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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)

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EDITORIAL

Dear Readers,

It is my great pleasure to briefly present the papers published in the second issue of the scientific journal *Facta Universitatis: Law and Politics* for the year 2022. This issue comprises articles on a range of different research topics and current social and legal issues in the field of LGBT+ human rights, behavioral approach to law and economics, criminal law, international arbitration law, international commercial law, intellectual property law, EU law, and international law on the protection of children's rights.

Aleksandar S. Mojašević, **LL.D.,** Associate Professor**,** Faculty of Law, University in Niš; **Dejan Vučetić, LL.D.,** Full Professor, Faculty of Law, University of Niš; **Stefan Stefanović**, PhD Student, Faculty of Law, University of Niš, submitted the paper *COVID-19 Vaccination Policy and Human Rights: A Behavioral Approach.* The authors explore the implications of different vaccination policy models (mandatory or voluntary) on human rights from the behavioral science perspective. First, they seek to determine the optimal framework for vaccination policy, starting from diverse forms of paternalistic interventions: 1) anti-paternalistic policies, 2) nudge policies, 3) coercive paternalism, and 4) behavioral regulation of externalities. Giving prevalence to the libertarian paternalism policy (the nudge policy), the authors support their hypothesis with studies on behavioral insights in the context of the COVID-19 pandemic and vaccination policy. Then, they explore the implications of mandatory vaccination on human rights and the conditions for implementing the compulsory vaccination policy. Finally, the authors correlate the established optimal behavioral framework with the requirements for mandatory vaccination, and present arguments in favor of provisional mandatory vaccination which does not violate the individual freedom but contains an element of obligation.

Zorica Mršević, LL.D., Associate Professor, Faculty of European Legal and Political Studies, University Business Academy Novi Sad, submitted the paper *Same Sex Unions between Invisibility and Legality.* The author analyzes the social and legal status of same-sex unions in the Republic of Serbia. The right to legal regulation of same-sex unions as an alterity to marital and extramarital unions is presented in light of the importance of the legitimate right to diversity and the right to guaranteed civil rights of those who are a minority. The paper aims to develop the social awareness and facilitate establishing a dialogue with this family alterity. The legal recognition of same-sex unions is much more than the legal regulation of their property relations and civil status. It is a sign of democratization of society, its openness and tolerance. The paper presents the scientific and current social context in Serbia, affirmative views of the Protector of Citizens as an independent institution, and the European context, with special reference to recent documents of the Parliamentary Assembly of the Council of Europe and relevant judgments of European human rights courts. As the position of the LGBTI+ people in Serbia is slowly changing for the better, the author advocates for legal regulation of this matter.

Kristina Stevanović, LL.D., Senior Legal Affairs Officer at the University of Niš, submitted the paper *The Enforcement of Arbitral Awards under the ICSID Convention and Public Policy.* International arbitration emerged as a response to cross-border trade and foreign investments. This legal instrument enables the uninterrupted flow of foreign capital which has a significant impact on the national economy, particularly considering that arbitral awards are enforced in national jurisdictions. The profit-oriented economic trend and its impact on individual states is even more visible in international investments, given that foreign investors who operate on the Host State territory are included not only in economic but also in social affairs of that State. This poses a challenge: how should a State preserve national interests? Referring to the relevant provisions of the New York Convention (1958) and the ICSID Convention (1965), the author elaborates on the idea that public policy may be used in the enforcement stage as justification for non-compliance with the rendered arbitral award. The author introduces relevant arbitration practice that has challenged the interpretation of Article 54 of the ICSID Convention and analyzes the impact it has had on the ICSID system.

Filip Mirić, LL.D., Scientific Research Associate and Technical Associate for PhD studies, Faculty of Law, University of Niš, submitted the paper *Preventing the Spread of the COVID-19 Disease: Criminal Law Aspect.* Given that the COVID-19 pandemic has affected every aspect of our daily lives, the paper analyzes the criminal law aspect of preventing the spread of COVID-19 pandemic in the Republic of Serbia, by presenting two criminal offences whose incrimination is important for pandemic control: Failure to comply with the Health Regulations during an Epidemic (Article 248 CC RS) and Transmitting a Contagious Disease (Article 249 CC RS). The author analyzes the work of judicial bodies during the pandemic with reference to the statistical data issued by the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions, and sanctions imposed for the commission of these criminal offences in the first pandemic year (2020). Based on the statistical data which provide a clear insight into the phenomenological characteristics of this form of crime in Serbia, the author formulates recommendations for improving the response of the criminal justice system *de lege ferenda*.

Yunus Emre Ay, LLB, LLM (Prague), Antalya Bar Association, Turkey, submitted the paper *The Interpretation of the Principle of Strict Compliance in Letters of Credit in International Commercial Law.* Letter of Credit (L/C) is a very popular payment method in international trade. The issuing bank has the obligation to make payment if the documents stipulated in a Letter of Credit are presented. Under the strict compliance principle, any discrepancy in the documents may be the reason for refusing payment. There are two different approaches to the interpretation of the principle of strict compliance: literal compliance and substantial compliance. In literal compliance, a slightest inaccuracy may be the reason for refusing payment; the substantive interpretation is more flexible. The author provides an overview of these two approaches, with specific reference to relevant case law and relevant provisions of the UCP Rules and ISBP Rules governing this international trade matter. These international rules and diverse case law offer opportunities for a more flexible and balanced approach to the interpretation of strict compliance.

Aleksandra Vasić, LL.M., PhD Candidate, Faculty of Law, University of Novi Sad, submitted the paper *Licence Fee as an Essential Element of a Licence Agreement.* The author examines the the institute of licence fee which is envisaged in the Serbian Civil Obligations Act as an essential element of a licence agreement. In the context of intellectual property law, the author analyzes the most frequent types of payment related to licence fees

(lump sum, roylaties) and the payment methods (in cash or in kind, as a single payment or in installments). The lump sum payment may be effected as a single payment or in several instalments, while the amount of royalties depends on the scope of exploitation of the subject matter of licence. The author also discusses the factors to be considered in determining the licence fee amount and the issue of gratis licence agreements.

Jovana Tošić, LL.M.,PhD Candidate, Faculty of Law, University of Belgrade, submitted the paper *Constitutional Breakthrough of the Common Foreign and Security Policy in the context of Bank Refah Kargaran Case.* The paper aims to shed some light on the process of constitutionalization of the Common Foreign and Security Policy (CFSP) which has been underway for some time, but also to investigate potential impacts of the judgment of the EU Court of Justice in the case *Bank Refah Kargaran v Council*, considering the political sensitivity of foreign affairs and shared power of national courts in exercising judicial review of the CFSP acts. In the appeal case *Bank Refah Kargaran v Council*, the EU Court of Justice established its jurisdiction over claims for damages in the field of Common Foreign and Security Policy (CFSP) pertaining to restrictive measures against individuals. The case indicates a broader tendency of the Court to expand the contours of its review despite limitation clauses set out in the Lisbon Treaty. Driven by the present case and former case law, the Court emphasized the importance of effective judicial protection in preserving the unity of the EU legal order. Thus, the Court reaffirmed its ambitions in terms of further constitutionalization of CFSP matters in the name of the rule of law and human rights protection.

Ljubica Mihajlović, LL.M., PhD Student, Faculty of Law, University of Niš, submitted the paper *The Third Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: A New Method Of Legal Protection Of Children's Rights.* The author analyzes the Third Optional Protocol to the Convention on a Communications Procedure (2011), one of the most important developments in the children's rights protection system established under the Convention on the Rights of the Child (CRC, 1989). Under this Protocol, the competences of the Committee on the Rights of the Child have been expanded, and children have been given the opportunity to address the Committee, either directly or through adult representatives, for violations of the rights guaranteed by the CRC, the First Optional Protocol and the Second Optional Protocols to the CRC. The author presents the available proceedings, an illustrative case from the Committeee practice, and the nature of the Committee decision.

We would like to extend our sincere 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.

Considering that our scientific journal *Facta Universitatis: Law and Politics* is committed to publishing scientific articles on different law-related issues across a wide range of social sciences and humanities, we invite you to submit research articles on topics of your professional interest.

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

Niš, 1th November 2022

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Review Paper

COVID-19 VACCINATION POLICY AND HUMAN RIGHTS: A BEHAVIORAL APPROACH

UDC 616.98COVID19:578.834.1SARS-CoV-2 615.371:342.7]:159.9.019.4

Aleksandar S. Mojašević, Dejan Vučetić, Stefan Stefanović

Faculty of Law, University of Niš, Republic of Serbia

Abstract. *In this paper, the authors explore the implications of different models of vaccination policy (mandatory or voluntary) on human rights from the perspective of behavioral science. For this purpose, the authors first seek to determine the optimal framework for vaccination policy, starting from different forms of paternalistic interventions: 1) anti-paternalistic policies, 2) nudge policies, 3) coercive paternalism, and 4) behavioral regulation of externalities. Giving prevalence to the policy of libertarian paternalism (the nudge policy), the authors underpin their hypothesis with numerous studies on the importance of behavioral insights in the context of the COVID-19 pandemic and vaccination policy. Then, the implications of mandatory vaccination on human rights are explored and the conditions required for implementing the compulsory vaccination policy are determined. In conclusion, the authors correlate the established optimal behavioral framework with the requirements for mandatory vaccination, and present arguments in favor of provisional mandatory vaccination which does not violate the freedom of individuals but contains an element of obligation.*

Key words: *vaccination policy, COVID-19, human rights, behavioral measures*

1. INTRODUCTION

The pandemic of the infectious disease **COVID-19**[1] caused by the **SARS-CoV-2**[2] virus has "shaken" the foundations of our usual way of life and led to the so-called "new normal".[3] It was reflected in the reduction of social and physical contacts, a change in the standard way of organizing work and education (switching to online work and schooling from home), mental health impairment, endangerment of material existence, etc. (Cleveland Clinic,

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[1] COVID-19 is the abbreviation for the 2019 Coronavirus disease.
[2] SARS-CoV-2 stands for Severe acute respiratory syndrome-Coronavirus 2.
[3] It is a term used to denote the new social order created as a result of the pandemic.

2020).[4] However, the "new normal" did not strike all parts of the world and all strata of the world's population equally (e.g., the homeless, members of minority communities, and the poor residents of some African countries such as Nigeria, where the "hunger virus" reigned even before the Coronavirus emergency). The data from the outset of the COVID-19 pandemic (World Economic Forum, 2020)[5] indicated that the Coronavirus could "push" half a billion people into poverty; the residents of East Asian and Pacific countries, South Asia, Latin America, and African countries were the most vulnerable. Thus, at the beginning of the pandemic, the situation seemed hopeless only in more developed (wealthier) parts of the world (e.g., Europe and North America), where the pandemic generated huge fear and anxiety. Over time, people got mentally accustomed to the newly created situation, which was partly remedied by the invention of vaccines. However, the advent of vaccines was accompanied by new dilemmas, social divisions and conflicts. One research showed that the emergence of vaccines had a significant impact on increasing fear and economic anxiety, which were measured by Google search trends regarding different topics, such as recession and stock market crash, survivalism, and conspiracy theory (Awijen, Ben Zaied, Nguyen, 2020). The major point of contention between experts and citizens was vaccine safety. Contradictory information was spread over the Internet, especially on social networks, creating huge animosity among citizens who were for or against vaccination; it generated a division into vaxxers and anti-vaxxers. Concurrently, the media reported on well-packaged conspiracy theories alleging that the COVID-19 pandemic was "a hoax", that the virus was "invented in a laboratory", that the vaccine was not actually needed, etc.[6]

In the atmosphere of divided opinions, the presence of conspiracy theories and a strong emotional charge, the space for rational decision-making was suddenly narrowed. The automatic, fast and intuitive System 1 of our cognitive apparatus prevailed over the slow, rational and deliberative System 2 (Kaneman, 2015). However, a vaccination policy should certainly have been conceived and implemented with the aim of mass immunization of the population. Judging by the percentage of vaccinated population, some countries succeeded (e.g., Portugal or Cuba), and some did not (e.g., Serbia or Croatia). All the mentioned countries implemented a universal vaccination policy (vaccines were available to everyone). According to recent data (Our World in Data, 2021),[7] Portugal and Cuba recorded 95% of fully vaccinated people,[8] while Serbia recorded 49% and Croatia 57%.[9] The absolute numbers are even more convincing: Cuba 10.68 million vaccinated (population: 11.3 million),[10] Portugal 9.74 million vaccinated (population: 10.1 million), Serbia 3.35 million vaccinated (population: 6.9 million) and Croatia 2.32 million vaccinated (population: about 3.9 million). It is interesting to look at the ratio of administered "booster" doses in the mentioned countries, measured according to the initial protocol of doses per 100 inhabitants: Cuba 66:282 (total: 348), Portugal 66:175 (total: 241), Serbia 28:97 (total: 124) and Croatia

[4] Cleveland Clinic (2020); https://health.clevelandclinic.org/heres-how-the-coronavirus-pandemic-has-changed-our-lives/

[5] World Economic Forum (2020). There's nothing new about the 'new normal'. Here's why (5.6.2020); https://www.weforum.org/agenda/2020/06/theres-nothing-new-about-this-new-normal-heres-why/

[6] For more details on conspiracy theories, see: Imhoff, Lamberty, 2020.

[7] See: Our World in Data (2021): Coronavirus (COVID-19) Vaccinations; https://ourworldindata.org/covid-vaccinations, accessed: 17 August 2022.

[8] For Portugal, the data was updated on July 22, 2022, and for Cuba on 23 July 2022.

[9] For Serbia, the data was updated on 23 June 2022, and for Croatia on 23 July 2022.

[10] The data on the number of inhabitants was downloaded from: Worldometer (2022): World Population, https://www.worldometers.info/world-population/

15:105 (total: 119).[11] When looking at the number of deaths, the data are as follows: Portugal records **24,754** deaths (on 16 August 2022), with the number doubling in the last **563** days (more precisely, compared to 12,179 deaths as of on 30 January 2021); Serbia **16,481** (on 16 August 2022), with the number doubling in the last **320** days (compared to 8,234 deaths on 30 September 2021); Croatia **16,520** total deaths (on 16 August 2022), with the number doubling in the last **381** days (compared to 8,259 deaths on 31 July 2021); Cuba **8,529** deaths (on 16 August 2022), with the number doubling in the last **363** days (compared to 4,240 deaths on 18 August 2021). We can also compare these countries with the general trend at the world level, which is **478** days for which the number of deaths has doubled.[12] Therefore, Portugal is 85 days *above*, while Serbia is 158 days, Croatia 97 days and Cuba 115 days *below* the number of days at the world level.[13]

These data direct research attention to countries with a lower percentage of vaccinated people when compared to the world average (**67%** of vaccinated population) or the European average (**69%** of vaccinated population).[14] By the nature of things, the emphasis is placed on the unvaccinated people, i.e., on the reasons why they did not get vaccinated and especially why they hesitated to get vaccinated. In addition, a very important question in the context of vaccination is: ***What do people value more: freedom of choice or health protection?*** A reasonable assumption is that if people give more weight to health protection, then they are more likely to get vaccinated, regardless of the vaccination model (voluntary or mandatory). But, if people value freedom of choice more, then the probability of getting vaccinated decreases; in such a case, their decision will largely depend on the vaccination model and the way it is implemented. The COVID-19 pandemic has shown that a large number of people prefer *non-intrusive measures* in the vaccination process. Experience has also shown that the choice of health protection measures is a disputable issue which has been the subject matter of clashing opinions of experts and citizens alike. In this context, the central question that we seek to examine in this paper is the highlighted dichotomy between the freedom of choice or health protection, in order to formulate certain conclusions and offer recommendations to vaccination policymakers. We present different levels of state (paternalistic) interventions and discuss their implications for human rights. In the context of vaccination, it particularly refers to the right to freely choose a vaccine and get vaccinated or not.

2. The Optimal Behavioural Framework of Vaccination Policy

Pandemics are strong negative externalities, and their internalization (reduction or minimization) requires some form of state (paternalistic) intervention.[15] Even if we reach a consensus about this general principle, the question arises as to which type of state intervention is the optimal solution. In other words, what is the optimal vaccination policy?

[11] The data for Croatia is from 9 January 2022, for Serbia from 23 June 2022, for Portugal from 22 July 2022, and for Cuba from 23 July 2022.

[12] It is interesting that China, a country with about 1.7 billion inhabitants, records 5,226 deaths (on 16 August 2022), with the number doubling in the last 904 days.

[13] At the European level, the number of deaths has doubled in 495 days. It may be interesting to look at the data at the level of lower middle income countries (444 days), upper middle income countries (480 days), and high income countries (529 days).

[14] At the level of European Union countries, the average is **75%**. The data was downloaded from: https://ourworldindata.org/covid-vaccinations, accessed on 17 August 2022.

[15] For more on this issue, see: Nikolić, Mojašević, 2016: 164.

In order to answer this question, we need to look at the policy options that the state has at its disposal. Here, they are presented according the intensity of intervention impact, from the least to the most obtrusive.

The first option available to the state is the **anti-paternalist policy**. This policy guarantees people full freedom of choice; it strives to *maximize freedom*, rather than wealth, because it starts from the fact that preferences are a subjective category; thus, one cannot speak of "objectively good preferences" (Mitchell, 2004: 19–20). In the context of vaccination, this means that people have a guaranteed right to freely choose a vaccine and get vaccinated, while the state's interference in that choice can only be reduced to:

1. education about the importance of vaccination,
2. simplifying the process of making decisions about vaccination, or
3. encouraging citizens attentiveness when choosing vaccines (Mitchell, 2017:697–698).

It is obvious that this policy involves a passive role of the state when it comes to the ultimate *goal* (making a decision to get vaccinated), but the state has an active role when it comes to the *means* (instruments) for making such a decision. This policy entails interference in the decision-making process but not in the outcome (freedom of choice).

The second option is **the nudge policy.** This level of state intervention refers to directing or nudging people in a certain pre-defined direction (Thaler, Sunstein, 2008). In the context of vaccination, concerning the need to protect public health, the state has a legitimate right to intervene in a private sphere and urge people to get vaccinated, while leaving them sufficient leeway to give up (change their minds) or not to choose the pre-defined preferred option. It is important to emphasize that this policy does not oblige people to get vaccinated but only encourages them to make a certain decision that they would otherwise make if there were no *cognitive biases* in their reasoning and decision-making.[16] In other words, it is assumed that a person devoid of cognitive errors in thinking and decision-making would make exactly such a decision: to get vaccinated! Relying on that assumption, it is legitimate for the state to help people in their endeavour to get vaccinated, but it is done by using more "compelling" instruments than those applied in the anti-paternalistic policies. For example, to nudge people, the state can use the following behavioral instruments:

1. default rules,
2. social norms,
3. salience,
4. commitments,
5. and many others (Institute for Government, UK, 2010: 18).

The third option at the disposal of the state is **regulation.** This level of state intervention can be classified into two categories: **coercive paternalism** and **behavioral regulation of externalities**. They are two classic paternalistic interventions: the former is applied to *internalities* (such as smoking)[17] and the latter is applied to *externalities* (such as gambling). These policies involve some form of coercion, such as banning smoking indoors or rules limiting the maximum amount of money in gambling (in England, up to two pounds) that fixed-odds betting terminals (roulette machines) can accept (Gambling Commission, 2019).[18]

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[16] For more, see: Zamir, Teichman, 2008: 19–138.

[17] *Internalities* are external effects arising from activities that cause harm or benefit exclusively to the individual who undertakes or performs those activities. Conversely, *externalities* harm or benefit others. It should be noted that some activities have both internal and external character. Thus, it is necessary to observe internalities and externalities as a ***continuum***; depending on which effects prevail, we can talk about one or the other.

[18] See: Gambling Commision (2019): Regulator warns gambling industry not to circumvent FOBT stake cut.

Considering that all three policies (two regulatory policies and the nudge policy) are based on *behavioral insights*, they are also called ***behavioral public policies.***[19] Table 1 provides a summary of the basic elements of all mentioned policies and differences between them.

Table 1 (Anti)paternalistic Public Policies – Delimitation

Type of policies	Freedom or regulation	Internalities or externalities	Behavioral insights
Antipaternalism	freedom	internalities	no
Nudge policy	freedom	internalities	yes
Coercive paternalism	regulation	internalities	yes
Behavioral regulation of externalities	regulation	externalities	yes

Source: Oliver, 2017 (table created by authors)

Upon consistent consideration of the elements of the aforementioned policies, and taking into account the nature of the pandemic as a strong negative externality, the principle recommendation of economic theory in case of pandemics (including COVID-19) would be to apply **the behavioral regulation of externalities**, which comes down to **mandatory vaccination**. In other words, people should be forced to get vaccinated! Although consistent and based on logical premises, this recommendation is difficult to implement in practice. Why? First, the question arises whether the *offer* of intervention is in compliance with the *demand* for intervention, i.e. whether the citizens' preferences are in line with such a choice of policy. The latest in a series of pandemics (COVID-19 pandemic) supports the claim that a significant number of people (depending on the country)[20] did not want to get vaccinated or were hesitant; thus, they were highly unlikely to support mandatory vaccination. We may wonder why support for compulsory vaccination should be sought at all. In our opinion, implementing a vaccination policy forcefully, without a prior consensus of citizens and the medical profession, would have only aggravated the already tense and heated atmosphere during the COVID-19 pandemic. Certainly, the question is how to ensure that consensus. We think that the national parliament (e.g. the National Assembly of the Republic of Serbia) is the best forum for eventually reaching such a consensus, based on the previously articulated proposal of medical and other experts. This is supported by the fact that even a tiny hint or suggestion about introducing mandatory vaccination during the COVID-19 pandemic created great people's resistance, regardless of the provided justification. Taking into account such preferences, the choice of the optimal policy would come down to either an anti-paternalistic policy or a nudge policy, or a combination thereof. The essence is not to encroach on the autonomy and free choice of individuals but to direct their decisions towards accepting the vaccine as the best possible available means in the fight against the COVID-19 pandemic. Thus, our thesis is that the optimal vaccination policy is the one that is predominantly conceived in the behavioral framework of libertarian paternalism, i.e., the nudge policy. This thesis was confirmed in our survey on attitudes about vaccination conducted on a student population sample (Mojašević, Stefanović, 2022). Numerous other studies support the thesis that the behavioral policy framework is appropriate in the context of vaccination. Due to their importance in terms of vaccination policy, these behavioural insights are reviewed in the next part of the paper.

[19] For more, see: Mojašević, 2021: 75–134.
[20] In the introductory part, we presented the percentages for certain countries.

3. Research Review on the Significance of Behavioral Insights in Vaccination Policy

Research on the importance of behavioral insights in raising awareness about vaccination was conducted even before the COVID-19 pandemic. One such study (Betsch, Böhm, Chapman, 2015) identified several factors of reluctance to get vaccinated: 1) complacency; 2) inconvenience; 3) lack of confidence in the vaccine; and 4) rational calculation of pros and cons to getting vaccinated. To tackle vaccine hesitancy, the authors formulated specific behavioral measures: enhancing motivation (to target factor 1), removing impediments (to target factor 2), and providing economic incentives (to target factor 4). They emphasized that these measures cannot be equally effective in case of those people who express a lack of confidence in the vaccine (factor 3).

As a follow-up of the meeting held in October 2020, the World Health Organization (WHO) published the report *Behavioral Considerations for Acceptance and Uptake of COVID-19 Vaccines* (WHO, 2021), which identified the shortcomings of the current vaccination promotion policy and indicated the necessity of applying behavioral measures in order to popularize the vaccine against the Coronavirus. The WHO report recommended the following strategies (WHO, 2021: 9):

1. creating a favorable environment for vaccination: facilitating the vaccination process and making the vaccine publicly available to everyone, without excessive administrative burden;
2. encouraging social influence: promoting vaccination to the general public by well-known people, as an example of good practice;
3. increasing citizens' motivation for vaccination: ensuring open and transparent dialogue and communication about the risks that the vaccine carries.

Another important research (Reñosa, Landicho, Wachinger, Dalglish, Bärnighausen, McMahon, 2021) highlighted the significance of nudging citizens toward vaccination in the fight against the COVID-19 pandemic. Incentives aimed at changing citizens' attitudes about vaccination and sending messages (directly generated from central databases or delivered by credible health authorities via text messages, emails or personalized letters) to raise citizens' awareness about the importance of vaccination proved to be effective measures in some settings. A recent meta-research (Mertens, Herberz, Hahnel, Brosch, 2022) on the effectiveness of behavioral interventions confirms a statistically significant relationship between these interventions, especially default rules, and changing people's conduct in different social contexts.

A behavioral study conducted in Japan (Khan, Watanapongwanich, Kadoya, 2021), including people of different ages, examined the causes of negative attitudes towards vaccination resulting in refusal to receive the vaccine. The research results showed that young people are more vaccine-hesitant than older people, whereby young women demonstrated a higher hesitancy rate than young men. The root of the repulsive attitude of young people towards the vaccine lies in health concerns, i.e. uncertainty regarding the adverse effects of the vaccine. The researchers concluded that there is a need to avoid applying a single strategy to all age groups (the *one-size-fits-all approach*) and to adapt the communication strategy to different age categories.

Another behavioral study (Bavel, *et. al.*, 2020) provided a critical review of previous research on topics relevant to pandemics, such as: risk management, social and cultural influence on behavior, communication science, moral decision-making, leadership, and

stress management. As a result, the authors recommended (to vaccination policymakers and the general public) a number of behavioral measures that may be suitable in the context of the COVID-19 pandemic (Bavel, *et al.*, 2020: 462):

1. playing on the card of "common identity" and acting for the common good;
2. identifying credible authorities in the community to share public health messages;
3. promoting cooperative behavior by emphasizing that cooperation is the morally right thing to do and that others are already cooperating;
4. combining the norms of pro-social behavior with the expectation of social approval from the authority;
5. emphasizing "bipartisan" support for measures against COVID-19 to reduce polarization and biased reasoning;
6. targeting information on public health towards marginalized communities;
7. sending messages that: (i) emphasize benefits to the recipient; (ii) focus on protecting others; (iii) align with the recipient's moral values; (iv) appeal to social consensus or scientific norms; and/or (v) emphasize the possibility of group approval;
8. developing people's awareness that they benefit from access to other preventive measures;
9. preparing people for disinformation and providing accurate information and counterarguments against false information before they encounter conspiracy theories, fake news or other forms of disinformation;
10. using the term "physical distancing" rather than "social distancing" because social connection is possible even when people are physically separated.

Some authors (Williams, Drury, Michie, Stokoe, 2021) point to the lessons we have learned or should learn during the COVID-19 pandemic: 1) **trust in the state (government)** is one of the strongest predictors of adherence to the prescribed measures and vaccination; 2) adherence to measures is not only a consequence of human motivations but also of **opportunities and abilities**, which particularly relates to socially and economically vulnerable groups, such as ethnic minorities; 3) **clarity and consistency of the vaccination policy and messages** are very important because people have to understand the rules of conduct, which means that the policy should be clearly formulated and communicated; 4) **preparedness for a pandemic should focus on protection, not on restrictions**, which particularly refers to financial and other support measures for working from home.

We may also single out the special book edition "*COVID-19 and Behavioral Science*" (Jackson, Steed, Pedruzzi, Beyene, Hai Yan Chan, 2022) which contains 34 articles on the use of behavioral insights in health care during the COVID-19 pandemic, divided into six thematic units: 1) Risk communication and public health messaging; 2) Public education and health literacy; 3) Community engagement; 4) Psychological impact of COVID-19; 5) Coping strategies and the COVID-19 pandemic; and 6) Adherence to public health preventive recommendations.

In addition to scientific and professional articles on this matter, there are numerous government and private agencies all around the world which were fully engaged during the COVID-19 pandemic. The most prominent Behavioural Insights Team (abbr. BIT) or the Nudge Unit published numerous reports, blogs, and podcasts on the COVID-19 issue.[21] It is also worth mentioning some private non-profit organizations, such as Ideas42, with significant publication practice on this matter during the COVID-19 pandemic.[22]

[21] See: BIT webpage (2022), https://www.bi.team/search/COVID, accessed on 30 July 2022.
[22] See: Ideas42 webpage (2022), https://www.ideas42.org/covid19/, accessed on 30 July 2022.

Finally, a review of the Serbian Citation Index (abbr. SCI)[23] indicates a prolific scientific publication on COVID-19 issues, mainly from the perspective of medical science, economics and other social sciences but there is a notable lack of behavioral studies on this matter. The first empirical research conducted in Serbia on the behavioural approach to the COVID-19 vaccination policy (Mojašević, Vučetić, Vučković, Stefanović, 2022) seeks to fill in this gap and popularize behavioral science in the field of health care during the COVID-19 pandemic.

4. Implications of Mandatory Vaccination on Human Rights

As a rule, the introduction of mandatory vaccination raises the question of the implications of such a vaccination regime on human rights, primarily the right to life, the right to respect for private life, the freedom of religion, and other rights (ECHR, 1950).[24] In this regard, on 17 June 2020, the European Commission (EC) adopted and published a special *EU Strategy for COVID-19 vaccines* (hereinafter: the EU Vaccines Strategy) for the purpose of vaccine development, production and application (EC, 2020a).[25] Based on the EU Vaccines Strategy, on 15 October 2020, the European Commission published a document called *Communication on preparedness for COVID-19 strategies and vaccine deployment* (hereinafter: the EC Communication) (EC, 2020b).[26] According to these documents, considering the country-specific demographics and epidemiological situations in different EU Members States, the EU cannot impose mandatory vaccination on its member states because the formulation of a national vaccination policy is the responsibility of each member states. The EU can only help them in their efforts to suppress the COVID-19 pandemic by proposing actions and setting the key elements for designing the vaccination policy, such as:[27]

1. ensuring sufficient resources for the operation of vaccination services;
2. making the vaccines and vaccine services easily accessible, both in terms of affordability (free of charge) and physical proximity;
3. ensuring clear and timely access to information through relevant media;
4. observing the different characteristics of vaccines, specific storage and transport requirements;
5. labeling and packaging of multi-dose COVID-19 vaccines to facilitate production, distribution and deployment;
6. monitoring the performance of vaccination strategies by keeping relevant registries;
7. establishing an effective recall system for multi-dose vaccines;
8. promoting and creating public confidence in the vaccine by clearly communicating risks and benefits via relevant media d popular communication channels;

[23] See: Serbian Citation Index (SCI), accessed on 30 July 2022. https://scindeks.ceon.rs/SearchResults.aspx?query=ARTAK%26and%26Covid%2b19&page=0&sort=1&stype=0

[24] See: Articles 2, 8 and 9 of the European Convention on Human Rights (ECHR, 1950); https://www.echr.coe.int/documents/convention_eng.pdf

[25] European Commission/EC (2020a): EU Vaccines Strategy, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank, Brussels, 17.6.2020; https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1597339415327&uri=CELEX:52020DC0245; https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en;

[26] European Commission/EC (2020b): Communication from the Commission to the European Parliament and the Council: Preparedness for COVID-19 vaccination strategies and vaccine deployment, Brussels, 15.10.2020; https://ec.europa.eu/health/system/files/2020-10/2020_strategies_deployment_en_0.pdf, accessed 30 June 2022.

[27] See: EC Communication (2020b: 6–11): Part 3. Elements for Effective COVID-19 Vaccination Strategies.

9. suppressing disinformation and misinformation on the vaccines through proactive approach, collaboration with EU and global actors (WTO), and providing clear, objective, accurate and timely information on the importance of COVID-19 vaccines, their safety and effectiveness in fighting the pandemic;[28]
10. encouraging cooperation and collaboration of member states through discussions, exchange of information and sharing experiences in order to ensure the coordination of national responses to the pandemic (EC, 2020b: 6–9).

In this document, special attention was paid to priority groups,[29] such as: health workers, people over the age of sixty, patients suffering from chronic diseases, employees outside the health sector (educators, policemen, etc.), community members who cannot keep physical distance (factory workers, refugees, prisoners, and others), members of vulnerable socio-economic groups and other socially-deprived communities at higher risk (EC, 2020b:12).

From the human rights perspective, the introduction of compulsory vaccination[30] may be justified only if there is a legitimate aim. In case of a pandemic, the legitimate aim is the protection of public health by ensuring the development of collective immunity. At this point, it is important to make a subtle distinction. Namely, the state is obliged to protect the health of its population from indirect consequences of the pandemic (illness, death) but it has no right to protect people from their own "bad" choices that may affect their health. Practically speaking, the state cannot force those who do not want to get vaccinated to do so but, under specific circumstances, it can introduce compulsory vaccination if the functioning of the health system as a whole has been threatened. This brings us to the issue of *appropriate measures* to achieve the given goal: an **efficient** and **safe** vaccination. Vaccination is *efficient* if it prevents the disease, or at least its more serious progressive course, and its fatal consequences; it is *safe* if the expected benefit of vaccination is significantly greater than the associated risks. In addition, the introduction of a mandatory vaccination regime is based on two other conditions: **necessity** and **proportionality**. Mandatory vaccination is *necessary* if other less intrusive or non-intrusive measures, such as information campaigns, have not achieved the desired goal. It satisfies *the principle of proportionality*[31] if there is a balance between the importance of the legitimate aim (health protection by creating collective immunity) and the intensity of the threat to human rights, which means that the life or health of the majority of people must be threatened to legitimately justify the introduction of this measure. Table 2 provides an overview of legal requirements for introducing mandatory vaccination.

[28] On 10 June 2020, the European Commission adopted a special document for this purpose. See: EC (2020c): Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions: Tackling COVID-19 disinformation-Getting the facts right, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0008

[29] EC Communication (2020b:11–13): Part 4. Possible priority groups for the initial phases of vaccine deployment.

[30] The following analysis of the aims and means of vaccination is based on: Reich, 2021, https://www.liberties.eu/en/stories/mandatory-covid-vaccines-human-rights/43918, accessed 5 August 2022.

[31] For more details on the principle of proportionality in the legal field, and especially administrative law, see: (Lončar, Vučetić, 2013: 1617–1642).

Table 2 Legal requirements for introducing mandatory vaccination

	Legitimate aim	Condition I	Condition II	Condition III
Mandatory vaccination	protection of public health	appropriate means	necessity	proportionality
Description	collective immunity	effective and safe vaccine	other measures did not yield results	the proportion of the aim and the threat to human rights

Source: Reich, 2021 (table created by authors)

Given that the introduction of mandatory vaccination was the responsibility of each EU member state, there were only a few countries that introduced mandatory vaccination, but in different formats. At the outset of the COVID-19 pandemic in Europe, Austria was the first country that passed a law on mandatory vaccination for everyone over the age of 18 (in February 2020), but soon abandoned its implementation (in March 2020) (BBC, 2020).[32] Some countries (France, Greece, Hungary, Italy, Latvia, and Poland) introduced mandatory vaccination for certain groups, such as healthcare workers or workers in long-term care facilities. Hungary introduced compulsory vaccination for the police, the army, the civil services, and the tax inspectorate, and employees in the public education sector; moreover, employers had the right to require workers to get vaccinated. In Latvia, vaccination was mandatory for employees and officials of state and local government institutions, educational staff, medical staff, security and rescue staff, prison staff and those working in specific private care institutions (ECDPR, 2022: 17).[33] Serbia, as a candidate country for EU membership, was not obliged to abide by the guidelines stipulated in the aforementioned EU documents. However, the presented requirements for introducing mandatory vaccination may be useful for further consideration of the Serbian policymakers in the process of devising a vaccination policy in case of future pandemics.

4. Discussion and Conclusion

This paper presents a summary of research that confirms the importance of behavioral insights in the design and implementation of vaccination policy during pandemics, including COVID-19. In addition, various paternalistic interventions are explained, according to their intensity, from anti-paternalism to behavioral regulation of externalities. The authors have supported libertarian paternalism, i.e., the nudge policy. It seems to be not only a compromise between the "extremes" (complete freedom and complete coercion) but also a policy that gains credibility through its effectiveness. However, the nudge policy is not monolithic and uniform, and it is certainly not a "panacea". This policy includes various behavioral measures that vaccination policymakers can apply. As previously noted (Mertens, *et al.*, 2022), different levels of effectiveness of behavioral measures should be taken into account.

In that regard, considering the effectiveness of behavioral measures as well as the implications of mandatory vaccination on human rights, we recommend a ***provisional***

[32] BBC (2020): Covid: Austria suspends compulsory vaccination mandate; https://www.bbc.com/news/world-europe-60681288, accessed on 15 August 2022.

[33] See: European Centre for Disease Prevention and Control (2022). https://www.ecdc.europa.eu/sites/default/files/documents/Overview-of-COVID-19-vaccination-strategies-deployment-plans-in-the-EU-EEA-Jan-2022_1.pdf

mandatory vaccination (abbr. PMV). This implies that, in future pandemics, vaccination would generally be the default option[34] but people would be able to opt out; it means that citizens would be obliged to get vaccinated but they would also have the option (freedom) to abstain from vaccination. In order to preclude fast and easy decisions on abandoning vaccination, the state has to set some administrative "hurdles", such as the duty to file a report justifying the reasons for the decision, which may be time-consuming and may entail some administrative costs. In this regime, people are free to choose but they have to "pay" a certain price for that freedom in the form of transaction costs (administrative hurdles and wasted time). In proposing this type of vaccination policy, we certainly acknowledge the fact that a pandemic is a strong externality which needs to be "regulated" in some way. However, the COVID-19 experience has revealed a significant resistance of people to vaccination, which can be partly attributed to their decision-making in conditions of fear, anxiety, uncertainty and "novelty" of the entire experience. For this reason, we abandon the behavioral regulation of externalities (which is the basis of compulsory vaccination). It seems to be most effective to regulate this matter in advance, before the onset of the next pandemic, so that people are not taken by surprise and the novelty of provisions. That is why we plead for *ex-ante* regulation in the form of prescribing mandatory vaccination but within the nudge policy framework, which protects the freedom of individuals.

Does this mean that the state should abandon anti-paternalistic policy as a non-intrusive policy model? The answer to this question is simple: anti-paternalism can be successfully combined with nudge policy. We do not consider that these two policies are in such a conflict as presented in some theoretical debates (Mitchell, 2004); in fact, we see compatibility and complementarity between the measures advocated in these policies. For example, the measures commonly used in the anti-paternalistic policy, such as educational campaigns and incentives including the reduction of information costs, are not inconsistent with the provisional mandatory vaccination policy. In any case, the stipulated legal requirements for introducing mandatory vaccination must be met, particularly the one regarding the vaccine safety and efficiency. If that requirement could not have been ensured (for whatever reason) during the COVID-19 pandemic, there should be no justification for not satisfying this requirement in future pandemics. In particular, it should be noted that communication with citizens is of key importance in ensuring the success, safety and effectiveness of vaccination. In this sense, expert opinions should be void of dissonant tones and experts should avoid sending contradictory messages to the public. However, it should be also borne in mind that even fully synchronized messages are most unlikely to have a positive effect on the proponents of conspiracy theories. From the behavioural science perspective, it is due to the receptivity of the fast and easy System 1 to conspiracy theories, i.e. the non-receptivity to scientifically based information (Salali, Uysal, 2020: 2). Only people who hesitate or have doubts about the vaccine may be influenced to change their stance towards vaccination.

Finally, it seems that the introduction of mandatory vaccination as the default option satisfies the principle of proportionality, in terms of the ratio between the legitimate aim and a risk of endangering human rights. It is legitimate to undermine human rights if the majority of the population is faced with a significant threat to public health. Yet, this conception has been a huge stumbling block for people and experts during the COVID-19

[34] It would exclude some vulnerable population categories, such as children, pregnant women, patients with chronic diseases, etc.

pandemic. For this reason, instead of fully compulsory vaccination, we propose provisional mandatory vaccination as the default option which includes the freedom to opt out. Such a provision may counterbalance the major argument that citizens are "forced" to act against their will, which would be unsustainable in terms of provisional mandatory vaccination.

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POLITIKA VAKCINACIJE PROTIV KOVIDA 19 I LJUDSKA PRAVA: BIHEVIORISTIČKI PRISTUP

U ovom radu autori ispituju implikacije različitih modela vakcinacije (obavezne ili dobrovoljne) na ljudska prava iz ugla biheviorističke nauke. U tom cilju, oni prvo nastoje da utvrde optimalan okvir politike vakcinacije polazeći od različitih oblika paternalističkih intervencija: 1) antipaternalističke politike, 2) politike usmeravanja, 3) prinudnog paternalizma i 4) biheviorističke regulacije eksternalija. Opredeljujući se za politiku libertarijanskog paternalizma (politiku usmeravanja), autori svoju tezu potkrepljuju brojnim istraživanjima o značaju biheviorističkih nalaza u kontekstu COVID-19 pandemije i vakcinacije. Potom se istražuju implikacije obavezne vakcinacije na ljudska prava i utvrđuju uslovi koji su potrebni za primenu modela obavezne vakcinacije. U zaključku autori povezuju ustanovljeni optimalan bihevioristički okvir sa uslovima za obaveznu vakcinaciju, iznoseći argumente u prilog uslovnoj obaveznoj vakcinaciji – onoj koja ne narušava slobodu izbora pojedinaca, ali sadrži elemenat obaveznosti.

Ključne reči: *politika vakcinacije, kovid 19, ljudska prava, biheviorističke mere.*

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Review Paper

SAME SEX UNIONS BETWEEN INVISIBILITY AND LEGALLITY

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Abstract. *The subject matter of this paper is the analysis of the social and legal status of same-sex unions in the Republic of Serbia. In practice, they function although there is still no legislation on this matter. The right to legal regulation of same-sex unions as an alterity to marital and extramarital unions is presented in light of the importance of the legitimate right to diversity and the right to guaranteed civil rights which are recognized to those who are a minority in number and/or social influence. The main idea is the need to respect the union which is different from the majority heteronormative one. The paper aims to develop the social capacity for perception and to facilitate a dialogue and establishing relationships with this family alterity. The need to develop understanding that the legal recognition of same-sex unions is much more than the legal regulation of their property relations and civil status. It is a sign of democratization of society, its openness and tolerance. The paper is organized in several thematic parts presenting the scientific and current social context in Serbia, affirmative views of the Protector of Citizens as an independent institution, and the European context, with special reference to recent documents of the Parliamentary Assembly of the Council of Europe and relevant judgments of European human rights courts. The author notes that the position of the LGBTI+ people in Serbia is slowly changing for the better and advocates for legal regulation of this matter.*

Key words: *sex unions, social alterity, scientific context, European context, deconstruction of heteronormativity, legal security of "rainbow" unions*

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1. INTRODUCTION

When homosexuality was decriminalized and removed from the list of mental illnesses,[1] i.e. when homosexuals stopped being treated as criminals and "sick" people, there was nothing left but bare prejudices which fueled discrimination and hindered the legal regulation of same-sex family communities. Same-sex unions are a part of reality that can no longer be ignored, especially considering that the dynamics of their legal recognition and regulation on a global scale is a consequence of their existence and one of the most intensive legal changes today. Obviously, Serbia is not in the legal vacuum. There are comparative legal solutions and initiatives in a large number of European and non-European countries, international conventions, judgments of domestic and international courts, theories and practices of human rights that have already addressed this issue. Nowadays, legally regulated same-sex unions are not just an interesting legal alterity which is available exclusively to "others". The legal regulation of same –sex unions has reached our state borders by becoming part of the positive legal systems in the neighboring countries: Hungary, Croatia, and Montenegro. This gives new hope to millions of homosexuals in the Western Balkans that they will be able to legally regulate their family unions, which may contribute to the normalization of their social status.

2. THE SCIENTIFIC CONTEXT

Critical analysis of the legal position of LGBTI people[2] is part of Gender Studies,[3] an academic discipline whose examination relies on traditional jurisprudence and feminist critical analysis of legal theory, law and their application as essentially patriarchal, discriminatory institutions. Jurisprudence (legal theory) and feminism[4] came into a collaborative, allied relationship in the second half of the 20th century, when (seemingly) neutral legal theory and very openly engaged feminism became the closest allies and collaborators in joint critical reflection on women's legal status and efforts to improve it. At the same time, feminist jurisprudence finally finds its true academic ally in left-wing (general) jurisprudence with which it articulates common arguments advocating the necessity of legal sanctions of sexism, misogyny, racism, speech and hate crimes, xenophobia, homophobia, anti-Semitism, islamophobia (Mršević, 2019: 253-254).

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[1] In Serbia, male homosexuality was decriminalized in 1994 and removed from the list of psychiatric illnesses in May 2008.

[2] The commonly used term "queer" includes all people of non-heterosexual orientation or gender identity different from the biological one attributed to them at birth.

[3] Gender Studies is a teaching and scientific discipline which examines the existence and functioning of the basic legal and political principles (such as: justice, equality, conditions and situations of possession or deprivation of rights, etc.) which are relevant to all areas of society, viewed through the prism of specific differences between women's and men's needs and requirements, as well as the relationship between women and men in the social, institutional and legal environment.

[4] Feminism is a teaching that advocates for the expansion of women's rights and roles in society. It entails both theory and practice which, starting from the equality of women and men, strives for social change with the aim of ending social, political and economic discrimination against women. Feminism is a social movement, theory and personal commitment based on the fact that women in society are disadvantaged, which can be changed by systematic activities to make women's issues specific and visible, recognized and adequately valued, by identifying violence against women and pointing to discrimination and favoritism of women as well as through the struggle for equal opportunities in all aspects of human life (Mršević, 1999: 44).

Gender Studies point to intersectionality and analyze the phenomena of double and multiple legal discrimination resulting from the existence and simultaneous consequences of multiple discriminatory factors. From the outset, Gender Studies have dealt with the rights of lesbians and the general LGBTI community, pointing out that the previously non-existent legal regulations in this area do not mean that there are no problems; on the contrary, it shows a lack of a large anti-discrimination package, based on sexual orientation and gender identity.

It is a mistake to assume that all people are heterosexual. One of the typical types of discrimination against same-sex oriented people is called heterosexism (Mršević, 1999:50) or heteronormativism (Mršević, 2011:162). The assumptions that LGBTI people do not have permanent partners, that they probably lead a promiscuous life, that some "shameful or abnormal" things happen among them, that such relations are not "decent" and socially acceptable, or that these issues have no place in academic research are part of the heteronormativism, which has been abandoned for being anachronistic and inaccurate. Homosexuals have a vivid emotional and sexual life and, in their relationships, they experience the same ups and downs, uncertainties and challenges that are encountered by typical heterosexual partners. Their problems are only more complex and difficult due to the negative attitude of society towards them, as well as the inability to legally formalize and officially regulate their long-lasting emotional communities, often including parenthood.

3. The Feminist Context

Since the mid-1990s, the feminist movement in Serbia has raised the question of whether and why the legal regulation of same-sex unions should be part of the feminist political agenda, and if so, whose jurisdiction it actually is, and what are the arguments in favor of that (Mršević, 2009:23). The feminist movement has also raised the additional question of the role of women's activism and women's needs. Namely, most women do not "need" activism because they have other problems; on the other hand, each person perceives one's current problems as the most serious and important ones. In that context, do we need any legal regulation of same-sex communities, particularly considering that such an "extravagant" request may satisfy the needs of only some homosexuals (lesbians and gays) but certainly not all or even most members of the LBGTIQA communities. Considering everything that women may wish in terms of legal changes in our country, in various historical moments, the legal regulation of same-sex communities seemed to be the most distant, the most difficult to achieve, and the most impossible option. But the symbolic and moral significance of the legal recognition of same-sex union, as the right of people to love and live with another person of the same sex, is a much greater issue than merely enabling several same-sex couples to formalize their relationship. The legal regulation of same-sex unions gives a completely different dimension to a range of political, social, economic and other issues (e.g. the right to abortion, domestic violence, sexual harassment and mobbing at work and in educational institutions, women's poverty and unemployment, women's right to get organized, their public and political activities, including the right to disagree with mainstream political and academic trends, etc.). The legalization of same-sex unions entails the legal recognition of women's right to autonomy, independence, independent existence, the right to choose, financial autonomy and emancipation, and many other things that women need but do not have enough or do not have at all.

The legal regulation of same-sex unions also implies the legal recognition of alterity ("otherness"). It entails the legalized right to diversity, as well as the right not only to be tolerated for being different but also the right to active legal protection of alterity. It also entails the observance of guaranteed civil rights recognized for members of minority groups which are marginalized in number or social influence. The legal regulation of same-sex unions also implies much more than mere legal regulation of property relations and the civil status of persons that it directly refers to; in effect, the legalization of same-sex unions is a sign of democracy, openness and tolerance in society. It is also a sign of social welfare (in both material and moral sense); in fact, the states that recognize or pursue the recognition of same-sex union are among the states with the highest living standard (measured by material criteria). In short, the feminist movement in Serbia has never had a dilemma regarding the right to same-sex unions as a necessary human right of same-sex partners. Serbian feminists have always unequivocally supported this right, hoping that the issue would finally be removed from the political agenda after the adoption of a legislative act regulating same-sex unions.

4. The Social Context: The Current Position of the LGBTI+ People in Serbia

Three basic problems have characterized the position of the LGBTI+ population in Serbia for years (Mršević, 2019:619): a threat to personal security due to the occurrence of unauthorized (or rarely sanctioned) phobic violence which is still the biggest problem of the queer community (Kovačević, Planojević, 2021:31); tolerated phobic hate speech in public discourse (Commissioner, 2022); and a lack of possibility to establish a legally regulated unions and family relations. Despite significant developments and obvious changes in citizens' attitudes across the region, violence and discrimination continue to pose a major challenge to the community (Gavrić, Čaušević, 2021:8). Many important issues (such as: registration of same-sex unions, rights of trans and intersex persons, civil and other rights related to inheritance, pensions, etc.) are still unregulated (GayEcho, 2020). Yet, after two decades of legislative changes, improved access to justice, increased visibility and the rise of several prominent activists and organizations in Serbia, the endeavor to improve the legal position of LGBTI+ people has culminated in advocating for equality in marriage (by enacting same-sex laws).

In the absence of any legal solution, same-sex partners use all existing legal and non-legal mechanisms and resort to finding alternative ways to at least partially compensate for the rights enjoyed by spouses in a traditional family. This status, in cooperation with the pressure created by the conservative environment, leads to a complete lack of legal and physical security. This generates revolt in the LGBTI+ community, resulting in growing mutual animosity between the LGBTI+ community and the majority heterosexual population, which ultimately leaves less and less room for a lasting solution. On the other hand, when the LGBTI+ community raises the issue of legalizing same-sex partnerships through its representatives, these initiatives are often misunderstood by the public as a requirement to ensure the enjoyment of some basic human rights, human and minority rights and social dialogue (Ministry, 2021b: 2).

However, the position of LGBTI+ people in Serbia is slowly but surely changing for the better. In 2021, the Pride Parade was successfully held in Belgrade for the eighth time, as well as the 13th Merlinka Queer Film Festival and numerous other events organized for

by members of the queer community. The United Nations Office in Serbia organized a promotional campaign aimed at supporting the adoption of the legislative act on same-sex communities, which included participation of diplomats, public figures, and represetnatives of the Ministry for Human and Minority Rights and Social Dialogue. The Rulebook on Conditions, Criteria, Manner of Selection, Testing and Assessment of Reproductive Cell and Embryo Providers has been amended, thus ending the direct two-year discrimination against queer persons by the Ministry of Health. The first regional platform ("You are heard") for reporting hate crime and incidents motivated by prejudice against LGBT+ people was launched in 2021, which enables more systematic and comprehensive monitoring and reporting on the safety of queer people.

In terms of directions for improvement, opinions, attitudes, suggestions, etc., come from different sources, such as: regular annual and special thematic reports of independent institutions, published research, the views of civil society organizations, etc. A common denominator in all of them is the observed need to reduce stereotypes and prejudices towards groups at risk of discrimination and to promote a positive public image of these groups. For years, the reports of independent institutions have been highlighting the need for more active participation of the state and relevant activities of state institutions at all levels.

In terms of the general public attitudes towards the LGBTI+ population in Serbia, Geten's research (2021) on the degree of social integration of the LGBTI populations in Serbia[5] indicates that the respondents largely opt for inclusive egalitarian social relations (Mršević, 2021:15-18). A vast majority of respondents in the general population believe that all people should be treated equally (95.9 %), that social equality is needed because we would have fewer problems if we really treat people equally (94.2 %), and that everything possible must be done to ensure equal conditions for different groups of people (90.4 %). Notably, most respondents expressed a clear position that LGBTI+ persons should be able to legally regulate same-sex unions as a form of establishing family relation (two thirds or 65.4% fully agreed with this statement and 16.7% partially agree, which makes a total of 82.1 % of respondents from the general population. This is one of the important findings of this research in a situation when there is a common perception in general public that the legalization of same-sex unions cannot "pass" in Serbia because "the majority of the population does not agree" with it. This research results refute the accuracy and authenticity of that allegedly widespread negative attitude of the majority, which is neither measured nor exactly documented. Due to the prevailing presence and loud rhetoric of the opponents of same-sex unions in the public discourse, they are likely to develop a misconception that their views are the views of the majority, whereas the much quieter majority actually has nothing against such unions and considers that it the duty of the state to provide the necessary legal context. Moreover, 75.6% of respondents in the general population believe that LGBTI+ people should be allowed to adopt or foster children under the same terms as traditional families (57.1% fully agreed with the statement and 18.5 % partially agreed, which makes a total of 75.6% of respondents).

[5] The research was organized by Geten (Centre for LGBTIQA people's rights) from 1 February to 30 April 2021.

5. The Legal Protection Context: Ongoing Ombudsman's Support

The Protector of Citizens (Ombudsman) is one of the independent institutionsin Serbia[6] which has been providing explicit support to the LGBTI+ community since 2009. The Ombudsman's Special Report (2012) and regular annual reports (from 2009 to 2022) include concrete proposals for improving the position of the LGBTI+ persons in Serbia since 2009 and tackling a number of observed problems: inadequate response of institutions to cases of violence; hate speech against LGBTI+ people; attacks on LGBTI+ activists and their groups and associations supporting LGBTI+ rights, etc. Since 2016, the Protector of Citizens has regularly and continuously pointed out (through public announcements, recommendations, educational activities, opinions, mediation activities, engagement in legislative initiatives, as well as in regular annual reports) that there is a need for legal regulation of same-sex communities. At the same time, the Ombudsman does not refrain from submitting a request for legal regulation of this issue to the highest bodies of the legislative and executive power. Namely, according to Article 17 (para. 3) of the Ombudsman Act, the Protector of Citizens is not authorized to control the work of the National Assembly and the Government. However, the Ombudsman believes that it would be useful for (policy design purposes) if these bodies would take into consideration the Ombudsman's proposals on the legal regulation of same-sex unions and many other issues.[7]

It is important to highlight the Ombudsman's continuous commitment to raising public awareness about respect for and observance of the LGBTI+ rights: "The government, autonomous province bodies and local self-government units should ensure continuous implementation of measures and activities aimed at raising public awareness of the need to respect LGBTI rights." (Protector of Citizens, 2018:37-39). This affirmative and proactive strategy may reduce the presence of public resistance to all legal changes aimed at regulating same-sex unions. The Ombudsman's Annual Report for the year 2015 states that it is crucial to ensure the respect for and the exercise of the LGBTI persons' rights in the field of education, employment, health care, social security, legal regulation of same-sex unions, legal consequences of sex and gender reassignment surgery, as well as the protection of their physical and mental integrity (Protector of Citizens, 2016:22). In the Annual Report for 2016, it is noted (*inter alia)* that the full exercise of the LGBTI persons' rights in the field of legal regulation of same-sex unions has not been ensured yet (Protector of Citizens, 2017:18). The Annual Report for 2017 states that the full exercise of the LGBTI persons' rights has not been observed in the area of education, employment, health care, social welfare, legal regulation of their cohabitation, the legal consequences of gender change and gender identity, and protection of their physical and psychological identity (Protector of Citizens, 2018:6). Reports sent by the Protector of Citizens to the United Nations bodies and treaty bodies point to shortcomings in the exercise and legal protection of the LGBTI persons' rights, such as: the lack of laws regulating same-sex unions, the lack of a national campaign to raise public awareness of LGBTI status and rights, the lack of laws regulating gender identity and legal consequences of sex reassignment, the lack of law on free legal aid for vulnerable social groups (including LGBTI population), etc. (Protector of Citizens, 2018:38).

[6] It should be noted that all independent institutions (Commissioner for the Protection of Equality, Commissioner for Information of Public Importance and Personal Data Protection) are supportive in terms of the LGBTI+ rights.

[7] Some of these issues are: the freedom of expression and peaceful assembly, protection of their physical and mental integrity, education, employment, health, social protection and legal consequences of gender adjustment.

6. THE EUROPEAN ENVIRONMENT CONTEXT

In terms of the legal regulation of same-sex unions, Serbia is constantly lagging behind, not only in relation to the western and northern European countries but also in relation to southern European countries (Spain, Portugal, Italy and Greece). Serbia is also lagging behind Hungary, governed by the conservative and homophobic Orban's administration; however, it should be noted that registered unions of same-sex couples have been legally recognized in Hungary since 2009 and regulated by the Registered Partnership Act no. XXIX.[8] According to the Hungarian Central Statistical Office (STADAT), on the average, there are 75.3 registered same-sex unions in Hungary per year (48.7 by male partners and 26.7 by female partners), while the average age of partners is 38.7 years (STADAT, 2022).[9] Serbia is also lagging behind the neighboring countries: Croatia and Montenegro.[10] All three Western Balkan countries (Serbia, Croatia and Montenegro) have similar cultural and socio-economic characteristics and could be said to share a similar social context in this regard. All these societies are patriarchal, conservative and the influence of the church is extremely high. Thus, the fact that Croatia and Montenegro have adopted legislative acts regulating same-sex unions (registered partnerships)[11], which aim to improve the quality of life of LGBTI+ people and their social status, shows that the same goal could be achieved in Serbia.

Same-sex marriage is legally regulated in 19 European countries[12]: Andorra 2023, Austria 2019, Belgium 2003, Denmark 2012, Finland 2017, France 2013, Germany 2017, Iceland 2010, Ireland 2015, Luxembourg 2015, Malta 2017, Netherlands 2001, Norway 2009, Portugal 2010, Slovenia 2022, Spain 2005, Sweden 2009, Switzerland 2022, and United Kingdom 2020. Although they do not recognize same-sex unions, Bulgaria, Latvia, Lithuania and Romania are bound by a ruling by the European Court of Justice to recognize same-sex marriages performed within the EU and including an EU citizen for the purposes of granting legal residence (Wikipedia, 2022).[13]

Civil unions is regulated by law in 10 countries: Croatia 2014, Czech Republic 2006, Cyprus 2015, Greece 2015, Hungary 2009, Italy 2916, Liechtenstein 2011, Monaco 2020, Montenegro 2021, and San Marino 2019. Unregistered cohabitation[14] exists in 2 countries: Slovakia and Poland (Wikipedia, 2022).

There is no recognition of same-sex marriages or partnerships in 8 countries: Albania, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, North Macedonia, Romania (but part of the

[8] The Hungarian Act No. XXIX on Registered Partnerships and related legislation and on the amendment of other statutes to facilitate proof of Cohabitation (*Törvény, amely szabályozza a bejegyzett élettársi kapcsolatokról szóló)*, governing same-sex relationships, entered into force on 1 July 2009. See: Jurisdiction and Rule of Law Network; https://net.jogtar.hu/jogszabaly?docid=a0900029.tv. Also see: Háttér Support Society for LGBT People and Hungarian LGBT Alliance (2021:2):

[9] See: The official data of the Hungarian Central Statistical Office (STADAT) on Registered partnerships (22.1.1.18. *Bejegyzett élettársi kapcsolatok*, Kozponti Statisytoaki Hivatal), last updated 15 July 2022.; https://www.ksh.hu/stadat_files/nep/hu/nep0018.html

[10] The legal regulation of same-sex unions is the responsibility of the member states of the Council of Europe.

[11] *In Croatia, the Life Partnership Act was adopted in 2014. In Montenegro, the Same-sex Partnership Act was adopted in July 2020. (ERA – LGBTI Equal Rights Association for Western Balkans and Turkey (2022): https://www.lgbti-era.org/blog/same-sex-unions-%E2%80%93-overview-europe-and-balkans*

[12] Other types of partnerships are also available in eleven countries that have enacted same-sex maarrige laws.

[13] Wikipedia (2022): Recognition of same-sex marriages; https://en.wikipedia.org/wiki/Same-sex_marriage

[14] This is private contractual cohabitation of two persons (regardless of sexual orientation or relationship type - including non-sexual non-intimate relationships) for limited purposes.

EU, it is legally bound to recognize same-sex unions contracted abroad in compliance with C-673/16 of the European Court of Justice), Turkey, and Vatican City (Wikipedia, 2022).

7. JUDGMENTS OF THE EUROPEAN COURTS IN STRASBOURG AND LUXEMBOURG

An important element of the European legal environment pertaining to same-sex unions are the judgments of European courts, primarily the European Court of Human Rights (ECtHR) in Strasbourg but also the Court of Justice of the European Union (CJEU) in Luxembourg.

7.1. Case *Valianatos and Others v. Greece*, ECtHR Judgment 7.11.2013 [GC][15]

The applicants filed an application with the European Court of Human Rights in Strasbourg (on 7 November 2013), under Article 14 (Prohibition of discrimination) in conjunction with Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (ECHR), claiming that the Greek State had discriminated them by excluding same-sex couples from the scope of the legislative act (Law no. 3719/2008), which officially regulated the partnership of unmarried couples of different sex. The legally established "civil unions" provided a more flexible legal framework for unmarried couples but it was only applicable to heterosexual couples while same-sex couples were excluded. In light of the legitimate aims invoked by the law when introducing civil unions, the Court ruled that Greece had failed to prove that it was necessary to ban same-sex couples from entering "civil unions" and that the reasons for such exclusion were not convincing and justifiable.

7.2. Case *Oliari and Others v. Italy*, ECtHR Judgment 21.10.2015[16]

The applicants were six Italian men (three same-sex couples) who filed their applications with the ECtHR in 2011, claiming discrimination on the basis of sexual orientation, after Italian courts had rejected their marriage requests. In Italy, same-sex marriages are not legal and the Italian law (at the time) did not provide for the recognition of any other union alternative to marriage, either for heterosexual or for homosexual partners. Thus, Italy remained among the last Western European countries that had no legislation on civil partnerships. The Court found that Italy had violated Article 8 of the ECHR (Right to respect for private and family life) by failing to legally recognize their stable same-sex unions and established a positive obligation of member states to provide relevant legal framework which would ensure the legal recognition and protection of same-sex couples.

7.3. Case *Orlandi and Others v. Italy*, ECtHR Judgment 14.03.2018[17]

In their application submitted in 2012, six same-sex couples complained about the Italian authorities refused to register their marriages which had been contracted abroad. Given that Italian law did not allow same-sex marriage, nor did it provide for the legal

[15] Case App. 29381/09 and 32684/09 *Vallianatos and Others v. Greece* [GC], Judgment 7.11.2013 [GC], Retrieved 5 March 2022 from https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9224%22]}

[16] Case App. 18766/11 and 36030/11 *Oliari and others v. Italy*, Judgment 21/10/2015, Retrieved 5 March 2022 from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156265%22]}

[17] Case App. 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and others v. Italy*, Judgment 14/03/2018, Retrieved 5 March 2022 from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179547%22]}

recognition of any other type of alternative union, they could not have their marriage legally recognized and protected in Italy. With reference to Articles 8 (Right to respect for private and family life), Article 12 (Right to marry), and Article 14 (Prohibition of discrimination) of the ECHR, the Court found that the rights of applicants' rights were violated, and urged the member states to legally recognize and protect same-sex unions. In effect, following the decision in *Oliari* (2015), Italy enacted a legislative act (Law no. 76/2016) providing for the legal recognition, registration and protection of civil unions, which has been effective since 2017.

7.4. Case C-673/16 *Coman and Others v. Romania,* CJEU Judgment 5 June 2018[18]

In 2016, the EU Court of Justice received a request for a preliminary ruling from the Constitutional Court of Romania concerning the interpretation of Article 2 (Definition of 'spouse', Same-sex marriage), Article 3 (Family members of EU citizens), and Article 7 (Right of residence for more than three months) of Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely in the territory of an EU Member State. In 2010, a Romanian national (Coman) and a US national (Hamilton) got married in Brussels. In 2012, the same-sex spouses requested from the Romanian authorities to issue relevant documents to enable the couple to permanently reside in Romania. The request was based on the Directive 2004/38/EC, which allows a spouse of an EU citizen to get residence in the country of residence of the EU citizen. Romania refused to grant the right of residence to Hamilton because Romanian law did not recognize same-sex marriages; thus, he was not the 'spouse' of an EU citizen. In light of the freedom of movement and residence of EU citizens and their family members, the Court held that the term "spouse" equally refers to same-sex and different-sex marriages. Thus, family members of EU citizens, including same-sex spouses/partners who are aliens, have the right to reside longer than three tourist months in the country of residence of the EU citizen (European Sources Online, 2022).[19]

8. CONCLUSION

During 2021, when there was preparatory process leading to a possibility of adopting the Act on Same-Sex Unions in Serbia, the views of the opponents of same-sex unions prevailed. They were determined to preserve the *status quo* by inducing an irrational sense of loss of "privilege", creating a mental fog of distortion, overemphasis and mystification, and constructing the illusion of otherwise non-existent significant symbolic differences between the pros and cons of legal regulation of same-sex unions. Insisting on conventional "family values", they insult LGBTI people in various ways, blame them for lack of sensibility for family life, accuse them of declining birth rates, etc. Same-sex orientation is presented as an immoral phenomenon, a disease to be medically treated. It is also unjustifiably concluded that more extensive LGBT rights may threaten the rights of the

[18] Case C-673/16 *Coman, Hamilton and Others v Romania*, Judgment 5 June 2018, Retrieved 6 February 2021 from https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN

[19] European Sources Online (2022): C-673/16 Case summary; Retrieved 6 February 2021 from https://www.europeansources.info/record/judgement-in-case-c-673-16-relu-adrian-coman-and-others-v-inspectoratul-general-pentru-imigrari-and-others/#:~:text=The%20Court%20argues%20that%2C%20while,a%20derived%20right%20of%20residence

heterosexual majority and, thus, lead to "ruining" the family and the society as a whole (Kovačević, Planojević, 2021:110).

Although they depart from the model of heterosexual family community, same-sex unions are not a detrimental phenomenon for traditional family values, nor are they a reflection of promiscuous, antisocial behavior, avoidance of parenthood, and denial of family existence. On the contrary, they are a reflection of the efforts of homosexuals not to be deprived of their partners/spouses, families, parenthood and all other features that are commonly associated with a stable, emotionally/sexually, socially and legally regulated conventional (monogamous) community. The legal recognition of same-sex unions as families is also the result of the need and interest of every society to legally enable as many people as possible to live in stable family environments, in legally recognized and regulated unions, with due respect for various *de facto* family modalities. Therefore, the legal regulation of same-sex communities as alternative family units would not undermine the existence of different-sex families nor the traditional family values; in fact, the family values may be much more undermined by efforts to delimit family legislation, impose boundaries on family law institutes, and make legal provisions exclusively accessible to heterosexual couples.

There is no convincing evidence about the correlation between the decline in heterosexual marriages and the legal provisions allowing homosexuals to legitimize their unions, nor is there any rational reason for such causality. So far, no decline in the number of heterosexual marriages has been observed in any of the countries that legally recognize same-sex unions. Heterosexual people get married for reasons that have nothing to do with what homosexuals do; thus, disappointment, anger, protest or any other negative (or even positive) reaction to the legal regulation of homosexual unions can by no means and in no individual case be a deterrent to establishing heterosexual families. The forewarnings that the institutions of marriage and family may be endangered by the legal recognition of same-sex unions are supported by the presumptions that heterosexual partners may increasingly repudiate the institutions of marriage and family altogether. The social reality does not support such “theories”, which have proven to be ill-founded, nor does the social reality include the slightest indication that it could occur in the future (Mršević, 2009:17-22).

Same-sex orientation is not a contagious disease but a minority variety of normal human sexuality. There is also no danger of spreading homosexuality by allowing same-sex unions. Heterosexual people do not become homosexuals for the mere fact that there is no legal ban on homosexuality that same-sex unions are legally recognized, or that homosexuality has become more visible and socially and publicly accepted. The presence of same-sex communities should not be kept secret and out of sight of children and youth, who are highly unlikely to "get infected" or "get some wrong ideas" simply by seeing homosexuals in public life, nor can they “lose” their heterosexual orientation if it is innate. The legal recognition of alternative types of family communities certainly does not imply that the conventional family unit is "destroyed" or "devalued"; on the contrary, it is strengthened as an institution by ensuring legal certainty, stability and benefits of family life to a much larger number of people.

In Resolution 2239 (2018), the Parliamentary Assembly of the Council of Europe is explicit that intolerance towards one’s sexual orientation or gender identity can never be used as an excuse for discriminatory treatment, which unacceptably serves to legitimize human rights’ violations. On the contrary, “states must work vigorously to combat prejudices that allow such discrimination to persist, in order to fulfill their responsibility to protect and promote the human rights of all those within their jurisdiction and to eliminate

discrimination on all grounds, including sexual orientation or gender identity." (CoE PA Resolution, 2018). Legal regulation of same-sex unions is the responsibility of each member state of the Council of Europe.

In many countries, homophobia has been significantly reduced by the legal regulation of same-sex family unions because homophobia ceases to be a legitimate reason for "justifiably opposing the illegal LBGT+ communities" and their "unlawful" same-sex unions. Thus, by supporting the social context of reduced homophobia and increased acceptability of same-sex unions, the "Rainbow" family (Mršević, 2020:72) is normalized. Therefore, it is necessary to exert joint efforts (in consultation with independent institutions, academia, civil society and the media, both before and after drafting the same-sex unions legislation) and actively work on combating stereotypes, discrimination and intolerance against LGBTI persons, promoting the acceptance and respect of rainbow family alternatives and ensuring human dignity and gender equality (CoE PA Report, 2021: 2, 10). The ultimate results of this act of social affirmation, without hindering the hetero majority legal rights, would be a greater legal certainty and visibility of the LGBTI+ communities in the social context, which would eventually make their activities aimed at deconstructing stereotypes about LGBTI+ people and their same-sex communities much more impactful.

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ISTOPOLNE ZAJEDNICE IZMEĐU NEVIDLJIVOSTI I PRAVNE PRIZNATOSTI

Predmet rada je analiza društvenog i pravnog statusa istopolnih zajednica u Srbiji koje u svakodnevnoj praksi funkcionišu uprkos još uvek nedostajuće pravne regulative. Izlaže se pravo na zakonsko regulisanje istopolnih zajednica kao alteriteta u odnosu na bračnu i vanbračnu zajednicu, u svetlu značaja legitimnog prava na različitost, pravo na zagarantovana građanska prava priznata onima koji su manjinski po broju i/ili društvenom uticaju. Glavna ideja je neophodnost uvažavanja egzistencije drugačije od većinske heteronormativne. Cilj izlaganja je razvijanje društvene sposobnosti za percepciju i za omogućavanje uspostavljanja odnosa i dijaloga sa tim porodičnim alteritetom. Naglašava se potreba razvijanja shvatanja da je pravno priznanje istopolnih zajednica mnogo više od pravnog regulisanja njihovih imovinskih odnosa i građanskih statusa jer je znak demokratizacije društva, njegove otvorenosti i tolerancije. Tematski, rad je organizovan kroz prezentaciju naučnog i aktuelnog društvenog konteksta u Srbiji, afirmativnih stavova nezavisne institucije Zaštitnika građana i evropskog konteksta, sa posebnim osvrtom na nedavna dokumenta Parlamentarne skupštine Saveta Evrope i relevantne presude evropskih sudova za ljudska prava. Tekst se završava zaključkom da se situacija u Srbiji ipak, polako menja u pravcu poboljšanja položaja LGBTI+ osoba. Zaključuje se da se homofobija znatno umanjuje pravnom regulativom statusa istopolnih ("duginih") zajednica, jer gubi legitimitet "opravdanog suprostavljanja ilegalnim" zajednicama kao jedan od svojih značajnih oslonaca. Istovremeno, istopolne zajednice tzv. "dugine" porodice dobijaju pravnom regulativom normalizovan, podržavajuć društveni kontekst suzbijene homofobije i samim tim povećane prihvatljivosti. Posledično, očekivani rezultat je da bi tim činom društvene afirmacije pripadnici LGBTI+ zajednice, ne ometajući ni na koji način većinsku heteronormativnost, imali veću pravnu sigurnost, i neophodne uslove da u društvenom kontekstu postanu vidljiviji i uticajniji na dekonstrukciju stereotipa o LGBTI+ osobama i njihovim istopolnim zajednicama.

Ključne reči: *istopolne zajednice, društveni alteritet, naučni kontekst, evropski kontekst, dekonstrukcija heteronormativnosti, pravna sigurnost „duginih" zajednice.*

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Review Paper

THE ENFORCEMENT OF ARBITRAL AWARDS UNDER THE ICSID CONVENTION AND PUBLIC POLICY

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Abstract. *International arbitration emerged as a response to cross-border trade and foreign investments. It is an instrument which enables the uninterrupted flow of foreign capital which has a significant impact on the national economy, particularly considering that arbitral awards are enforced in national jurisdictions. The profit-oriented economic trend and its impact on individual states is even more visible in international investments, given that the foreign investor who operates on the territory of a Host State is included not only in economic but also in social affairs of that State. This poses a challenge: how should a State preserve national interests? Referring to the relevant provisions of the New York Convention (1958) and the ICSID Convention (1965), the author elaborates on the idea that public policy may be used in the enforcement stage as justification for non-compliance with the rendered arbitral award. The author introduces relevant arbitration practice that has challenged the interpretation of Article 54 of the ICSID Convention, and analyzes the impact it has had on the ICSID system.*

Key words: *international investment arbitration, ICSID, public policy*

1. INTRODUCTION

The 20th century economy was marked by the conceptual framework of liberal economy, which shaped the development strategies of countries worldwide. The concept of liberal economy entailed the liberalization of national markets and openness of domestic economies to facilitate international trade. Legal framework had to adapt to the changing trends in economics. International arbitration developed as a response to the emerging developments in international trading system. Perceived as a method for faster and cheaper resolution of trade disputes, international arbitration favored the development of the profit-driven economy through cross-border business operations. This trend is even more apparent in the context of foreign investments.

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In the 1960s, the influx of foreign capital through direct investments was considered the best financial instrument for economic development; thus, this period was marked by the expansion of investment projects into the undeveloped or developing countries. Foreign investments were exposed to unstable political systems, or the unsophisticated legal orders, which made them vulnerable to uncommercial risks. Such surrounding in the host states created uncertainty regarding the realization of investment projects. Consequently, the capital-exporting countries strived to provide an efficient mechanism for protecting investors' rights.

International arbitration emerged as a compromise between the sovereign state powers and domestic legal and judicial system (on the one hand), and the need for business to maintain their profit-seeking activities (on the other hand). This idea is underlined in the Investor-state dispute settlement (ISDS) system, in which the States derogate part of their sovereignty (to arbitration) and grant investors the right to directly bring claims against the States. This system was originally built on the idea to provide a mechanism for undisturbed flow of private investments.

Unlike the commercial relations which imply the right of access to a foreign market, the international investment projects imply the investors' right to be present in a foreign market (Schneiderman, 2000: 759). Consequently, the investor participates in the market of the host state, affecting not only the economic affairs but other issues as well, such as the environment, labor, public health, etc. By signing investment treaties or becoming a member of international organizations, the States have created a legal framework in which certain standards of treatment are granted to investors or to foreign trade partners. This treatment is usually led by the prerequisite of creating a favorable business and investment environment, which is guaranteed by access to international arbitration. Such an environment poses a huge challenge for the States: how to preserve national interests?

The challenge to preserve national interests is even more enhanced by international arbitration, which challenges the traditional concept of dispute resolution mechanisms, the notions of jurisdiction, decision-making authority, as well as the legal corpus underlying these concepts and the general idea of legality and legitimacy of the process. The issues which were resolved under the auspices of courts or governmental bodies, and guarded by the patronage of state sovereignty, have been shifted into the areas of private regime. International arbitration is, at its core, a private institute based on the principle of party autonomy. This allows the parties to create the system for their dispute resolution, not only by opting for specific rules of procedure but also by agreeing upon the substantive law to be applied to their relations (Donovan, 1995: 647).

The State's regulatory power still allows for some control over the international trade flow in the context of preservation of national non-economic interests. However, regulatory powers in the open economy are affected by the international input. This input may be the institutional one (obtained through membership in international organizations or by signing international treaties), or *de facto* input (reflected in constructed domestic regulation aimed at attracting profits. In such circumstances, the question of how far the party autonomy may go becomes even more important. Referring to the relevant provisions of the New York Convention (1958) and the ICSID Convention (1966), this paper elaborates on the idea that the public policy may function as a corrective force which may reach a compromise between two clashing interests: those of the business community and the non-economic interests of the society (Buchanan, 1988: 511-532).

2. Placing Public Policy in the Focus of International Arbitration

Modern arbitration is based on a premise that it should accommodate the needs of the international business community. As such, it strives to position itself as a neutral dispute resolution forum, in which parties to a dispute are isolated from the State's national interests. This is one of the tools to circumvent uncommercial risks, but also to stress the latent aspirations to minimize judicial interference with the arbitral process (Donovan, 1995: 649). This is in line with a principle *Interest republicae ut sit finis litium*, which means that it is in the public interest to preserve the finality of arbitral awards (Poon, 2021: 188).

International arbitration is viewed as an autonomous system (independent from states), where disputes are resolved in a private regime set by the parties. But, the disputing parties' activities are reflected on the national market, and have a social impact as well. So, the question remains how domestic or even local authorities can enforce national laws and cope with their impact not only on economic but also on social and political interests (Donovan, 1995: 649)

Arbitral awards are enforceable through national judicial systems. This calls for a compromise between the finality of arbitral awards and national interests, given the fact that courts have the authority to supervise arbitral practice and the application of substantive law chosen by the disputing parties to govern their relations and dispute resolution (Buchanan, 1988: 512). In the area of commercial arbitration, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the New York Convention, 1958)[1] put public policy in focus as an instrument for achieving this compromise (Gibson, 2008: 1229).

Public policy sets the standards and principles governing the corpus of legal rules in each country and serves to protect the basic values in a community (Buchanan, 1988: 519). Public policy comprises regulations which cannot be altered by the parties' arrangement and cannot be affected by the party autonomy principle (Buchanan, 1988: 513).

In the context of the New York Convention, public policy may be used by courts to defend national interests in two ways. Article V (2) of the New York Convention prescribes:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country." (Article V(2) of the NY Convention).

The first part of the cited rule concerns the arbitrability of a dispute. In certain subject matters, it is preferred for state's judicial body to have exclusive jurisdiction, which is often determined on the basis of public policy (Buchanan, 1988: 516). The second part of the rule invokes public policy on more specific grounds; it entitles national courts to refuse the enforcement of an arbitral award which is inconsistent with the public policy. This justifies the idea which describes the courts as the exclusive gatekeepers of the state's public policy (Poon, 2012: 194). The problem arises when it comes to the scope of public policy. While there is a consensus that public policy protects the basic convictions and notions of justice that a given community is based upon (Trakman, 2018: 213), public policy is believed to be a dynamic concept, which constantly adapts itself to the changing needs of the society. In that respect, public policy is "inconsistent in nature and unpredictable in application"

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958; https://www.newyorkconvention.org/

(Trakman, 2018: 213). In addition, neither the *travaux preparatoires* to the New York Convention nor the arbitration jurisprudence since 1958 have resolved the uncertainty about the content of public policy (Trakman, 2018: 211). It is perhaps for this reason that public policy is considered to play a greater role in arbitration theory than in practice (Buchanan, 1988: 519).

3. PUBLIC POLICY THROUGH THE LENS OF INTERNATIONAL INVESTMENT ARBITRATION

International investment tribunals were created to protect foreign investors from the unilateral actions of the State. But, in turn, international arbitration for resolving investment disputes is often perceived as being biased towards the investors. It should be noted that the investment flows have changed. In the 1980s, there was a rush of foreign investors from developed countries to invest in the undeveloped ones, which generated the growing requests for openness and liberalization. But, modern investments are more likely to flow into the developed countries, which asks for new legal framework that should balance the competing interests of the States and foreign investors with greater sensitivity. In practice, there is a gap between the corporative practices and the State sovereignty (Shan, 2006: 662). It ultimately calls for distancing the theoretical background from liberal economy towards a more conservative approach to regulating the international capital flows. One of the aspects of such an approach is the possibility to refuse the enforcement of awards rendered in international investment disputes if the awards are contrary to public policy.

The International Centre for Settlement of Investment Disputes (ICSID)[2] plays a significant role in shaping the system of investment disputes resolution. It was created as a means of providing stable and efficient protection to foreign investors, enabling them to plan and manage long-term investment projects. The ICSID is a system for resolving disputes with unique features in the international arena. It allows private investors to initiate proceedings directly against a State. It was envisioned as a neutral, depoliticized forum with "rule-based" model for rendering decisions. One of the most peculiar ICSID features is that it is a "self-contained" system because the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter: the ICSID Convention, 1965) does not allow any other review of awards but the one envisaged within the system itself. Article 53(1) of the ICSID Convention provides that "the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention".[3] There are several remedies and review procedures that the ICSID Convention offers to the parties[4], but the distinctive characteristic of these procedures is that there is no external review of the awards. The ICSID system is "insulated from domestic laws and court involvement" (Bermann, 2020: 312).

In international arbitration, there is usually some discretion left for the national courts to decide about the enforcement of the arbitral awards, but the ICSID Convention is very restrictive in that regard. The enforcement provisions are described as the most important ones (Schreuer, 2009: 1117). Article 54 of ICSID Convention reads as follows:

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[2] the International Centre for Settlement of Investment Disputes (ICSID) was created by Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 1965.

[3] Article 53 of the ICSID Convention

[4] Supplementing the award and rectifying errors (Article 49-2); Interpretation of the award (Article 50); Revision upon discovery of new decisive facts (Article 51); and Annulment (Article 52 of the ICSID Convention).

"(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."[5]

Unlike the New York Convention (1958), the ICSID Convention does not provide the possibility for domestic courts to review the award in the enforcement stage. It does not envisage any objections that may be raised by a State concerning either the enforcement of awards or the national public policy. Therefore, the enforcement mechanism under the ICSID Convention is considered its distinctive feature (Schreuer, 2009: 1117). The provisions of Article 54 of the ICSID Convention have created belief that it is easier to obtain enforcement of the award under the ICSID Convention than under the New York Convention. Furthermore, Article 54 is interpreted in a manner that the enforcement stage is understood as a practically automatic part of the procedure (Schreuer, 2009: 1115-1150). In a case brought before the ICSID Tribunal, *Vivendi v. Argentina* (II), the Tribunal remarked that "one of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention governing commercial arbitration in the Member States".[6]

The history of drafting the ICSID Convention shows that automatic enforcement system was subject to many debates. Some commentators thought that this was an innovative approach while some insisted on the same enforcement regime as the one provided by the New York Convention. There were also ideas to leave the States the right to refuse the enforcement of an award on the basis of public policy (Bermann, 2020: 322-326). Negotiations among the drafters of the ICSID Convention show that there was a common belief that it is highly unlikely that the States would not comply with the award (Schreuer, 2009: 1115-1150). The international reputation of that State would be at stake, along with the effects on investment climate and the attractiveness of the national market to future inflow of foreign capital. Moreover, a failure to comply with the award would enable diplomatic protection of State nationals (and the right to file any international claim), and it would politicize the relations between the Contracting States (Article 27 of the ICSID Convention). Given the fact that the ICSID Convention was negotiated right after the New York Convention came into effect, it was necessary to provide compelling arguments for departing from the system established therein. As a compromise, the ICSID

[5] Article 54 of the ICSID Convention

[6] *Compañia de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic,* Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award Rendered on August 20, 2007, ICSID Case No ARB/97/3 (Annulment Proceeding), 4 November 2008, para 35.

Convention introduced the obligation to enforce only pecuniary obligations contained in the arbitral award (Schreuer, 2009: 1115-1150).

The past 50 years seem to justify the expectations of the ICSID Convention drafters. But, when compared to the expectations of governments, the ensuing economic circumstances and theoretical approaches, the foreign investors' practice has been demonstrating a paradigm shift in practice. The understanding of Article 54 of the ICSID Convention and the concept of enforcement of arbitral awards provided therein are being challenged. There is a call for rethinking the interpretation and application of Article 54 of the ICSID Convention, and implicitly *de novo* introducing the importance of public policy in the arena of international economic relations.

3.1. The peculiar case of Argentina

In the universal rush to embrace the principles of liberal economy, open the national markets and attract foreign capital through private investment projects, Latin American countries were, at first, reluctant to do so. But in the 1980s, there was a shift in their economic strategies, and some Latin American countries privatized their energy companies and opened their industry to foreign investors. This new policy implied signing bilateral investment treaties (BITs) to stimulate investments by providing treatment standards guarantees to foreign investors. Even though it took some time to overcome the ideology and governing principles of the "Calvo doctrine", BITs exposed these countries to the international dispute resolution forums. Many of the Latin American countries joined the ICSID system.

Argentina is one of the most striking examples of how foreign investors and the ICSID system impacted the national economy. Argentina attracted many investments in the energy sector and in the sector of public services. In the 2000s, Argentina faced a severe economic crisis, which even lead to civil unrest; thus, Argentina was forced to introduce measures to deal with the situation. Some of these measures were unpopular with foreign investors (mainly those relating to dollar-to-peso convertibility and the devaluation of currency), and led to a number of claims filed before the ICSID Tribunal. In these cases, foreign investors claimed BIT violations; in a large number of cases, the ICSID arbitral awards were rendered in their favour (Gomez, 2011: 198). However, it was estimated that if Argentina was found liable in all these cases, it would have to compensate the amount that goes up to hundreds of billions of dollars (Kasenetz, 2009: 710). The officials stated that Argentina would not be able to comply with the awards and pay the awarded compensation (Goodman, 2007: 453). For that reason, Argentina started to develop strategies to avoid payment. Some of these strategies were referred to as "legal and political ways in which Latin American nations are opposing the ICSID system from outside of its framework" (Gomez, 2011: 200).

Relying on the provisions of the ICSID Convention, Argentina promoted the conception that ICSID awards may be subjected to review before national courts, which would have such an authority in the enforcement stage. According to this conception, Article 54(1) of the ICSID Convention deals with the validity of ICSID awards in the country where enforcement is sought, while Article 54(3) subjects the enforcement of arbitral awards to the jurisdiction of national procedure laws. Specifically, in Argentina, national laws require all the rulings of foreign adjudicative bodies to comply with the national public policy. It means that national courts are obliged to decide whether ICSID awards may be enforced on the basis of the national public policy requirements (Kasenetz, 2009: 739-742).

Although Argentine scholars were aware that their interpretation of the ICSID Convention would not be supported either by other ICSID member states or by the ICSID tribunals (Kasenetz, 2009: 742), their struggle posed a great challenge to the ICSID system.

Firstly, it shows that provisions that were taken for granted for many years may be subjected to greater scrutiny, called into question, and applied in a manner not at all predicted when drafting the ICSID Convention. The economic circumstances and future practice might contribute to developing stronger arguments in favour of the Argentine point of view and add to its social legitimacy and persuasive power. A shift from automatic enforcement of arbitral awards to introducing the authority of domestic courts in the enforcement stage (all under the ICSID Convention provisions) is perceived as a great paradigm shift which cannot be disregarded.

Secondly, the case of Argentina illustrates (in a fairly picturesque manner) that the ICSID Convention was drafted under the unquestionable assumption that the effects and spillovers of foreign investments contribute to the economic development of the Contracting States. Schreuer states that the history of drafting the ICSID Convention shows that the original motive for including the enforcement provision was to protect the States against defaulting investors (Schreuer, 2009: 1119). Among other arguments, it is perhaps one of the prevailing factors that contribute to the non-inclusion of public policy objection to the enforcement of awards. But, as shown in the case of Argentina, pecuniary obligations under the ICSID awards may amount to public policy issues, if they pose a threat to maintaining the level of economic development of the country or even bankruptcy of the state.

3.2. Going a step further: EU and the Miculas

The EU regime goes even further in challenging Article 54 of ICSID Convention. A particularly good example is the ICSID case *Micula v. Romania*[7]. In this case, prior to the EU accession, Romania had granted some incentives for foreign investors, but the EU regulations considered such incentives to be illegal state aid, so Romania withdrew them. Micula brothers, operating in Romania, filed a claim before the ICSID Tribunal on the ground of violation of the Romania-Sweden BIT. The ICSID Tribunal rendered an award in favour of Micula brothers, but the European Commission issued an injunction prohibiting Romania to pay damages awarded to Micula brothers by the ICSID Tribunal, on the ground that such payment would constitute illegal state aid (Bermann, 2020: 316).

The Miculas tried to get the ICSID award enforced in numerous jurisdictions but failed. In the context of interpreting and applying Article 54 of the ICSID Convention, the reasoning of the Swedish court was the most problematic. The Swedish court held that, even though the injunction was addressed to Romania only, each Member State is bound by the Commission's decision, otherwise they would be responsible for not acting in accordance with the EU legal system (Bermann, 2020: 329). This decision may be understood as an act in accordance with the basic rules and principles of the EU legal order, or even the matters of public policy. More importantly, the legal reasoning in the Swedish court decision had legal grounds in Article 54 of the ICSID Convention stating that national courts may deny the enforcement of domestic judgments on the basis of requirements of domestic or EU laws. Under Article 54 of the ICSID Convention, ICSID awards must be treated in a same manner as if they were the final judgement of a domestic court. Thus, the court would not allow

[7] *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20)

the enforcement of a domestic judgement which was characterized as an illegal state aid; the court must not allow the enforcement of an ICSID award that would constitute a breach of EU competition laws (Bermann, 2020: 329).

4. The Possibility of Interpreting Article 54 of the ICSID Convention in Consideration of Public Policy

In the provided examples[8], the selected views which challenge the understanding and application of Article 54 of ICSID Convention are yet to show how far-reaching their implications will be. There are some predictions that departure from the mechanism of automatic enforcement is not to be expected (Kasenetz, 2009: 742), but the challenge to the ICSID Convention provisions should not be easily neglected. Notwithstanding the said predictions, the fact is that some of the Latin American states are leaving the ICSID membership. If the EU authorities rule that the enforcement of ICSID awards would constitute a breach of EU law, it may be assumed that the ICSID member States are to be expected to withhold and comply with the enforcement (Bermann, 2020: 332).

The approaches taken by the Argentine scholars and the EU did have an echo in theoretical considerations about a true meaning of Article 54, its objective and purpose, as well as the scope of its application. A good standpoint for arguing in favor of challenging the "automatic" enforcement of the arbitral awards under Article 54 of the ICSID Convention is the *effet utile* principle, which requires that treaties be interpreted in such a manner that all provisions are given meaning and that they are applicable in practice within the scope of that meaning. Interpreting any provision of the ICSID Convention in such a way as to deprive it of its legal effect would be contrary to the Vienna Convention interpretation rules embodied in the Vienna Convention on the Law of Treaties (1969).[9]

As noted in relevant literature, when State obligations had to be limited by national laws, it was done by expressly prescribing that the State shall be subject to some restrictions, thus leaving no room for uncertainty (Bermann, 2020: 340). When put in that context, it is hard to imagine that the ICSID Convention drafters failed to envisage the objections to enforcement of the awards (which were envisaged in the New York Convention) and the ones based on public policy but left to the will of the States to challenge the awards on other grounds envisaged in the national laws of the States (Bermann, 2020: 341).

Even if the enforcement of ICSID awards is considered automatic under the self-contained ICSID system of dispute resolution, Article 54(1) of the ICSID Convention clearly provides that the national courts must treat an ICSID award as if it were a final judgment of the court of that State. This means that the award can be subjected to the same enforcement requirements as national judgments. Otherwise, Article 54(1) of the ICSID Convention lacks meaning and has no practical effect (Bermann, 2020: 342).

[8] The examples of Argentina and EU law explained in the sections 3.1. and 3.2 of this paper.

[9] The Vienna Convention on the Law of Treaties, Vienna, 1969, UN Treaty Series, vol. 1155, available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

5. Concluding Remarks

Public policy is a vague and broad category which may consist of a whole series of specific rights and obligations. But, it is also the most fundamental framework governing legal, economic and social organization in each State. National courts are often perceived as guardians of that framework. If public policy is viewed as a counterforce to oppose the international input that may not always serve the best interest of the national community, institutionalizing the authority of national courts to refuse the enforcement of arbitral awards does not contradict this idea. The New York Convention upholds this conception. It seems that international investment arbitration is not as open to introducing *ordre public* into the framework of this dispute resolution system. As suggested, "any exception on the basis of public policy was supplanted by a carve-out for non-pecuniary awards" (Bermann, 2020: 325). The example of Argentina shows that pecuniary awards may be regarded as the public policy, where values which go well beyond the economic amount of the compensation are at stake. The EU example once again introduces the notion of public policy as the concept that must be at the root of all and every legal action undertaken by the EU Member States.

So, were the ICSID Convention drafters short-sided when construing Article 54? Or was the faith in the compliance with the awards justified, as it shows the rationale for bypassing the public policy as a means to reject enforcement of arbitral awards?

Article 54 of the ICSID Convention provides the opportunity for States to use different tools in the enforcement stage which are immanent to its legal order. It is a means for reconciling different legal traditions under the provisions of the ICSID Convention. Treating an arbitral award as if it were a final judgement of the national court, or the enforcement as it is regulated by the domestic laws, means that the enforcement methods provided by the national laws should be in compliance with Article 54 of the ICSID Convention. The history of drafting the ICSID Convention, as well as the objective, purpose and the very nature of the ICSID system, provide no grounds for interpretation that Article 54 of the ICSID Convention envisages a substantive standard of review before the national courts (Schreuer, 2009: 1148). As nicely noted by Bermann: "In sum, Article 54(1) essentially performs the function of filling the ICSID Convention's enforcement procedure gap" (Bermann, 2020: 342).

Challenging Article 54 of the ICSID Convention, at least for the time being, does not undermine the basic ideas that shaped the ICSID system itself. But, it does add to the debate of who should be responsible for guarding the public policy in international investment arbitration. It stands as a reminder that all the actors in international arbitration are to take into account the interests that might be affected by its outcomes, before reaching the final stage of enforcement of arbitral awards.

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IZVRŠENJE ARBITRAŽNIH ODLUKA PREMA *ICSID* KONVENCIJI I JAVNI POREDAK

Međunarodne arbitraže su se razvile kao odgovor na prekograničnu trgovinu i strane investicije. One omogućavaju neometani tok stranog kapitala, ali ujedno imaju i značajan uticaj na nacionalnu ekonomiju država, naročito imajući u vidu da se arbitražne odluke izvršavaju pred domaćim sudovima. Uticaj ekonomije orijentisane ka sticanju profita je još značajniji kroz realizaciju stranih investicija, jer kroz realizaciju investicije u državi domaćinu, investitor se uključuje ne samo u njene ekonomske, već i u šire društvene tokove. Ovo predstavlja izazov: kako da država očuva ncionalni interes? Autor razmatra ideju da država može odbiti da se pridržava donete arbitražne odluke pozivajući se na javni poredak u fazi izvršenja, čak i pod okriljem odredbi Konvencije o rešavanju investicionih sporova između država i državljana drugih država (ICSID Konvencije). Autor opisuje relevantnu praksu koja već preispituje tumačenje člana 54 ICSID Konvencije i analizira uticaj koji je imala na ICSID sistem.

Ključne reči: *međunarne investicione arbitraže, Konvencija o rešavanju investicionih sporova (ICSID), javni poredak.*

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Review Paper

PREVENTING THE SPREAD OF THE COVID-19 DISEASE: CRIMINAL LAW ASPECT

UDC 343.347.2:616.9
616.98COVID19:578.834.1SARS-CoV-2

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Abstract. *The outbreak of the contagious disease COVID-19 has led to major changes in everyday life. There is almost no segment of life and work that has not been affected. In this context, the paper analyzes the criminal law aspect of preventing the spread of COVID-19 in the Republic of Serbia, by presenting two criminal offences whose incrimination is important for pandemic control: Failure to comply with the Health Regulations during an Epidemic (Article 248 CC) and Transmitting a Contagious Disease (Article 249 CC). The work of judicial bodies during the pandemic will be presented and analyzed with reference to the statistical data issued by the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first pandemic year (2020). The statistical data will provide a clear insight into the phenomenological characteristics of this form of crime in Serbia, which will enable the formulation of recommendations for improving the response of the criminal justice system de lege ferenda.*

Key words: *COVID-19, criminal law, Failure to act pursuant to health regulations during a epidemic, Transmission of a contagious disease*

1. INTRODUCTION

The outbreak of the contagious disease COVID-19, caused by the SARS CoV2 virus, was declared a global pandemic by the World Health Organization (WHO) on 11 March 2020. This public health emergency led to major changes in everyday life (Bradbury-Jones, 2020: 2047). Lockdown measures were introduced worldwide to prevent the spread of the disease (Halford, Dixon, Farrell, Malleson, Tilley, 2020: 1). There is almost no segment of human life and work that has not been affected by the ongoing pandemic. In the context of human health protection, the paper will analyze the criminal law aspect of preventing the spread of the contagious disease COVID-19 in the Republic of Serbia, by presenting two

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criminal offences envisaged in the Criminal Code of the Republic of Serbia (hereinafter: CC RS)[1] whose incrimination has been important for suppression of the pandemic: Failure to Act pursuant to Health Regulations during an Epidemic (Article 248 CC RS) and Transmitting a Contagious Disease (Article 249 CC RS). The work of judicial authorities during the pandemic will be presented with reference to the statistical data issued by the Statistics Office of the Republic of Serbia concerning the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first year of the pandemic (2020). The statistical data will provide a clear insight into the phenomenological characteristics of this form of crime in the Republic of Serbia, which will facilitate the formulation of recommendations for improving the reaction of the criminal justice system in the conditions of the pandemic.

The paper is divided into several parts. In the first part, the author presents and analyzes the basic characteristics of the two criminal offences provided in the Serbian Criminal Code (CC) which are relevant for preventing the spread of the contagious disease COVID-19: Failure to Act pursuant to Health Regulations during a Epidemic (Article 248 CC) and Transmitting a Contagious Disease (Article 249 CC). The second part of the paper presents the phenomenological characteristics of these criminal offences, with specific reference to the statistical data of the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these criminal offences in the first year of the pandemic (2020). On these grounds, the author draws conclusions and makes recommendations for improving the response of the criminal justice system in prospective pandemics.

2. The Normative Framework for Preventing THE Spread of the Contagious Disease COVID 19: Criminal Law Aspect

The Criminal Code of the Republic of Serbia (CC RS) prescribes two criminal offences which are relevant in terms of preventing the spread of the contagious disease COVID-19: Failure to Act pursuant to Health Regulations during an Epidemic (Art 248 CC) and Transmitting a Contagious Disease (Article 249 CC).

These two criminal offenses fall into the group of criminal offenses against human health, envisaged in Chapter 23 (Offences against Human Health, Articles 246-259)[2] of the Criminal Code. The object of protection in these two criminal offences is people's health, and the consequence can occur in the form of endangerment (concrete or abstract danger) or injury (e.g., the spread of a contagious disease). It refers both to the commission of these criminal offences and omission to act in compliance with the prescribed legislative or regulatory acts governing public health. Any natural person or legal entity (the authorized person in a state body, company or organization responsible for implementing the prescribed protection measures) can be the perpetrator of these criminal offences (Jovašević, 2006a: 155-156).

Article 248 of the Serbian Criminal Code regulates the criminal offense of Failure to Act pursuant to Health Regulations during an Epidemic, which reads as follows: "*Whoever,*

[1] Criminal Code of the Republic of Serbia, *Official Gazette, no.* 85/2005, 85/2005-corr., 107/2005-corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019; English version available at: https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf

[2] For more on criminal offences against public health, see: Nikolić-Ristanović, Konstantinović-Vilić, 2018:94.

during an epidemic of a dangerous contagious disease, fails to act pursuant to regulations, decision or orders setting forth measure for suppression or prevention thereof shall be punished by a fine or a term of imprisonment of for up to three years" (Article 248 CC RS). Therefore, the offense envisages penalties for inobservance of and non-compliance with the legal provisions, decisions or orders that stipulate relevant measures for suppression or prevention of contagious diseases and epidemics. In nature, this is a criminal offence with a blanket disposition, whose elements are prescribed in subject-specific health care legislative acts. In terms of the essential elements of crime, it is a deliberate offence which entails proving intent (*dolus*) (Lazarević, 2006: 658).

Article 249 of the Criminal Code prescribes the criminal offense of Transmitting Contagious Diseases, specifying that "whoever fails to act pursuant to regulations, decisions or orders for suppression or prevention of contagious decease", as a result of which "a contagious disease is transmitted, shall be punished by imprisonment of up to three years"(Article 249 CC RS). Therefore, the offence again refers to inobservance of and non-compliance with the prescribed legal provisions, decisions or orders for the suppression or prevention of contagious diseases. The object of protection in this criminal offense are measures for the suppression or prevention of contagious diseases. It is a blanket criminal offense, whose elements are prescribed in subject-specific health care legislative acts. An essential element proving the commission of this offence is the actual spread (transmission) of the contagious disease. The essential element in establishing the perpetrator's guilt (culpability) is intent (Jovašević, 2006 b:565).

In some neighboring countries we may observe somewhat different and more elaborate legal solutions on this issue. In the Criminal Code of Republika Srpska (hereinafter: CC RepS),[3] the provisions on public health are envisaged in Chapter 21 (Articles 194-208 CC RepS). Under Article 194(1) of the CC RepS, the criminal offense of Transmitting a Contagious Disease is committed by a person who does not comply with the regulations or ordinances by which a competent authority prescribes medical examinations, disinfection, isolation (quarantine) of patients or some other measures for suppressing or preventing contagious diseases in humans, an thus causes the transmission of an contagious disease, shall be punished by a fine or a term of imprisonment not exceeding two years. The same penalty shall be imposed on persons who fail to abide by the regulations or orders pertaining to the suppression or prevention of contagious diseases in animals which can be transmitted to humans (Article 194(2) CC RepS). If an incurable contagious disease is transmitted as a result of the criminal offences referred to in Article 194(1), the perpetrator will be punished by a term of imprisonment ranging between one and ten years (Article 194(3) CC RepS). If the criminal offences referred to in Article 194(1) and (2) have been committed out of negligence, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding six months. If the criminal offences referred to Article 194(1), (2) and (4) have resulted in a grievous bodily injury or a serious impairment of health of one or more persons, the perpetrator shall be punished by a term of imprisonment ranging between one and eight years for criminal offences referred to in Article 194(1) and (2), and by a term of imprisonment not exceeding three years for a criminal offense referred to in Article 194(4). If the criminal offences referred to in Article 194 (paragraphs 1 through 4) have resulted in the death of one or more persons, the perpetrator shall be punished by a

[3] Criminal Code of Republic of Srpska, *Official Gazette of Republika Srpska*, br. 64/2017, 104/2018-CC Decision, 15/2021, 89/2021; available at http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/New2019/RSCC_64-17.pdf

term of imprisonment ranging between two and twelve years for criminal offences referred to in Article 194 (1) and (2), by a term of imprisonment ranging between two and fifteen years for the offence referred to in Article 194(3), and by a term of imprisonment ranging between one and eight years for the criminal offence referred to in Article 194(4). (Article 194 (5) CC RepS).

When compared to the Criminal Code of Republic of Serbia (CC RS), the criminal offense of Transmitting a Contagious Disease is more thoroughly defined in the Criminal Code of Republika Srpska (CC RepS), including a wider range of penalties reflecting different degrees of culpability. Notably, Article 194(4) CC RepS envisages that the criminal offence of transmitting a contagious disease may also be committed negligently (without intent).

Article 195 of the CC RepS envisages the criminal offence of Failure to comply with Sanitary Regulations during an Epidemic. Thus, during an epidemic of a contagious disease in humans, any person who fails to comply by the regulations, ordinances and decisions which order measures for its suppression or prevention, shall be punished by a fine or a term of imprisonment not exceeding two years (Article 195(1) CC RepS). The same punishment shall be imposed against anyone who, at the time of an epidemic of a contagious animal disease transmissible to humans, fails to abide by the regulations, ordinances and decisions ordering measures for its suppression or prevention (Article 195(2) CC RepS). If the offences referred to in Article 195(1) and (2) have been committed out of negligence, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding one year (Article 195(3) CC RepS).

Article 196 of the CC RepS envisages the criminal offence of Failure to Apply Measures for Prevention of Contagious Diseases Article, which particularly refers to institutions and authorized person in hospitals, maternity wards, boarding schools, schools, companies and other organizations, cleaning and foodstuff handling services. Any person in these institutions, acting in contravention of sanitary regulations, who fails to apply hygienic measures or employs or keeps employed a person suffering from a contagious disease, and thus causes the transmission of a contagious disease, shall be punished by a fine or a term of imprisonment not exceeding one year (Article 196(1) CC RepS). If the offense referred to in Article 196 (1) has been committed negligently, the perpetrator shall be punished by a fine or a term of imprisonment not exceeding six months (Article 196(2) CC RepS). In case the offences referred to in Article 196(1) and (2) have resulted in a grievous bodily injury or a serious impairment of health of one or more persons, the offender shall be punished by a term of imprisonment ranging between 1 and 5 years for the offences referred to in Article 196(1) and a term of imprisonment not exceeding 3 years for the offence referred to in Article 196(2) (Article 196(3) CC RepS). In case the offences referred to in Article 296 (1) and (2) have resulted in the death of one or more persons, the perpetrator shall be punished by a term of imprisonment ranging between 2 and 12 years for the criminal offence referred to in Article 196(1) and for a term of imprisonment ranging between 1 and 8 years for the offence referred to Article 196(2) (Article 196(4) CC RepS).

Therefore, we may observe that these legal provisions of the CC RepS envisage the possibility of negligent commission of the prescribed criminal offences. *Prima facie*, this legal solution seems to be useful because it regulates a wider range of illegal activities which are sanctioned by criminal legislation. However, a question arises whether it is really justified in terms of the relationship between these criminal law provisions and the misdemeanor law provisions in the area of human health protection. This legal issue was

particularly important during the COVID-19 pandemic. As noted by Šikman and Bajičić (2021), strict application of these criminal law provisions would be ineffective; considering the extent of non-compliance with the prescribed measures for suppression or prevention of the Corona virus epidemic, it would only result in people's resistance and lead to massive violations of the prescribed measures. For instance, "if we look at the application of two basic prevention measures (the mandatory wearing of masks and keeping physical distance), we may observe that the prescribed measures were either not applied or were applied in the wrong way (e.g. wearing a mask under the chin). If all these forms of behaviour were covered in the prescribed criminal offences, the fragmentary character of criminal law would definitely be lost and, thus, the purpose of its existence. The above implicitly leads to the conclusion that these criminal law provisions, considering the extensive character of the prescribed essential elements of crime, are not applicable in the conditions of a pandemic, such as the current COVID-19 pandemic" (Šikman, Bajičić, 2021: 84).

In order to improve the response of the criminal justice system in such circumstances, these authors point to the need to change the existing legal provisions of the Criminal Code of the Republic of Srpska pertaining to the subjective element of the criminal act. They consider that an acceptable legal solution would be to prescribe criminal law punishment only for the commission of intentional criminal acts, while negligence would remain part of the misdemeanor legislation. "On the one hand, it would ensure the principle of *ultima ratio* of criminal law and enable the application of criminal legislation in judicial practice. On the other hand, considering the *de facto* non-compliance with the prescribed norm, this position supports the thesis that it is not necessary to "decriminalize" these forms of behaviour. It is essential to clearly and precisely determine what is considered to be a criminal offense and to apply such a norm in practice. The effectiveness of state reaction to this form of crime substantially depends on the adequate legal norm and its adequate application. It will ensure appropriate criminal law protection of public health, which will contribute to the overall activities aimed at preventing and suppressing the current COVID-19 pandemic and similar situations in the future" (Šikman, Bajičić, 2021: 84).

This *de lege ferenda* proposal can be evaluated as positive because it contributes to a more comprehensive criminal law protection against the pandemic of various contagious diseases. Thus, only the most serious forms of violation of health protection measures have to be sanctioned by the criminal law norms while less serious ones should be regulated by misdemeanour law. This promotes the principle of legal certainty and ensures the protective function of criminal law, as the last means of protecting the most important social values.

3. Phenomenological Characteristics of Criminal Acts Related to the Prevention of Spreading COVID-19 Contagious Disease

As already noted, this part of the paper presents the basic phenomenological characteristics of the two criminal offences pertaining to the suppression and prevention of spreading contagious diseases, with specific reference to the statistical data of the Statistics Office of the Republic of Serbia on the number of criminal reports, charges, convictions and sanctions imposed for the commission of these offences in the first year of the pandemic (2020).

Table 1 Number of reported perpetrators and dismissed criminal reports (2020)

Criminal offence	Total number of criminal report	Number of reports against known offenders	Women	Criminal reports dismissed	Investigation suspended/ terminated
Art. 248 CC	880	877	163	441	/
Art. 249 CC	8	8	4	7	/

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)[4]

The statistical data contained in Table 1 show that, in the year 2020, there was a total number of 880 reported cases for the commission of the criminal offense envisaged in Article 248 CC, 877 of which were filed against known offenders and 163 reports were filed against female offenders. Interestingly, more than 50% of reported cases (441) were dismissed and there was no record on suspended/terminated investigation proceedings. In the same period, there were only 8 criminal reports on the offence of transmitting a contagious disease (Article 249 CC), 7 of which were dismissed. Such a difference in terms of reported offences is expected because the prerequisite for the criminal offense envisaged in Article 249 CC is that the perpetrator must be aware that he/she is infected and that he/she is transmitting the contagious disease to another person through his actions.

Table 2 Number of indictments, convictions and suspended criminal proceedings (2020)

Criminal offence	Total number of indicted offenders	Women	Convictions	Suspended/terminated criminal proceedings/
Art. 248 CC	370	52	343	11
Art. 249CC	8	1	7	/

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)

Table 2 shows a similar trend when it comes to persons indicted and convicted of these criminal offences. In the observed period, a total of 370 offenders were charged with the criminal offense of non-compliance with health regulations during the epidemic (Article 248 CC), 343 of whom were convicted, while criminal proceedings were suspended/terminated in 11 cases. In the same period, only 8 offenders were accused of committing the criminal offense of spreading a contagious disease (Article 248 CC RS), 7 of whom were convicted.

Tabela 3 Number of convictions according to the type of punishment (2020)

Crime	Total	Women	Attempt	Imprisonment/ house arrest	Fine	Suspended/conditional sentence	Secondary sentence
Art. 248 CC	344	44	/	43 / 132	44	124	4
Art. 249 CC	7	1	/	1	/	3	/

Source: Statistical Office of the Republic of Serbia: Adult offenders (2022)

[4] Statistical data on reported, accused and convicted perpetrators of criminal offenses from Article 248 and Article 249 of the Criminal Code of the Republic of Serbia were collected from the Statistical Office of the Republic of Serbia - Adult offenders, https://publikacije.stat.gov.rs/G2022/Pdf/G20221189.pdf, accessed 25.07.2022.

The statistical data contained in Table 3 show different types of criminal sanctions which were imposed for the commission of these crimes in this period. The most frequently imposed sanctions for the commission of the offense envisaged in Article 248 CC were imprisonment (43)/house arrest (132), and suspended/conditional sentence (124); only 4 offenders were awarded a secondary sentence. The collected statistical data on the criminal offense referred to in Article 249 show that the most frequently imposed sanction for spreading the COVID-19 disease was a suspended/conditional sentence (3). Such data can be explained by the nature of this criminal acts and the time of commission, primarily given the fact that the state of emergency was in force in the Republic of Serbia in the period from 15 March to 6 May 2020. In the situation of a declared pandemic, it is quite expected that the sentence of house arrest would be the most frequently imposed sentence for criminal offences against public health, particularly considering that both crimes are punishable by a term of imprisonment of up to three years. Interestingly, in the observed period, there are no records in the available data that there were any attempted criminal acts pertaining to Article 248 and 249 of the CC.

At the end of this overview of the basic phenomenological characteristics of criminal offences pertaining to the prevention of spreading the contagious disease COVID 19, it should be noted that criminal reports, charges and convictions for the criminal offense envisaged in Article 248 CC prevailed in the period under observation, whereby the prevailing number of offenders were men. At that time, the commission of this criminal offence attracted a lot of public attention in the circumstances of the escalating pandemic and the growing death rate.

4. Conclusion

The outbreak of the COVID-19 pandemic in late 2019 affected almost all aspects of life in the next couple of years. In order to suppress and prevent the spread of the pandemic, states worldwide introduced various prohibitions, restriction and measures during the state of emergency (ban on movement, gatherings; restrictions on contacts between people; lockdowns, keeping physical distance, mandatory mask-wearing; etc.). The media reported daily on the number of people who contracted COVID-19, hospitalized patients, critically ill patients, and the overall death rate. All this information led to panic and continuous fear among the population. In the circumstances of panic, fear and general confusion, many people chose not to abide by the prescribed prohibitions or recommended health measures (for various reasons) and, thus, consciously or unconsciously contributed to the transmission of COVID-19 contagious disease.

In order to improve the response of the criminal justice system *de lege ferenda*, the author examined the legal provisions envisaged in Article 248 (Failure to comply with Health Regulations during an Epidemic) and Article 249 (Transmitting a Contagious Disease) of the Criminal Code of the Republic of Serbia (CC RS). In the context of examining the phenomenological characteristics of these criminal offences, the author provided an insight into the judicial practice of Serbian courts during the first year of the COVID-19 pandemic (2020), by exploring the statistical data issued by the Statistics Office of the Republic of Serbia on the number of criminal reports, indictments, and convictions for the commission of these offences in the period under observation.

On the basis of the collected data, we may conclude that the number of reported criminal offences envisaged in Article 248 of the CC was drastically higher (880 reported cases) than the number of reported offences envisaged in Article 249 of the CC (only 8 reported case). Such a difference in terms of reports is expected considering that the prerequisite for the existence of the criminal offense from Article 249 CC is the perpetrators awareness that he/she is infected and that his/her actions contribute to spreading a contagious disease to others. Notably, from the total number of criminal reports submitted under Article 248 CC (877), more than 50% of reported offences (441) were dismissed. Even a higher percentage is observable in terms of the criminal reports submitted under Article 249 CC (7 out of 8 cases). Notably, there is no record on the number of terminated investigation proceedings but the data show that a vast majority of criminal offences were committed by men (163 women in 877 reports submitted under Article 248 CC, and 4 woman in 8 reports submitted under Article 249 CC).

A similar trend may be observed in terms of the number of indicted and convicted persons. In the observed period, there were 370 indicted offenders for the criminal offense of non-compliance with health regulations during the epidemic (Art. 248 CC); 343 offenders were convicted while criminal proceedings were suspended (terminated) in 11 cases. As for the criminal offense of spreading a contagious disease (Art. 249 CC), there were only 8 accusations and 7 convictions were recorded. In terms of criminal sanctions, the most frequently imposed sanctions for the non-compliance with health regulations (Art. 248 CC) were imprisonment (43)/house arrest (132 offenders) and conditional sentence (124 offenders). The most common sanction imposed for spreading COVID-19 disease (Art. 249 CC) was a suspended/conditional sentence (3 out of 7 offenders), which may be explained by the state of emergency that was in force from March to May 2020. Notably, in the observed period, there were no records about any attempted criminal acts pertaining to Article 248 and 249 CC.

Pursuant to the provisions of the Criminal Code of the Republic of Serbia, the observed criminal acts can only be committed intentionally. The criminal legislation of the Republika Srpska includes slightly different legal provisions, which is unexpected considering that Serbia and Republika Srpska have the same legal tradition. Namely, relevant provisions of the Criminal Code of Republika Srpska envisage that these criminal offences may also be committed negligently. In the criminal law literature, there are opinions that negligent actions pertaining to this subject matter should be qualified as misdemeanors (Šikman, Bajičić, 2021). Such a proposal can be evaluated as a positive one because it contributes to a more complete criminal law protection against the pandemic of various contagious diseases. Thus, only the most serious forms of violation of health protection measures have to be sanctioned by the norms of criminal law while less serious ones should be regulated by misdemeanour law. Such a legal solution promotes the principle of legal certainty and ensures the protective function of criminal law, as the last means of protecting the most important social values

The pandemic is still ongoing and the question is when it will end. Until then, every single individual has the responsibility to protect one's own health and the health of other people because social solidarity is one of the most powerful weapons that we may resort to in suppressing pandemics and defeating similar adversities in the future.

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SPREČAVANJE ŠIRENJA ZARAZNE BOLESTI COVID 19 – KRIVIČNOPRAVNI ASPEKT

Pojava zarazne bolesti COVID 19, izazvane virusom SARS CoV2, dovela je do velikih promena u svakodnevnom životu. Gotovo ne postoji segment života i rada koji nije pretrpeo promene usled pandemije. U radu će biti analiziran krivičnopravni aspekt sprečavanje širenja zarazne bolesti COVID 19 u Republici Srbiji, kroz prikaz inkriminacija dva krivična dela, od značaja za suzbijanje pandemije – krivično delo nepostupanje po zdravstvenim propisima za vreme epidemije (čl. 248. KZ) i prenošenje zaraznih bolesti (čl. 249. KZ).

Kako bi se prikazao rad pravosudnih organa u vreme pandemije, biće prikazani i analizirani statistički podaci Republičkog zavoda za statistiku u pogledu broja prijava, optuženja, osuda i izrečenih krivičnih sankcija za ova krivična dela, u prvoj godini pandemije (2020. godina). Na ovaj način, steći će se jasan uvid u fenomenološke karakteristike ovog oblika kriminaliteta u Republici Srbiji, što će omogućiti formulisanje preporuka za poboljšanje reakcije krivičnopravnog sistema u uslovima pandemije.

Ključne reči: *nepostupanje po zdravstvenim propisima za vreme epidemije, prenošenje zaraznih bolesti, COVID 19, krivično pravo.*

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Review Paper

THE INTERPRETATION OF THE PRINCIPLE OF STRICT COMPLIANCE IN LETTERS OF CREDIT IN INTERNATIONAL COMMERCIAL LAW

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Abstract. *Letter of Credit (L/C) is a very popular payment method in international trade. The issuing bank has the obligation to make payment if the document stipulated in a Letter of Credit are presented. Under the strict compliance principle, any discrepancy in the documents may be the reason for refusing payment. There are two different approaches to the interpretation of the principle of strict compliance: literal compliance and substantial compliance. In literal compliance, a slightest inaccuracy may be the reason for refusing payment, which is not the case in substantive interpretation. The author provides an overview of these two approaches, with specific reference to relevant case law and relevant provisions of the UCP Rules and ISBP Rules governing this international trade matter. These international rules and diverse case law offer opportunities for a more flexible and balanced approach to the interpretation of strict compliance.*

Key words: *Letter of Credit, principle of strict compliance, literal compliance, substantial compliance*

1. INTRODUCTION

In international trade, the buyer and the seller are located in different countries and the goods are transferred from the country of the seller to the country of the buyer. The seller is reluctant to deliver goods without an assurance of payment. The buyer is reluctant to make payment before the delivery of goods without the assurance that he shall get commodities. Contracting parties are part of different legal systems. Moreover, various factors, such as physical distance, between the parties, cultural differences, political risks, and currency exchange restrictions, increase the lack of trust and uncertainty. Thanks to

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the documentary letter of credit system, the seller ensures the security of payment since the bank is under a legal obligation to make the specified payment (Low, 2010:2).

A letter of credit (L/C) is a secured payment method which minimizes the risk of non-payment and non-performance of contracts for both parties. It is considered to be the "life-blood" and the "backbone" of international commercial transactions (Gao, 2007: 1067; Khan & Fareed, 2020:99). The UCP 600 Rules for Documentary Credits[1], established by the International Chamber of Commerce (ICC) in 2007, lay down rules on issuing and using documentary letters of credit in international financial transactions.

A letter of credit relationship involves the participation of three parties: the buyer (known as the applicant), the issuing bank, and the seller (known as the beneficiary). There is an underlying contract between the buyer and the seller. This contract may contain a letter of credit clause but the letter of credit is independent from the underlying contract. Acting upon the request of the buyer, the issuing bank opens a letter of credit in favour of the seller (beneficiary), which serves as a guarantee of the buyer's payment. The issuing bank is obliged to pay the seller (beneficiary), provided that the documents stipulated in the letter of credit are properly presented by the seller and strictly comply with the terms and conditions specified in the letter of credit. The required documents (e.g. sales licence, certificate of origin, specification of goods, bill of lading, etc.) are produced to prove the seller's performance under the sales contract (Gao, 2007: 1069). The presented documents are then subjected to strict scrutiny (by the issuing bank), in line with the principle of the strict compliance.

The purpose of this principle is to protect the distant buyer and to ensure (to buyer's satisfaction) that strictly conforming documents prove that the seller has performed his obligation as agreed in the contract of sale (Alavi, 2016: 29). The rationale behind this principle is that the issuing bank is "*a special agent of the buyer. If an agent with limited authority acts outside the that authority (in banking terminology: his mandate) the principal is entitled to disown the act of the agent, who cannot recover from him and has to bear the commercial risk of the transaction*" (Toth, 2006: 88). The second reason for the application of strict compliance is that banks do not have specialist expertise in all industries and, naturally, they do not know how or what goods/services are bought or sold in international transactions. They only deal with conformity of tendered documents and cannot go beyond the face of the documents (Atabaş, 2018: 497-498). Thus, the tender of similar documents is not acceptable under the principle of strict compliance (Carr, 2009: 479). There are two different approaches to interpreting compliance of presented documents with the letter of credit: literal compliance and substantive compliance. In literal compliance, any minor inaccuracy may be the reason for refusing payment, which is detrimental for international trade. Substantive compliance provides a more flexible approach to interpretation (Warnasuriya, 2021: 21).

[1] The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("the UCP 600 Rules"), the International Chamber of Commerce's (ICC) Commission on Banking Technique and Practice; available at http://static.elmercurio.cl/Documentos/Campo/2011/09/06/2011090611422.pdf

2. LITERAL COMPLIANCE

The doctrine of literal compliance basically means that all documents presented by the beneficiary to the issuing bank shall strictly meet the criteria stipulated in the terms and conditions of the letter of credit. Thus, even the smallest discrepancy may be a sufficient reason for the bank to reject the presented documents for non-conformity with the L/C.

This principle was first formulated in a decision of an English court, in the case *Equitable Trust v Dawson Partners* (1927), where the court stated: "*There is no room for documents which are almost the same, or which will do just as well … The bank which knows nothing officially of the details of the transactions financed cannot take upon itself to decide what will do well enough, and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk*." (Arban, 2005: 83, 84). A similar decision was made in the case *English, Scottish and Australian Bank Ltd v Bank of South Africa (*1922), which stated: "*It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened*." (Kelly-Louw, 2016: 93).

Both statements are an expression of interpretation of the strict compliance principle as literal compliance, involving "the greatest degree of accuracy and clarity" (Kelly-Louw, 2016: 93). There are three reasons justifying this approach: 1) the "ribbon matching" theory of common law contract that has long governed offer and acceptance; 2) providing more certain reimbursement to bankers from the account party without litigation; and 3) providing quick and easy rule to determine compliance of documents (Leary & Ippoliti, 1987: 604-605).

In the aforementioned cases, the doctrine of strict compliance is interpreted literally. There is the "mirror image" rule, which implies that any slight discrepancy in the presented documents is unacceptable. This approach allows an issuing bank to dishonour a documentary letter of credit when presented documents contain even a typographical error (for instance, if "Alex" was spelled "Alexx"). This issue was tackled in the case *Hanil Bank v. PT. Bank Negara Indonesia* (2000). In this case, the District Court for the Southern District of New York ruled that an inconsistency between the spelling of the seller's name in the documentary letter of credit and the presented documents was a valid discrepancy to dishonour the letter of credit. Naturally, this "rigorous and detail-oriented" approach is the most extreme form of interpretation of the principle of strict compliance, which may be too burdensome in some circumstances (Conley, 2001: 978).

Another interesting case is *J.H. Rayner & Co Ltd v. Hambros Bank Ltd*. (1943), concerning a bank's refusal to honour a letter of credit on account of a discrepancy between the presented documents. It was a case involving an English seller who sold groundnuts to a Danish buyer, where an irrevocable letter of credit was accepted as the payment method. The documentary letter of credit, issued by the defendant bank in favour of the plaintiff, included as follows: "*Confirmed credit No. 14597. We beg to inform you that a confirmed credit has been opened with us in favour of yourselves for an amount of up to about £16,975, account of Aarhus Oliefabrik available by drafts on this bank at sight to be accompanied by the following documents – invoice, clean on board bills of lading in complete set …. covering a shipment of about 1400 tons of Coromandel groundnuts in bags."(Toth, 2006 :89)* "*All drafts … must contain the clause 'Drawn under confirmed credit No. 14597.' We undertake to honour drafts on presentation, if drawn in conformity with the terms of this credit."* (Chow,

Schoenbaum, 2015: 242). The plaintiff submitted a bill of lading which described the commodities as "machine-shelled groundnut kernels", including the abbreviation C.R.S. (in the margin) which is in commercial practice used for "Coromandels". The plaintiff also submitted an invoice where the description of goods ("Coromandel groundnuts") complied with the requirement of the documentary letter of credit. The defendant rejected to honour the draft which contained the abbreviation C.R.S. instead of "Coromandels". The Court of Appeal ruled that the defendant bank was entitled to refuse payment on the strict compliance principle (for non-compliance with the L/C) because the issuing bank was not obliged to have knowledge of customary terminology used in trade practices. The Court further explained that, "even if the bank had knowledge of such trade practice, it made the promise of paying against a bill of lading which describes the goods in a particular way. Therefore, it was only obliged to effect payment if the bill of lading stated the required goods."(Toth, 2006: 89-90).

The case *Bank Melli Iran v. Barclays Bank Ltd.(Dominion, Colonial & Overseas) (UK 1951)* involved the sale of 100 new Chevrolet trucks. The action was brought by the issuing bank (Melli) which claimed that payments under an irrevocable confirmed letter of credit had been made against discrepant documents. Under the L/C, the payments were due upon presentation of commercial invoice for shipment of 100 "new Chevrolet trucks", but the invoice (presented by the seller) described the trucks as being "in new condition. The confirming bank (Barclays) accepted these documents but the issuing bank (Melli) refused to make the payments, arguing that there was a non-compliance between the presented documents and the L/C. Relying on the doctrine of strict compliance, the court ruled that the issuing bank was entitled to reject payment because the description "in new condition" contained in the commercial invoice was not the same as the description "new" contained in the confirmed letter of credit (Krazovska, 2008: 44, 45).

The literal compliance interpretation has been criticized for causing high rejection rates because minor discrepancies may hinder the operation of the Letter of Credit as a payment method and thus hinder the flow of international trade the. The critics suggest that the doctrine of strict compliance should not be interpreted as a "blind" (literal) or "mirror image" compliance, which calls for "exceedingly rigorous proof-reading" by banks checking the documents. Instead, interpretation should focus on the type of mistake in the document; a document should be rejected if a discrepancy substantially affects the value or merchantability of goods, or refers to a material mistake (Chigerwe, 2016: 12). Some critics also argue that the literal compliance approach may be subject to abuse; for example, the issuing bank may avoid payment by relying on minor technical inaccuracies in the document (Leon, 1986: 453).

3. SUBSTANTIAL COMPLIANCE

As previously noted, the literal interpretation of strict compliance is too rigid. As such, it has been subject to criticism because it may lead to acting in bad faith, which is contrary to the expectations of the honest (conscientious) seller. For this reason, some courts have pursued a different interpretation approach, which is called *substantial compliance*. Under the substantial compliance approach, if the differences between the presented documents are insignificant, this approach offers protection to the beneficiary (seller) (Arban, 2005: 84).

In the case *South Korean Hyosung Corp. v. China Everbright Bank (Xiameng Branch)*, (China, 2003), the issuing bank claimed that there were discrepancies in some documents; one of them was the mistaken spelling of the word "bank" , which was misspelled as

"bnak". In accordance with international standard banking practice, the court ruled that a minor technical or typographical error cannot be interpreted as discrepancy when it is obvious that the word was clearly mistyped (Kwaw, 2021: 83-84).

The case *Banco Espanol del Credito v. State Street Bank & Trust Co.* (1967) concerned the sale of clothing and garments. The documentary letter of credit required that the presented documents include a certificate of inspection by relevant Spanish authority, "certifying that the goods are in conformity with the order, that "a ten per cent random sample had been taken "for examination, and that the "whole ...[was] found conforming to the conditions stipulated on the Order-Stock-sheets." As the presented certificate did not comply with the exact terms of the letter of credit, the defendant bank refused to pay on the grounds of non-compliance. However, the court disregarded the discrepancy in the documents, stating that it was unreasonable to expect that the inspector would examine all goods related to the contract of sale; "*since the stock order sheets referred to in the certificate were stock sheets which the parties had already dealt with, that relationship was enough to supplant the original order".* Thus, the court considered that there was substantial compliance of documents with the terms of the letter of credit, while the discrepancy was deemed to be immaterial (Kwaw, 2021: 76).

In theory, the substantial compliance approach has been criticized for providing a wide discretion to banks in compliance control, which may undermine the purpose of the letter of credit. Namely, literal compliance transfers the risk of presenting discrepant documents to the seller, thus entitling the buyer to refuse a document even for a slightest discrepancy; on the other hand, "substantial compliance transfers that risk to the issuing bank, which is then compelled to make an assessment that goes beyond its authorization", thus entitling the buyer to contest the bank's arbitrary evaluation of compliance (Arban, 2005: 84).

4. Regulatory Instruments of the International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) developed uniform rules on banking practices and transactions in international trade, such as the Uniform Customs and Practices for Documentary Credits (UCP) and the International Standard Banking Practices (ISBP).

4.1. TheUniform Customs and Practices for Documentary Credits (UCP 600 Rules)

The *Uniform Customs and Practices for Documentary Credits* (UCP Rules) are a set of standard rules and practices governing letters of credit, which are periodically revised. The UCP 600 Rules (2007) are the most recently updated rules on documentary letters of credit.

4.2. Amendments in UCP Rules

Article 13(a) of the UCP 500 Rules (1993 Revision),[2] stipulating the standard for examination of documents, reads as follows:

> "A. *Banks must examine all documents stipulated in the credit with reasonable care to ascertain whether or not they appear on their face to be in compliance with the terms and conditions of the credit. Compliance of the stipulated documents on their face with*

[2] The Uniform Customs and Practices for Documentary Credits, 1993 Revision, (UCP 500 Rules), ICC Publ. 500

the terms and conditions of the credit shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the credit."[3]

Article 14 of UCP 600 Rules (2007 Revision) sets a new standard for examination of documents, which reads as follows:

*"***a.** *A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.* [...]
d. *Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit*."[4]

The revised provisions of the UCP 600 Rules have softened the principle of the strict compliance because they decrease the responsibility of banks. There is no longer reference to "reasonable care" as found in the former UCP 500 Rules, which was deemed to be ambiguous and which imposed more substantial responsibility on the banks to establish whether documents appear on the face to comply with the credit (Low, 2010: 27-28). The concept of "reasonable care" was tackled by the Supreme Court of Korea, which stated as follows: "*The care is the opposite concept of the negligence in Korean jurisprudence. Lack or disregard of care constitutes negligence. However, the reasonable care is not the one as to be determined generally or commonly but is such one as it expected from a reasonable person under the specific circumstances at issue. In other words, the reasonable care can be interpreted as the one a decent and reasonable person would exercise in order to protect himself or herself. It cannot be interpreted as the same as the one to be exercised for one's own property but can be the one to be generally expected from the bank's employee engaging in the matter of Credit (i.e. the fiduciary duty of care.)*." (Kim, 2017: 537).

However, given the fact that Article 14 of the UCP 600 Rules (2007) still obliges the banks to examine the presented documents for compliance, the banks still have to perform this duty with reasonable care in order not to act negligently. Article 14(a) stipulates that the presented documents shall be examined on their own merits, in order to determine "*whether or not the documents appear on their face to constitute a complying presentation."* The term "on the face" does not imply a more stringent duty to strictly examine the documents accuracy (Low, 2010: 28) because Article 14(d) clearly states that the data in documents need not be identical to but they must not conflict with the data in any other present document or the letter of credit. On the whole, the exclusion of the "*reasonable care*" concept has been interpreted as a positive development, aimed at ensuring "*more comprehensive and precise*" provisions in the UCP 600 Rules (Alavi, 2018: 40). The exclusion of this concept has softened the strict compliance principle.

4.3. The International Standard Banking Practice (ISBP Rules)

Although the UCP 500 and UCP 600 Rules do not explicitly refer to the strict compliance doctrine (either literal or substantial compliance), the reference to the "international standard

[3] UCP 500 Rules (1993): Documentary Credits, https://digilander.libero.it/Viniciuss/ucp500.pdf
[4] UCP 600 Rules (2007): http://static.elmercurio.cl/Documentos/Campo/2011/09/06/2011090611422.pdf

banking practice" in Article 14(d) of UCP 600 Rules may be observed as a partial support for the substantial compliance theory (Arban, 2005: 85). The UCP 600 Rules do not regulate typographical errors or misspellings in the tendered documents. This legal issue was first addressed in 2003, when the ICC Banking Commission published *the International Standard Banking Practice (ISBP)* for the Examination of Documents under Documentary Credits (Karim & Islam, 2016: 109). The ISBP Rules have also been revised several times (2007, 2013) to bring them into line with the new UCP 600.

The provision in paragraph 25 of the ISBP Rules (2007 Revision)[5] reads: "A *misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs does not make a document discrepant. For example, a description of the merchandise as "mashine" instead of "machine", "fountan pen" instead of "fountain pen" or "modle" instead of "model" would not make the document discrepant. However, a description as "model 123" instead of "model 321" would not be regarded as a typing error and would constitute a discrepancy.*" Until the publication of the revised ISBP, the interpretation of such errors was left to the national courts. Over time, national courts have developed their own standards to assess the discrepancy of the tendered documents. Naturally, different standards often produced different results even if applied to similar typing or spelling mistakes (Karim &, Islam, 2016: 109-110). In order to avoid these inconsistencies, it is necessary to find a balanced (common-sense) approach to interpreting compliance (Kim, 2017: 58, 178). Some authors suggest that discrepancies may be divided into two groups: "*irrelevant irregularities* with no effect on principle of strict compliance, and *material discrepancies* which violate the principle of strict compliance and result in rejection of payment" by a bank (Alavi, 2016: 31).

The provision in Article 14(d) of the UCP 600 Rules, stating that "*data in a document need not be identical to but must not conflict with data in any other document or a letter of credit*', certainly softens the strict compliance principle in favour of using substantial compliance (Karim & Islam, 2016: 113). Article 18(c) of the UCP 600 Rules also states that "*the description of goods, services or performance in a commercial invoice must correspond with that appearing in the credit*." The provision in paragraph 58 of the ISBP Rules (2007) also specifies that "*The description of the goods, services or performance in the invoice must correspond with the description in the credit. There is no requirement for a mirror image. For example, details of the goods may be stated in a number of areas within the invoice which, when collated together, represent a description of the goods corresponding to that in the credit.*" While strict compliance now seems to be restricted to substantive data (e.g. specified documents, goods description, agreed amounts), substantial compliance may be used in terms of supporting documents (e.g. collated details of goods, typing and spelling mistakes). In view of the more lenient nature of these provisions, it may be said that the UCP 600 Rules, in conjunction with the ISBP Rules, soften the strict (literal) compliance interpretation principle and provides for equitable and transparent international trade (Karim & Islam, 2016:113).

[5] International Standard Banking Practice for the Examination of Documents under Documentary Credits, 2007 Revision for UCP 600, ICC publication no. 681, available at https://sites.google.com/a/tradefinanceguru.net/www/international-rules/isbp

5. Conclusion

In the operation of a documentary letter of credit, strict compliance principle and the bank's notice on the rejection of payment are two sides of the same coin (Adodo, 2005: 118). The refusal decision is based on the interpretation of strict compliance principle. In practice, there are two interpretation approaches: literal compliance and substantial compliance. In literal compliance, even a slightest inaccuracy in the presented documents may be the reason for refusing payment; thus, the compliance risk is fully transferred to the seller. Such a rigid interpretation of required documents compliance with the documentary letter of credit is considered unjustifiable because it generates high rejection rates and hinders international trade. In substantial compliance, interpretation is based on a more flexible approach; if the discrepancies are embodied in minor (technical, typographical) inaccuracies, payment is not refused. Yet, as the burden of compliance assessment rests on the issuing banks, there is a risk that banks may abuse the wide discretionary authorities related to compliance control.

The UCP Rules and the ISBP Rules allow for a departure from the literal compliance by providing a more flexible approach to interpretation. They do not require strict ("mirror image") compliance, and documents with minor defects or inaccuracies are unlikely to be rejected for non-compliance with the letter of credit. In view of more consistent assessment, discrepancies may be classified into two groups: irrelevant irregularities and material discrepancies. On the whole, there seems to be a need for a balanced common-sense approach, which would strike a good balance between the literal compliance interpretation and the substantial compliance interpretation.

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TUMAČENJE NAČELA STRIKTNE SAOBRAZNOSTI KOD AKREDITIVA U MEĐUNARODNOM TRGOVINSKOM PRAVU

Akreditiv je široko prihvaćen instrument plaćanja u međunarodnoj trgovini. Banka koja izdaje akreditiv kao sredstvo plaćanja ili obezbedjenja ima obavezu da izvrši plaćanje korisniku (prodavcu) ukoliko je korisnik uredno dostavio sve tražene dokumente koji su specifikovani u akreditivu. Na osnovu principa striktne saobraznosti, čak i najmanja netačnost ili nepodudarnost u dokumentaciji može biti razlog da banka odbije plaćanje. Postoje dva različita pristupa tumačenju načela striktne saobraznosti: doslovna (striktna) saobraznost i substancijalna (suštinska) saobraznost. U okviru doslovne (striktne) saobraznosti, svaka nepodudarnost u dokumentaciji može biti razlog za odbijanje plaćanja, što nije slučaj kod substancijalne saobraznosti koja nudi fleksibilniji pristup. S obzirom da se odluka o odbijanju plaćanja kod dokumentarnih akreditiva zasniva na tumačenju principa striktne saobraznosti, autor daje prikaz ova dva pristupa, sa osvrtom na relevantnu sudsku praksu i odredbe sadržane u dokumentima Međunarodne privredne komore (ICC) koji regulišu ovu materiju: Jedinstvena pravila i jednoobrazna praksa za dokumantarne akdreditive (Uniform Customs and Practice for Documentary Credits, UCP Rules), i Međunarodna standardna bankarska praksa za pregled dokumenata u skladu sa jedinstvenim pravilima za dokumentarne akreditive (International Standard Banking Practice for Examination of Documents under UCP 600, ISBP Rules). Neka pravila iz ovih dokumenata i međunarodna sudska praksa otvaraju mogućnost za fleksibilniji i izbalansiraniji pristup tumačenju principa striktne saobraznosti.

Ključne reči: *dokumentarni akreditiv, princip striktne saobraznosti, doslovna saobraznost, substancijalna saobraznost.*

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Review Paper

LICENCE FEE AS AN ESSENTIAL ELEMENT OF A LICENCE AGREEMENT

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Abstract. *In this paper, the author examines the institute of licence fee as an essential element of a licensing agreement. The author analyzes a number of most frequent types of payment related to licence fees in licence agreements. The lump sum payment may be effected either as a single payment or in several instalments, while the amount of royalties depends on the scope of exploitation of the subject matter of licence.*

Key words: *licensing agreement, consideration, lump sum payment, royalties*

1. INTRODUCTION

The word "licence" comes from the Latin word *licentia*, which means freedom, presumed or unrestrained liberty, volition, audacity or impertinence.[1] In contemporary European languages, the basic meaning of the word *licence* is somewhat different. In English, for example, the word "licence" means permission, freedom to engage in an activity otherwise unlawful (Martin, 2003: 288). In German (*die Lizenz*) and in French (*licence)*, it has the same meaning. In Serbian, the word *licenca* means approval, permission, entitlement, right to use, right to exercise, perform or present something, concession, etc. (Vujaklija, 1980: 514). The word was borrowed from English language via intellectual property law (Radovanović, 2012: 48). In Serbian language, this concept generally refers to legal transactions related to intellectual property; in particular, the term *licenca* is reserved for granting permission to use an intellectual property right for a specific time in exchange for a licence fee or royalty.

In Serbian law, licence agreements are regulated by general and subject-specific legislative acts. In the national legislation, the general legislative act governing licence agreements is the Civil Obligations Act.[2] Specific rules on licence agreements are contained in several subject-

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[1] See: Word Sense Dictionary (2022): Licentia; available at https://www.wordsense.eu/licentia
[2] Civil Obligations Act (Contracts and Torts), *Official Gazette of the SFRY*, no. 29/78, 39/85, 45/89 - Decision of the Yugoslav Constitutional Court, and 57/89; *the Official Gazette of the FRY*, no. 31/93, and *Official Gazette of the Republic of Serbia and Montenegro*, no. 1/2003 - Constitutional Charter.

specific legislative acts regulating intellectual property rights, such as the Patents Act, the Trademarks Act, the Act on Legal Protection of Industrial Design, etc.

The Civil Obligations Act (hereinafter: COA) defines a licensing agreement as an agreement obliging a licensor to grant a licensee, in whole or in part, the right to use an invention, a technical know-how, a trade-mark, a sample or model, while the licensee is obliged to pay the fee specified therein (Article 686 of the COA). A licensing agreement is a bilateral, mutually binding agreement where both contracting parties undertake specified obligations by establishing a mutual relationship. As a licensing agreement implies the licensee's obligation to pay the agreed licence fee for commercial exploitation of the subject matter of licence (licenced asset), such an agreement falls into the group of onerous contracts. Certain authors often classify a licensing agreement as aleatory agreements because the economic outcome of using the licenced asset depends on the actual market situation, which is unpredictable for the contracting parties at the moment of concluding the agreement (Popović, 2015: 395).

The subject matter of a contract is an essential element that the contracting parties must agree upon in order to create a contract. The subject matter of a contract may be a specified provision, performance or non-performance, or some forbearance that one contracting party expects from the other party (Salma, 2001:246). For this reason, it is an integral part of the definition of any agreement, including the licence agreement. The subject matter of assignment in a licensing agreement may be all transferable industrial property rights (patent, trademark, know-how, etc.) as well as the rights in the registration phase, provided that the application for recognition of a specific industrial property right submitted to the competent national authority is accepted and that the specific right is registered in a prescribed manner (Vasiljević, 2012: 328).

The legal definition of a licence agreement provided in the Civil Obligations Act may be somewhat confusing as the legislator seems to have mixed up the subject matter of protection in industrial property law with industrial property rights. The subject matter of any licence may be protected intellectual property assets or those for which protection procedure has been initiated. Thus, the legislator could have specified that the norm does not refer to "an invention" but to "a patented invention". The same objection may be raised in relation to the use of term "a sample and model", which could have been substituted by a more precise term "protected design".

In the Serbian Draft Civil Code (hereinafter: the Draft CC)[3], a licensing agreement is defined in almost identical terms as in the Civil Obligations Act, as an agreement obliging a licensor to assign to a licensee, entirely or partially, the right to use an invention, know-how, patent, design, trademark, sample or model, while the licensee is obliged to pay the fee specified therein (Article 1040 of the Draft CC). This definition includes the same vague terminology as the Civil Obligations Act (COA).[4] In terms of the legal form of a licensing agreement, the Serbian Draft CC proposes keeping the current legal solution envisaged in Article 687 of the COA, which prescribes that a licensing agreement shall be made in written form.

In addition to these general legislative acts, the Serbian legislation comprises a number of subject-specific legislative acts regulating the subject matter of licensing agreements, such as the Patents Act, the Trademarks Act, the Act on Legal Protection of Industrial

[3] The Draft Civil Code of the Republic of Serbia (Draft CC), Government of the Republic of Serbia, Belgrade, 2015; https://www.mpravde.gov.rs/files/NACRT.pdf

[4] Article 1040 of the Draft CC states that the subject matter of a licence agreement may be "an invention, patent, design, model or sample", which leads to the conclusion that the legislator did not make a clear differentiation between the subject matter and the form of protection in industrial property law.

Design, etc. (Šogorov, Arsić, 2017:129). For example, Article 46 of the Patents Act (PA)[5] provides that the rights arising from the application for patent registration, as well as the rights to a patent or a small patent may be transferred, with or without restrictions, by a license agreement. The licence agreement shall be in writing and it shall include: the date of signing the agreement, names and surnames or business names of the contracting parties, the places of domicile or residence or registered business seats of the contracting parties, the patent or small patent application number or the registration number of the recognised patent right, the period of licence validity, and the scope of the licence (Article 46 para.3 of the PA). The licence agreement shall be entered into the Patent Register kept by the competent authority at the request of the right holder, applicant or licensee; the entry of the license agreement into the Patent Register produces legal effect in relation to third parties (Article 46, paragraphs 4 and 5 of the PA).

Article 65 of the Trademarks Act (TA)[6] envisages that a trademark owner or applicant may, on the basis of a written licence agreement, grant another the right to use his/her trademark or the rights arising from the application for trademark registration. The licence agreement shall be recorded in the Trademark Register at the request of the trademark owner, applicant or assignee (Art. 65 paragraphs 3 and 4 of the TA).

2. The Subject Matter of a Licence Agreement

The legal definition of a licensing agreement provided in the Civil Obligations Act may be somewhat confusing as the Serbian legislator seems to have mixed up the subject matter of protection in industrial property law with industrial property rights. In this definition of a licensing agreement, the legislator envisages that the subject matter of a licensing agreement may be an invention, a know-how, a trade-mark, a sample or model. Obviously, the legislator has not made a clear distinction between the subject matter of protection and the form of protection in industrial property law. Namely, after a special administrative procedure before the Intellectual Property Office has been conducted, inventions that meet the prescribed statutory and substantive requirements may be protected by a patent. In that sense, the subject matter of a licensing agreement may be inventions protected by patent law. Moreover, after the application for patent registration has been published, the rights arising from the patent application may be transferred by a licence agreement. Furthermore, this legal definition provides that the subject matter of a licensing agreement may also be samples and models. As in the previous case, the legislator disregarded the fact that a sample and model are two subject matters (objects) of protection which are protected by industrial design legislation.

In the Serbian Draft Civil Code (hereinafter: the Draft CC), a licensing agreement is defined in almost identical terms as in the current Civil Obligations Act (COA), as an agreement obliging a licensor to assign to a licensee, entirely or partially, the right to use an invention, know-how, patent, design, trademark, sample or model, while the licensee is obliged to pay the fee specified therein (Article 1040 of the Draft CC). This definition includes the same general terminology as the Civil Obligations Act (COA) and generates further confusion. Namely, the Draft CC provides that the subject matter of a licence

[5] The Patents Act, *Official Gazette of the RS*, no. 99/2011 and 113/2017 - another law.
[6] The Trademarks Act, *Official Gazette of the RS*, no. 104/2009, 10/2013 and 44/2018-another act.

agreement is the right to use an invention, a know-how, a patent, a design, a trademark, a sample or model, which again shows that the legislator did not clearly distinguish between the subject matter of protection and the form of protection in industrial property law. Like in the case of defining the subject matter of a licensing agreement in the applicable COA, the legislator seems to have mixed the subject matters of protection in industrial property law (e.g. invention, trade and service marks) with the specific industrial property rights (e.g., patent, trade-mark). By contrast, the Patents Act prescribes that the subject matter of patent protection is a new invention which meets all statutory and substantive requirements for obtaining patent protection (Article 1 of the PA). Thus, instead of using the general term "an invention", the legislator should have specified that the norm refers to an invention protected by patent (patented invention). The Act on Legal Protection of Industrial Design[7] does not use the terms "sample" and "model" any more.[8]

Therefore, the definition of the subject matter of licence should have included the terms such as: patented invention, trademark protected brand, protected design, protected plant variety, and protected integrated circuit topography. These terms clearly refer to the subject matter of transferable industrial property rights. The right to protection of geographical origin (the protected designation of geographic origin or protected geographical indication right) has been omitted in the definition of the subject matter of a licensing agreement because it is a non-transferable right. On the other hand, some authors reasonably question why the legislator unjustifiably omitted to prescribe patent-related rights (e.g. the right to protect a plant variety and the right to protect integrated circuit topography) as possible subject matters of licence agreements (Popović, 2015:397). Thus, bearing in mind that the Act on the Protection of Topography of Semiconductor Products[9] and the Act on the Protection of Plant Breeders' Rights [10] allow for the transfer of intellectual property rights by means of a licence agreement, we opine that the text of the Draft CC should be revised in that regard.

3. Licence Fee in Licence Agreements

A licence fee is a countervalue for granting permission for the use of the subject matter of licence. Article 686 of the Civil Obligations Act (COA) [11] indicates that a licence fee is an essential element of a licensing agreement (*essentialia negotii*). Article 1055 of the Draft Civil Code contains an identical provision. In both legislative acts, a licence agreement is designated as an onerous agreement, which is further supported by the fact that the licensee

[7] The Act on Legal Protection of Industrial Design, *Official Gazette of the RS*, no. 104/2009 -115, 45 2015 -3, 44/2018 -27 - another act.

[8] In the Act on Legal Protection of Industrial Design, the legislator also created a terminological confusion regarding the subject matter of protection and the form of protection. Namely, Article 2 of the Act on Legal Protection of Industrial Design prescribes that industrial design implies a three-dimensional or two-dimensional appearance of the entire product or a part thereof, defined by its visual features, in particular the lines, contours, colours, shape, texture and/or materials of the product itself or its ornamentation, or a combination thereof. In the author's opinion, the legislator should have provided that industrial design entails the right to protect a three-dimensional or two-dimensional appearance of the entire product or a part thereof, defined by its visual features. Thus, the legislator would have made a clear distinction between the subject matter of protection and the form of protection.

[9] The Act on the Protection of Topography of Semiconductor Products, *Official Gazette of the RS*, no. 55/2013.

[10] The Act on the Protection of Plant Breeders' Rights, *Official Gazette of the RS*, no. 41/2009 and 88/2011

[11] Article 686 of the COA provides: "By signing a license agreement, the licensor undertakes to assign to the licensee, in whole or in part, the right to use (exploit) an invention, a technical know-how and practical experience, a trademark, a sample or model, while the licensee undertakes to pay a fee specified therein."

is obliged to pay the stipulated fee to the licensor at the time and in the manner specified in the agreement (Article 701 of the COA). In case the licence fee is agreed depending on the scope of using the subject matter of licence, the licensee is obliged to submit a report to the licensor on the scope of using the licence and make an annual account of the licence fee to be paid, unless a shorter period is stipulated in the licence agreement (Article 702 of the COA).[12]

The Civil Obligations Act (COA) also prescribes the application of a clause referring to a licence fee. Thus, if the stipulated licence fee has obviously become inadequate or disproportionate in relation to the revenue that the licensee has obtained through the use of the subject matter of licence, the interested party may request that the stipulated fee be changed (Article 703 of the COA). This provision is justifiable because the circumstance under which a licence agreement was initially contracted may substantially change during the term of the licensing agreement, which makes it unprofitable for one of the contracting parties to abide by the contractual obligations (Jovanović, Radović, Radović, 2021: 408). For example, after the concluding the agreement, the situation in the market may change to such an extent that the licensee generates substantially less revenue than expected; thus, the licence fee payment becomes a disproportionately greater obligation in comparison to the benefits obtained by using the licence. In such a case, the licensee is entitled to request a reduction of the licence fee. The opposite situation is also possible: the licence may generate much greater revenue than the one expected at the moment of concluding the agreement, which makes the stipulated licence fee too low when compared to the benefits obtained by using the licence. In such a case, relying on the changed circumstances, the licensor may pursue an increase of the licence fee. This rule refers to the cases involving a lump sum payment of a licence fee, i.e. situations where the licence fee amount does not depend on the scope of using the subject matter of licence (Šogorov, Arsić, 2017: 130).

In Serbian legal theory, there is no consent on the issue whether a licence fee is an essential element of a licence agreement. Some authors point out that the licence fee payment is an essential obligation of the licensee (Marković, Popović, 2020: 243). If the contracting parties have not reached an agreement on the licence fee amount, such agreement is considered not to have been concluded because there is a lack of mutual consent (will) of the contracting parties on an essential element of agreement. However, in practice, we may encounter a situation where the obligation to pay a fee is not agreed in the licence agreement. In such an event, the agreement could not be considered to be a licensing agreement, but it would have a character of an unnamed agreement, which is regulated by the general rules of obligation law (Marković, 2007: 230). Similarly, the authors advocating the standpoint that a licence fee is an essential element of a licence agreement do not exclude the possibility that the licensor may waive the right to a fee by concluding a gratuitous licence agreement. In this case, the licensee has no obligation to pay any fee, which implies that all other provisions related to onerous contracts are inapplicable, which primarily refers to the obligation to guarantee the industrial applicability of the licenced object, to provide a warranty for legal defects, and to provide notifications aimed at specific performance (Radovanović, 2012: 264).

Some authors consider that the licensor is entitled to an appropriate licence fee even in case it is not expressly stipulated in the licence agreement, as the licensor is assumed to have undertaken contractual obligations for the purpose of making profit or acquiring some material benefits. If the amount of a licence fee is not stipulated in the agreement, it is determined in line with common business practices and field-specific rules (Perović,

[12]Article 1056 of the Draft CC contains the same provision..

Stojanović, 1980: 483). On the other hand, some theoreticians advocating the standpoint that a licence fee is an essential element of a licence agreement opine that there is an exception from this rule; the exception refers to a licence without a fee, i.e. a *gratis* licence (Janjić, 1978:899).[13] A *gratis* licence must be explicitly agreed; otherwise, the licence is assumed to be a licence with a fee (Besarović, 2011: 205).

On the other hand, in legal theory, there are authors who consider that a licence fee is not an essential element of a licence agreement. Some scholars, for example, advocate that a licence fee is not an important element of a licence agreement because, in practice, the licensor often does not request any fee, particularly if the licence agreement constitutes an integral part of some more complex contractual relationship (Verona, 1984: 354).

In Serbian legal theory, some authors raised the issue of the legal ground for concluding an agreement on a *gratis* licence in Serbian law. For example, Janjić (1967) asserted that a *gratis* licence is a licence without a fee which, as such, falls into the category of gratuitous legal transactions; he further notes that "in such licensing agreements, the right to use the subject matter of licence is usually granted for the purpose of obtaining compensation for the missing licence fee" (Janjić, 1967:50).[14] In our opinion, gratis licences can also have a positive effect on the licensors' revenues. For example, a cross-license agreement (on mutual gratis licenses) has the same effect as licence agreements where the licence fee amount and payment method have been stipulated (Gogić, 2012: 3). It is indisputable that there are situations where there is a need to conclude *gratis* licence agreements, particularly those pertaining to obsolete technology that has insignificant commercial value.[15] For this reason, the author of this paper believes that the Serbian legislator should standardise the institute of gratis license agreements *de lege ferenda*.

On the other hand, considering that the Civil Obligations Act prescribes that a fee is an essential element of a licence agreement, the author of this paper thinks that such an agreement is not concluded if there is no mutual consent of the parties' wills on an essential element of the agreement. Namely, a licence agreement where the contracting parties have not agreed on a licence fee could be seen as a *sui generis* agreement, i.e. an unnamed agreement which would be subject to application of the general rules of obligation law. In addition, there are scholars who believe that such an agreement would also be subject to application of some other rules which are applicable to some other named agreements whose elements are present in the licensing agreement where the contracting parties have not agreed on a licence fee (Bubalo, 2012: 133).

The legal theory includes a list of factors affecting the amount of fee in licence agreements. Thus, when agreeing on the licence fee amount, the contracting parties should especially take into account the properties of the rights being transferred, the size of the market, and the type of licence (exclusive or non-exclusive license) (Travaglini, 1979: 165). In industrial property rights, an important factor is the duration of legal protection. For example, as the right to a patent lasts 20 years from the date of submitting an application for patent protection, the licence fee will be lower if the licence is granted towards the end of the protection period. On the other hand, given that the right to a trademark can be extended for an unlimited number of times and its market value increases

[13] The institute of a *gratis* licence is also recognized in German law. See: Judgement of the Federal Court of Justice (*Bundesgerichtshof – BGH*) no. 1 ZR 312/02 dated 21.7.2005.

[14] For more, see Miodrag Janjić, *Ugovor o licenci (posebno međunarodn iugovori o licenci)* (Licensing Agreement (Especially international licensing agreements), Institute for Comparative Law, Beograd, Beograd,1967, p.50.

[15] For more on licensing agreements without a fee (compensation), see: Thorsten Käseberg, *Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US*, Hart Publishing, 2019, pp. 138-139.

over time (especially when it comes to famous trademarks), it is realistic to expect that the licence fee will be higher. Another important factor in determining the licence fee amount in the licence agreement is whether the right is transferred in the application phase or whether the agreement is concluded after the competent state authority has issued a decision on the recognition of the right that is the subject matter of license agreement. In legal theory, there is a stance that the licence fees are significantly lower if the right is in the application phase than the fees that are agreed after the right has been officially recognized (Sherry, Teece:2008, 152-153). Moreover, the market size and structure are also significant factors when determining the fee amount, as well as whether the licence is granted for competitive products or services; thus, the higher the competition on the market, the lower the licence fee, and vice versa.

Concerning the type of licence, practice shows that higher licence fees are usually agreed in exclusive license agreements, providing the licensee with the exclusive right to commercial exploitation of the licensed asset. Some cases from practice illustrate that the fee for non-exclusive licensing of technology was lower by as much as 30%, in spite of the fact that the license agreement contained an exclusivity clause (Parr, 2007:64). Another important factors in determining the license fee amount is the degree of protection of industrial property rights. Thus, licence fee amounts will be lower in developing countries where the protection of industrial property rights is weaker than in the developed countries where industrial property rights are respected and enforced (Parr, 2007:65). Last but not least, the licence fee amount depends on state-specific regulations (e.g. tax treatment of license agreements) and general economic conditions. In some legal systems, the state may be more prone to directly intervene and regulate the license fee amount, for example, by prescribing its maximum amount.

3.1. Licence fee payment methods

The contracting parties in a licence agreement are generally free to determine the licence fee amount and the payment method. In practice, the payment methods are numerous. A licensee may pay the agreed fee to a licensor both in cash and in kind.

3.1.1 Lump sum payment of a licence fee

Lump sum payment of a licence fee may be effected either as a single payment or in several instalments. In practice, certain amount of the lump sum is commonly paid in advance (e.g., 50% of the total licence fee amount), immediately after concluding the licence agreement, while the remainder is paid in equal instalments for each year of the contract (Besarović, 2011: 206). Considering that the amount and the dynamics of licence fee payment is determined at the moment of concluding the agreement, the benefit procured by the licensor does not depend on the scope of licence use. As a rule, lump sum payment of a licence fee is agreed in the event where the subject matter of a licence agreement is simple or obsolete technology (Miladinović, 2009: 280); in agreements related to know–how, the licence fee is most frequently agreed and paid in a lump sum (Besarović, 2011:206). Such a method of payment may be suitable for a licensor for a number of reasons: the licence fee amount is determined in advance and does not depend on the scope of use of the licenced asset; thus, licensor is not obliged to monitor the business operations of the licensee and he does not bear the risk for the licensee's performance. In practice, this method of licence fee payment is often agreed with business partners who are less known or do not offer sufficient guarantees that the licence

fee will be paid, for example, in case of transferring industrial property rights in international transactions (Bubalo, 2012:139).

On the other hand, by agreeing to pay a licence fee in a lump sum, the licensor takes a significant risk that the fee amount will not increase if the licensee proves to be using the licensed technology successfully. The licensee may be motivated to contract this type of fee payment because he/she would not have any obligations to the licensor, which the licensee would have by default if a different payment method was agreed. Namely, in case of lump sum payment, the licensee does not have any obligation to notify the licensor about the profit made by using the subject matter of licence. In case of agreed lump sum payment, there are also opinions in legal theory that the licensee does not have any obligation to use the subject matter of licence. However, as for the licensee, the author of this paper thinks that the drawbacks of lump sum payment of a licence fee overweigh the mentioned benefits. Namely, the licensee agrees to pay the licence fee at the moment of concluding the licensing agreement, when he/she still does not know whether the licensed technology will be cost-effective and to what extent. Thus, in case of lump sum payment of a licence fee, the risk of cost-effectiveness of the subject matter of licence is borne by the licensee. In practice, after the licensee has performed the obligation by paying the agree licence fee in a lump sum, it is quite common that the licensor has no interest to invest in research and development of the licenced technology. As the licensor is in a more favourable position, lump sum payment of a licence fee is very rarely agreed in contemporary business practice, particularly in exclusive licence agreements and in licence agreements that contain clauses on transferring the right to the licensee to make his/her own improvements.

3.1.2 Royalties

Royalties are used a method of paying a licence fee in licence agreements in cases where the fee amount depends on the scope of exploitation of the licenced asset. The payment of the agreed licence fee is based on a specific percentage for each produced or sold item. This payment method is mainly used in relation to standardised consumer goods.

In business practice, there is a number of different methods for the calculation of royalties. For instance, the licensor's revenues may be linked to the quantity of sold products; in such a case, royalties are calculated on the basis of a specific percentage of the product price. Notably, in this payment method, the licensee is free from paying a specific percentage on produced but unsold products. In practice, we may encounter various percentages pertaining to royalty payment which largely depend on the type of licensed asset.

Royalties may also be calculated on the basis of the scope of production (*per use royalty*). The licence fee is determined according to the number of produced units, in a fixed amount for each produced unit, or produced weight (in kilograms, tons, etc.), or specific volume (in litres, cubic metres, etc.), or specific quantity of produced energy (in kilowatts, etc.) (Miladinović, 2009: 281). In practice, this calculation method is more favourable for the licensor because it is easier to monitor the scope of production than the scope of sales; in order to calculate royalties, it is often sufficient to know the licensee's production capacities (Bubalo, 2012:142).

In practice, it is also possible to link the licence fee to the profit arising from the utilisation of technology. If royalties are agreed as a licence fee payment method, the calculation base is taken from the net profit, and the payment is effected on the basis of a specific percentage of the obtained profit. However, this payment method is rarely used in practice because it is often quite complicated to determine the actual amount of the

licensee's profit obtained from the licenced asset. Namely, the licensee may also be engaged in activities that are unrelated to using the subject matter of licence, or may also use technology licensed by some other licensor; thus, it may be very difficult to determine to what extent the profit is generated from the licence or from other activities that the licensee is engaged with.

In literature, we may also encounter a special model of calculating royalties based on the scope of production, called "the 25% rule" (Goldscheider, 2011:1). In legal theory, *t*he *Twenty-Five Percent Rule,* proposed by Goldscherider about fifty years ago, is the most famous rule for calculating a fair fee in licensing agreements.[16] According to this rule, the licensee shall get 75% and the licensor shall get 25% of the profit generated from the product which is related to the use of the licenced technology. The rule is based on the underlying theory that the licensor and the licensee should share the profit from any product manufactured by using licensed technology. It is *a priori* assumed that the major percentage of profit (75%) should go to the licensee who bears the risk of business operations and commercialization of the subject matter of licence, (Smith, Parr, 2004: 111). The rule is primarily used when determining a fair fee in patent licensing agreements but it may also be used in trademark and know-how licensing agreements.

In practice, contracting parties may also agree that the licence fee is to be paid in the form of a combination of lump sum payment and royalties. Thus, part of the licence fee may be paid in a lump sum after concluding the agreement, and the remainder is paid in royalties. In such a case, the lump sum payment is designated as the admission fee, which enables the licensor to promptly return part of the money invested in research and development of technology (Bubalo, 2012:145). The admission fee serves as a guarantee to the licensor, particularly considering that the amount of the licensor's income that will be paid in the form of royalties is fairly uncertain and largely depends on the licensee's business strategies. Thus, the higher the fee amount that is paid in lump sum, the lower the amount of royalties, and vice versa. In practice, the licence fee may be agreed in cross-licensing agreements.

4. CONCLUSION

In Serbian legislation, the general legislative act which regulates the issues pertaining to a licensing agreement is the Civil Obligations Act (COA). It defines a licensing agreement as an agreement obliging a licensor to assign to a licensee, entirely or partially, the right to use an inventions, know-how, trade-mark, sample or model, while the licensee is obliged to pay the licence fee specified therein. A licensing agreement is a bilateral binding agreement, as both contracting parties undertake specified obligations by establishing a mutual relationship. As a licensing agreement entails the licensee's obligation to pay the agreed licence fee for using the licensed asset, such an agreement falls into the category of onerous contracts. Under the COA, a licence fee (compensation) is an essential element of a licensing agreement. The fee for the granted right must be determined or capable of being determined. Otherwise, a licensing agreement without a fee is not valid because there is no mutual consent of the wills of the contracting parties on an essential element of the agreement.

In Serbian legal theory and practice, some authors have raised the issue of the legal grounds for concluding a gratuitous licence agreement (a *gratis* licence). Taking into account

[16] For more, see: Richard Razgaitis, *Early-Stage Technologies: Valuation and Pricing,* New York, 1999, p. 96-97.

the current national legislation, the author of this paper thinks that such licence agreements would not produce legal effect in practice. Yet, in practice, it is indisputable that there may be the need to conclude gratis licence agreements, particularly pertaining to obsolete technology that has insignificant commercial value. As this type of licensing would facilitate expansion of technologies, we believe that the national legislator should legally standardise the institute of an agreement on gratis licences *de lege ferenda.*

The amount of licence fee in licence agreements depends on a number of factors. In legal theory, there is a stance that the contracting parties, when agreeing on the licence fee amount, should particularly bear in mind the characteristics of the right to be transferred, the market size, and whether it is an exclusive or a non-exclusive licence. The contracting parties in licence agreements are generally free to determine the amount of licence fee and the payment method.

In practice, the payment methods related to a licensing agreement are numerous. The most commonly used ones are lump sum payment and royalties, but a combination thereof is also possible. A licensee may pay the fee to a licensor both in cash and in kind. The lump sum payment of a licence fee may be effected either as a single payment or in instalment. The agreed licence fee may also be paid in royalties; the amount depends on the scope of using the licenced assets and it is expressed in a specific percentage for each produced or sold item. In literature, we may also find a special model of calculating royalties in relation to the scope of production, called "the 25% rule". According to this rule, the licensee receives 75% and the licensor receives 25% of the expected profit from the product relating to the licensed technology.

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NAKNADA KAO BITAN ELEMENT UGOVORA O LICENCI

Autor se u radu bavi analizom instituta licencne naknade kao bitnog elementa ugovora o licenci. U radu su analizirani različiti modaliteti plaćanja naknade kod ugovora o licenci koji su najzastupljeniji u praksi. Naknada u paušalnom iznosu plaća se ili odjednom ili u više rata, dok visina tantijema (eng. royalties) zavisi od obima iskorišćavanja premeta licence.

Ključne reči: *ugovor o licenci, naknada, paušalna naknada, tantijeme.*

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Review Paper

CONSTITUTIONAL BREAKTHROUGH OF THE COMMON FOREIGN AND SECURITY POLICY IN THE CONTEXT OF BANK REFAH KARGARAN CASE

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Abstract. *In the appeal case of Bank Refah Kargaran v Council, the EU Court of Justice established its jurisdiction over claims for damages in the field of Common Foreign and Security Policy (CFSP) pertaining to restrictive measures against individuals. The case at hand indicates a broader tendency of the Court to expand the contours of its review despite limitation clauses set out in the Lisbon Treaty. Driven by the present case and former case law, the Court emphasized the importance of effective judicial protection in preserving the unity of the EU legal order. Thus, the Court reaffirmed its ambitions in terms of further constitutionalization of CFSP matters in the name of the rule of law and human rights protection. The paper aims to shed some light on the process of constitutionalization of the CFSP which has been underway for some time, but also to investigate potential impacts of the judgment at hand considering political sensitivity of foreign affairs and shared power of national courts in exercising judicial review of the CFSP acts.*

Key words: *Court of Justice of the European Union, Common Foreign and Security Policy, restrictive measures, rule of law, actions for damages, effective judicial protection*

1. INTRODUCTION

Between 2010 and 2013, various regulations and decisions pertaining to the Common Foreign and Security Policy (hereinafter: CFSP) had directly targeted the Bank Refah Kargaran for involvement in Iran's nuclear proliferation.[1] As a result, the appellant's funds

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[1] For further reference, *see:* Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP; Council Regulation (EU) No 961/2010 of 25 October 2010 concerning restrictive measures against Iran; Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413; Council Regulation (EU) No 267/2012 of 23 March 2012 on restrictive measures against Iran; Council Decision 2013/661/CFSP of 15 November 2013 amending Decision 2010/413.

were frozen on the basis of Article 29 of the Treaty on the European Union (hereinafter: TEU) and Article 215 of the Treaty on Functioning of the European Union (hereinafter: TFEU) providing for restrictive measures or sanctions against individuals, states and non-state entities. After successfully challenging the targeted CFSP regulations and decisions before the General Court, the Iranian bank went on to claim damages in reparation for the injury caused by respective CFSP acts. The General Court was therefore faced with jurisdictional question as to whether the Court of Justice of the European Union (hereinafter: the Court, CJEU) has a competence to award damages for non-contractual liability incurred by the EU in the context of restrictive measures brought under Article 29 TEU. Following the logic of strict textual interpretation of the Treaties' provisions, the General Court concluded that it did not have jurisdiction to rule on damages allegedly suffered by the appellant as a result of adopted CFSP acts.[2] In the appeal procedure before the Grand Chamber in late 2020, the Court took the opposite view in quite a surprising manner. Even though the action was dismissed due to insufficient legal ground for non-contractual liability on the part of the Union[3], the Court decided that it did have jurisdiction to hear an action for damages based on Article 263 TFEU.[4] Therefore, the Court provided highly important clarification on the type of judicial remedies available within the sphere of CFSP. In other words, the Court further strengthened its constitutional and oversight role in the CFSP as to include not only the legality of CFSP decisions imposing restrictive measures against natural or legal persons, states and non-state entities but also relevant actions for damages incurred by the EU.

As observed by Bartoloni, the Court's decision was built upon four main arguments (Bartoloni, 2020: 1364). Firstly, the Court reiterated that its limited capacities in the area of CFSP should be interpreted narrowly as an exception to the general jurisdiction rule under Article 19 TEU.[5]Secondly, the Court stipulated that action for damages constitutes an integral part of the EU's system of legal remedies pursuant to the right to an effective legal remedy.[6] Finally, the Court recalled the rule of law as "one of the EU's founding values" and stressed the need for coherent system of judicial protection provided for by the EU law.[7] By this judgment, inherently limited jurisdiction of the Court was further extended as to cover not only the review of legality of decisions providing for restrictive measures (as prescribed by the Treaty text) but also relevant actions for damages, which in fact has sparked much debate in academic circles.

2. The Legal Basis of the CJEU's Competence in CFSP

The Treaty of Lisbon has introduced some significant changes to the EU legal order by, *inter alia*, dissolving the Maastricht's pillar structure and conferring a single legal personality on the Union. Consequently, the CJEU's oversight role in the EU legal order was expanded, which was reflected onto the CFSP to some extent. As some authors

[2] CJEU, case T-552/15, *Bank Refah Kargaran v Council*, Judgment of the General Court (Second Chamber) of 10 December 2018, ECLI:EU:T:2018:897.

[3]As correctly emphasized by the General Court, the inadequacy of statement of reasons for annulled legal acts pertaining to restrictive measures does not itself provide an adequate legal ground for triggering the non-contractual liability of the Union. CJEU, case T-552/15, para. 68.

[4] CJEU, case C-134/19, *Bank Refah Kargaran v Council*, Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:793.

[5] CJEU, case C-134/19, para. 32.

[6] CJEU, case C-134/19, para. 33 and 36.

[7] CJEU, case C-134/19, para. 35 and 39.

suggest, the Court's principal task of ensuring the respect for the rule of law has remained fundamentally unchanged despite the significant increase in the number of activities relating to foreign relations (Kuijper, 2018: 212). The Court's invocation of rule of law and human rights values dates back to early 1970s when the Court ruled that human rights form an integral part of the general principles of Community law which are protected by the Court of Justice.[8] The Lisbon Treaty has significantly departed from intergovernmental approach to Union's external relations and the concept of European Political Cooperation[9] which was superseded by the CFSP. Consequently, the Court is now able to exercise judicial control, albeit limited, over CFSP matters that used to be delicate in their nature and devoid of judicial supervision.

Furthermore, it is important to stress the ambivalent position of the CFSP in the EU's constitutional architecture which is characterized by threads of both distinctiveness and integration (Koutrakos, 2018: 3). First of all, the rules governing CFSP are not set out in TFEU as one might expect due to their substantive nature but rather laid down in the TEU, which discerns between the CFSP and the rest of the EU's constitutional framework. The uniqueness of the CFSP is also reflected in Article 24(1) TFEU stating that this area is "subject to specific rules and procedures"[10], thus pointing out to its procedural and structural *sui generis* nature (e.g. no legislative acts can be adopted, the Council acts unanimously, the European Parliament does not participate in decision making, etc.). The CFSP competence is also distinguished from other EU's competences (*e.g.* shared, exclusive, coordinating, supporting and supplementing) and therefore listed separately in Article 2(4) TEU. On the other hand, the area of CFSP is characterized by some integrationist elements which have been clearly articulated in the Treaty's provisions and frequently used by the CJEU as the main argument for teleological approach to the limits of its judicial activism. This can be seen in intentional dissolution of the tripartite pillar structure as well as in subsequent integration of the Union's principles and objectives governing external policies into single legal framework.[11]

As for the CJEU's competence in the CFSP, the latter is explicitly exempted from judicial scrutiny based on Article 24(1) TEU and Article 275(2) TFEU. Nevertheless, the Treaty provisions envisage "an exception to the exception", meaning that the Court is competent to monitor compliance with Article 40 TEU and to rule on the legality of decisions pertaining to restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU, as Article 275(2) TFEU stipulates.[12] The following chapters will illustrate the Court's broader tendency to interpret the aforementioned "carve-outs"[13] in a narrow sense as an exception to the rule on general jurisdiction provided for in Article 19 TEU.[14] Building upon the logic of integrationist approach to judicial activism, the Court has opened the door to a greater scope of its jurisdiction in the realm of CFSP.

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[8] CJEU, case 11-70, *Internationale HandelsgesellschaftmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Judgment of the Court of 17 December 1970, ECLI:EU:C:1970:114.

[9] The European Political Cooperation was a synonym for the EU's external relation policy up until the Maastricht Treaty in 1993 and establishment of a Common Foreign and Security Policy under the second Maastricht's pillar.

[10] Consolidated version of the Treaty on European Union (TEU), Official Journal, C 326/2012,Article 24(1).

[11] Article 21 TEU.

[12] Article 40 TEU. Also *see:* Consolidated version of the Treaty on the Functioning of the European Union, Official Journal, C 326/2012, Article 275.

[13] In the *Rosneft* case, the Advocate General Wathelet referred to the limits on the CJEU's jurisdiction as "carve-outs" from the general jurisdiction of the CJEU, as opposed to "claw backs", enshrined in Article 275 TFEU, which simply take back the Court's judicial power in the field.

[14] Article 19(1) TEU:"…It shall ensure that in the interpretation and application of the Treaties the law is observed."

3. STRIVING FOR CONSTITUTIONALIZATION OF CFSP: NO LONGER THE "ODD ONE OUT"?

Notwithstanding the fact that the Court's jurisdiction remains largely outside the scope of CFSP, recent case law leading up to *Bank Refah Kargaran* judgment seems to indicate a progressive constitutionalization dynamics occurring within the field, with the CJEU in the driver's seat. In recent academic discussions, the process of constitutionalization has been referred to as "normalization", "mainstreaming" or "assimilation" of the CFSP into the EU legal order which was recognized in the Court's practice as well (Elsuwege, Van Der Loo, 2019:1352; Lonardo, 2021:297; Hillion, 2018:1675).[15] Despite the fact that the term "constitutionalization" has been frequently used in different legal and political discourses, especially when it comes to development of CFSP within the EU's constitutional context, no explicit theory of constitutionalization has been developed to date (Karolewski, 2005: 1650). Very little academic attention has been drawn to the process of constitutionalization, which is, however, not the case with the theory of constitutionalism which has formed part of a much clearer picture. The latter has been revolving around the role of law in democracy and has been frequently challenged against the theory of traditional legal constitutionalism (Bellamy, 2007:2). If constitutionalization is simply perceived as a part of a process or transition leading up to formation of a constitution, the term itself makes little sense in view of the EU's legal nature which still lacks a crucial constitutional feature – the constitution in a strict formal sense, despite some notable efforts that took place back in 2005.[16] However, if we broadly understand the collection of all EU and EC treaties as having established the constitutional framework of the EU as De Búrca points out, the term "constitutionalization of CFSP" in fact stands a chance (De Búrca, 2008: 11). As for the latter, this means that the aforesaid policy of the EU is slowly becoming integrated into the EU's constitutional architecture. However, this process seems to be done not by means of codification or formal regulation of CFSP processes but rather by the Court's loose interpretation of the applicable legal provisions.

The constitutionalization of the respective field has been taking place by virtue of horizontal application of the general constitutional principles and mechanisms with the aim of preserving the unified nature of the EU legal order. It might be even argued that the CFSP norms are no longer as soft as they may seem despite their intergovernmental nature (Wessel, 2015:126). Even though the CFSP norms comprise soft-law elements such as the absence of legal enforcement mechanisms as well as exclusion of the notions of supremacy and direct effect, the latter is considered to have some legally binding effect aimed at shaping the Member States' behavior in a certain way. Yet, even before the Lisbon Treaty, the Court underlined the binding nature of common positions under the CFSP, thus explicitly obliging the Member States to comply with their obligations under the EU law by virtue of duty to cooperate in good faith.[17] Accordingly, the CFSP norms could be described as *lex imperfecta* due to the presence of dichotomy between their legally binding nature and the lack of full judicial review over their enforcement.

While the Lisbon Treaty reconciled certain differences between the CFSP and other EU's policies, the subsequent case law, which will be discussed further in more depth, has

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[15]For further reference, *see:* CJEU, case C-244/17, *European Commission v Council of the European Union*, Judgment of the Court (Grand Chamber) of 4 September 2018, ECLI:EU:C:2018:662.

[16] Back in 2005, the Draft Treaty establishing a Constitution for Europe failed in the absence of necessary unanimity of all 27 Member States. On that occasion, France and Netherlands voted against the EU Constitution.

[17]CJEU, case C-355/04 P, *Segi, Araitz ZubimendiIzaga and Aritza Galarraga v Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:116.

created almost a blurred line between the two, especially considering the *Bank Refah Kargaran* case and recognition of the Court's jurisdiction over claims for damages under the CFSP for the very first time. Although innovative and progressive, the Court's holistic reasoning in the judgment at hand can be understood as a relic of the past at the same time. A similar perspective surrounds the landmark judgment *Les Verts* (1986) where the Court broadly interpreted the scope of its jurisdiction in the name of rule of law and uniform interpretation of the Community's law.[18] Although there were times when the Court tied up the scope of its jurisdiction to the exact wording of the Treaties while addressing the principle of effective judicial protection[19], it mostly continued in the same vein as in the aforesaid *Les Verts*, thus moving towards integrationist approach rather than the intergovernmental one which was reaffirmed by the case at hand.

In a string of cases leading up to *Bank Refah Kargaran*, the Court managed to avoid certain legal gaps associated with the EU's system of judicial protection in practically the same manner, *i.e.* by invoking the rule of law values. In cases such as *European Parliament v Council* (Mauritius case)[20], *Elitaliana v Eulex Kosovo*[21], *H. v Council*[22], the Court considered Article 40 TEU and Article 275 TFEU as derogations from the general jurisdiction rule established in Article 19 TEU. In other words, the CJEU used the expansionist approach in interpretation of its jurisdiction over the CFSP acts that are rooted in other areas of the EU's law, either in terms of procedural rules or legal basis.

The *Mauritius* case, primarily dealing with Article 218 TFEU and procedural rules on international agreements in the context of CFSP, perfectly illustrates the ambitious appropriation of the CJEU's jurisdiction even in those areas that are not exclusively related to the CFSP and are subject to more intergovernmental decision-making model, as it was the case with the *Bank Refah Kargaran* judgment (*e.g.* judicial cooperation in criminal matters)[23]. Besides, the former case illustrates the Court's tendency to use a "center of gravity test" as a way to avoid incompatibilities related to the legal basis of CFSP decisions, meaning that both the aim and content of disputed CFSP measures are examined at the same time as to elevate the power of the EU judiciary (Elsuwege, *et. al.*, 2019: 1352).[24]

By analogy, the same reasoning was applied to the *Kazahstan* case, where the Court dealt with a legal question covering both the CFSP and other policy areas.[25] Instead of approaching the CFSP separately from other fields of the EU's activity pursuant to Article 24(1) TFEU, the Court horizontally applied general constitutional principles in order to stress the importance of the EU's institutional balance and reach out for greater judicial powers (Lonardo, 2021: 297).

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[18] CJEU, case 294/83, *Partiécologiste "Les Verts" v European Parliament,* Judgment of the Court of 23 April 1986, ECLI:EU:C:1986:166, para. 23.

[19] CJEU, case T-173/98, *Unión de Pequeños Agricultores v Council,* Order of the Court of First Instance (Third Chamber) of 23 November 1999, ECLI:EU:T:1999:296.

[20] CJEU, case C-658/11, *European Parliament v Council,* Judgment of the Court (Grand Chamber), 24 June 2014, ECLI:EU:C:2014:2025.

[21] CJEU, case C-439/13, *Eulex Kosovo v Elitaliana*, Order of the Court (Tenth Chamber) of 16 January 2020, ECLI:EU:C:2020:14.

[22] CJEU, case C-455/14, *H v Council et. al.*, Judgment of the Court (Grand Chamber) of 19 July 2016, ECLI:EU:C:2016:569.

[23] Article 3(2) TEU.

[24] Also *see* CJEU,case C-300/89, *Commission v. Council (Titinium Dioxide),*Judgment of the Court of 11 June 1991., EU:C:1991:244.

[25] CJEU, case C-244/17, *European Commission v Council of the European Union,* Judgment of the Court (Grand Chamber) of 4 September 2018, ECLI:EU:C:2018:662.

In *Elitaliana v Eulex Kosovo* the Court emphasized that a CFSP mission and its rules on public procurement are not shielded from the CJEU's jurisdiction despite limitations in place.[26] Such a controversial line of reasoning was backed up by the judgment in *H. v. Council* case[27], where the boundaries of the EU law were pushed way beyond the wording of the Treaties. In particular, the Court decided that it has jurisdiction over EU military and civilian staff members deployed in a CFSP mission, including those seconded from Member States. Since the case concerned a staff member seconded from the Member State and not the EU, the Court's reference to Article 270 TFEU appears legally groundless, as the latter grants the CJEU's jurisdiction solely over the EU personnel.[28]

Even though the Court's invocation of the Union's founding values, such as the rule of law and the values of equality, seems legit from the perspective of coherent interpretation of CFSP rules and decisions, it is important to highlight the fact that formal constraints of Article 40 TEU, Article 275(2) TFEU and Article 218 TFEU do not allow any extension of the CJEU's jurisdiction in CFSP outside the scope of the established legal framework.[29] For these reasons, turning a blind eye to the relevant Treaties' provisions was rightfully assessed as "highly artificial and acrobatic", which could be applied to the case at hand as well (Elsuwege, 2021: 1748; Heliskoski, 2018: 10). In light of the foregoing, it is obvious that the CJEU's teleological approach to the limits of its jurisdiction moves beyond the literal interpretation or mere wording of the Treaties. Thus, it seems reasonable to bring into question a wide margin of the Court's maneuver from the perspective and the intention of the Treaties' drafters.

4. Analyzing the Intention of the Treaties' Drafters: a Matter of Perspective?

Before continuing with examination of the limits to the CJEU's review in the CFSP, it is necessary to get to grips with intention of the Treaties' drafters. In other words, did they intend to preserve the intergovernmental nature of the CFSP and exclude the CJEU's jurisdiction thereof, or did they aim to create a separate legal order for the CFSP where the CJEU would enjoy the wider scope of review? Having in mind the ambiguous position of the CFSP in the current state of affairs, it seems that both opinions could have sound grounds at the same time. Wessel argued that the CFSP isolation was not only not tolerated but also not intended (Wessel, 2015: 143). He further suggested that Member States did not want to attribute legally binding nature to the CFSP norms but that the latter had evolved over the years due to its close connections with other areas of EU law. Yet, the real question is to what extent divergent views on the Treaties' provisions can be tolerated from a pure legal perspective?

As previously noted, the Court tends to horizontally apply the EU's constitutional principles when dealing with the CFSP matters; however, the vertical dimension and the limits of the CFSP remain quite unclear. Within the meaning of the judgment at hand, a closer look at Article 275 TFEU and Article 24 TEU reveals no interpretative ambiguities

[26] Case C-439/13, para. 49.
[27] CJEU, C-455/14 P, H. v. Council of the European Union and Others, Judgment of the Court (Grand Chamber) of 19 July 2016, ECLI:EU:C:2016:569.
[28] TFEU, Article 270.
[29] Article 40(1) TEU: "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties". Also *see* Article 275(2) and 218(11) TFEU.

as both clearly imply limited judicial capacities in the CFSP matters with no interference in the action for damages. However, the Court had a wind at its back, based on loose wording of Article 19 TEU which states that "in the interpretation and application of the Treaties the law is observed".[30] The latter has been used as the main argument for exercising the general scope jurisdiction, along with Articles 268 and 340 TFEU suggesting that the Union should compensate for any damage caused by its institutions or servants.[31]

When discussing conflicting Treaties' provisions on the CFSP, it is important to bear in mind the fundamental principle of conferral laid down in Article 5 TEU, which stipulates that the EU acts only within the limits of the competences that Member States have conferred upon it in the Treaties.[32] Therefore, limited judicial review provided for by Article 275(2) TFEU is rather a result of "conscious choice made by the drafters of the Treaties", as argued by the Advocate General Wahl in *H. v. Council*[33]. This means that the Court should not exercise its powers beyond the limits laid down in the Treaties in spite of ambiguous and conflicting wording of certain provisions. The Advocate General Kokkot took the same view in Opinion 2/13 on the accession of the EU to the European Convention on Human Rights by saying that the Court is granted only restricted judicial review pursuant to Articles 24 TEU and 275(1) TFEU. She emphasized that wide interpretation of the Court's jurisdiction is "not necessary for the purpose of ensuring effective legal protection for individuals" and that "Member States are expressly obliged to provide remedies sufficient to ensure effective legal protection in the CFSP".[34]

It is worth remembering here that, based on Article 19(1) TEU, both the CJEU and national courts are charged with the responsibility of ensuring effective judicial protection for individuals. Whenever the CJEU lacks jurisdiction in the CFSP field, Member States should be able to step in and compensate for the existing legal gaps. The bottom line is that domestic courts are unable to come up with an independent position or to rule on the legality of decisions with respect to the CFSP. Therefore, propositions put forward by the Advocate General Hogan in *Bank Refah Kargaran* case, according to which the Treaties' drafters wanted to exempt only the decisions of a purely political nature because they are "inapt for judicial resolution"[35], seem rather weak in light of the legislative text at hand which explicitly prescribes only limited judicial review.

However, not every expansionist step that the Court has taken so far should be unwelcomed, despite implied limitations set out in the Treaties. For instance, in the *Rosneft* case, the Court stretched the notion of jurisdiction over the preliminary ruling procedure in matters dealing with the review of legality of CFSP decisions.[36] This ruling is significant for strengthening the relationship between the Court and Member States and ensuring uniform interpretation of the EU law by virtue of preliminary ruling procedure. The importance of such inter-institutional cooperation cannot be overstated, especially in

[30] Article 19 TEU.
[31] Article 340(2) TFEU.
[32] Article 5 TEU
[33] Opinion of AG Wahl to CJEU, case C-455/14 P, *H. v. Council and Commission*,7 April 2016, ECLI:EU:C:2016:212, para. 49.
[34] View of AG Kokott to CJEU, *Opinion pursuant to Article 218(11) TFEU*, 13 June 2014, ECLI:EU:C:2014:2475, para. 95 and 97.
[35] Opinion of AG Hogan to CJEU, case T-552/15,*Bank Refah Kargaran v Council of the European Union*,28 May 2020, ECLI:EU:C:2020:396, para. 47.
[36] Opinion of AG Wathelet to CJEU, case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*,31 May 2016, ECLI:EU:C:2016:381.

challenging times when the rule of law and democracy are most seriously at stake in backsliding Member States (Bard, 2021: 371-395; Tošić, 2021: 73-90).

Nevertheless, the continuous preference for a holistic approach can be criticized for disregarding the original intention of the Treaties' drafters. The question is how far the Court will go against the Union's general principle of legal certainty in setting out its own jurisdiction in CFSP matters. Some rightfully argue that the Court will never fully define the extent of limitations posed on it as it will be "pigeonholing itself for the future cases" (Butler, 2019:167).

5. CJEU'S APPROACH TO CFSP: ULTRA VIRES OR NOT?

Alongside the foregoing lines, it is important to investigate whether the CJEU's scrutiny in the field can be qualified as *ultra vires*, having in mind its frequent departure from the respective legal provisions. The integrationist approach to *Bank Refah Kargaran* case was heavily built upon the aforementioned *Rosneft* logic, as one of the CJEU's landmark judgments in the respective field.[37] The Court's argument in *Rosneft* was based on Articles 263 and 267 TFEU and the premise of general jurisdiction, which extends all the way to preliminary rulings as well as to review of the legality of the EU acts which are "intended to produce legal effect vis-a-vis third parties".[38] This particular predecessor of the *Bank Refah Kargaran* case revolved around the same legal concepts and arguments: the principles of rule of law and effective judicial protection pursuant to Articles 2 and 21 TEU as well as Article 47 of the EU Charter of Fundamental Rights.[39] Along with the case at hand, the *Rosneft* case was significant for providing further legal clarification on validity and context of restrictive measures under the CFSP. Thus, the Court has strengthened its problematic position that the jurisdiction is presumed even in the absence of textual basis thereto in the Treaties (Kuisma, 2018: 20).

It is worth recalling the times when the integrationist logic put forward by the *Bank Refah Kargaran* case was dismissed, which perfectly illustrates the progressive expansion of the Court's jurisdiction within the field. For instance, in *Segi*[40] and *Gestoras Pro Amnistia*[41], the Court explicitly ruled out the possibility of reviewing actions for damages on the ground that Treaties do not provide for such an expansive and loose interpretation. Likewise, the rulings in *Unión de Pequeños Agricultores* and *Jégo Quéré*[42] recalled the limits to the Court's power by stating that the judicial protection cannot go beyond the jurisdiction provided for in the Treaties and that Member States are the ones to make amendments to the scope of judicial review.

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[37] CJEU, case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, Judgment of the Court (Grand Chamber) of 28 March 2017, ECLI:EU:C:2017:236.
[38] TFEU, Articles 263 and 267.
[39] Articles 2 and 21 TEU; Charter of Fundamental Rights of the European Union, OJ, C 326/2012, Article 47.
[40] Case C-355/04 P, *Segi, Araitz ZubimendiIzaga and Aritza Galarraga v Council of the European Union*.
[41] CJEU, case C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano and Julen Zelarain Errasti v Council of the European Union*, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:115.
[42] CJEU, case T-177/01, *Jégo-Quéré & Cie SA v Commission of the European Communities*, Judgment of the Court of First Instance (First Chamber, extended composition) of 3 May 2002, ECLI:EU:T:2002:112.

A new light was shed on the CFSP by the (in)famous *Kadi* case[43], where the Court reflected on the nature of the EU's constitutional architecture and vertical hierarchy between the EU, the UN and national legal orders. By precluding primacy of the UN Security Council's resolution over the EU law, the CJEU turned its back on traditional fidelity to the public international law. The *Kadi* case, together with *Mox Plant,*[44] marked the beginning of a new phase of the Court's jurisdiction which has been heavily inspired by integrationist ideas ever since. Thus, the autonomy and unity of the EU legal order have been strongly tied up to the Court's (exclusive) jurisdiction which has been largely used to leverage the Member States' obligations and duties under the international law. However, there is a lack of clarity on the cause-effect relationship between the EU's autonomous nature and the Court's exclusive jurisdiction thereof, as some authors suggest (Lukić, 2013:198).

Slipping into a repetitive pattern of reasoning indicates that the Court is devoted to the protection of the Union's fundamental values more than ever before, but also interested in pursuing certain political objectives as a "driving force of the European integration process" (European Parliament, 2021). Legally speaking, such a flexible approach to judicial discretion has an *ultra vires* dimension and potentially threatens the principle of legal certainty at the same time. The Court's subtle political ambitions are reflected in an overly expanded jurisdiction which is ill-defined in the legislative text. The political question doctrine[45], albeit not officially recognized in the Court's practice, would help delimitate and clarify the uncertain scope of the Court's jurisdiction which is becoming slightly intrusive in the field of EU foreign policy (Lonardo, 2017: 587).

It follows that the Court's post-Lisbon *modus operandi* in the CFSP has shifted from abstentionism to expansionism. Although it might be criticized for being too artificial and unfaithful to the text of the Treaties in a formal sense, the Court's switch to unrestrained approach reflects the Union's changing political landscape that has been taking place for years. The rule of law and right to an effective judicial protection no longer have the same meaning within the CFSP context due to the progressive development of the notion of human rights but also (de)evolving geopolitical environment which surely requires a greater degree of coherence. In spite of the existence of legitimate (political) reasons for the Court's ever-expanding jurisdiction, infidelity to the scope and nature of the Treaties' provisions on the CFSP should not be welcomed with arms wide open in spite of an unorthodox understanding of tripartite separation of powers (Beširević, 2011: 77).

6. The Role of National Courts

As for the role of domestic courts in creating the CFSP, wishing to protect the uniform nature of the EU legal order, the CJEU recalled on several occasions that Member States are not entitled to rule on the validity of the CFSP acts. This is part of the so-called *Foto-*

[43] CJEU, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461.

[44] CJEU, case C-459/03, *Commission of the European Communities v Ireland*, Judgment of the Court (Grand Chamber) of 30 May 2006, ECLI:EU:C:2006:345.

[45] Traditional expression of the doctrine refers to the idea that politically sensitive issue should not be heard by the Court. *See* U.S. Reports, *Marbury et. al. v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Frost rule[46], which was explicitly invoked by the Court in the *Rosneft* case, unlike in the *Bank Refah Kargaran* case, where the Court relied solely upon the rule of law protection as well as rights to an effective remedy and judicial review. Nevertheless, it would be incorrect to say that the *Bank Refah Kargaran* judgment was not inspired by the *Foto-Frost* logic at all (Verellen, 2021: 23). Both cases demonstrate the Court's ever-growing powers but also its commitment to protect both individual rights and the unity of the EU legal order.

Within the meaning of the *Bank Refah Kargaran* case, the Court wanted to avoid a "lacuna in the judicial protection of the natural or legal persons"[47] and to ensure that compensation for damages would have the exact same meaning in all Member States. The question arises as to whether such an expansionist approach would threaten the position of domestic courts in this field. On the one hand, the role of national courts in the EU's system of judicial protection was strengthened via the *Rosneft* judgment and subsequent introduction of a preliminary ruling as a new procedural tool which enabled the Member States to take a greater part in implementation of the CFSP acts. As recalled by Elsuwege and Lonardo, the CFSP is conceived and implemented by both Member States and the EU, which means that domestic courts form a part of the EU's legal system of judicial protection and play a crucial role in upholding the rule of law (Elsuwege, 2021: 1758; Lonardo, 2021: 297).[48]

Even though national courts are guided by the principle of primacy and direct effect of the EU law as established by landmark judgments of *Costa v. E.N.E.L.*[49] and *Van Gend and Loos,*[50] the question of primacy in this regard remains rather unclear considering the lack of clarification on the type of competence that the CFSP falls into. The relevant case law of the CJEU suggests that the *sui generis* nature of the CFSP is characterized by some degree of primacy; however, it does not imply that the role of national courts should be undermined or set aside. After all, the CFSP is subject to "mixed judicial control in a multilevel judicial field" and Member States are supposed to assist each other in carrying out tasks stemming from the Treaties, pursuant to the principle of sincere cooperation (Butler, 2019: 157).[51] The systematic reading of Article 4 TEU as well as Article 24 TEU suggests that competences not conferred upon the EU will remain with the Member States themselves, and *vice-versa.* Therefore, neither the CJEU nor national courts are entitled to exclusively rule on the CFSP matters; instead, they should be co-responsible for the field at stake.

The presented case law of the CJEU suggests that the Court is striving for "exclusivity on the judicial scene", which can also be identified in the Court's Opinion 2/13 on the EU's accession to the European Convention on Human Rights[52] where indirect limitations were placed upon, *inter alia,* the national courts (Butler, 2019: 168). Even though complementary jurisdiction of the CJEU and national courts is inherently built in the complete system of judicial remedies within the EU, one cannot deny that such system suffers from practical deficiencies given that all Member States do not equally comply with their obligations under the EU law.

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[46] CJEU, case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*., Judgment of the Court of 22 October 1987, ECLI:EU:C:1987:452.
[47] CJEU, case C-134/19, para. 39.
[48] Also *see* Article 19(1) of the TEU.
[49] CJEU,case 6-64, *Flaminio Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.
[50] CJEU, case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Judgment of the Court of 5 February 1963, ECLI:EU:C:1963:1.
[51] Also *see* Article 4(2) TEU.
[52] Case Opinion 2/13, *Opinion pursuant to Article 218(11) TFEU*, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.

When it comes to actions for damages in particular, nothing in the relevant provisions, primarily in Article 24(1) TEU and Article 275(1) TFEU, seems to indicate that the Court's interpretative acrobatics might be able to stretch so far as to cover compensation for the harm incurred by the EU, which means that the latter competences rest upon the national courts in the first place. Having in mind some straightforward aspects of both pre-Lisbon and post-Lisbon case law, which heavily praised the competences of national courts in the field of compensatory justice[53], the *Bank Refah Kargaran* judgment came as a surprise due to significant departure from the well-established judicial practice, but also from relevant Treaties' provisions and the fundamental requirement of legal certainty.

7. Concluding Remarks

In light of the aforementioned, it could be said that the CJEU is committed to protection of the Union's overarching foundational values within the ambit of foreign policy, but also highly interested in performing certain political functions even at the expense of the Member States' traditional area of competence. The case of *Bank Refah Kargaran* is yet another example of this growing adjudicative trend in the EU.

It is important to note that the case at hand could have far-reaching implications stretching outside the scope of the EU's restrictive measures. The impact of the ruling is anything but limited at this point, despite the fact that restrictive measures were already subject to the Court's legality review. The broader perspective suggests that the Court's continued reliance on the integrationist approach could spread out to other non-political questions, such as the ones brought under the Common Security and Defense Policy (hereinafter: CSDP), *i.e.* EU's military and civilian missions and operations aimed at preventing human rights violations. After all, the Court's increased reference to the rule of law would make it difficult to uphold the view that the CSDP missions should be devoid of judicial review (Elsuwege, De Coninck, 2020). The judgment at hand, along with its predecessors, could also pave the way for subsequent action for damages brought by non-Member States before the CJEU.

The extensive and dualist jurisprudence indicates the Court's willingness to present itself as a powerful actor at both international and national levels. The main concern is, however, whether the Court is allowed to juggle between the law and politics insofar as the relevant legal constraints are considered. Notwithstanding the fact that the exact contours of the jurisdiction remain quite unclear to date, it is evident that the Court has taken some decisive steps in this regard. If it continues in the same vein, one of the greatest obstacles in the recommenced negotiations on the EU's accession to the ECHR, which refers to the lack of CJEU's jurisdiction in CFSP, might be dismantled at least (Council of Europe, 2019).

Based on the aforementioned, it could be said that the Court's role in CFSP is less limited in practice than it might be presumed from the narrow reading of the relevant provisions. The progressive constitutionalization of the CFSP has created a distorted reality where principles of primacy and direct effect can no longer be ruled out from the field at stake. This means that traditional understanding of the Union's foreign affairs has been abandoned, which has considerably undermined the role of the Member States as well as the fundamental principle of legal certainty. By acquiring the right to rule on action for

[53] CJEU, case T-328/14, *Mahmoud Jannatian v Council of the European Union,* Judgment of the General Court (Seventh Chamber) of 18 February 2016, ECLI:EU:T:2016:86.

damages, the CJEU is leading the CFSP's constitutional dynamics towards a higher degree of coherence and integration despite its debatable gap-filling role. It seems that the latter perfectly displays the Court's continuous attempts to "kill two birds with one stone", meaning that there is a strong need to protect the Union's fundamental values, on the one hand, but also to expand the scope of judicial powers for non-legal reasons, on the other hand.

Finally, a full-fledged system of judicial review and enforcement in the CFSP is unlikely to happen, at least as long as traditionally unadaptable political matters are concerned. However, given the current atmosphere in the EU, prevalence of unity over fragmentation is quite expectable in the future. In case these predictions come true, we might be witnessing something that Beširević referred to as judicial tyranny (instead of judicial activism), especially in the absence of much needed political question doctrine that would allow for a clearer delimitation of the Court's competences in the CFSP (Beširević, 2011: 78).

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KONSTITUCIONALIZACIJA ZAJEDNIČKE SPOLJNE I BEZBEDNOSNE POLITIKE U KONTEKSTU SLUČAJA *BANK REFAH KARGARAN* PRED EVROPSKIM SUDOM PRAVDE

U presudi od 6. oktobra 2020. godine u predmetu Bank Refah Kargaran, veliko veće Suda pravde odbacilo je presudu Opšteg suda, utvrdivši po prvi put sopstvenu nadležnost and zahtevima za naknadu štete u oblasti Zajedničke spoljne i bezbednosne politike u delu koji se odnosi na restriktivne mere protiv fizičkih i pravnih lica. Pomenuti slučaj predstavlja značajan iskorak u pravcu dalje konstitucionalizacije oveoblasti, iako je reč o ustavnosudskom aktivizmu koji u velikoj meri odstupa od slova Lisabonskog ugovora. Takođe, Sud je naglasio postojanje uzročno-posledične veze između prava na efikasnu sudsku zaštitu, s jedne strane, te jedinstva pravnog poretka Evropske unije, s druge strane. Predmetna presuda ukazuje na rastuće političke ambicije Suda povodom sopstvenih nadležnosti na polju ZSBP koje prevazilaze okvire lisabonskih ograničenja, a sve u svrhe očuvanja autonomnog pravnog Sistema koji se temelji na zaštiti vladavine prava i ljudskih prava. Rad je usmeren ka pojašnjenju konstitucionalnih procesa u okviru ZSBP, kao i ispitivanju praktičnih implikacija konkretne presude iz osetljivog spoljnopolitičkog ugla kojeg karakteriše podeljena nadležnost između Evropske unije i država članica.

Ključne reči: *Sud pravde Evropske unije, Zajednička spoljna i bezbednosna politika, restriktivne mere protiv fizičkih i pravnih lica, vladavina prava, pravo na naknadu štete, pravo na efikasnu sudsku zaštitu.*

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Review Paper

THE THIRD OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON A COMMUNICATIONS PROCEDURE: A NEW METHOD OF LEGAL PROTECTION OF CHILDREN'S RIGHTS

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Abstract. *One of the most important developments in the children's rights protection system established under the auspices of the Convention on the Rights of the Child (CRC, 1989) was the adoption of the Third Optional Protocol to the Convention on a Communications Procedure (2011), which completed the system of monitoring and protection of children's rights by the Committee on the Rights of the Child. The competences of the Committee on the Rights of the Child have been expanded, and children have been given the opportunity to address the Committee either directly or through adult representatives, alleging violations of the rights guaranteed by the Convention on the Rights of the Child, the First Optional Protocol and the Second Optional Protocols to the Convention on the Rights of the Child.*

Key words: *rights of the child, Convention on the Rights of the Child, Third Optional Protocol, individual complaints*

1. INTRODUCTION

One of the most important functions that provides for the effective exercise of the rights of the child guaranteed by the Convention on the Rights of the Child (1989)[1] is the supervision procedure. which ensures that children's rights are respected, observed and effectively exercised, i.e. that they not remain merely declarative. In relevant literature, supervision is defined as a set of activities aimed at assessing and measuring the implementation of the rights of the child in different areas of life, including the assessment

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[1] The Convention on the Rights of the Child (hereinafter: the CRC) was adopted and opened for signature and ratification by the UN General Assembly by Resolution no. 44/25 of 20 of November 1989 and entered into force on 2 September 1990. See: UN Convention on the Rights of the Child (1989), available at https://www.unhcr.org/uk/4d9474b49.pdf?msclkid=1ffc2261b2b911ec89fa906f7315b5f1

of situations where the rights of the child have been violated and particularly the cases where such violations call for judicial protection (Vučković Šahović, Petrušić, 2015: 250). The Committee on the Rights of the Child (hereinafter: the Committee) [2], as a treaty body established by the Convention on the Rights of the Child (hereinafter: CRC), has the most important role within the international system of supervision.

The supervision by the Committee is carried out through the reporting procedure. Under Articles 44 and 45 of the CRC, the reporting procedure implies the submission of reports on the measures adopted by the State Parties and progress made in the exercise of the CRC rights. The Committee jurisdiction also covers the implementation of two optional protocols to the CRC. This competence is established in Article 8 of the Optional Protocol to the CRC on the Participation of Children in Armed Conflict (OPAC), and Article 12 of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC).[3] The Committee performs its function by adopting general comments, on the basis of interpretation of the CRC provisions, which contributes not only to overcoming the generalizations in the CRC provisions but also to the evolving nature of the CRC (OHCHR, 2022).[4]

In addition to the above competences, there were views and suggestions in literature that the Committee could take over the role of an International Court of the Rights of the Child. It is a consequence of the fact that there is still no international or regional judicial body that would adequately and with sufficient authority decide on the violations of the rights of the child.[5] This idea was first put into effect by adopting Third Optional Protocol to the CRC on

[2] The establishment and competences of the Committee are regulated in Articles 43-45 of the CRC. The Committee was originally composed of ten experts of high moral values and recognized expertise in areas covered by the CRC. The UN General Assembly Resolution no. 50/155 of 21 December 1995 approved the amendment to Article 43(2) CRC; thus, the word "ten" was replaced by the word "eighteen". The decision to increase the number of Committee members was justified by the increasing number of ratification of this international agreement (182 states) and by the fact that the Committee recognizes the importance of monitoring the implementation of the CRC by the contracting states. The Amendment contained in Resolution no. 50/155 (1995) entered into force on 18 November 2002, when it was accepted by two thirds of the CRC State Parties (128 out of 191 states). The amended Article 43(2) CRC is available online at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx. The text of the UN General Assembly Resolution no. 50/155 (1995) is available online at https://undocs.org/en/A/RES/50/155.

[3] In the Socialist Republic of Yugoslavia (SRY), these two Optional Protocols to the CRC were ratified in 2002, by the adoption of the Act on the Ratification of the Optional Protocol to the Convention on the Rights of the Child on the Participation of Children in Armed Conflicts , *Official Gazette of the SRY*- International Agreements, no. 7/2002 (*Serb.*: *Zakon o potvrđivanju Fakultativnog protokola o učešću dece u oružanim sukobima uz Konvenciju O Pravima Deteta*, "Sl. list SRJ - Međunarodni ugovori", br. 7/2002), and the Act on the Ratification of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, *Official Gazette of the SRY*- International Agreements", no 7/2002 (Serb. *Zakon o potvrđivanju Fakultativnog protokola o prodaji dece, dečijoj prostituciji I dečijoj pornografiji uz Konvenciju o pravima deteta,* "Sl. list SRJ-Međunarodni ugovori", br. 7/2002).

[4] The Committee has adopted twenty-five general comments so far, and is currently drafting the twenty-sixth general comment on children's right to a healthy environment. For the list of all the Committee's general comments adopted so far (with links), see: OHCHR/UN Human Rights Office (2022): General comments/ Committee on the Rights of the Child, available online at https://www.ohchr.org/en/treaty-bodies/crc/general-comments

[5] Bearing in mind that the judges of the European Court of Human Rights (ECtHR) do not have special knowledge in psychology and do not have the expertise to conduct appropriate analysis of reports submitted by national courts, there are views that the existing legal and social thought is moving towards the establishment of an international tribunal for the rights of the child. The ECtHR does not hear children directly and cannot have an accurate insight into each individual case concerning the rights of the child because they only have direct contact with the government representatives and the applicant. The principle of the best interests of the child is a "subjective" concept, the interpretation of which is conditioned by several factors and has a significant dose of subjectivity, even when the principle of objectivity is present in the court decision-making process (Stanila, 2019: 42).

a Communications Procedure (hereinafter: the Third Optional Protocol/ OPIC),[6] by which the Committee has acquired quasi-judicial powers to examine communications submitted by individuals or groups acting on behalf of children as right holders. The communications may be submitted either directly or through representatives, on the grounds of violation of the children's rights guaranteed by the CRC, the First Optional Protocol or the Second Optional Protocol.

2. THE THIRD OPTIONAL PROTOCOL: A NEW CHAPTER IN THE CHILDREN'S RIGHTS PROTECTION SYSTEM

The Third Optional Protocol to the Convention on a Communications Procedure (OPIC, 2011) was adopted after two decades of applying the CRC provisions, when experts on children's rights protection concluded that the supervision and protection system in this field should be completed by vesting the Committee on the Rights of the Child with the authority to handle individual complaints (Lee, 2010: 567).[7] The working group for drafting the text of the Third Optional Protocol was established by a Resolution of the Human Rights Council of 17 June 2009. The UN General Assembly adopted the Third Optional Protocol on 19 December 2011,[8] which entered into force in April 2014 (Carletti, 2020: 116). The Third Optional Protocol established the possibility for individuals, groups, or their representatives to address the Committee through one of two possible procedures: the Communications Procedure and the Inquiry Procedure. The Communications Procedure has been regulated as a procedure for individual communications (Articles 5-11 of the OPIC) and Inter-State Communications (Article 12 of the OPIC). The Inquiry Procedure, initiated upon complaints alleging grave or systematic violations of the guaranteed children's rights is regulated in Articles 13 and 13 of the OPIC.

2.1. Individual Communications Procedure

Article 5 of the Third Optional Protocol to the CRC on a Communications Procedure regulates Individual Communications Procedure, also known as the *complaints procedure* (OPIC, 2022).[9] Communications (complaints) may be submitted by or on behalf of an individuals or a group of individuals under the jurisdiction of a state that has ratified the Third Optional Protocol who active procedural legitimacy to file an individual complaint

[6] United Nations (2011). Optional Protocol to the Convention on a Communications Procedure , available online at https://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf

[7] Notably, the intention of the advocates for the rights of the child (both in terms of adopting the CRC and establishing the Committee) was to establish a body which would receive and consider individual and interstate complaints concerning compliance with the provisions of the CRC and the First and the Second Optional Protocols, but that the final text of the CRC did not contain such provisions; namely, due to the comprehensive nature of the CRC, there was a need for a compromise solution, which was ratified in almost all countries of the world (Lee, 2010: 567). In addition to the influence of the Committee members, the adoption of the Third Optional Protocol was greatly influenced by civil society representatives, upon whose proposal (in 2008) the UN General Assembly formed an open working group on drafting the Third Optional Protocol (Carletti, 2020: 116).

[8] UN (2011): Optional Protocol to the Convention on a Communications Procedure (OPIC). The text of the Third Optional Protocol includes a preamble and 24 articles grouped into four parts: Part 1: General Provisions (Articles 1-4); Part 2: Communications Procedure (Articles 5-12); Part 3: Inquiry Procedure (Articles 13-14); and Part 4: Final Provisions (Articles 15-24).

[9] *See: OPIC (2022): Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC) website, last updated June 2022; https://opic.childrightsconnect.org/what-is-opic/the-mechanisms/*

before the Committee, claiming a violation of children's rights guaranteed under the CRC, or the First or the Second Optional Protocol. Adults may file individual complaints on behalf of children if there is explicit consent of the child, unless the complainant may justify acting on behalf of the child or a group of children without their consent. (Article 5 of the OPIC).

This procedure allows the child, groups of children or their representatives, who claim that their rights have been violated, to submit a complaint or communication to the Committee. In this way, rights of the child guaranteed by the CRC and the First and Second Optional Protocols can be protected. As a condition for filing a complaint, it is necessary that the violation was committed by a State Party that has ratified the CRC, the First or the Second Optional Protocol. It is also necessary that a specific Contracting State has ratified the Third Optional Protocol. Before filing an application, the applicant must first exhaust legal remedies prescribed by the national law and obtain a final decision of the national court, unless the domestic remedies prove to be ineffective of unreasonably prolonged. The eligibility (admissibility) conditions in Article 7 of the OPIC are stipulated in negative terms; thus, the Committee will consider a communication inadmissible if: a) it is anonymous; b) it is not in writing; c) it constitutes an abuse of the right to submit such a communication or is incompatible with the provisions of the CRC, or the First or the Second Optional Protocol; d) the same matter has already been examined by the Committee or is being examined under another procedure of international investigation or settlement; e) all available domestic remedies have not been exhausted, unless it is proven that the remedy procedure is unjustifiably prolonged or unlikely to be effective; f) the complaint is manifestly ill-founded or insufficiently substantiated; g) the facts which are the subject matter of the complaint occurred before the entry into force of the Third Optional Protocol in a particular State Party, unless the facts continued to exist after that date; h) the complaint has not been filed within one year after the domestic remedies had been exhausted, unless the complainant shows that it was impossible to lodge a complaint within that time limit. (Article 7 of the OPIC). The strictly set admissibility criteria explain many rejected applications. By September 2019, the Committee had received more than 300 petitions, and only 99 have been accepted as admissible (OPIC, 2022).

Therefore, the procedure initiated by filing individual communications (complaints) is a quasi-judicial procedure, which results in the adoption of the Committee's opinion on the existence or non-existence of the violation of the guaranteed children's right. The Committee may formulate recommendations for a State Party that has violated the rights of the child (Article 10 of the OPIC). In case of an established violation of the rights of the child, the State Party shall give due consideration to the Committee views and recommendations, and submit a written response as soon as possible, stating what measures have been taken or are to be taken in compliance with the Committee opinion and recommendations (Article 11 of the OPIC). Thus, the Committee's opinion on the existence of a violation of children's rights concurrently establishes the responsibility of the State Party and its international obligation to act in accordance with the adopted opinion.

Under the individual communications procedure, the Third Optional Protocol also envisages the possibility of reaching an amicable settlement (Article 9 of the OPIC) as one of the ways of ending the procedure, which established the Committee's duty to make its good services available to interested parties in view of reaching a friendly settlement. It is a favored dispute resolution method which allows the complainant and the State Party to come to a mutually agreed solution on the violation alleged by the complainant. The settlement procedure is terminated by a settlement agreement, without a decision of the Committee, whose

duty is to provide adequate space and assistance to the parties, and to ensure that the settlement agreement fully complies with the CRC, the First and the Second Optional Protocols, as well as with the well-established principle of the best interests of the child.

The amicable settlement procedure may be initiated at the request of one of the parties at any time, from the moment the petition (complaint) has been received by the Committee until the moment when the decision on the merits is rendered. The procedure is voluntary, and the parties must give their explicit consent. In case the Committee concludes that the parties are unlikely to reach an agreement, the Committee may intervene, either to facilitate a dialogue or to reinstate its own proceedings if one of the parties withdraws from the process or demonstrates reluctance to reach a friendly settlement.

The Committee encourages the submission of petitions directly by children and strives to respond to every child's petition as soon as possible in a child-friendly manner. By September 2019, the Committee had received 6 petitions directly submitted by children (OPIC, 2022).

2.2. Interstate Complaints Procedure

Article 12 of the Third Optional Protocol (OPIC) establishes the inter-state communications procedure. Thus, a State Party which has ratified the Third Optional Protocol and declared its acceptance of the inter-state communication procedure may file a complaint with the Committee against another State which has ratified the Third Optional Protocol and accepted the application of the inter-state communications procedure. This procedure may be applied to protect the rights guaranteed by the CRC, the First and the Second Optional Protocols, if the State that allegedly committed the violation has ratified the CRC, the First or the Second Optional protocol (OPIC, 2022).[10]

2.3. The Inquiry Procedure

The Inquiry Procedure is regulated in Articles 13 and 14 of the Third Optional Protocol (OPIC). This procedure is a mechanism which enables the Committee to investigate alleged grave and systemic violations of the CRC, the First or the Second Optional Protocol by State Parties that have ratified these international instruments. This procedure is an optional mechanism because Article 13(7) of the OPIC explicitly provides that each State Party may declare that it does not recognize this competence of the Committee at the time of ratification of the Third Optional Protocol (an *opt-out clause*), and thus exclude the application of this procedure by a declaration. Thus, if the Committee receives reliable information indicating serious or systematic violations of rights (e.g. sale of children, child prostitution, pornography, or involvement of children in armed conflicts), it may decide to conduct an inquiry (Articles 13(1) OPIC). In order to initiate this procedure, it is not necessary to have exhausted all domestic remedies or to identify the specific victim(s). The inquiry is conducted confidentially, in cooperation with the State Party at all stages of the proceedings (Article 13(3)OPIC). By October 2021, the Committee had conducted one investigation, and is currently conducting four investigations (OPIC, 2022).

[10] For more, see: OPIC (2022). available at https://opic.childrightsconnect.org/what-is-opic/the-mechanisms/

3. THE SCOPE AND LIMITS OF THE THIRD OPTIONAL PROTOCOL

Although the entry into force of the Third Optional Protocol is a great achievement in the field of children's rights protection, the question is whether its entry into force is a definite victory for those who have advocated for its adoption. This question arises because the final text of the Third Optional Protocol has been formulated after long negotiations between the members of the working group and, particularly, considering the fact that its provisions are essentially a compromise between different interests.

The process that preceded the final formulation of the Third Optional Protocol involved lengthy discussions, largely pertaining to the issue who would have active procedural legitimacy to submit petitions to the Committee. In addition to the submission of individual petitions, the dominant idea was to prescribe the possibility of submitting collective petitions alleging a violation of the children's rights guaranteed by the CRC, the First and the Second Optional Protocols (UN GA: Draft Proposal for Third Optional Protocol, 2011a).[11]

According to the originally formulated proposal, individual children or a group of children or their representatives who claimed to be victims of violations of children's rights guaranteed by the CRC, or the First and the Second Optional Protocols, had active procedural legitimacy to submit individual petitions to the Committee (Article 6 of the Draft Proposal 2011). The submission of collective petitions was regulated in Article 7 of the Draft Proposal (2011), which envisaged that each State Party to had the possibility to declare (at the time of signing or ratifying the Optional Protocol) whether it would accept the Committee's competence to receive and consider collective petitions (the so-called *opt-in clause*). It was further stipulated that collective petitions may be submitted by human rights organizations, ombudsmen, or non-governmental organizations. A state that accepts the possibility of submitting collective petitions could withdraw this statement at any time by notifying the UN Secretary-General (Article 7 of the Draft Proposal 2011).

It was stated that introduction of the institute of collective complaint would enable communication in cases when victim choose not to file an individual petition, as well as to prevent the revictimization of children. On the other hand, some of the reasons given by the members of the working group against the introduction of the collective complaint are that this institute largely overlaps with the institute of inquiry procedure in case of serious and systematic violations of rights and with the reporting procedure. It was claimed that in the case of collective complaints it is often not easy to identify the victim, which according to opponents of this procedure leads to abstract procedures and reduces the possibility of the state to respond to the submitted petition in the right way (UN GA: Report of the Working Group, 2011b:13).[12]

The text of the Optional Protocol adopted by the Human Rights Council Resolution 17/18 of 14 July 2011 (UN GA, 2011c) [13] did not envisage the institute of collective petition

[11] This legal solution is contained in the UN General Assembly (2011a): *Revised proposal for a draft optional protocol to the Convention on the Rights of the Child*, submitted to the UN General Assembly on 18 January 2011 by the Human Rights Council Working Group (2nd session); available online at http://www.bayefsky.com/reform/a_hrc_wg7_2_4.pdf

[12] UN General Assembly (2011b): *Report of the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, UN GA A/HRC/17/36 of 25 May 2011, Human Rights Council (17thsession), Chairperson-Rapporteur: D.Štefánek (Slovakia); https://archive.crin.org/sites/default/files/images/docs/A.HRC.17.36_en.pdf?msclkid=a28affeea54011ec8d36c3e6fc6aaaf0

[13] UN General Assembly (2011c): Resolution A/HRC/RES/17/18 adopted by the Human Rights Council, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, HRC 17th Session, Geneva; avilable at https://www.refworld.org/docid/4e72fbb12.html

although the working group members who had advocated for introducing this institute stated that the collective petition (as a kind of *actio popularis*) is provided in the African Charter on the Rights and Welfare of the Child and the Additional Protocol to the European Social Charter (Carletti, 2020: 117). It was an opportunity to introduce the institute of collective petition, which would enable children from different groups (whose rights had been violated and who were are ready to speak publicly) to be represented by the non-governmental sector or institutions for the protection of the rights of the child (children's ombudsman). It was also an opportunity to draw public attention to violations of children's rights, to prevent secondary victimization of children, and to give the Committee the opportunity to interpret the text of CRC on a case-by-case basis. Unfortunately, the international community missed the opportunity to provide a wider scope of protection for children's rights at the international level by envisaging this institute in the Optional Protocol. Thus, the institute of collective petitions is not contained in the last version of the Third Optional Protocol adopted by the UN General Assembly on 19 December 2011.[14]

One of the obstacles precluding the Third Optional Protocol (OPIC) to achieve its full function in the field of children's rights protection is the fact that this Protocol has been ratified by a relatively small number of countries, and that the ratification process is very slow. Thus, according to the UN Treaty Collection (2022)[15], in 2022, eight years since the entry into force of the Optional Protocol, 48 States have ratified the OPIC, 16 have signed but not yet ratified it, and 133 have taken no action (OPIC, 2022). [16] The Republic of Serbia signed the Third Optional Protocol in 2012, but it has not been ratified by the National Assembly.[17] It seems that the hesitation of states to ratify the Third Optional Protocol is a consequence of fear that their actions could be criticized by another international human rights body, in this case the Committee.

On the other hand, the resistance of State Parties to enable children to directly submit individual complaints to the Committee (for violations of the rights guaranteed by the CRC, the First and the Second Optional Protocol) may be understood as a reflection of their distrust in children as right holders and active subjects in these proceedings because the direct submission of individual complaints to the Committee implies the highest level of children's participation.

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[14] UN General Assembly (2011d): Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), adopted by UNGA Resolution A/RES/66/138 of 19 December 2011; https://treaties.un.org/doc/source/docs/A_RES_66_138-Eng.pdf; https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-communications

[15] UN Treaty Collection (2022): *11. d Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, New York, 19 December 2011 Ratification status on 30.8.2022;available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4

[16] After considering the ratification status of the listed countries, we can conclude that the largest countries in the world have taken no action (the United States, Australia, Canada, New Zealand, China, Russia, India, Indonesia, Mexico, and the United Kingdom are not even signatories to the Third Optional Protocol 2011). Some European countries (Bulgaria, Greece, Hungary, Iceland, Lithuania, the Netherlands, Norway, Sweden) are not signatories either. On the other hand, some countries (Austria, Mali, Malta, Mauritius, Morocco, Romania and Serbia) are signatories to the Third Optional Protocol but they have not ratified it. For more information, see: OPIC (2022): Ratification Status , available at https://opic.childrightsconnect.org/ratification-status/

[17] North Macedonia is another former Yugoslav republic that signed the Third Optional Protocol in 2012 but has not ratified it yet. The Third Optional Protocol (OPIC) was ratified by Bosnia and Herzegovina (2018), Croatia (2017), Montenegro (2013), and Slovenia (2018). See: Ratification status data at https://indicators.ohchr.org/ and https://treaties.un.org/pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-11-d&src=IND

In terms of justifying the introduction of the provision allowing children to submit individual petitions, Smith (2013) raised the issue of education: whether children know their rights and whether they are able to access the new protection mechanism established under the auspices of the CRC. She proposed introducing a human rights educational program in institutions for children education and upbringing, which would provide lessons for both children and their parents/guardians (Smith, 2013: 305). The human rights education was also promoted in the UN Declaration on Human Rights Education and Training (2011). [18]

The Third Optional Protocol is not the first international document allowing children to submit individual complaints for the protection of their rights. Such a provision is also envisaged in Article 44 of the African Charter on the Rights and Welfare of the Child (1990).[19] In the system under the auspices of the Convention on the Rights of the Child, this possibility is introduced only by the Third Optional Protocol to the CRC as an additional document (Smith, 2013: 305).

In terms of allowing individual petitions to be filed by children, the question arises whether there are more states in the contemporary world that are willing to enable children to use their active procedural legitimacy before an international quasi-judicial body; if they have confidence in children's capacity to be active subjects in these proceedings, they will decide to ratify the Third Optional Protocol. On the other hand, there are many other state that are highly unlikely to entrust children with such a capacity.

Some authors also raise the issue of the legal nature of the individual communications procedure before the Committee, which leads to decisions that are not legally binding. Considering that this quasi-judicial mechanism only requires states to "give due consideration" to the recommendations and to report on the legislative and other measures taken, the Committee opinions and recommendations are not legally binding on the State Parties. On the other hand, the small number of ratifications is justified by the inability to meet the strict acceptability conditions, as well as by the fact that there is a lack of awareness about communications procedure in the general public (Carletti, 2020: 119).

For all these reasons, the effects of the Third Optional Protocol are still limited. Therefore, additional ratifications of the Third Optional Protocol would contribute to ensuring a more complete protection of the rights of the child beyond national borders, increasing children's participation in these proceedings, and promoting the evolutionary nature of the CRC through its interpretation when considering individual complaints.

We believe that the ratification of the Third Optional Protocol by the Republic of Serbia would enable a more comprehensive protection of the rights of the child, which would open a completely new chapter in understanding and promoting the rights of the child guaranteed

[18] The UN General Assembly adopted the UN Declaration on Human Rights Education and Training by Resolution A/RES/66/137 of 19 December 2011.. This Declaration reaffirms the principle that every individual should strive to promote respect for human rights and fundamental freedoms through teaching and education, that education should be aimed at the full development of human personality and a sense of dignity, and that it should promote understanding, tolerance, and friendship among nations. Thus, states are obliged to ensure respect aimed at the promotion, protection and effective realization of human rights and fundamental freedoms. The Declaration is available at https://www.ohchr.org/en/resources/educators/human-rights-education-training/11-united-nations-declaration-human-rights-education-and-training-2011?msclkid=dc5ba843a69311ec85b95d7ee15091af

[19] African Charter on the Rights and Welfare of the Child (1990), adopted by the African Union at the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia, July 1990, entered into force on 29 November 1999; available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf?msclkid=602e33afb2bb11ecb44a1ead5f713bcc

by the CRC, the First Optional Protocol and the Second Optional Protocols.[20] Given the fact that the Committee is a multidisciplinary expert body composed of specialists from different fields who are professionally engaged in the field of children's rights and welfare (psychologists, social workers, medical professional, legal professionals specializing in human rights and children's rights, etc.), the Committee is the most adequate authority to decide on the violation or non-violation of children's rights referred in their petitions (OHCHR/UN Office of the High Commissioner for Human Rights, 2022).[21] Thus, the Committee's multidisciplinary composition generates a holistic approach to the protection of children's rights (Lee, 2010: 574).

4. The Committee Practice on Individual Communications

According to the OHCHR data, on 23 February 2022, there were 85 individual complaints pending before the Committee, the largest number of which were lodged against Switzerland (21), Spain (17), and France (11) (OHCHR, 2022) [22] The insight into the Committee's practice (OCHR: CRC Jurisprudence, 2022)[23] shows that the Committee made 24 decisions by 25 March 2022 on the merits of the submitted complaints and issued them in the form of an opinion (*adoption of views*); 29 complaints were rejected as inadmissible (*inadmissibility decision*); in 31 cases, the Committee decided to discontinue the proceedings for various procedural reasons (*discontinuance decisions*). The largest number of complaints referred to alleged violations of the rights of migrant children, while 16 out of 24 opinions referred to Spain (OHCHR, 2022).

In this part of the paper, we will look into one of the Committee decisions referring to the alleged violation of the child's right to maintain a personal relationship and direct communication with a non-resident parent. The Committee's View on *Communication no. 30/2017 of 3rd February 2020* (OHCHR: CRC Jurisprudence, 2022)[24] was issued against the State of Paraguay. The complainant (an Argentine citizen) submitted a complaint acting on behalf of his daughter born in 2009 (an Argentine citizen), claiming that the child was a victim of violation of the rights guaranteed by Articles 3, 4, 5, 9, 10, 18 and 19 of the Convention (CRC). According to the complaint, the petitioner's daughter was born in Argentina, in a relationship with the child's mother (a citizen of Paraguay). Eleven days after the birth of the child, the mother moved with the child to her hometown in Paraguay. The petitioner occasionally traveled to Paraguay to visit his daughter. The decision on child

[20] Children enjoy the protection of their rights before other international judicial bodies, such as the European Court of Human Rights (which directly refers to the CRC), the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court of Human Rights.

[21] Under Article 43 of the CRC, the Committee consists of 18 independent experts, who are persons of high moral standing, elected by State Parties; they serve in their personal capacity and may be re-elected after the expiry of their mandate. For more on the Committee membership , see: OHCHR (2022): Committee –Membership; available at https://www.ohchr.org/en/treaty-bodies/crc/membership

[22] See: The list of cases pending before the Committee on the Rights of the Child (February 2002), available at: OHCHR (2022); https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/TablePendingCases.pdf

[23] The database of the jurisprudence of the EU Treaty Bodies established under the auspices of the UN, including the practice of the Committee, can be accessed at OCHR (2022): Jurisprudence; see: https://juris.ohchr.org/

[24] OHCHR (2022): CRC Jurisprudence/ UN Committee on the Rights of the Child (2020): Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning *Communication No. 30/2017 N.R. v. Paraguay* (CRC/C/83/D/30/2017) of 3 February 2020; https://juris.ohchr.org/Search/Details/2629

custody was never made but the mother actually took care of the child. Over time, the mother started preventing contact between the petitioner and the child. The petitioner initiated a civil court proceeding in Paraguay in 2015, seeking to be allowed to communicate directly with his daughter by phone and the child to visit him occasionally in Argentina. In its decision, the domestic court regulated the manner of maintaining personal relations between the child and the petitioner, including as follows: communication with the child via Skype on Mondays, Wednesdays and Fridays from 18:00 to 19:00, for which the petitioner would provide the necessary equipment; the petitioner's right to spend one Saturday a month (from 9 am to 6 pm) with a child; and the child's right to visit the father in Argentina (a week during the winter and summer holidays). However, the final court decision was not executed in a timely manner, given the passage of time from its adoption to the time the application was submitted to the Committee (Committee Opinion, § 2).

The petitioner claimed that the state, by not taking measures to enforce the court decision, violated the rights of the child guaranteed by the CRC and did not respect the principle of the best interests of the child. He referred to the ECtHR decisions in *Strumia v. Italy* (2016) and *Giorgioni v. Italy* (2016), where the ECtHR found a violation of the right to respect for private and family life guaranteed by Article 8 of the European Convention on Human Rights (ECHR) (Committee Opinion, § 3.1). He referred to the violation of Article 10(2) of the CRC which guarantees a child whose parents reside in different states the right to maintain a personal relationship and direct contact with both parents, except in exceptional circumstances. He claimed that the state of Paraguay violated Articles 18 and 19 of the CRC because both parents are responsible for the child's upbringing and education, and that the state had not taken any action in terms of ensuring the exercise of this right (Committee Opinion, § 3.8).

The State argued that application should be declared inadmissible *ratione temporis* pursuant to Article 7(g) of the Third Optional Protocol because the alleged violation occurred before its entry into force in Paraguay and because domestic remedies have not been exhausted. The state claimed that there was no evidence of a violation because this is a child that attends a private school, lives with his mother in a decent home, maintains contact with the father over the Internet, and visited the father in Argentina in the period from 2017 to 2018, while the mother paid the costs of one of the trips (Committee Opinion, § 4).

The Committee concluded that, pursuant to Article 20 of the Third Optional Protocol (OPIC), the communication was admissible *ratione temporis* because the alleged violation continued after its entry into force in Paraguay. Regarding the exhaustion of domestic remedies, the Committee concluded that admissibility criteria were met because the petitioner repeatedly addressed the Paraguayan authorities, claiming that the right to a fair trial had been violated, including recourse to the Supreme Court. Regarding violations of Article 18 and 19 of the CRC, the Committee concluded that the conditions of admissibility were not met because these violations were not sufficiently substantiated, but that the alleged violations of Article 3, 4, 5, 9 (3) and 10 (2) of the CRC are sufficiently reasoned and acceptable (Committee Opinion, § 7).

Deciding on the merits, the Committee concluded that the State Party had failed to take the necessary measures to ensure the enforcement of the decision governing contact between the child and the complainant, whereas the father repeatedly addressed the judicial authorities of the State of Paraguay claiming the violation of the guaranteed rights due to non-enforcement of the final court decision. According to Article 9 (3) of the CRC, State Parties have an obligation to respect the right of a child separated from one or both parents

to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the best interests of the child. The Committee claimed that the preservation of the family environment includes the preservation of the child's ties in a broader sense, and that these ties are particularly important in cases where parents are separated and live in different places. Therefore, the Committee should establish whether the authorities of the State Party have taken effective measures to ensure the preservation of personal ties and contacts between the petitioner and the child. The Committee referred to the general rule that it is the responsibility of State Parties to interpret and apply domestic law, unless their assessment proves to have been manifestly arbitrary and led to a denial of justice (Committee Opinion, § 8).

The Committee concluded that decisions regarding the regulation of personal relations between the child and the parent (from whom the child is separated) must be urgently made and executed because the passage of time may have irreparable consequences on their relationship. As the domestic court decision was not enforced, the petitioner and the child were unable to maintain regular and direct contact for several years; the child did not maintain direct contact via the Internet with the author and she did not want to travel to Argentina during the holidays. Bearing in mind that the adoption of an interim measure would prevent the problem of gradual alienation of the child from the father, the Committee concluded that the State did not take sufficient and timely steps to enforce the interim measure concerning the final court decisions, which all led to a violation of Articles 3, 9 and 10 of the CRC (Committee Opinion, § 8).

Therefore, the State should provide the child with effective satisfaction for her injuries, in particular by taking effective measures to enforce the final judgment, through counseling and other appropriate and proactive support services to rebuild the relationship between the child and the father, primarily taking into account the best interests of the child. The Committee further noted that it was the responsibility of the State Party to prevent similar violations in the future, and recommended the State Party to: 1) take the necessary measures for the urgent and efficient execution of court decisions in a child-friendly manner so that the relationship between the child and the parent is re-established and preserved; 2) organize trainings for judges and other professionals on the child's right to maintain regular contact with both parents, as well as on the content of General Comment no. 14 (Committee Opinion, § 9).

According to Article 11 of the OPIC, it is necessary for the State Party to submit information on the measures taken to implement the Committee's opinion, as soon as possible but not later than 180 days from the date of receiving the Committee opinion. The State party also has the duty to publish the opinion of the Committee and to disseminate it widely. In compliance with Article 44 of the CRC, the State Party is also bound to submit a report with detailed information on these measures (Committee Opinion, § 11).

5. Conclusion

The adoption of the Third Optional Protocol to the CRC on Communications Procedure (OPIC) represents the realization of decades-long aspirations to complete the international system of protection of the rights of the child. It aimed to ensure that the guaranteed children's are not declarative but that legal provision contain a potential sanction for non-compliance. The Third Optional Protocol (OPIC) allows children to submit individual

complaints, either individually or through their representatives, to the Committee on the Rights of the Child.

The Committee on the Rights of the Child is an international body which has powers reminiscent of judicial powers but they are in fact quasi-judicial. It is not a court in the true sense of the word because it does not exclusively consist of lawyers; it is a quasi-judicial mechanism and a multidisciplinary body composed of experts in different areas who come from the State Parties that have ratified the CRC. Thus, the decisions made by the Committee are not judgments but opinions or views on alleged violations of children's rights. As such, they are not formally binding but have a great *de facto* impact on the State Parties and their international reputation in case of inobservance of the issued recommendations. In this sense, the Third Optional Protocol has a great potential for effective protection of children's rights at the international level. *In concreto* interpretation of the provisions envisaged in the CRC, the First Optional Protocol and the Second Optional Protocol on a case-by-case basis makes these provisions more flexible; they are like a "living tissue" that may be applied to an indefinite number of individual cases.

The most recent data shows that one of the main obstacles to accomplishing the intended goals of the Third Optional Protocol seems to be a relatively small number of ratifications, as well as the slow ratification process in the countries that have signed the Third Optional Protocol. In that sense, as it is necessary to accelerate the ratification process of this international legal instrument, we urge the Republic of Serbia to ratify the Third Optional Protocol to the CRC on Communications procedure. It would contribute to promoting respect for, observance and effective protection of children's rights.

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TREĆI FAKULTATIVNI PROTOKOL O POSTUPKU PO PRITUŽBMAMA UZ KONVENCIJU O PRAVIMA DETETA – NOVI PUT PRAVNE ZAŠTITE PRAVA DETETA

Jedan od značajnijih trenutaka u oblasti zaštite prava deteta koja se ostvaruje pod okriljem Konvencije o pravima deteta, jeste donošenje Trećeg fakultativnog protokola o postupku po pritužbmama, kojim je zaokružen sistem nadzora i zaštite prava deteta od strane Komiteta za prava deteta, jer je navedenim protokolom nadležnost Komiteta za prava deteta proširena, a deci pružena mogućnost da se neposredno ili posredstvom odraslih obraćaju Komitetu za prava deteta i to predstavkama kojima će se pozivati na povrede prava garantovanih Konvencijom o pravima deteta, odnosno Prvim i Drugim fakultativnim protokolom uz Konvencija o pravima deteta.

Ključne reči: *prava deteta, Konvencija o pravima deteta, Treći opcioni protokol, individualna predstavka*.

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