most common reasons for dismissal were: the maintenance creditor's work capacity which has been preserved to an appropriate degree to ensure independent means of earning; the maintenance creditor's employment; and care about common children by the maintenance debtor. In the decision-making process, the court assessed whether there were specific circumstances that would constitute a manifest injustice to the maintenance debtor. Notably, in the rationale of two judgments, the court pointed out that, although the maintenance creditors had no regular income of their own, they lived with their parents or adult children who supported or could support the maintenance creditor. Observed in isolation, the presented stance of the court must be criticized as being contrary to the statutory provision which stipulates that the spouse exercises the right to maintenance primarily from the other spouse (Article 166 of the FA).

The **statement of claims** for establishing maintenance **was adopted** only in one case. Although the plaintiff was unemployed and had no sufficient means for maintenance, the Court highlighted that there was a real possibility for the plaintiff to independently provide

some financial means, but in an insufficient amount. Therefore, having established the maintenance debtor's capacity to provide support, the court partly adopted the plaintiff's statement of claims, in the amount less than required.

Acting upon a claim submitted by the maintenance debtor, the court established the **termination of maintenance obligation** due to the changed circumstances on the side of the maintenance creditor who meanwhile had exercised his/her right to a disability pension which provided for the maintenance creditor's needs.

An appeal against the first instance judgment was filed in three cases. The second instance court rejected the appeals in all three cases and upheld the first-instance judgments.

3.5. Costs of Maintenance Litigation Proceedings

In two cases only, the plaintiffs were released from a prior payment of court fees; in one case, the decision was not made upon the plaintiff's application.[21] No application was filed for prior exemption from payment of costs, nor were there any motions for appointing a legal representative free of charge (in accordance with Articles 168 and 170 of the FA).

The decision on the litigation costs depends on the outcome of litigation proceedings. The losing party shall reimburse the costs to the opposing party but, in case of partial success in litigation, the court may order each party to bear its own costs or order one party to reimburse the other party a proportional amount of the costs (Article 153 of the CPA). Given that the court can also base its decision on reasons of fairness, drawing qualitative conclusions about the litigation costs is extremely limited. Referring to the research sample, we may highlight that the court ordered the losing party to pay the litigation costs in 50% of the cases, basing the decision either on the other party's success in litigation or on reasons of fairness; in 25% of the cases, the court decided that each party was to bear its own expenses. Finally, in 25% of the cases, the litigants did not claim reimbursement for the litigation costs (Table 11).

Table 11 Costs of litigation

Decision on the costs of litigation	Number of cases	Percentage out of 12
The losing party pays the costs to the other party.	6	50%
Each party bears its own costs	3	25%
No claim for costs was raised	3	25%

The awarded costs for the litigation proceedings ranged from 6,000 RSD to 90,000 RSD.[22] Bearing in mind lawyer services' tariffs, such amounts do not seem unusually high.[23] In four cases, both litigating parties had legal representatives; in three cases, neither party had a lawyer. In the remaining five cases, only one litigant was represented by a lawyer.

[21] In that case, the decision to consider the complaint withdrawn was made at the first hearing for the main trial.

[22] The costs of litigation proceeding included the costs of representation by a lawyer at the held and adjourned hearings for the main trial, the costs of expertise, and court fees.

[23] According to Tariff No. 3 of the Tariff for Lawyer Fees and Rewards (*Official Gazette of RS*, 121/2012 and 99/2020*)*, the amount of 6,000.00 RSD is the fee for drawing up a motion in litigation cases where the subject matter dispute value is up to 450,000.00 RSD; the fee for legal representation at the held hearing is 7,500.00 RSD and the fee for legal representation (appearance) at the adjourned hearing is 4,500.00 RSD. Generally speaking, court fees are calculated according to the designated value of the subject matter of the dispute and in compliance with the Court Fees Act (*Official Gazette of RS*, 28/94, 53/95, 16/97, 34/2001, 9/2002, 29/2004, 61/2005, 116/2008, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015 and 95/2018).

3.6. Duration of Maintenance Litigation Proceedings

Six litigation proceedings in the research sample were completed within a 9-month period, while the remaining six proceedings lasted from 15 to 30 months. The longest lawsuit took 30 months and the shortest lawsuit took two months. The common reasons for the length of litigation proceedings lie within the time range between scheduling two hearings, the number of hearings held, and the re-opening of the main trial due to replacement of the acting judge. Considering the principle of particular urgency in maintenance litigation proceedings, the stated results offer valid reasons to question the efficiency of providing legal aid in the maintenance litigation proceedings observed in the research.

In seven cases, the first hearing for the main trial was held in the period from 75 to 136 days after the date of filing the complaint with the Court. In one case, the plaintiff withdrew the complaint before the first hearing for the main trial was scheduled; the complaint was withdrawn 25 days after it had been submitted to the Court. The research results lead to the indisputable conclusion that in none of the proceedings was the first hearing held within the statutory eight-day time limit from the date of submitting the maintenance claim to the Court (Article 280 of the FA).

On the basis of the available data in the research sample, it was not possible to establish the period of time from the receipt of the appeal in a second-instance court to the time of delivering the second-instance decision.

4. Concluding Remarks and Considerations

Bearing in mind the research sample, the research conclusions refer to the case law of the Basic Court of Niš in maintenance litigation proceedings that were finished during the year 2018. The presented results aim to provide the basis for future research in this area and promote the efficiency of legal protection in maintenance litigations.

The profile of an average maintenance creditor in the research sample reveals the following features: it is a woman, over the age of 50, residing in town, of secondary school education level, an unemployed blue-collar worker, who is requesting maintenance after more than 20 years of marriage with the maintenance debtor. The profile of an average maintenance debtor reveals the following features: it is a man, over the age of 50, residing in town, of secondary school education level, employed, and a blue-collar worker.

The highest number of maintenance proceedings in the research sample (84%) referred to litigations for establishing maintenance. In the majority of cases, maintenance lawsuits were conducted as the main proceedings; a small number of ancillary proceedings were mainly initiated by a counter-claim for establishing maintenance in divorce litigation.

In comparison to previous research results, the common outcome of maintenance lawsuits between spouses (conducted while the marital community was still ongoing) was the adoption of the statement of maintenance claim. The highest percentage of litigation disputes were resolved between former spouses (75%), followed by the disputes between spouses (17%), and then between extramarital partners (8%). In the research sample, there were no litigations between former extramarital partners, which may be the result of the citizens' insufficient awareness of such rights.

In 42% of litigation proceedings for establishing maintenance, the statement of maintenance claim was dismissed, and it was adopted only in 8% of the cases. In 42% of the proceedings, the Basic Court in Niš rendered a decision that the complaint was

withdrawn or was considered to be withdrawn. In most cases, the reason for withdrawing the complaint was of a financial nature, which raises the issue of exercising the right of access to court. The withdrawal of complaints also indicates the citizens' insufficient awareness of the opportunities stipulated in the Civil Procedure Act; referring to the research sample, this conclusion may be supported by the fact that no litigant filed an application for prior exemption from payment of litigation costs, that there were no motions for appointing a legal representative free of charge, and that the application for prior exemption from payment of court fees was filed only in three cases.

Considering the investigating principle applicable in maintenance litigation proceedings, the percentage of cases where one party had legal representation (42%) or where neither party had a lawyer (25%) is significant but it does not pose a threat to exercising quality legal protection, However, the stated percentages may lead to a conclusion that the tariff for lawyer services fees is sometimes a deterrent factor for instigating litigation proceedings, which directly depends on the economic power of citizens.

The research results show that the principle of particular urgency was not accomplished in court proceedings, given that the lawsuits in the research sample lasted from six months to 30 months. In none of the cases was the first hearing scheduled within the statutory time limit of eight days from the date of filing a complaint with the Court. Notably, in one case, the first hearing was held 136 days after filing the complaint with the Court.

The existential nature of the need to exercise the right to maintenance calls for an effective and timely legal aid. Bearing in mind the latent obstacles for accessing the court and lengthy judicial proceedings, the fair trial standards are not fully implemented in the maintenance lawsuits observed in the research sample.

REFERENCES

Cvejić Jančić, O. (2009). *Porodično pravo* (Family Law), Pravni fakultet, Univerzitet u Novom Sadu.

Draškić, M. (2011). *Porodično pravo i prava deteta* (Family Law and the Rights of Children), Pravni fakultet, Univerzitet u Novom Sadu.

Kovaček Stanić, G. (2014). *Porodično pravo: patnersko, dečje i starateljsko pravo* (Family Law: Partnership, Child and Guardship), Pravni fakultet, Univerzitet u Novom Sadu.

Mandić, Lj. (1991). *Postupak u alimentacionim parnicama,* magistarski rad (Maintenance litigation procedure, master thesis), Pravni fakultet, Univerzitet u Nišu.

Panov, S. (2010). *Porodično pravo* (Family Law), Pravni fakultet, Univerzitet u Beogradu.

Petrušić, N. (2007). Pravo na pristup pravdi u svetlu novog ZPP (Right of Access to Justice in light of the new CPA)/In: Petrušić N. (ed.) *Pristup pravosuđu: Instrumenti za implementaciju evropskih standarda u pravni sistem Republike Srbije,* knj.2, Pravni fakultet, Univerzitet u Nišu, 2007, str. 161–178.

Petrušić, N., Konstantinović Vilić, S. (2012). *Ostvarivanje prava na zakonsko izdržavanje pred pravosudnim organima u Vranju, Bujanovcu i Bosilegradu* (Excercising the right to maintenance before judicial authorities in Vranje, Bujanovac and Bosilegrad), Narodni univerzitet, Vranje.

Počuča, M., Šarkić, N. (2014). *Porodično pravo i porodičnopravna zaštita* (Family Law and Legal Protection), Pravni fakultet, Univerzitet u Beogradu.

Polovina, N., Žegarac, M. (2007). Razvod braka u kontekstu društvene tranzicije iz ugla stručnih radnih timova za razvod (Divorce in the context of transition: from the perspective of divorce expert teams), *Sociološka revija,* Vol. XLI, br.3, str. 397–410.

Ponjavić, Z. (2011). *Porodično pravo* (Family Law), Pravni fakultet, Univerzitet u Kragujevcu.

Rakić, N. (2018). *Izdržavanje supružnika nakon prestanka braka,* master rad (Maintenance between spouses after the termination of marriage, master thesis), Pravni fakultet, Univerzitet u Nišu.

Stanković, G. (2006). Zaštita prava na izdržavanje u Porodičnom zakonu Republike Srbije (Protection of the right to maintenance in the Family Act of the Republic of Serbia)/ In: Stanković, G. (ed.), *Collection of Papers from the Scientific Conference "Novelties in Family Law"*, Niš, Faculty of Law, University of Niš, 2006, pp. 191–209.

Vuković, S., Stanojčić, G. (2013). *Komentar Porodičnog zakona, sa sudskom praksom, obrascima, registrom pojmova i prilozima* (Commentary of the Family Act, with relevant case law, legal forms, register of terms and appendices), Poslovni biro, Beograd.

Republički zavod za statistiku, Republika Srbija (2020): Zaključeni i razvedeni brakovi- podaci od 2011 (Statistical Office of the Republic of Serbia: Statistical data on Marriages and Divorces–since 2011), retrived 10.7.2020 from https://data.stat.gov.rs/Home/Result/180402?languageCode=sr-Latn

Legal documents

Porodični zakon (Family Act), *Službeni glasnik Republike Srbije*, br. 18/2005, 72/2011 i 6/2015.

Zakon o besplatnoj pravnoj pomoći (Free Legal Aid Act), *Službeni glasnik RS*, br. 87/2018.

Zakon o parničnom postupku (Civil Procedure Act), *Službeni glasnik RS*, br. 72/2011, 49/2013, 74/2013, 55/2014, 87/2018 i 18/2020.

Zakon o sedistina i područjima sudova i javnih tužilaštava (Act on Registered Seats and Territories of Courts and Public Prosecutor's Offices), *Službeni glasnik RS*, br. 101/2013.

Zakon o sudskim taksama (Court Fees Act), *Službeni glasnik RS*, br. 28/1994, 53/1995, 16/1997, 34/2001, 9/2002, 29/2004, 61/2005, 116/2008, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015 i 95/2018.

Tarifa o nagradama i naknadama troškova za rad advokata (Tariff on Lawyer Fees and Rewards), *Službeni glasnik RS*, br. 121/2012 i 99/2020.

OSTVARIVANJE PRAVA NA IZDRŽAVANJE IZMEĐU BRAČNIH I VANBRAČNIH PARTNERA U PRAKSI OSNOVNOG SUDA U NIŠU

Zakonom je regulisano pravo na izdržavanje između supružnika i između vanbračnih partnera, uslovi pod kojima se ono može ostvariti, kao i poseban parnični postupak za sudsko ostvarivanje prava na izdržavanje. Egzistencijalni značaj prava na izdržavanja ukazuje na nužnost provere kvaliteta funkcionisanja uspostavljenog pravnog mehanizma radi ostvarivanja ovog prava. Stoga je autor sproveo istraživanje o parnicama za izdržavanje pred Osnovnim sudom u Nišu, koje su pravnosnažno okončane u toku 2018. godine. U radu autor predstavlja i analizira rezultate istraživanja u parničnim postupcima u parnicama za određivanje, promenu visine, prestanak ili produžetak trajanja izdržavanja, između bračnih ili vanbračnih partnera. Cilj istraživanja bilo je sticanje uvida u adekvatnost primene zakonskih propisa u praksi i stepen efikasnosti pružanja pravne zaštite u analiziranim parnicama za izdržavanje. Rezultati istraživanja otkrivaju neefikasnost postupaka u parnicama za izdržavanje i ozbiljnu neinformisanost građanstva o procesnim mogućnostima u parnicama za izdržavanje.

Ključne reči: *poverilac izdržavanja, dužnik izdržavanja, bračni i vanbračni partneri, parnice za izdržavanje, trajanje parničnog postupka*

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

34+32

FACTA Universitatis. Series, Law and Politics / editor in chief Dejan Vučetić. - [Štampano izd.]. - Vol. 1, no. 1 (1997)- . - Niš : University of Niš, 1997- (Niš : Atlantis). - 24 cm

Dostupno i na: http://casopisi.junis.ni.ac.rs/index.php/FULawPol.
Polugodišnje. - Drugo izdanje na drugom medijumu: Facta Universitatis. Series: Law and Politics (Online) = ISSN 2406-1786
ISSN 1450-5517 = Facta Universitatis. Series: Law and Politics
COBISS.SR-ID 138066439