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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)
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Court decisions	Case Ap.23037/04 *Matijasevic* v. Serbia	Footnote: Case Ap.23037/04 Matijasevic v. Serbia
Online sources	Ocobock, P., Beier, A.L., (2008). *History of Vagrancy and Homeless in Global Perspective*, Ohio University Press, Swallow Press, Retrieved 31 November, 2015, from http://www.ohioswallow.com/book/Cast+Out	In-text citation: (Ocobock, Beier, 2008)

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EDITORIAL NOTE

Dear Readers,

The principal aim of the scientific journal *Facta Universitatis, Series: Law and Politics* is to publish papers on a diverse range of law-related issues. We strive to present new and different topics in every issue. In order to promote the quality and scientific ranking of our scientific journal, we have issued an open call for papers, encouraging authors from Serbia and abroad to submit their articles. Considering the ongoing interest in our journal, we will continue with such practice in the future.

This issue of *Facta Universitatis: Law and Politics Series* includes original papers, review articles, and a book review. In order to select articles that meet the high standards of this journal, the submitted papers were subjected to a double-blind peer-review process. We are particularly grateful to the reviewers from Serbia and abroad whose participation in this process has significantly contributed to the quality of our journal.

The Editor-in-Chief and the Editorial Board hereby extend gratitude to all authors and reviewers who have made a substantial contribution to the publication of this issue. We hope you will enjoy reading the findings of scientific studies on legal and political matters that the writers have chosen to address.

In view of the tradition and scientific importance of this journal, we shall make every effort to contribute to improving the quality of the journal and further advance its ranking among the publications of this kind.

Editor-in-Chief

Maja Nastić, LL.D.

Niš, 10th November 2023

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Original Scientific Paper

THE NATIONAL ASSEMBLY OF SERBIA AS A ''WORKING'' PARLIAMENT: LEGAL PROSPECTS AND ACHIEVEMENTS

UDC 342.533(497.11)
328(497.11)

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Abstract. *The paper examines the legal framework and parliamentary practice that provides opportunities for the National Assembly of Serbia to act as a "working assembly". After theoretical considerations on the "talking" and "working" assemblies, the author analyzes some issues relating to the Rules of Procedure which regulate the organization, working conditions and functioning of the National Assembly. The subject matter of analysis are the parliamentary committees, the Conference of Presidents, and the plenary sessions of the National Assembly. The Rules of Procedure indicate that there was an intention for the parliament to acquire the characteristics of a "working" assembly. However, parliamentary practice and the absence of good customs indicate that this intention was not achieved in practice. The general conclusion would be that the National Assembly has retained most of the attributes of the "talking" assembly, which performs most of its work in the plenum.*

Key words: *National Assembly of Serbia, parliamentary committees, Conference of Presidents, plenary session, Rules of Procedure*

1. INTRODUCTION

The internal composition of parliament derives from the parliamentary autonomy and the parliament's right to control its own composition. The comparative analysis of European systems shows that the parliamentary composition is adjusted to the needs of the contemporary representative body as well as to the demands of achieving more working efficiency and being more open to the public. The political structure of the contemporary parliament and the new rules of the political game have imposed some new solutions for the internal composition of parliament. However, these new challenges are still unusual to the Serbian parliamentary law.

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There are two types of bodies within the internal composition of parliament: parliamentary committees and parliamentary groups. Whereas parliamentary committees prepare parliamentary work in the technical sense (primarily in the legislative processes), parliamentary groups represent the center of political decision-making and bargain-creating actions. Taking into account the scope and the strength of impact that parliamentary committees have, parliaments can be classified into a "working" assembly and a "talking" assembly. In spite of a large number of parliamentary committees in the National Assembly of the Republic of Serbia, none of them have taken on the role of an active and influential participant in the parliamentary process. The parliamentary committees, made up on the principle of proportionate representation of parliamentary groups, have lost the elements of expertise and professionalism. Instead of that, they have assumed the position of the inter-faction body which is ineffective and inactive in the Serbian parliamentary law.

The parliamentary competence, as a legislative authority to regulate own internal organization, comes out of the parliamentary autonomy as a principle embodied in the Rules of Procedure. Despite the fact that each legislature can independently dispose of its own Rules of Procedure, the parliamentary stability is based on the durability of these rules. Continuity of the Rules of Procedure should ensure the good parliamentary practice and parliamentary customs. As these rules of procedure have to connect the many different elements of the legislative procedure, the Serbian academician M. Jovičić said: "To express a heretical thought, it is more difficult to create a good Rule of Procedure than a good Constitution, even most acts of law" (Jovičić, 1998: 5).[1]

In Serbia, the parliamentary autonomy is primarily regulated by the Constitution (2006), as well as by the National Assembly Act (2010) and the Rules of Procedure of the National Assembly (revised and consolidated in 2012). The Constitution regulates the issues related to parliamentary law in general, such as composition and dissolution of the National Assembly, parliamentary sessions, the right to propose laws, the manner of decision-making, the terms of office, and the parliamentary privileges. On the other hand, the National Assembly Act (2010) as an ordinary act of parliament regulates the constitutional matter *par excellence*, and its importance is not in accordance with the hierarchy assigned to it by the Constitution. According to its normative subject matter, this Act belongs to the legal sources that shape not only the parliamentary but also the constitutional construction. This is further complicated by the contradiction of the constitutional provisions on the competence of the National Assembly to regulate its own autonomy. Unlike the National Assembly Act, which should be adopted by the simple majority, the Rules of Procedure must be adopted by the absolute majority of votes of all deputies, which makes it a qualified parliamentary act.

In order to consider possibilities of the National Assembly as a "working" or a "talking" assembly, one should first take into account the normative framework and then consider the parliamentary practice, which in many segments is a decisive factor for determining the nature of parliament.

[1] A long time ago, E. Pierre (1902) concluded that the Rules of procedure are "a dangerous instrument in the hands of parties", which often has a greater and stronger influence on the "flow of public affairs" than the constitution itself (Cf. Jovičić, 1998: 5)

2. About a "Talking" and a "Working" Assembly

In order to guarantee parliamentary autonomy in the separation of powers system, it is necessary for the parliament to be able to arrange its internal organization and functioning in such a way that it could respond to the dominant executive branch. One of the assumptions for improving the parliament's position in relation to the executive authorities is a well-built relationship between the parliamentary plenum and the parliamentary committees. The connection established in the relationship between the plenum and the committees is the basis for designating the parliament as a "talking" or a "working" assembly. The "talking" assembly refers to parliaments that mainly discuss issues, while the "working" assembly refers to finding a rational measure regarding the efficiency of work and the implementation of parliamentary competences in relation to the Government. (Hague, Harrop, 2004: 251).

The parliament with effective committees (a strong "committee system") enables the "working" assembly to be active through parliamentary bodies and performs most of the tasks without an influence of the Government or ministries (Lijphart, 1999: 102). Although the Government`s dominance in the legislative process has become a reality, through good internal organization of the parliament, committees can take the initiative and, participate in the creation and control of government policy. Therefore, the committees contribute to strengthening the position of the parliament in relation to the executive authorities, especially the Government. While the importance of specialized parliamentary bodies is diminished in the "talking" assemblies, specialized bodies diminish the deep differences between the parliamentary majority and minority in the "working" assemblies. There is an opinion that parliament is becoming increasingly powerless in proportion to the time it spends in plenary sessions (Beyme, 2000: 53).

During the second half of the 20th century, the model of a "working" assembly was developed in most European assemblies. The American Congress is also known as a distinctly "working" assembly because the center of activity is transferred to the committees. As early as 1885, Woodrow Wilson wrote that Congress in its plenary session is only a public performance, while Congress in its committees sections is the working Congress (Wilson, 1885). The British Parliament, however, performs a predominantly deliberative and debating function and largely neglects the activity of parliamentary committees. Due to their importance in the internal organization and rationalization of the parliamentary process, a large number of European constitutions directly regulate the parliamentary committees.[2]

The intention of modern constitutions is not to limit the parliamentary autonomy, but to strengthen the functions of the legislative authority: firstly, to strengthen the legislative function through an efficient parliamentary procedure, primarily preventing parliamentary obstruction, and secondly, to restore the control function over the Government whose activities are overseen by parliamentary committees.

The "working" assembly acts in the legislative process through parliamentary bodies, not allowing the Government to impose the rules of the game. Although the Government dominates in proposing the laws/acts, the parliament could take the initiative through committees as specialized bodies. On the other hand, the plenum provides ample opportunities

[2] The issue of parliamentary committees is the subject matter of regulation in many European constitutions, such as Bulgaria (art. 79), Greece (art. 68), Denmark (art. 51-52), Italy (art. 72), Hungary (art. 21), Germany (art 44), Poland (art. 110-111), Portugal (art. 181-182), Romania (art 64), Slovakia (art 92.), Finland (art. 35), Czech Republic (art. 30-31), Switzerland (art. 151), Spain (art. 75), The Austrian Constitution regulates in detail the matter of investigative committees (arts. 52a, 52b, 53).

to unnecessarily turn the procedure into a broad public discussion. There are examples of committees even having full legislative capacity. For instance, according to the Rules of Procedure of the Italian Chamber of Deputies, the parliamentary committee is allowed to act as an active legislator. If the committee has considered and approved a bill, the plenum does not discuss about it, but only adopts the act passed in the committee procedure.[3]

Working in committees provides the opportunity for negotiation with professional discussion and arguments. The model of public hearings has been developed because the citizens are more interested in that form of parliamentary activity than in the work of the parliamentary plenum. Also, parliamentary committees are trained to perform a range of tasks that correspond to ministerial portfolios. Hence, the number of standing committees corresponds to the number of formed ministries. In addition to using traditional instruments of parliamentary control (i.e. parliamentary questions, interpellation, vote of no confidence), the parliament can thus control the Government through the activities of its committees.[4]

Finally, the representative function of parliament received its new expression in the form of a "working" assembly. The new construction caused the committee seats to become important for all participants in the parliamentary process. In the "parliamentarism of political parties", which has replaced the original "parliamentarism of distinguished individuals", committees have become important for political groups because of the influence they can exert through these bodies. The new parliamentary structure ensured, albeit indirectly, that the content of the free parliamentary mandate was preserved. When a deputy (MP) resigns from a parliamentary group or a political party, he/she loses only his/her seat in the parliamentary committee, and retains the position of an independent MP until the end of the parliamentary legislature. This problem is faced by the countries of the "new" democracy, including Serbia.

The need to maintain party discipline in the contemporary parliament is quite clear, but it does not enjoy direct legal protection under the principle of free mandate. Due to the important and influential role of committees, in most Western European systems, political parties are allowed to recall their representatives in the committees. Thus, the recalled MPs lose their seat in the parliamentary group and the seat in the committee, but remain in parliament as independent MPs until the expiry of their term of office.[5] In this way, party discipline received an effective means of legal protection, which does not contradict the principle of a free parliamentary mandate.[6]

The "working" assembly is based on the following principles:

1) *The principle of efficiency:* Unlike the plenum, which cannot fully oversee the Government, committees ensure constant cooperation with the relevant ministry and thus represent a politically adequate and competent substitute for an inert plenum. In order to rationalize the parliamentary process, the committee may cover several ministries.

2) *The principle of representation:* By its structure, the parliamentary committee represents a mini-assembly because the committee composition fully reflects the political

[3] According to some estimates, committees pass as many as three quarters of acts in the Italian Parliament. (Lees, Shaw, 1979)

[4] Christensen, Laegrid and Roness think that the parliament "through its internal organization, puts a stronger focus on control by organizing investigative committees, introducing public hearings, expanding the time for asking questions (Question time) and expanding the audit function" (Schedler, Mastronardi, 2005: 261)

[5] This constitutional rule is applied by Austria, Belgium, Denmark, Finland, Germany, Greece, Iceland, Luxembourg, Holland, and Spain.

[6] For more details on the parliamentary mandate in comparative systems, see Pejić, 2006: 41-52.

profile of the parliament. Each parliamentary group is assigned a number of committees seats in proportion to its participation in the distribution of the total number of parliamentary seats.

3) *The principle of transparency*: Like the plenum sessions, committee sessions are public, committee reports are published and individual members are entitled to express their separate opinions in written form. Thus, the individual responsibility of deputies is strengthened, as well as the collective responsibility of the assembly but the latter tends to weaken in the plenum.

4) *The principle of expertise:* By strengthening the professional capacity of their members, the committees become specialized; it enables them to take initiative in the process of submitting amendments and amending bills, especially those originating from the Government. However, this principle does not legally oblige political groups in parliament to designate their members to the committees on the basis of the criteria of expertise, although this has become a good practice resulting from the *modus operandi*, powers and authority of the committees in the parliamentary process.

5) *The principle of effective parliamentary control:* The committee organization and activity contribute to strengthening the parliamentary control (not only through the so-called investigation committees but also through permanent committees). To this end, the Rules of Procedure may prescribe the minister's obligation to respond to the request of the parliamentary committee and submit a report or (more mildly) a statement on a specific issue.

3. The Parliamentary Committees in the National Assembly

The establishment of parliamentary committees in the National Assembly of Serbia is based on a good solution that each parliamentary group has the number of committee seats in proportion to the number of its parliamentary members. The proposal of parliamentary groups on the composition of committees has to be adopted by an absolute majority of votes of all deputies (MPs). These two solutions could come into conflict because the guarantee of proportional representation of parliamentary groups may be called into question if an absolute majority is not secured in accordance with the Rules of Procedure.

As a rule, one deputy can be a member of more than one committee, which pretty much distorts the construction of the "working" assembly. The explanation for this may be found in the number of standing committees and the number of all seats in permanent committees, taking into account the principle of proportional representation of all parliamentary groups. There are no provisions on the distribution of Chair positions in committees among parliamentary groups. Comparative practice shows that the positions of presidents of some standing committees, such as the finance or budget committee, are always reserved for the parliamentary opposition. Although it proved to be good practice in some sessions of the National Assembly, this unwritten rule should be protected by the Rules of Procedure.

Based on formal criteria, the Serbian National Assembly aimed to develop the model of a "working" assembly, especially before the adoption of the new Rules of Procedure in 2010, when as many as 30 standing committees were organized. Their competences were not strictly related to the subject matter of expertise of the specific ministry; their number exceeded the number of ministerial departments. However, since the National Assembly mainly acted in the plenum, while the committees did not take the initiative towards the ministries action, the goal was not achieved because the legislature failed to strike a proper

balance between work in the plenum and committees work. Despite the large number of standing committees, the held committee meetings indicate that their activity was far from expected; so, the National Assembly realized its position mainly as a "talking" forum.[7]

Since the adoption of the new Rules of Procedure of the National Assembly in 2010, the number of standing committees was reduced from 30 to 20 parliamentary bodies.[8] There is also a possibility of establishing temporary working bodies of the National Assembly *ad hoc*, including inquiry committees and commissions. However, the action and control function of these bodies will depend on the strength of the parliamentary opposition to prompt their establishment in order to control the Government, as well as on the tolerance of the political majority to allow the application of this instrument of parliamentary control.

The structure of standing committees in the National Assembly shows they do not meet the principles of the so-called "working" parliament.[9] The main function of a committee is to ensure efficiency in the internal organization of the parliament, but also to protect the parliamentary autonomy from the external influences of the executive power by taking the initiative and reviewing the proposals coming from the Government. As professional and working bodies, parliamentary committees should be structured in such a way as to enable the parliament to provide a relevant response to government policy. The deputies' actions through committees should strengthen the National Assembly and constrain the Government influence on the parliamentary affairs.

The basic features of parliamentary committees (such as expertise, internal cohesion and support) have not come to the fore both due to the large number of committees (which caused an unnecessary overlap of responsibilities) and due to their composition (which has been an obstacle to the efficient work and effective influence on the parliamentary plenum). The committee members should be chosen from among MPs according to the criteria of their expertise, which would enable the committee to act as a specialized body that permanently tackles subject-specific issues in the parliamentary process. Internal cohesion indicates that a relatively small group of MPs gathered in a committee, although representing different political orientations, could reach an agreement more easily than political groups in the plenum. Finally, support implies that the committees are referred to experts in specific fields, which enables committee members to base their proposals on a professional stance instead of being guided only by political reasons (Hague, Harrop, 2004: 251).

Considering that one parliamentary group in the Serbian National Assembly may be composed of minimum five deputies (MPs), it is not possible for such political miniatures

[7] For example, immediately before the adoption of the new Rules of Procedure (2010), more than two-thirds of the standing committees held fewer than ten sessions per year (Pejić, 2011: 285)

[8] The Serbian National Assembly includes the following permanent committees: 1) Committee on Constitutional and Legislative Issues, 2) Defence and Internal Affairs Committee; 3) Foreign Affairs Committee; 4) Committee on the Judiciary, Public Administration and Local Self-Government; 5) Committee on Human and Minority Rights and Gender Equality; 6) Committee on the Diaspora and Serbs in the Region; 7) Committee on the Economy, Regional Development, Trade, Tourism and Energy; 8) Committee on Finance, State Budget and Control of Public Spending; 9) Agriculture, Forestry and Water Management Committee; 10) Committee on Spatial Planning, Transport, Infrastructure and Telecommunications; 11) Committee on Education, Science, Technological Development and the Information Society; 12) Committee on Kosovo and Metohija; 13) Culture and Information Committee; 14) Committee on Labour, Social Issues, Social Inclusion and Poverty Reduction; 15) Health and Family Committee; 16) Environmental Protection Committee; 17) European Integration Committee; 18) Committee on Administrative, Budgetary, Mandate and Immunity Issues; 19) Security Services Control Committee; 20) Committee on the Rights of the Child. (RoP NA, 2010, art. 46-47).

[9] There is an opinion that committees are the most significant organizational phenomenon in the modern parliament and they contribute to the economy of the parliamentary procedure (Judge, Earnshaw, 2003: 177).

to meet the criteria of expertise because they do not have a sufficient number of deputies who can competently participate in the committee`s work. In addition, such a small group does not have the capacity to invite or engage external associates because the fragmentation of the parliament contributes to the alienation of experts fearing the risk of abuse and political games they do not want to "play" as independent experts.

The structure of the committees and their membership only formally meet the criteria set before a modern parliament. All parliamentary groups are represented in the structure of standing committees in proportion of their strength, whereby there is a rule that an MP can be a member of several committees. If one parliamentary group does not want to exercise the right to distribution of seats in the committees, then the number of elected members of the parliamentary committee will be considered the final composition, if it represents more than half of the number of committee members determined by the Rules of Procedure. In 20 permanent committees, the total number of seats is 315 (each committee comprises 17 members, except for the Security Services Control Committee which has 9 members); it means that MPs occupy seats in at least two (or more) parliamentary committees. In this way, small parliamentary groups may have the same representative in several standing committees, which does not contribute to strengthening the professional capacities of the committees. Thus, for example, in the 8th legislature (2008-2012), when the Serbian National Assembly had 30 parliamentary committees with over 460 seats, some parliamentary groups that brought together less than five percent of MPs were represented in the membership of as many as 80% of standing committees (Pejić, 2021: 47).

The activity of parliamentary committees cannot be measured only by the number of meetings held but also through the effects of discussions and conclusions that influence decision-making in the plenum. During the 12th legislature, which lasted less than two years (22 October 2020 to 2 August 2022), a total of 570 committee meetings were held. Taking into account that the committee sessions lasted 38.3 minutes on average, and that even 31% of all sessions lasted less than 10 minutes, it can be concluded that these bodies did not fulfill their role. Moreover, during the 12th convocation, only six committees organized a total of 23 public hearings (Open Parliament/CRTA, 2022:15, 16, 31).[10]

In addition to the mentioned shortcomings in terms of organization, there has been a notable absence of practice in conducting public hearings before standing committees. Given that the Rules of Procedure only regulate public hearings in general, Pajvančić is of the opinion that there is no clear demarcation between the public hearings which are part of the legislative process and the public hearings which are established as a control function of the National Assembly. It gives rise to the key questions: what is the purpose of compiling and submitting the information from the public hearing, and what will happen to the information that is submitted to the President of the National Assembly, committees members and other participants of the public hearing (Pajvančić, 2012: 17).[11]

[10] Open Parliament/CRTA (2022): The Annual state of play Report of the National Assembly 2021, by the Open Parliament Initiative, CRTA, June 2022, available at https://otvoreniparlament.rs/istrazivanje/75

[11] In the 12th convocation of the legislative body, committees organised a total of 23 public hearings, the largest number of which were organised by the Committee on Constitutional and Legislative Issues, while a total of 10 hearings were dedicated to changing the Constitution in the field of justice (Open Parliament/CRTA, 2022:31).

3.1. The Conference of Presidents

In comparative law, special importance is given to the institutionalized form of inter-factional cooperation in parliament. The special body has the features of governing authority of parliament and it is composed of the Chair/President of the parliament and the heads of the parliamentary groups. Its composition is in proportion to the strength of each parliamentary group. Large groups have more members than smaller groups; thus, the composition and functioning of this body reflect the political relations from the plenum.[12] The same rule is applied to the formation of other parliamentary bodies, and all of them should be only a minor political form of parliament. This is a very important question from the legal notion of the parliamentary opposition.

In the Serbian National Assembly, and in the state-controlled media, the opposition has never had equal opportunities, and it has not been fairly allocated influential, primarily financial resources. According to the Rules of Procedure, parliamentary services are available to all parliamentary groups; yet, the parliamentary opposition has not had any influence either in the parliamentary plenum or in parliamentary committees. The parliamentary opposition activity has also been hampered by an emerging distortion in the Serbian parliamentary life, embodied in parliamentary obstruction by the majority, which prevents or limits the participation of the opposition in the discussion and the legislative initiative.[13]

The inter-fractional body is predominantly advisory in nature. It is expected to reach a certain compromise, which will be adopted later in the plenum. In this way, all represented political groups strive to highlight and protect their interests. In addition to the presidents of the parliamentary groups, other members of political groups could also be represented. The goal is to reach a bargain among the political groups in advance, especially regarding the distribution of Chair seats in the committees. Although it does not have the authority of a decision-making body, the inter-fractional body exercises an important advisory and mediating role. As a deliberative body, it could prepare the program of work, agendas and sitting times of the plenum and committees. This body has a central role in misunderstandings concerning the Rules of Procedure interpretation.

The National Assembly Collegium is a completely new subsidiary body of the National Assembly established by the National Assembly Act (2010). In that way, one of the standards in the interior organization of the parliament was met. However, this solution requires a detailed elaboration of the Rules of Procedure. The National Assembly Collegium consists of the President and the vice-presidents of the Assembly and the presidents of parliamentary groups. It is an advisory body and its competences should be considered in that context. The National Assembly Act (Article 26) provides that the Rules of Procedure shall regulate the competences of the Collegium in more detail and expand

[12] The German Council of Elders (*Ältestenrat*) includes the president of the Bundestag and his deputies and a maximum of 23 members appointed in proportion to the strength of individual fractions (Par.12. GeoBt). Deutscher Bundestag (2023). Council of Elders; https://www.bundestag.de/en/parliament/elders
In France, the Conference of Presidents (*Conférence de Présidents*) consists of the president of the National Assembly, vice-presidents, presidents/chairs of permanent committees, the parliamentary bureau of the Conference of Presidents, and, if needed, presidents/chairs of special committees, presidents/chairs of parliamentary groups, the general rapporteur of the Finance Commission and the president of the delegation of the NA for the European Union (Art.13. R.A.N.). Assemblée nationale/French National Assembly (2023). La Conférence des Présidents; https://www2.assemblee-nationale.fr/15/la-conference-des-presidents/(block)/42495.

[13] Taking into account the complexity of the legal concept of the opposition, it can be said that the Serbian constitutional system has not even started searching for an answer to this question (Pejić, 2021: 50).

them in matters within the competence of the President of the National Assembly. For example, when declaring a state of emergency in the Republic of Serbia in 2020, the President of the National Assembly should have previously consulted with the Collegium on whether there was a possibility of holding a parliamentary session or not (which the President of the Assembly did not do).

In the Serbian National Assembly, there is no collective governing body such as a presidency; instead, there is an individual one, embodied in the function of the President of the NA who should maintain order among deputies and ensure that the requirements for an effective operation in parliamentary sessions are met. However, it would be good if the Rules of Procedure would regulate certain powers that the President of the NA would exercise after consulting with all the vice-presidents, in the form of some informal presidency, taking into account the rule that each parliamentary group has the right to one vice-president.

The President of the NA does not have the power as other constitutional authorities but his role is not only of a ceremonial nature. The reason for establishing the principle *primus inter pares* should not be excluded but the influence that his/her political group exert in the work of the parliament should be not ignored either. For this reason, the satisfaction of both parties (the parliamentary majority and the minority) rests on the provisions of the Rules of Procedure and their implementation which largely depends on the tact and conscience of the President of the NA who runs the sessions. Yet, this is not enough in the modern parliament which is no longer made up of strong individuals (only) but is a parliament of political parties. A collective body in the form of the presidency should be granted these complex leadership prerogatives for the purpose of oscillating between different political groups.

3.2. Plenary sessions

The range of constitutional competences and the complexity of affairs in modern parliaments indicate the need for certain rationalization measures in the parliamentary process, especially when it comes to work in the plenum. However, these measures should be cautiously applied because they may produce a dual effect as they have good and bad sides. On the one hand, the abolition of the debating quorum enables parliamentary sessions to be held, but it encourages the MPs' abstention. As parliamentary sessions are publicly broadcast on the national television, it indirectly affects the citizens perception of the legislature and projects a bad image about people`s representatives. That is why the provision on the quorum should be systemically linked to the provision on the number of days for parliamentary sessions. The Rules of Procedure of the National Assembly provide for two types of quorum: quorum for opening the discussion and quorum for decision-making. The decision-making quorum is necessary in several cases: at the first opening session, on the voting day, and when adopting the minutes and setting the agenda. Instead of the debating quorum (which existed until 2005), the Rules of Procedure establish a type of "introductory quorum", i.e. a quorum for opening the debate (one-third of the total number of MPs).

The parliamentary plenum should be strengthened by a mandatory discussion quorum (presence of one-third of MPs during the entire session) in the course of two "sitting" days of the week. In other cases, it would be enough to have only the so-called introductory quorum. The rule on mandatory "sitting" days, which is applied in some European parliaments,[14] would

[14] For example, the rule on three working days per week was established in France, and on two working days in the Netherlands. As part of the parliamentary reform, motivated by the deputies' low attendance in the parliamentary plenum, the German Bundestag in 1995 introduced the so-called core time (from 4 to 6 hours a week) for discussing essential issues which have been put on the agenda and could not be postponed.

enable MPs to perform other duties related to their parliamentary functions. In order to avoid wasting time and a bad impression of an ineffective assembly (due to empty chairs during sessions), the reform should bring the MPs back to the benches in the period that is essential for discussing certain issues.

The aim of this analysis is not to limit or diminish the importance of the parliamentary plenum. Although in modern times the public discussion no longer has a central place in the parliamentary procedure, MPs and parliamentary groups are interested in making their political program available to the public. Discussion in the plenum strengthens the function of informing and influencing the citizens. In the long legislature period between two elections, equal chances should be provided to the parliamentary majority and the minority to gain importance and verify their political views with the electorate. Parliamentary discussion sublimates the individual right of MPs to speak, which is limited because MPs rarely have the opportunity to present their own opinions. They do so on behalf of their parliamentary group or on behalf of their political party. As a rule, the time for participation in the parliamentary debate is distributed between the parliamentary groups, which determine who the time will be allocated to and how many of their members will take part in the debate.

Apart from the plenum where parliamentary bills are discussed, there is work in the plenum which comes as a result of parliamentary questions that MPs put forward to the Government. Unfortunately, in the Serbian National Assembly, parliamentary questions are not followed by discussion, and the allocated time is often used for other purposes rather than for asking parliamentary questions, which significantly reduces the capacity of MPs to discuss issues related to the work of the Government. The Rules of Procedure of the National Assembly regulate two forms of parliamentary questions: oral and written questions. The oral ones may can be asked only on the last Thursday of the month, when the National Assembly has the so-called "sitting" days. A special form of control called "parliamentary questions on topical issues" is reserved for parliamentary groups which are completely passive in using this instrument of parliamentary control. One session per month is reserved for the Parliamentary Question Time, which is held every last Thursday of the month from 4pm to 7pm. Thus, more restrictions are introduced; not only is the question time scheduled only once a month but it is also done "during an ongoing parliamentary sitting" when the work in line with the agenda "shall be adjourned" (Article 205 para.1 Rules of Procedure NA). Hence, the effect of the control instruments is minimal and the National Assembly cannot be designated as a "working parliament" even in this segment of its work. ..

For example, during the short 12th legislature (October 2020-August 2022), MPs had the opportunity to ask questions to the Government (Question Time) only ten times. In such limited conditions for exercising parliamentary control, it is interesting that the opposition deputies were given only 15 percent of the total time, while 85 percent was used by the parliamentary majority (Open Parliament/CRTA, 2022: 34). This indicates that, on most occasions, parliamentary questions were not used as an instrument of parliamentary control but for providing support to the executive authorities, primarily to the President of the Republic, whom the majority of MPs addressed in their speeches, highlighting his merits.

4. CONCLUSION

The Rules of Procedure of the Serbian National Assembly indicate that the legislative body was intended to acquire the structure of a "working" assembly. However, the disproportionately large number of permanent parliamentary committees, and the (in)activity of some of them,

indicates that this intention has not been put into effect. The National Assembly has retained most of the attributes of the "talking" assembly, which performs most of its work in the plenum. The parliamentary plenum is still the central place for parliamentary activities, and MPs are often exhausted in protracted debates dominated by the political majority, whose primary task is to neutralize every proposal of the opposition. In the last couple of convocations of the National Assembly, a distorted form of obstruction has been observed in Serbian parliamentary practice, which is applied by the parliamentary majority in order to prevent the opposition from presenting its amendments and discussing them. This form of action in the parliamentary plenum is completely replicated in standing committees, where professional and expert discussion is made completely impossible.

The current practice and the normative framework on the operation of the Serbian National Assembly, as well as parliamentary experiences with a long-standing tradition, indicate that it is desirable to profile the National Assembly as a "working" body. It rests on the assumption of a rational internal organization, including well-organized and active parliamentary committees and parliamentary groups. It would contribute to improving the efficiency in the parliamentary process, while establishing a proper balance in terms of the internal organization and functioning of the national parliament would be the basic prerequisite for strengthening the independent position of parliament in relation to the Government.

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NARODNA SKUPŠTINA SRBIJE KAO „RADNI'' PARLAMENT: PRAVNI OKVIR I DOSTIGNUĆA

Unutrašnja organizacija parlamenta proizilazi iz ustavnog principa o parlamentarnoj autonomiji i prava parlamenta da uređuje svoju unutrašnju kompoziciju. Uporedna analiza evropskih parlamentarnih sistema pokazuje da je kompozicija parlamenta usmerena na stvaranje predstavničkog tela koje bi ostvarilo zahteve za postizanje veće efikasnosti u radu i otvorenosti prema javnosti. U unutrašnjoj organizaciji parlamenta mogu se razlikovati dve vrste organa, skupštinski odbori i parlamentarne grupe. Dok skupštinski odbori imaju zadatak da pripreme rad parlamenta u tehničkom i stručnom smislu, parlamentarne grupe predstavljaju centar političkog odlučivanja koji se odražava direktno na akte usvojene u parlamentu. Uzimajući u obzir stepen i nagu uticaja kupštinskih odbora, parlamenti se mogu podeliti na „radne" i „raspravne skupštine". Uprkos velikom broju skupštinskih odbora u Narodnoj skupštini Republike Srbije, oni nemaju očekivanu uticajnu ulogu, pa se ni ovo predstavničko telo ne može svrstati u „radne parlamente". Parlamentarni plenum je i dalje centralno mesto za parlamentarne aktivnosti, a ono se iscrpljuje u dugotrajnim raspravama u kojima dominira politička većina sa zadatkom da neutrališe svaki predlog opozicije. U poslednjim legislaturama u srpskoj parlamentarnoj praksi pojavio se i skrivljeni oblik opstrukcije koji primenjuje parlamentarna većina da bi onemogućila opoziciju da istakne svoje amandmane i o njima diskutuje. Ovaj oblik delovanja u plenumu u potpunosti se preslikava na parlamentarne odbore u kojima je argumentovana i stručna rasprava potpuno onemogućena.

Ključne reči: *Narodna skupština Republike Srbije, parlamentarni odbori, parlamentarni plenum, Poslovnik Narodne skupštine Srbije.*

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LEGAL DISPUTES OVER THE JUDICIARY: AN ELEMENT OF THE POLISH CONSTITUTIONAL CRISIS

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Abstract. *This article is an attempt to outline and explain the essence of disputes on the legal solutions adopted in the field of the functioning of the judiciary in Poland after 2015, which have been subject to critical assessment by international bodies and representatives of Polish jurisprudence. The constitutional crisis in Poland concerns the functioning of the Constitutional Court, the Supreme Court, common and administrative courts, and the National Council of the Judiciary. The last one is not an organ of the judiciary but its constitutional powers concern the judiciary, and the changes which have been made in the method of appointing its members constitute one of the essential elements of the constitutional crisis in Poland. Therefore, to show the complexity of the problem more fully, the article will discuss legislative activities, the content of amendments to legal acts, and the consequences brought about by introducing defective regulations into the legal order of the Third Republic of Poland, both at the national and international level.*

Key words: *Constitution, judge, independence, National Council of the Judiciary, Republic of Poland*

1. INTRODUCTION

After the parliamentary elections in 2015, Poland encountered a constantly deepening constitutional crisis, one of the consequences of which is that Poland became one of countries that have not yet received financial resources from the Reconstruction Fund of the EU. The reason for this state of affairs is the critical assessment of the European Union (EU) with regard to the state of the rule of law in Poland, including the situation in the judiciary in particular. This is reflected not only in political assessments but also in the judgments of the Court of Justice of the EU (hereinafter: the CJEU), the consequence of

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which are high financial penalties imposed on Poland. Similar conclusions regarding the state of the rule of law in Poland may also be found in the judgments of the European Court of Human Rights (hereinafter: ECtHR).

In the following study, we present the changes in the area of the judiciary in Poland after 2015 and explain the essence of disputes regarding the adopted regulations that are subject to critical assessment. The paper will focus on the key issues of the aforementioned legal disputes in Poland on the functionin of the Constitutional Court, the Supreme Court, common and administrative courts, and the National Council of the Judiciary. Although the last one is not an organ of the judiciary, its constitutional powers concern the judiciary and the changes that have been made in the method of appointing its members constitute one of the essential elements of the constitutional crisis in Poland.

Although the study touches on the activities of some of the institutions of the European Union, it should be noted that the analysis does not cover the relations between Polish law and EU law. Yet, in this context, it is it is worth emphasizing that, in accordance with Article 8, Article 87 and Article 91 of the Constitution of the Republic of Poland,[1] ratified international treaties must be consistent with the Constitution; the acts of the Parliment must also be consistent with the Polish Constitution and the adopted/ratified international treaties.

2. Disputes over the Election of Three Judges of the Contitutional Court

The controversy over the constitutionality of the composition of the Constitutional Court has been present since 2015. In the year that sparked the controversy, the elections for the President took place in May 2015, the parliamentary elections for representeatives in the Sejm and the Senate were to take place in October 2015, and the term of office of five judges of the Constitutional Tribunal was coming to an end (for 3 of them on 6 November, for one of them on 2 December, and for one of them on 8 December 2015). It should be recalled that the Constitutional Tribunal, pursuant to Article 194 § 1 of the Constitution, shall be composed of 15 judges individually elected by the Sejm for a 9-year term of office; they replace of judges who end their term of office (Article 194 §1 of the Constitution).

In the spring of 2015, when the process of prepairing of the new Act on the Constitutional Tribunal was underway, the date of the parliamentary elections and thus the beginning of the new term of the Sejm was unknown. This situation created a risk that the term of office of 5 judges might expire but new judges would not be appointed to replace them. Therefore, the Constitutional Court Act of 25 June 2015 (hereinafter: the CC Act)[2] envisaged that the election of all 5 judges shall be made by the Sejm at the end of the Sejm term of office. Thus, on 8 October 2015, five new judges of the Constitutional Court were elected during the last session of the Sejm. Andrzej Duda, the new President of the Republic of Poland, who has been in office since July 2015, never took an oath from any of the newly appointed judges (as envisaged in Article 21 of the CC Act).

Parliamentary elections were held on 25 October 2015 and, as expected, the opposition party took power. The first Sejm session in the new term of office took place on 10 November 2015, i.e. after the end of the term of office of three judges of the Constitutional Tribunal, but also

[1] The Constitution of the Republic of Poland of 2nd April 1997, *Dziennik Ustaw*, No. 78, item 483. https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

[2] The Constitutional Court Act, *Dziennik Ustaw*, of 25 June 2015, item 1064; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)009-e

before the end of the term of office of two more judges in December 2015. The Act amending the Constitutional Court Act (hereinafter: the CCA Act)[3] was passed on 19 November 2015. Article 137a of this Act stipulated that in the case of all judges of the Court whose term expires in 2015, new judges will be elected by the Sejm in the current term of office. In turn, on 25 November 2015, the Sejm adopted 5 separate resolutions declaring "*the lack of legal force*" of the resolutions issued on 8 October 2015 on the election of 5 judges of the Constitutional Court. It should be emphasized that this was highly peculiar because, under the Polish law, Sejm does not have the power to adopt resolutions on the lack of force of resolutions issued by the Sejm. On 2 December 2015, the Sejm elected 5 new judges of the Constitutional Court; in the night of 2 December 2015, four new judges took the oath in front of the President of Poland (one judge could not take the oath because the term of office of the former Constitutional Court judge, whom the new judge was to replace, had not expired yet).

The newly appointed judges reported to work in the morning on 3 December 2015, but they were not allowed to work by the President of the Constitutional Court due to legal doubts regarding the constitutionality of their election under the Polish Constitution. The President of Constitutional Court made this decision because the Constitutional Court hearing on the constitutionality of the Constitutional Court Act of 25 June 2015 was scheduled for the same date. In its judgment in Case no. K 34/15 of 3. December 2015,[4] the Constitutional Court found that the regulation allowing the Sejm of the 7th term of office to appoint three judges in place of those whose terms of office ended in November 2015 was constitutional, while the regulation allowing the Sejm to elect two judges whose term of office ended in November 2015 and December 2015 was unconstitutional (CC Case no. K 34/15**).** On 9 December 2015, the Constitutional Court issued a judgment[5] in the matter of the Act amending the Constitutional Court Act of 19 November 2015, in which the Court found the provisions on the new election of Constitutional Court judges unconstitutional. Despite the judgments, President of Poland did not take the oath from the three judges elected on 8 October 2015, arguing that all seats in the Constitutional Court were filled. Since then, some representatives of the legal doctrine and journalists have used the term ”stand-in judges” (or "doubles") when referring to the three judges who were elected by the 8th Sejm on 2 December 2015. The dispite continued even after the death of two of these people and appointing others in their place (Skotnicki, 2020: 105–114). Ever since, the Court has already issued, over 300 judgments on the participation of ”stand-in judges” ("doubles").

In the following years, further amendments to the Act amending the Constitutional Court Act were adopted, as well as new legislative acts regulating the organization and functioning of the Constitutional Court (seven in total since 2015).Currently, these are: the Act of 30 November 2016 on the status of judges of the Constitutional Court,[6] and the Act of 30 November 2016 on the organization and procedure before the Constitutional Court.[7] Yet, the adoption of these acts did not end the disputes over the composition of the Court; on the contrary, there are allegations that the Court has been politicized, as it is includes**,** *inter alia,* one of the most active deputies of the ruling party. The judicial activity of the

[3] Act amending the Constitutional Court Act, *Dziennik Ustaw*, of 19 November 2015, item 1928;
[4] Judgment of the Constitutional Court of Poland in Case no. K 34/15.
[5] Constitutional Court Case no. K 35/15 of 9 December 2015.
[6] Announcement of the Marshal of the Sejm of the Republic of Poland on the publication of the consolidated text of the Act on the status of judges of the Constitutional Tribunal, *Dziennik Ustaw*, 2018 item 1422.
[7] Announcement of the Marshal of the Sejm of the Republic of Poland on the publication of the consolidated text of the Act on the organization and procedure before the Constitutional Tribunal, *D. Ustaw,* z 2019 item 2393.

Constitutional Court is also criticized, not only because of the controversial content of many judgments (particularly those regarding EU law and the right to abortion) but, above all, because of a significant reduction in the number of judgments issued. At the same time, a very negative phenomenon of the increased number of applications submitted by the Government or the deputies of the ruling majority has been observed, which leads to issuing Court judgments which legitimize the changes in the law made in recent years (Wolny, Szuleka, 2021: 64).The situation is further complicated by doubts concerning the appointment of the President of the Constitutional Court in December 2016, including reservations as to the the proper procedure for convening the General Assembly of the Constitutional Court judges, the participation of the so-called "stand-in judges" and, above all, the failure of the General Assembly to adopt the required resolution on presenting candidates for the President of the Constitutional Court to the President of Poland.

3. Changes in the Method of Appointing and Dismissing Presidents and Vice-presidents of Common Courts

Until 2017, the judicial self-governance played an extremely important role in the procedure of appointing and removing presidents and vice-presidents of common (ordinary) courts. Under the Act on the Organisation of Ordinary Courts of 27 July 2001 (OOC Act),[8] the appointment and dismissal of presidents and vice-presidents of the courts of appeal and district courts were made by the Minister of Justice, but only after consulting the general assembly of appeal judges; if the opinion was negative, the Minister had to request the opinion of the National Council of the Judiciary (NCJ); if the NCJ also issued a negative opinion, it was binding on the Minister. Presidents and vice-presidents of district courts were appointed and dismissed by the President of the court of appeal, after consulting the general assembly of district court judges. Presidents of the courts of appeal and regional courts were appointed for a 6-year term, and presidents of district courts served for a 4-year term of office (Article 27 of OOC Act).

On 12 July 2017, despite numerous negative opinions of the legal doctrine, the judiciary community, and protests of a significant part of the general public, the Act amending the Act on the Organisation of Ordinary Courts and certain other acts (2017)[9] was adopted. It countermanded the previous procedure of appointing and dismissing presidents and vice-presidents of common courts. From then on, it has become the exclusive competence of the Minister of Justice, who does not have to consult either the judicial self-government bodies (general assemblies of appeal and district court judeges) nor the National Council of the Judiciary. In addition, it was established that the Minister of Justice may dismiss any of the incumbent presidents and vice-presidents of courts within a period of no more than 6 months from the date of entry into force of the amending Act (12 August 2017). As a result of this regulation, at least 130 court presidents and vice-presidents have been dismissed.

Therefore, this solution deprives judges of any influence on filling these judicial positions**.** Currently, it is a purely political decision, which does not contribute to the independence of the judiciary and the independence of judges**.** In a democratic state goverened by rule of law, where

[8] Act on the Organisation of Ordinary Courts of 27 July 2001 (amended in 2011, 2017, 2019), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)004-e

[9] Act amending the Act on the Organisation of Ordinary Courts and certain other acts, *Dziennik Ustaw*, 2017, item 1452, which entered into force on 12 August 2017. See: CoE Opinion no. 904/2017, Strasbourg, 20 November 2017, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)046-e

the system of state bodies is based on the principle of the separation and balance of powers between the three branches of government, it absolutely does not correspond to these principles expressly guaranteed in Article 10 of the Polish Consitution. The relations between the judiciary and the other two branches of government are different from those between the legislative and executive powers, where their competences are correlated and even intersect. Art. 173 of the Constitution explicitly stipulates that courts and tribunals shall constitute a separate power, which shall be independent from other branches of government. However, this separate organizational and functional power of the judiciary does not imply complete separation of powers (Łętowska, Łętowski, 1996; Trzciński, 1999). Therefore, it is possible for the executive authority to encroach upon the extrajudicial powers of the courts. This is manifested in the competence of the Minister of Justice to exercise administrative supervision over courts, an element of which is the appointment and dismissal of presidents and vice-presidents of ordinary courts. However, the jurisprudence of the Constitutional Court has repeatedly indicated that this cannot be the exclusive right of the Minister of Justice, but that the judicial self-government bodies should also significantly participate in the process.[10] These judgments, especially in Case no.K 45/07 issued on 15 January 2009, are recognized by the doctrine as the most important judgments of the Constitutional Court of Poland (Wiliński, 2016: 745)**.**

4. The National Council of the Judiciary

In order to present disputes over the judiciary and violations of the rule of law in Poland, due consideration shall be given to the institution of the National Council of the Judiciary (NCJ). Poland was the first country in Central and Eastern Europe to establish such a body (Godlewski, 2019: 198), at the beginning of the political transformation in 1989. From the very outset, it has been a constitutional body whose task is to safeguard the independence of courts and judges (Article 186 of the Constitution); its main competence is to present the judicial candidates for the Supreme Court, the Supreme Administrative Court, common courts, administrative courts and military courts to the President of Poland for approval.

Article 187 § 1 of the Constitution (1997) prescribes the composition of this body, which is composed of three distinctive groups of members. The first group comprises the *ex officio* members: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, and a person appointed by the President (Art. 187 § 1, point 1). The second group comprises 15 judges selected from among judges of the Supreme Court, common courts, administrative courts, and military courts (Art. 187 § 1, point 2). The third group comprises 4 members elected by the Sejm from among the deputies and 2 members elected by the Senate from among the senators (Art. 187 § 1, point 3). Article 187 § 1, point 2 and the method of selecting judges to the National Council of the Judiciary are of particular importance for the rule of law disputes pending in Poland. Under the current Constitution, the manner of electing 15 judges was first regulated by the Act of 27 July 2001 on the National Council of the Judiciary[11] and then by the Act of 12 May 2011 on the National Council of the Judiciary[12]. Similarly to the former acts regulating the functioning of this body, these legislative acts stated that judges were appointed by general assemblies of judges of courts of various instances. Thus, Art. 187 § 2 of the Constitution was also interpreted by the Constitutional Court

[10] See: Judgments of the Constitutional Court in Case no. K 11/93, Case no.K 12/03, Case no.K 45/07.
[11] Act on the National Council of the Judiciary, *Dziennik Ustaw*, 2001, nr 100, item 1082.
[12] Act on the National Council of the Judiciary, *Dziennik Ustaw*, 2011, nr 126, item 714.

as establishing "the principle of the election of judges by judges" (Case no. K 25/07).[13] This notion was shared by the vast majority of representatives of the doctrine (Garlicki, 2005; Banaszak, 2012).

In 2017, however, the ruling political camp decided to depart from this well-established solution and to introduce the election of judges to the National Council of the Judiciary (NCJ) by the Sejm. In the opinion of the ruling majority, based solely on a linguistic interpretation, Article 187 § 1 (point 2) of the Constitution is not prejudicial to who is to elect judges to the NCJ and leaves the decision on this matter to the legislator. Occasionally**,** this interpretation is also expressed in the doctrine, which additionally emphasizes that, if the Constitution entrusts the decision to a specific body, it clearly indicates that it is done in light of the principle of legality (Article 7 of the Constitution); hence, the competence of judges to elect judges to the NCJ cannot be presumed (Kaczmarczyk-Kłak,2017:438-439). Supporters of this position also refer to the decision of the Supreme Court of 15 March 2011,[14] which states that the Constitution does not stipulate that judges to the National Council of the Judiciary must be elected only by judges (Case no.III KRS 1/11). However, the most important element of the justification for this position is the Constitutional Court judgment of 20 June 2017[15], concerning the participation of the persons whose membership in the NCJ composition was contested. In its judgment, the Court stated: ”The Constitutional Tribunal in the current composition does not agree with the position taken in the judgment in Case No. K 25/07 that the Constitution stipulates that judges elected by judges may be members of the NCJ. Article 187 § 1 (point 2) of the Constitution only stipulates that these individuals are elected from among judges. However, the constitution-maker did not indicate who may appoint these judges. Thus, the Constitution stipulates who may be elected a member of the National Council of the Judiciary, but it does not specify how to elect judges to membership of the National Council of the Judiciary. These issues were to be regulated in the act of parliment”(Case no. K 5/17).[16] This position is binding for the current government, as it allows the Sejm to consider the manner in which the Sejm appoints judges to the and assess the compliance of this procedure with the Constitution.

The original amendment to the NCJ Act, adopted on the initiative of the Council of Ministers, was vetoed by the President Andrzej Duda, who immediately submitted his own draft amendment which, however, did not change much in the new method of selecting judges to the National Council of the Judiciary. The Act amending the NCJ Act was passed on 8 December 2017.[17] Currently, under Article 11a (2) of the amended NCJ Act, candidates to the National Council of the Judiciary are proposed by 2,000 citizens over the age of 18 who have full legal capacity and full political rights, or by 25 judges (excluding retired judges). From among the candidates proposed in this way, each parliamentary club selects no more than 9 candidates (Article 11d (2) of the NCJ Act), and then the competent Sejm committee selects from among them a fifteen-person list of candidates for members of the National Council of the Judiciary, whereby the list must include at least one candidate from each parliamentary club (Art. 11d (4) of the NCJ Act). The election is made by voting for the entire list; in the first vote, a majority of 3/5 votes is required, in the

[13]Judgment of the Constitutional Court in Case no. K 25/07.
[14]Judgment of the Constitutional Court in Case no. III KRS 1/11, OSNP 2012, no. 9–10, pos. 131.
[15] Judgment of the Constitutional Court in Case no. K 5/17; OTK-A 2017, pos. 48.
[16]Judgment of the Constitutional Court in Case no. K 5/17; OTK-A 2017, pos. 48.
[17] Act amending the Act on the National Council of the Judiciary and certain other acts of 8 December 2017,, *Dziennik Ustaw,* 2018, item 3 (entered into force on 17 January 2018).

presence of at least half of the statutory number of deputies (Article 11 (5) of the NCJ Act); if such a majority is not achieved, a second vote is held. where an absolute majority of votes is sufficient for election, in the presence of at least half of the statutory number of deputies (Article 11d (6) of the NCJ Act). It means that the judges are now elected to the NCJ by politicians; thus, as long as the ruling political camp has the support of more than half of the Sejm, they will always vote for their list of candidates for membership in the National Council of the Judiciary.

This solution has been strongly criticized by the opposition and legal scholars. The situation in which the Sejm makes a decision on filling 19 out of 25 seats in the National Council of the Judiciary is deemed to be unacceptable, especially considering that the Minister of Justice is also an NCJ member. The opponents stress that this method of appointing judges is contrary to the principles of the separation of powers and independence of the judiciary and judges; not only does it deprive the judiciary of its autonomy but also fails to protect the judiciary against interference of the legislative and executive authorities; thus, it allows the political parties to indirectly control the judicial nomination process. As the Constitution clearly regulates how many members to the NCJ are elected by the Sejm, this is a violation of the constitutional proportion of representatives of individual authorities in the National Council of the Judiciary (Piotrowski, 2017: 14-15, Garlicki, 2018: 390; Szmyt, 2019: 125; Rakowska-Trela, 2019: 112-113; Skotnicki, 2020: 47-59).

The allegation that the current composition of the National Council of the Judiciary is unconstitutional (and, thus, commonly designated as the neo-NCJ) generates frequent disputes on the judicial nomination procedure, which is an important issue for further considerations in this study. Moreover, the termination of the 4-year term of office of the existing members of the National Council of the Judiciary under the amenended NCJ Act of 8 December 2017 was considered unconstitutional as well. Ultimately, in the ECtHR judgments of 15 March 2022 and 16 June 2022 concerning the applications lodged by judges Jan Grzęda and Leszek Żurek[18], whose terms of office at the NCJ were shortened under the amended NCJ Act, the European Court of Human Rights held that there was a violation of Article 6 § 1 of the European Convention on Human Rights (the right of access to a fair trial) due to the lack of judicial review of premature termination of their terms of office.

5. The Disciplinary Chamber of the Supreme Court (2017) and the Professional Liability Chamber of the Supreme Court (2022)

On 8 December 2017, another act relating to the judiciary was adopted on the initiative of the President, the new Supreme Court Act (SC Act).[19] In the context of presenting the problem of disputes over the rule of law in Poland, it is important to outline the key changes that his Act has introduced in the organizational structure of the Supreme Court of Poland. In addition to the the existing chambers (the Civil Law Chamber, the Criminal Law Chamber, and the Chamber of Labor Law and Social Security), Article 3 of the SC Act (2017) introduced two new chambers: the Disciplinary Chamber, and the Chamber of Extraordinary Review and

[18] ECtHR Cases: *Grzęda v. Poland* (Appl. no.43572/18), Garn Chamber judgment of 15 March 2022; *Żurek v. Polan*d (Appl. no. 39650/18), Grand Chamber judgment of 16 June 2022 .

[19] Act of 8 December 2017 on the Supreme Court (hereinafter: the Supreme Court Act), *D.Ustaw*, 2018, item 5.

Public Affairs (Domańska, 2020: 103-116).[20] Although the dispute did not concern the structure of the Supreme Court, as it is often presented by the ruling political camp, the issue of the legal status of the Disciplinary Chamber and the method of appointing judges to its composition was raised.

Under the 2017 Supreme Court Act, the main task of the Disciplinary Chamber was to adjudicate cases related to disciplinary misconduct and liability of judges, prosecutors and representatives of other legal professions (Article 27 of the SC Act 2017). The problem was that this Chamber was given a special status; hence, despite formally remaining in the structure of the Supreme Court, the Disciplinary Chamber became a far more separate entity than it was necessary (Radajewski, 2019: 23). Under the SC Act, the Supreme Court is headed by the First President of the Supreme Court (Article 14 § 1 SC Act), and individual chambers are headed by the presidents of the Chambers (Article 15 § 1 SC Act).The First President has a leading function; he manages the work of this body, represents the Supreme Court before the Contitutional Court, in the Sejm and in the Senate committes, reports to the President of the Republic on identified irrecularities, *inter alia*, issues opinion and presents them to the President of the Republic on the candidates for the position of the President of the Supreme Court, and judges of the Disciplinary Chamber (Article 14 § 1, points 2) and 3) SC Act). The new SC Act (2017) also stipulates that the President of the Disciplinary/Professional Liability Chamber is largely autonomous; he was obliged to submit independent annual reports on the activities of this Chamber to the Sejm, the Senate, the President of the Republic, and the National Council of the Judiciary, along with comments on identified loopholes or irregularities that have to be removed in order to ensure the rule of law, social justice and the cohesion of the legal system of the Republic of Poland (Article 6 § 2 SC Act); the presidents of other chambers do not have this competence. Unlike the presidents of other chambers, he also had an exclusive competence to decide on the jurisdiction of the Disciplinary Chamber[21], which could not be modified by the First President of the Supreme Court or any composition of the Supreme Court (Article 28 §2 SC Act).

The obligation of the First President of the Supreme Court to represent the Supreme Court in proceedings before the Constitutional Court, in the work of parliamentary and senate committees in consultation with the President of the Disciplinary Chamber (Article 14 § 1 SC Act) was also absolutely surprising**.** The Disciplinary Chamber had its own separate budget, the draft of which was adopted by the assembly of judges of this Chamber, and which was included without any changes in the draft budget prepared by the First President for the Supreme Court (Article 7 § 4-6 SC Act). The President of the Disciplinary Chamber also had an independent chamber office and press spokesperson, whose appointment and activities were beyond the control of the First President of the Supreme Court.[22] Thus, the judges who were to sit in this Chamber were the judges appointed after the establishment of the Disciplinary Chamber (by decision of the President of the Republic at the request of the new NCJ), and they would receive remuneration 40% higher than other

[20] See: The Supreme Court of the Republic of Poland (2023): Organization; https://www.sn.pl/en/about/SitePages/OrganizationIOZ.aspx (accessed 22.10.2023).
[21] Article 28 (2). Act of 8 December 2017 on the Supreme Court, Dz. U from 2018, item 5.
[22] § 1 p.2. Regulation of the President of the Republic of Poland of February 11, 2019 amending the regulation - Rules of Procedure of the Supreme Court, *Dz.U* of 2019 pos. 274.

judges of the Supreme Court (Article 48 § 1 - 2 SC Act).[23] The procedure before the Chamber was also specific, and the adjudicating panels were to be composed of lay judges (benchers) appointed by the Senate, i.e. by politicians (Article 62 § 2 SC Act).

Finally, it should be noted that the institution of the Extraordinary Disciplinary Prosecutor of the Supreme Court was established to conduct investigative actions on a specific case concerning a judge of the Supreme Court and present evidence on disciplinary offences which meet the criteria of a deliberate fiscal crime or a deliberate indictable crime prosecuted by public indictment. The Extraordinary Disciplinary Prosecutor is appointed by the President of the Republic of Poland from the ranks of judges or prosecutors; if the President does not do that within the specified time limits, it can be done by the Minister of Justice (Article 76 § 8 SC Act).

In view of all these provisions, the literature on this subject matter even includes the opinion that the Disciplinary Chamber is an unconstitutional solution, as it has all the features of an extraordinary court within the meaning of Art. 175 § 2 of the Constitution,[24] or is a judicial body which is not provided for in Article 175 § 1 of the Constitution[25]; thus, "the conferral of powers over the judiciary in disciplinary and other matters relating to the status of Supreme Court judges is a clear breach of the Constitution" (Wróbel, 2019: 29).

The introduced legal solutions have been severely critized. The representatives of the doctrine and judges spoke out very strongly against the adopted amendments (Machnikowska 2018; Bojarski, Grajewski, Kramer, Ott, Żurek, 2019). We may also refer to the Opinion of the European Commission for Democracy through Law (the so-called Venice Commission), published on 11 December 2017.[26] Referring to the Polish reforms of the judiciary, the Venice Commission pointed that the amended legislative acts, including the new Supreme Court Act, ”pose a serious threat to the independence of the Polish judiciary” and „seriously undermine the separation of powers and the rule of law in Poland” (Venice Commission, 2017: 4; § 9). The Commission considered that the two new chambers were given a special status and powers that exceed those of other chambers, that they are mainy composed of newly appointed judges (appointed by the President of the Republic at the request of the new National Council of the Judiciary, which is dominated by the current political majority), and that adjudication of judges exclusively appointed by the President of the Republic may be dangerous both for disciplinary proceedings and for extraordinary review proceedings (e.g. on politically sensitive sensitive issues involving election disputes or validation of election results), as well as for democracy at large (Venice Commission, 2017: 10; § 37-38, § 43) The Commission also criticized the involvement and selection of lay judges (benchers who are directly appointed by the Senate along the political lines), and particularly their participation in the disciplinary and extraordinary proceedings at the SC level, which is dangerous for the efficiency and quality of justice (Venice Commission, 2017: 15, 19; § 66-70, § 91). In turn, on 20 December 2017, for the first time in

[23] Art. 48. § 1 of the SC Act. ”The base remuneration of a Supreme Court judge shall be 4.13 times the base figure used to determine such remuneration..”

[24] Art. 175 § 2 of the Constitution:” Extraordinary courts or summary procedures may be established only during a time of war.”

[25] Art. 175 § 2 of the Constitution: ”The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.”

[26] European Commission for Democracy through Law (Venice Commission) (2017): Opinion No. 904 / 2017. Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (Venice, 8-9 December 2017), CDL-AD(2017)031, published on 11. Decemner 2017; https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e;

EU history, the European Commission proposed to the Council of the European Union to take action under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe as there was a risk of serious violation of the rule of law and judicial independence in Poland (EC, 2017)[27]

In 2018, the amendments to the Act on the Organization of Ordinary Courts, the Act on the National Council of the Judiciary, and the Supreme Court Act[28] did not introduce any significant changes to the judiciary. However, the judgment of the Court of Justice of the European Union (CJEU) of 19 November 2019 in three joint cases[29] was important for disputes over the judiciary and the rule of law in Poland. In its judgment, the Court of Justice stated that that the examination of the independence of the Disciplinary Chamber should belong to the Supreme Court itself. As a consequence, in its judgment of 5 December 2019[30], the Chamber of Labor and Social Security of the Supreme Court stated in the legal reasoning, *inter alia*, that the National Council of the Judiciary is not independent of the legislative and executive authorities, and that the Disciplinary Chamber of the Supreme Court is not a court within the meaning of EU law and national law (Case no. III PO 7/18). Subsequently, three chambers of the Supreme Court (Civil Chamber, Criminal Chamber, and Labor Chamber) adopted a resolution on 23 January 2020, which stipulated that the right to adjudicate on judges appointed on the basis of the requests of the neo-NCJ may be questioned.[31] In order to obtain a full picture of the confusion regarding the judiciary in Poland, we may refer to the case law of the Constitutional Court, which was elected in its entirety by the ruling bloc of right-wing parties. In its judgment of 21 April 2020, the Constitutional Court, stated in that the resolution of the three chambers of the Supreme Court is unconstitutional, the Treaty on European Union and the European Convention on Human Rights (CC Case no. Kpt 1/20).[32] It was a judgment issued on the basis of the motion of Prime Minister for a settlement of the dispute over powers between the Sejm of the Republic of Poland and the Supreme Court, and between the President of the Republic of Poland and the Supreme Court. However, in the public space, this dispute was recognized as fictional. This judgment is also surprising because the Constitutional Court does not have the right to review the constitutionality of the judgments of ordinary courts or the Supreme Court; therefore, it is justified to recognize that that the CC judgment does not have any legal effect on a resolution of the Supreme Court.

Another important stage in deepening legal disputes around the judiciary and the Disciplinary Chamber of the Supreme Court was the adoption of the Act of 20 December 2019 amending the Act on the Organization of Ordinary Courts, the Act on the Supreme Court and certain other acts[33]. *Inter alia*, the amending Act stipulated that the judicial self-governance cannot concern itself with political matters and, in particular, it is forbidden to

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[27] EC/European Commission (2017): Rule of Law: European Commission acts to defend judicial independence in Poland, Brussels, 20 Dec. 2017, https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367

[28] Act amending the Act on the Organization of Ordinary Courts, the Act on the National Council of the Judiciary, and the Act on the Supreme Court, *Dz. U.* 2018, item 848.; Act amending the Act on the Organization of Ordinary Courts and the Act on the Supreme Court and certain other acts, *Dz. U.* 2018, item 1045: the Act amending the Act on the Organization of Ordinary Courts and certain other acts, *Dz. U.* 2018, item 1443.

[29] Court of Justice of the EU/ CJEU Joined cases: C-585/18 *A. K. v Krajowa Rada Sądownictwa;* C-624/18 *CP v Sąd Najwyższy;* and C-625/18 *DO v Sąd Najwyższy;* (2020/C 27/07); *Official Journal of the EU*, Vol. 63, 27 January 2020; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CA0585

[30] Judgment of the Chamber of Labor and Social Security of the Supreme Court, Case no. III PO 7/18.

[31] Resolution of the combined Chambers of the Supreme Court: Civil, Criminal, and Labor Law and Social Security Chambers, Case no. BSA I-4110-1/20, of 23 January 2020.

[32] Judgment of the Constitutional Court, Case no. Kpt 1/20.

[33] Act amending the Act on the Organization of Ordinary Courts, the Act on the Supreme Court and certain other acts, *Dz. U.* 2020, item 190.

adopt resolutions which undermine the principles governing the operation of the authorities of the Republic of Poland and its constitutional bodies. Some judges refused to adjudicate in panels including judges appointed by the President at the request of the neo-NCJ. Moreover, the abovementioned Act considered it unacceptable for an ordinary court (or another authority) to assesss and establish the legality of a judicial appointment of a judge or the resulting entitlement to perform tasks in the field of justice (Article 42a. § 1).

In 2021, the European Commission filed a complaint against Poland with the CJEU asking for a declaration of infringement of EU law, considering that the aforesaid Act (2019) prohibited all national courts to examine the fulfillment of the Union's requirements concerning an independent and impartial tribunal previously established by law. The Commission also argued that the doubts as to the independence of the Disciplinary Chamber of the Supreme Court made its jurisdiction to adjudicate in cases concerning the status of judges and deputy judges and the performance of their office questionable. In response, the Vice-President of the Court of Justice of the EU issued the decision in case C-204/21, *Commission v Poland* of 14 July 2021[34], obliging Poland to immediately suspend the application of national provisions relating in particular to the powers of the Disciplinary Chamber of the Supreme Court. In the event that the Disciplinary Chamber continued to operate, Poland was obliged to pay a periodic penalty of EUR 1 million per day. It is worth noting that actions taken by the EU institutions should not be considered an attempt to interfere in the organization of the Polish judiciary, but only to ensure the independence of the judges, which is possibile due to the fact that Polish judges are also European judges.[35]

The judgment of the Court of Justice of the EU in case C-791/19[36], issued on 15 July 2021, is even more important. Recalling that the rule of law is a common value of the EU Member States, the CJEU ruled that a Member State may not change its legislation in a way that would weaken the protection of the value of the rule of law, specifically expressed in Article 19 TEU. The CJEU also argued that the organisation of administration of justice is the sole competence of the Member State but, when exercising this competence, the Member State is required to comply with the obligations arising under EU law, in particular Article 19 § 1(para.2) of the TEU (remedy for effective legal protection). This applies, *inter alia*, to disciplinary proceedings against judges, which should be conducted by authorities meeting the independence requirements. However, this requirement is not met by the Disciplinary Chamber of the Supreme Court due to doubts as to the independence of the National Council of the Judiciary, the composition of which is influenced to such a large extent by the legislative and executive powers. Thus, the Disciplinary Chamber does not ensure independence and impartiality, and Poland is in breach of its obligations under Article 19 § 1 (para.2) of the TEU (CJEU case C-791/19).

In the case *Reczkowicz v. Poland (*Appl. no. 43447/19),[37] the European Court of Human Rights (ECtHR) examined the issue of appointing the Disciplinary Chamber judges and

[34] CJEU case: Order of the Vice-President of the Court, C-204/21 *Commission v Poland* of 14 July 2021, https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-204/21&jur=C

[35] See: ECtHR case: *Baka v.* Hungary (Appl. no. 20261/12), Judgment of 27 May 2014 (violation of the right to freedom of expression of the President of Hungary's Supreme Court for public criticism of judicial reforms), https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/JUIN_2014/CASE_OF_BAKA_v._HUNGARY.pdf

[36] CJEU case: Judgment of the Court of Justice of the EU (Grand Chamber)in case C-791/19, *European Commission v Republic of Poland* (Disciplinary regime applicable to judge **)** of 15 July 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CJ0791

[37] ECtHR case: *Reczkowicz v. Poland (*Appl. no. 43447/19), Judgment of 22 July 2021, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2243447/19%22],%22itemid%22:[%22001-211127%22]}

the the violation of the applicant's right to an impartial and independent "tribunal established by law" under Article 6(1) of the ECHR. In its judgment of 20 July 2021, the Court stressed the unacceptable influence of the legislative and executive powers on the judicial appointments.

In response to these judgments, primarily the CJEU judgment, Poland adopted the Act of 9 June 2022 amending the Supreme Court Act and certain other acts (2022).[38] Undoubtedly, its most important solution was the liquidation of the Disciplinary Chamber of the Supreme Court and the establishment of the Professional Liability Chamber in its place, which is composed of 11 judges (Article 22a § 1).[39] While the change was largely ostensible, the Act envisaged that the process of appointing these judges would take place in two stages. In the first stage, the First President of the Supreme Court draws 33 judges from among all Supreme Court judges (excluding court officials) (Article 22a § 1 – 6). As the amendment of the opposition parties (proposing that these judges should have at least 7 years of adjudicating experience in the Supreme Court) was rejected, it means that this number insludes the judges who have been nominated at the request of the neo-NCJ to be appointed to the Supreme Court, as well as the judges who previously sat in the Disciplinary Chamber and expressed their willingness to continue adjudicating at the Supreme Court level. Thus, on 9 August 2022, 17 judges nominated at the request of the new NCJ and 16 judges whose status was generally undisputable were drawn. In the second stage of this process, the President of the Republic of Poland (together with the Prime Minister) decides who will ultimately adjudicate cases in the Professional Liability Chamber; under the law, it is the head of state who ultimately appoints 11 judges from among these 33 candidates, but the act on their appointment is countersigned by the President and the Prime Minister. It means that two most important representatives of both executive power authorities decide on the composition of this Chamber. The appointed judges may not refuse to adjudicate in the Professional Liability Chamber (Article 22a § 8).

Therefore, the liquidation of the Disciplinary Chamber and the establishment of the Professional Responsibility Chamber is hardly a significant change that meets the expectations of the European Union, most of the judiciary and the legal doctrine. This is an ostensible change because the new body cannot be recognized as independent, impartial and autonomous. The Act amending the SC Act (2022) has not resolved the problem of the neo-NCJ appointments, nor does it guarantee that judges can challenge the status of another judge without the risk of being held liable in disciplinary proceedings.

6. Conclusion

The conducted analysis shows that the Polish constitutional crisis related to disputes over the judiciary is constantly deepening. While the crisis was initially associated only with the Constitutional Court, over time it has spread to ordinary courts and the Supreme Court. Unfortunately, the current Constitutional Court, which is composed entirely of the judges elected by the Sejm after 2015 (including the highly active former deputes of the ruling party), ceased to play the role envisaged in the Polish Constitution. The number of cases reviewed by the Constitutional Court has significantly decreased, as well as the quality of judicial

[38] Act amending the Act on the Supreme Court and certain other acts, *Dz. U.*, 9 June 2022, item 1259. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001259/T/D20221259L.pdf

[39] Notably, the existing judges of the Disciplinary Chamber are given a chance to decide whether they want to adjudicate in other Supreme Court chambers or to retire.

decisions and justifications; but, above all, the Court is used to legitimize the actions of the current government, which raises reservations on the consitutionality of its decisions and their compliance with the Constitution. In particular, it refers to judgments on the relationship between domestic law and EU law. After the full subordination of the presidents and vice-presidents of ordinary courts to the Minister of Justice was established, the efficiency of ordinary courts has decreased and the time for considering cases and issuing judgments has lengthened. The abolition of the Disciplinary Chamber of the Supreme Court and its replacement with the Professional Liability Chamber is a superficial change, which does not bring any qualitative and substantial reforms in terms of judicial independence.

However, the consequences of the unconstitutional composition of the National Council of the Judiciary (neo-NCJ), under the dominant impact of politicians from the ruling parties, seem to be the most important reason for the deepening crisis. It ultimately translates into substantial doubts about the independence of judges appointed by the President of the Republic at the request of the NCJ. In that regard, we may refer to the resolution of the panel of 7 judges of the Supreme Court in the Case no. I KZP 2/2 of 22 June 2022,[40] which states:"(1) The National Council of the Judiciary established in accordance with the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (*Dz. U*. 2018, item 3) is not a body identical to the constitutional body whose composition and method of selection are regulated by the Constitution of the Republic of Poland, particularly in Art. 187 § 1. (2) There are no grounds to assume *a priori* that each ordinary court judge who was nominated after 17 January 2018, as a result of participating in the competition called by the National Council of the Judiciary, does not meet the minimum standard of impartiality, nor that their appointments are unlawful within the meaning of Article 439 § 1 point 2 of the Criminal Procedure Code. It applies only to the Supreme Court judges who have been approved under such conditions." One may wonder whether this legal reasoning is fully correct. We may also raise the question about the independence of those judges who have been promoted and transfered to district courts and courts of appeal after that date. Yet, it undoubtedly reflects an attempt to resolve the deepening problem of millions of judgments issued by judges appointed in such circumstances. As announced by the ECtHR in 2023, the issues of independence of judges nominated by the so-called "neo-NCJ" and the method of judicial appointments have been raised in complaints filed by citizens and judges in the Republic of Poland (Jałoszewski, 2023).

In this study, we highlighted only the most important elements of the deepening crisis concerning the judicial independence and the rule of law in Poland within the judiciary. There are many other factors, such as the refusal of the President of the Republic to appoint judges (to the Supreme Court, *inter alia*), at the proposal of the National Council of the Judiciary in its constitutional composition, where judges were elected by judges (not by politicians). All things considered, it comes as no surprise that the European Union has decided to withhold the funds from the Reconstruction Fund to the Republic of Poland due to serious concerns over judicial independence, the rule of law, breach of human rights of Polish citizens and disciplinary proceedings against judges who invoke EU law, and non-compliance with the ECtHR and ECJ judgments (DW, 2023).[41]

[40] Resolution in the Supreme Court Case no. I KZP 2/22 of 22 June 2022.

[41] DW/*Deutsche Welle* (2023).Rule of law: EU reprimands Poland and Hungary;B.Riegert,9. July 2023, https://www.dw.com/en/rule-of-law-eu-reprimands-poland-and-hungary/a-66165982

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PRAVNI SPOROVI O PRAVOSUĐU: ELEMENT USTAVNE KRIZE U POLJSKOJ

Članak je pokušaj da se prikaže i objasni suština pravnih sporova o zakonskim rešenjima donetim u oblasti funkcionisanja pravosuđa u Poljskoj posle 2015. godine, koji su bili predmet kritičke ocene međunarodnih pravosudnih tela kao i poljske jurisprudencije. Ustavna kriza u Poljskoj odnosi se na funkcionisanje Ustavnog suda, Vrhovnog suda, redovnih sudova i upravnih sudova, kao i Nacionalnog saveta sudstva. Nacionalni savet sudstva nije organ pravosuđa, ali se njegova ustavna ovlašćenja odnose na pravosuđe, dok zakonske promene koje su odnose na način imenovanja njegovih članova predstavljaju jedan od suštinskih elemenata ustavne krize u Poljskoj. Da bi se potpunije prikazala složenost problema, u članku se razmatraju zakonodavne aktivnosti, sadržaj izmena i dopuna zakonodavnih akata, i posledice koje donosi unošenje manjkavih propisa u pravni poredak Treće Republike Poljske, kako na nacionalnom tako i na međunarodnom nivou.

Ključne reči: *Ustav, sudija, nezavisnost, Nacionalni savet sudstva, Republika Poljska*.

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Review Paper

PARTICIPATION OF THE PRESIDENT OF THE REPUBLIC OF POLAND IN THE PROCESS OF IMPLEMENTING EUROPEAN UNION

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Abstract. *The implementation of European Union law is an obligation of the member states of this international organisation. In essence, it consists of the implementation of European Union law in the national legal system so as to ensure not only its validity but also its effective functioning. In the reality of the legal system of the Republic of Poland, implementation in fact implies enacting laws for the implementation of EU law in the national legal system. In this process, the leading role is played by the Council of Ministers, and the Sejm and the Senate. However, one cannot forget the important role of the President of the Republic of Poland, without whose participation the implementation process would not be completed. This paper is an attempt to provide a theoretical analysis of the participation of the Head of State in the implementation process, with particular emphasis on the systemic practice in recent years.*

Key words: *implementation of EU law, President of the Republic of Poland, European Union law*

1. INTRODUCTION

Pursuant to Article 10 (§2) of the Constitution of the Republic of Poland, the President is a constituent part of the dualistic executive, including the President of the Republic of Poland and the Council of Ministers.[1] Within the framework of powers exercised by the President, he participates in the process of implementation of EU law into the legal system of the Republic

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[1] The Constitution of the Republic of Poland, *Dziennik Ustaw* No. 78, item 483 (of 2 April 1997); https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

of Poland (Grzybowski, 2004: 7). The President's participation in this process is essential for the proper implementation of EU law. However, the scope of his participation may concern only the final stage of the implementation process, where it is limited to the necessary minimum, or it may also concern the first stage of the implementation process related to the preparation of draft laws implementing EU law in the legal system of the Republic of Poland (Więckowska, 2004: 79). In the second case, it is an optional possibility, constituting an exception to the principle that the obligation to prepare and bring draft implementation laws to the Sejm's deliberations rests with the Council of Ministers. The President is one of the entities indicated in Article 118 (§1) of the Constitution as having the legislative initiative. Thus, it is possible for draft implementation laws to be submitted to the Sejm on the initiative of the President of the Republic. However, in view of the division of competences and tasks provided in the Constitution for the President and for the Council of Ministers, it can be said that this would be an exception to the rule, where it is a clear competence of the government. This is because, in principle, the constitutional position of the President is to exercise the function of arbitrator and the function of reserve power (Chorążewska, 2005: 68). This means that, as a rule, the President should not carry out day-to-day state policy, which is the domain of the Council of Ministers. Thus, the President should only act on current state policy in exceptional situations. This position is also confirmed by the content of Article 126 (§3) of the Constitution, according to which the President performs his tasks to the extent and on the principles set out in the Constitution and laws. Further confirmation of this understanding of the role and tasks of the head of state is provided in Article 133 (§1 and §3) of the Constitution. They clearly indicate the area of foreign policy as an area of presidential competence. This is a confirmation of the lack of jurisdiction of the head of state in matters of day-to-day state policy (Mojak, 1997: 54).

2. Legal Regulations and Positive Constitutional Law

Given that the President of the Republic is explicitly vested with authorities in the area of foreign policy, he has jurisdiction to participate in the implementation of EU law into the legal system of the Republic of Poland. Thus, the President's involvement in the preparation of draft implementation laws could imply a violation of the division of competences within the bicameral executive branch functioning under the parliamentary-cabinet system. An additional element confirming such an interpretation of the mutual relations and of the functions, role and tasks of the Council of Ministers and the President are the provisions contained in the Constitution, as a result of which the system of the Republic of Poland is described as a rationalised parliamentary-cabinet system (Łabno, 2005: 7). This is because the provisions in question lead to an additional strengthening of the position of the Council of Ministers within the political system of the Republic of Poland. This strengthening also implies an even clearer positioning of the President of the Republic as a subject who, as a rule, does not get involved in day-to-day issues of current state policy. The presented way of perceiving and understanding mutual relations within the bicameral executive branch was also confirmed in the ruling of the Constitutional Court concerning the manner of representation of the Republic of Poland at the summit of the European Council (Decision of the Constitutional Court of 20 May 2009 in case ref. no. Kpt 2/08). However, the President has instruments with which he can initiate the process of implementation of EU law into the legal system of the Republic of Poland and influence its course (Trubalski, 2016: 116). As already mentioned, the President has the legislative

initiative. Thus, he can submit draft laws to the Sejm in the area of implementation of EU law and participate through his representative in the course of the legislative process. It should be noted that the exercise of the legislative initiative by the President belongs to the personal powers of the head of state, which do not require the countersignature of the Prime Minister. Thus, the President may take a decision in this regard at his discretion, but bearing in mind his constitutional competences and systemic roles. Despite the formally envisaged possibility for the President to participate in the legislative process, the view that he should not participate in the first stage of the implementation process (i.e. preparing the draft implementation law) should be considered correct. The role of the President becomes important at the final stage of the implementation process (i.e. signing the bill), which involves examining its content in terms of its compliance with the Constitution. Without the President's participation, the implementation process cannot be completed. Thus, the President's interpretation of the constitution enjoys precedence over other state bodies, except for the Constitutional Court, whose rulings have a final and universally binding force.

Turning to the analysis of the President's participation in the final stage of the implementation process, it must be emphasized once again that this participation is obligatory. First of all, it should be noted that upon completion of the legislative process before the Sejm and the Senate, pursuant to the provision of Article 122 (§1) of the Constitution, the Speaker of the Sejm submits the enacted bill to the President for signature. Once the enacted bill has been presented for signature, the President may decide to sign the law or refuse to sign it. He may also refer the enacted bill to the Constitutional Court to examine its constitutionality. (Article 122 (§3) of the Constitution). The second option is for the President to exercise a legislative veto. The Sejm may re-enact such a law by a majority of 3/5 votes, in the presence of at least half of the statutory number of MPs (Balicki, 1999: 42). In such a case, the President signs the law within seven days and orders its publication in the Journal of Laws of the Republic of Poland. If a law is re-enacted by the Sejm, the President may not refer it to the Constitutional Court for examination of its compliance with the Constitution (Article 122 (§5) of the Constitution). Based on the constitutional law premises, the President may also take actions with respect to the enacted law sent for his approval. As noted earlier, the point of departure of such actions is to interpret the provisions of the Constitution and to ensure its observance. Thus, after analysing the sent law, the head of state may conclude that it is constitutional. Consequently, he shall sign it within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (Article 122 (§2) of the Constitution). He may also raise doubts as to the constitutionality of particular provisions contained in the law presented for signature. In such a situation, prior to signing the act, the President may submit a motion to the Constitutional Court concerning the compliance of the act with the Constitution (Article 122 (§4) of the Constitution). As evident from the provision in question, this is an optional possibility that may occur if the President has doubts as to the constitutionality of the submitted law. As a result of the examination of the law by the Constitutional Court, he may declare that the law is constitutional or that the law is not constitutional. If the law is found to be constitutional, the President cannot refuse to sign it (Article 122 (§3) of the Constitution). If, on the other hand, the Constitutional Court has declared the law unconstitutional, the president shall refuse to sign the law (Article 122 (§3) of the Constitution). Depending on the nature and, above all, the extent of the inconsistency, the President may, after consultation with the Speaker of the Sejm, sign the law with the omission of the provisions deemed unconstitutional or return the law to the Sejm to remove the inconsistency (Trubalski, 2016: 120). The possibility described above for the President to

refer the adopted bill to the Constitutional Court is prior in nature, as it can take place before the law is signed. The Constitution also allows the President to address the Constitutional Court, which will be consequential. This is because he can sign the law and order its promulgation and then refer to the Constitutional Court to examine its compliance with the Constitution (Mołdawa, Szymanek, 2010: 13).

Therefore, the participation of the President in the final stage of the implementation process should be considered crucial. The participation of the head of state in this process should be treated as a manifestation of his role as the guardian of the Constitution. Assuming that it is formally possible to implement EU law into the legal system of the Republic of Poland by means of regulatory acts of the executive on implementing the law, it should be noted that the President of the Republic of Poland also has the formal possibility to issue such regulations. Therefore, the participation of the head of state in the process of implementation of EU law could include issuing such regulations. However, in view of the fact that the President, despite the absence of formal obstacles, is not the subject who exercises the legislative initiative with regard to implementation laws, it should be analogously concluded that he is even less the subject competent to issue implementation regulations as executive acts to laws. Despite the formal possibility for the President of the Republic of Poland to participate in initiating the implementation process, and issuing implementation regulations, it should be concluded that the head of state is not the competent body to undertake such actions (Wojtyczek, 2001: 54). Nevertheless, the President can influence actions related to current state policy through his authority.

In certain situations related to the creation of EU law enforceable in the legal system of the Republic of Poland, there is cooperation between the President and the Council of Ministers. Their cooperation on this matter is significant as it concerns EU legal acts of great importance for the functioning of this international organisation as well as individual member states (Prokopowicz, 2019: 207-237). The detailed premises of cooperation and its mode are regulated by the provisions of Articles 14 and 15 of the Act on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Membership of the Republic of Poland in the European Union (hereinafter: the Cooperation Act)[2]. In turn, as a result of the cooperation between the President and the Council of Ministers, the Head of State is entitled to take a binding decision on the subject of EU lawmaking. However, the decision in question is not of a substantive nature. It concerns the possibility to use a derogation from the standard law-making procedure in a given situation (Barcz, 2012: 150). Here, the subject matter of consideration are the issues relating to EU security, defence and foreign policy matters. As the EU's security, defence and foreign policy issues constitute a rather sensitive area, and one that rubs against the very essence of the sovereignty and independence of each Member State, qualified majorities comprising a sufficient majority of the European Council members and a sufficient majority of the EU's population are required when the EU legislates in this area. The consent of the representative of the Republic of Poland sitting in the European Council is necessary in the case of the above-described derogations in the procedure for the enactment of EU law that may be directly applicable in the legal system of the Republic of Poland or that requires implementation in the legal system of the Republic of Poland. This body has the power to

[2] Act on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters relating to the Membership of the Republic of Poland in the European Union of 8 October 2010, *Dziennik Ustaw* of 2010, No. 213, item 1395; https://www.sejm.gov.pl/prawo/ustawa_kooperacyjna_eng/kon12.htm

authorise the European Council to deviate from the procedures usually adopted in a given situation in favour of procedures that are more lenient and, therefore, easier to obtain. However, as already mentioned, the lowering of formal requirements for the majority necessary for EU lawmaking in the fields of security, defence or finance encroaches significantly on competences hitherto envisaged for the EU Member States. It may also have serious and long-term political, military and financial consequences.

For this reason, the Cooperation Act (2010) contains special procedures to best secure the process of authorising the Polish representative in the European Council to express his/her position in this area. This is important because the opposition of even one representative of a Member State sitting in the European Council blocks the possibility of authorising the Council to legislate the EU through a less stringent majority procedure. The consent of the representative of the Republic of Poland to legislate in the area of security, defence, or EU finances on the basis of less stringent procedures implies consent to regulate at the EU level issues that have hitherto been the responsibility of individual Member States. Normally, EU lawmaking in these areas required a large qualified majority. In addition, Member States opposed to a particular solution could seek to build a so-called blocking minority, which meant that a qualified majority was deemed not to have been achieved. The reduction of these requirements by the unanimous position of the European Council must be regarded as a significant weakening of the competence of the Member States in the areas in question and a transfer of this competence to the law-making bodies of the EU. This implies a weakening of the position of the state vis-à-vis the EU, as well as the practical possibility of adopting solutions that are unfavourable to certain EU Member States. This is why the consent of the representative of the Republic of Poland in the European Council to lower the requirements necessary for the adoption of a legal act was subject to very strict conditions.

3. Interpretation and Criticism of the Constitutional Framework on the Authority of the Head of State

Analysing the issue in question, one may come to the conviction that the solutions adopted in the Cooperation Act in this regard are a derivative of the regulations set out in Article 90 (§1) of the Constitution (Wojtyczek, 2007: 238). The creators of the Cooperation Act rightly perceived that, in the case of such sensitive issues as security, defence and foreign policy, it is necessary to create special procedures in order to forestall an action in this area that is not fully thought out or not fully in line with the interests of the state. In effect, the adopted solution differs somewhat from that provided in Article 90 (§2) of the Constitution, which establishes a high qualified majority in both chambers of parliament, allowing the passing of a law giving consent to the ratification of an international agreement on the basis of which the competences of the bodies of state power in certain matters are transferred to an international organisation or international body. Pursuant to Article 14 of the Cooperation Act, the decision on the position of the Republic of Poland on the draft EU legal act in the scope discussed above in the period between 1 November 2014 and 31 March 2017 (as regards matters governed by the Treaty on the Functioning of the European Union) and from 1 April 2017 (in respect of matters governed by the Treaty on the European Union) shall be taken by the President, upon the proposal of the Council of Ministers and with the consent of Parliament embodied in the law. In other words, the interaction of the Council of Ministers, the Parliament and the President of the Republic is necessary (Wojtyczek, 2010: 31).

However, despite the request of the Council of Ministers and the consent of Parliament embodied in the enacted law, the President can take a negative decision, or refuse to take a decision. This means that he has the decisive vote and is not bound by the position of the other bodies acting in the case. The President's autonomy in this respect is dictated by two fundamental issues. Firstly, the fact that he is not politically accountable to the Sejm, and that the Prime Minister is accountable on his behalf to the Parliament by countersigning official acts of the head of state (Trubalski, 2016: 125). Any binding of the President by the content of an adopted legislative act would mean that the Head of State is effectively accountable to the Sejm, which would clearly constitute a violation of the basic principles of the political system of the Republic of Poland and the mutual relations between the legislature and the executive. In the reality of the current Constitution, the body of the executive power controlled by and accountable to the Sejm is the Council of Ministers (Wójtowicz, 2008: 78). On the other hand, the concept of leaving the final and binding decision to the President in this respect deserves full approval, as the essence of the President's actions is to be active in special situations. Such situations include the possibility to delegate to the EU the competence to legislate in the area of security, defence or foreign policy. Moreover, the issues in question seem to go beyond the conduct of day-to-day state policy reserved for the Council of Ministers. In addition, issues concerning security, defence and foreign policy fall within the competences and roles exercised by the head of state under the Constitution.

The indicated competences of the President are not only part of the roles exercised by the President as set out in the Constitution concerning security, defence and foreign policy of the state. The possibility for the head of state to take decisions in these areas is primarily an expression of the President's role as the guardian of the Constitution and the guardian of state sovereignty. The possibility to legislate at the EU level in the fields of security, defence and foreign policy, and even more so the lowering of the formal requirements for a majority of votes for legislating in this area, is undoubtedly related to the competences hitherto specific only to sovereign states. Therefore, the transfer of competences in this area to the EU and its bodies is linked to the loss of some competences in this area by states. So far, competences so closely related to the core of sovereignty of the EU Member States have not been transferred to the EU and its bodies. Therefore, the introduction of a special mechanism in the Cooperation Act concerning this range of matters should be considered as appropriate (Wojtyczek, 2007: 341). A similar procedure for presidential decision-making is set out in Article 15 of the Cooperation Act. The identical decision-making procedure is envisaged in the provision of Article 14 of the Cooperation Act. However, when drafting a legislative act, the substantive scope of the national legislation to be covered by EU regulation may differ. The EU regulation covers the issue of judicial cooperation in civil matters. More specifically, it concerns family law regulations with cross-border implications. Another area covered by the EU regulation is social policy issues relating to labour issues. In addition, fiscal environmental issues and issues related to enhanced cooperation come into play (Chruściak, 2011: 246).

The President's interaction with the Council of Ministers, and the Sejm and the Senate, in matters related to Poland's EU membership is an important element of the systemic concept of law implementation. It does not directly concern only the law implementation process but also the law-making process at the EU level and the participation of representatives of the Republic of Poland in it. Nevertheless, the law enacted at the EU level determines the shape and scope of the implementation process and, above all, the

content of (national) laws implementing EU law. In this context, the distinctive features of the President's participation in the legislative process and authority to approve the lawmaking decisions are crucial. Currently, it can be said that the procedure established in the provisions of the Cooperation Act is sufficient for lawmaking at the EU level in the fields of security, defence and foreign policy (Trubalski, 2016: 129).

When juxtaposing the procedure provided for in the provisions of the Cooperation Act with the procedure envisaged in Article 90 (§2) of the Constitution, it should be stated that the procedure contained in the Constitution pertains to the general delegation of competence in certain matters. On the other hand, the procedure envisaged in the Cooperation Act relates to the individual delegation of competence to the representative of the Republic of Poland to consent to the creation of EU law in areas considered sensitive due to the very essence of state sovereignty (Wojtyczek, 2007: 42).

4. Conclusion

During the many years of Poland's membership in the European Union, the systemic practice of the implementation of EU law into the legal system of the Republic of Poland indicates that the President's role and participation in the implementation process has increased over time, when compared to its initial level. It refers not only to the content of the implementation laws but also to the President's role as the guardian of the Constitution. This is particularly significant in the context of actions taken by the EU and its bodies regarding the model of the judiciary in Poland, or attempts to transform the EU into a federation of states. The initiatives emerging at the level of the EU institutions regarding the establishment of a common army are also not without significance. In that context, it can be said that the importance of the President of the Republic of Poland in the implementation process as well as in the overall membership and functioning of Poland in the EU has been growing over the past years.

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UČEŠĆE PREDSEDNIKA REPUBLIKE POLJSKE U PROCESU IMPLEMENTACIJE PRAVA EVROPSKE UNIJE

Primena prava Evropske unije obaveza je država članica ove međunarodne organizacije. U suštini, ova obaveza podrazumeva implementaciju prava Evropske unije u nacionalni pravni sistem kako bi se osigurala validnost kao i efikasno funkcionisanje pravnog sistema Republike Poljske. U praksi, implementacija zapravo podrazumeva donošenje zakona za implementaciju prava Evropske unije u nacionalni pravni sistem. U ovom procesu vodeću ulogu imaju Savet ministara (vlada), Sejm i Senat (parlament). Međutim, ne može se izostaviti značajna uloga predsednika Republike Poljske koja je vremenom rasla, a bez čijeg učešća ne bi bilo moguće završiti proces implementacije prava Evropske unije u nacionalni pravni sistem. Svrha ovog rada je pokušaj teorijske analize učešća Predsednika (kao šefa države i čuvara Ustava) u procesu implementacije prava EU u nacionalni pravni sistem, sa posebnim osvrtom na sistemsku praksu poslednjih godina.

Ključne reči: *implementacija prava Evropske unije, predsednik Republike Poljske, pravo Evropske unije.*

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THE IMPORTANCE OF EMPIRICAL METHODS IN LEGAL RESEARCH: THE CASE OF CRIMINOLOGY, ECONOMIC ANALYSIS OF LAW, AND LAW AS AN ALGORITHM

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Abstract. *This chapter examines the empirical methods applicable in Criminology, Economic Analysis of Law, and the law embodied in the form of algorithms. The first part of the paper explores the empirical research methods used in Criminology. Focusing on the fundamental features of criminological methodology, the chapter elaborates on fundamental and applied research. The second part focuses on interdisciplinary methodology applicable in the field of Economic Analysis of Law (EAL), and examines the accompanying controversies and challenges generated by the development of behavioral research that has fundamentally changed the findings of the EAL. The third part elaborates on the importance of empirical data in the context of law as an algorithm and the "new trichotomy" reflecting the nature of data: text-driven law, data-driven law, and code-driven law. The trichotomy emerges as a result of an attempt to transform legal norms into machine-readable algorithms, as well as to ensure the application of these modalities in the legal context. The authors discuss the importance of empirical methods in law and the "extension" of standard legal methodology.*

Key words: *empirical methods, legal research, criminology, law and economics, law as algorithm, big data*

1. INTRODUCTION

Legal education and legal practice are constantly changing, but the change that deserves special attention and that has taken place in recent decades is the intensive use of *empirical methods*, encompassing *all techniques for systematically gathering, describing, and critically analyzing data* (Lawless, Robbennolt, Ulen, 2010: 7). Although the call for an

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empirical and rational study of law may be dated to much earlier times and is linked to the so-called legal realists' movement in America, whose intellectual foundation was laid down by judge Oliver Wendell Holmes (Holmes, 1987), the profound change in legal education and practice took place at the end of the 20th century.[1] This change has been reflected in the publication of new journals, such as the *Journal of Empirical Legal Studies*, the organization of special conferences on empirical methods in law,[2] the publication of subject-specific books on this topic,[3] and numerous scientific and professional papers where legal issues have been investigated by using empirical methods. This trend, conceived in America and accepted in numerous European countries,[4] is only in its infancy when it comes to Serbia.[5]

Besides the definition of empirical methods, the question arises about the differences between empirical research and legal analysis. The best response was provided by Lawless, Robbennolt & Ulen (2010) who single out four basic characteristics of empirical research as opposed to legal analysis: 1) empirical research is based on *observation*, while legal analysis is based on facts; 2) empirical research is used to test *hypotheses* or to establish whether some theory is based on facts or not; 3) empirical research is concerned with *aggregate effects*, while legal analysis is focused on the characteristics of the particular case; 4) empirical research is a *gradual and developmental process*, while legal analysis aims to reach the final resolution on some legal issue (Lawless, *et al*, 2010: 10-15).

In this context, considering the importance of empirical methods in general, the authors discuss the significance of these methods in three fields that are closely related to law. The first one is *criminology*, which is considered an subsidiary legal discipline that has been accepted by traditional legal education without reservation. The second one is the *economic analysis of law*, which has generated numerous controversies and debates among legal scholars in recent decades because it borrows the methodology of economic science and applies it in law. The third field refers to the *digitization and algorithmization of law*, a phenomenon that involves numerous challenges and problems that legal science will have to resolve in the time to come. The main goal of this chapter is to establish whether there are similarities and differences between empirical methods in the three mentioned disciplines and, if so, how they reflect on the law and legal education, respectively. The starting hypothesis is that the development of empirical methods in law is inevitable if we want to gain insight into highly intricate legal phenomena, which necessarily entails a "shift" of the methodological paradigm in law.

2. The Importance of Empirical Methods in Criminology

Every criminological research has a number of stages, which are specified and described in the research project. Criminological research implies not only determining the research subject matter and goals but also resolving all methodological issues. Thus, each research project must include specific parts: author(s), research topic and subject matter, goal(s), space

[1] For more details about the independent development of empirical legal studies (ELS) vis-à-vis legal studies as well as a social science in general, see: Pavone, Mayoral, 2020.

[2] Since 2006, when the first conference on legal empiricism was held at the Austin Law School, University of Texas, the American Society for Empirical Legal Studies (SELS) has organized regular annual Conferences on Empirical Legal Studies (CELS). See: https://community.lawschool.cornell.edu/sels/cels-conferences/

[3] For more on the first atempt to provide synoptic view of empirical methods in law, see: Lawless, *et al*, 2010.

[4] In 2010, the Oxford University Press published a handbook exclusively devoted to empirical jurisprudence, see: Pavone, Mayoral, 2020: 7-8.

[5] On the development of empirical legal research in Serbia, see: Milić, 2019.

and time frame, research hypotheses, methods, sample, variables and indicators, data processing and analysis, scientific explanation, and project significance for crime prevention (Konstantinović Vilić, Nikolić Ristanović, Kostić, 2009: 59). Thus, research methods are important instruments for obtaining data in criminology.

Although it applies the methods of other sciences, criminology has developed its own methods, which contributed to distinguishing criminology as an independent science. These discipline-specific methods are the clinical method and the individual case study method.

The clinical method is based on the idea that a delinquent suffering from a "criminal disease" may be treated in a psychiatric clinic just as a person who is treated in a medical clinic. Thus, the clinical method comprises: medical, psychological and social examination, analysis, criminological (expert) diagnosis, prognosis of future conduct, and determining relevant treatment (Sutherland, Cressey, Luckenbill, 1992: 342). The clinical method has significantly contributed to a wider application of individualized treatment; as each criminal offense and each perpetrator is different, there is a need to apply different forms of treatment to various convicts (Arnaudovski, 2007: 117). The application of the clinical method in Serbia may be illustrated by referring to the Act on the Execution of Criminal Sanctions.[6] Thus, upon admission to a penitentiary institution, the convicted offender is sent to the reception department, where he/she can be kept for a maximum of 30 days (Art. 74, par. 1). This Article also envisages that prescribes that the personality of the convicted person shall be assessed upon admission, including the risk level, capacity for change and individual needs, in order to determine the individualized treatment program and classify him/her into a closed, semi-open or open ward in compliance with bylaws (issued by the Ministry of Justice) regulating the treatment, sentence program and classification of convicted offenders (Art. 74, par. 2). The convicts are classified on the basis of the estimated risk level, the type of criminal offense, the imposed sentence, the state of health, the offender's attitudes to the committed offense, the degree of culpability, prior convictions and other criteria stipulated in bylaws regulating the treatment, program of action, classification and subsequent classification of the convicted offenders (Art. 74, par. 3).

The individual case study method implies the study of individual cases of delinquent behavior and individual perpetrators of criminal offences (Marković, 2010: 32). It includes an extensive examination of the offender's social and family life by collecting data through interviews (with the offender, family, friends, relatives, etc.) and inspecting records and documents. The aim is to address a number of questions: 1) Has the offender experienced any emotional trauma? 2) How strong/weak are his/her moral convictions? 3) How does he/she explain the delinquent conduct? and 4) Does he/she justify such conduct or not? The lack of objectivity and a tendency to justify the delinquent's criminal conduct are considered to be some disadvantages of this method (Sharma, 1998: 13).

In addition to these methods, criminology uses research methods characteristic of other sciences. Depending on whether the subject matter of criminological research is crime as a mass phenomenon or an individual phenomenon, criminologist may apply different quantitative and qualitative methods, which will be analyzed further.

In terms of **quantitative research methods**, criminology borrows the methods originating from mathematics and statistics, generally known as the ***statistical method*** (Konstantinović Vilić & all, 2009: 65-67). Depending on the research subject matter, the statistical method offers an opportunity to perform different types of analysis: static analysis, dynamic analysis, and

[6] Article 74, pars. 1, 2, 3. Act on the Execution of Criminal Sanctions, Official Gazette RS, 55/2014, 35/2019.

correlation analysis (mainly by using SPSS software programs for analyzing scientific data related to the social sciences). *Static analysis* provides data on the frequency of a phenomenon in the research sample; in criminological research, it provides data on the structure of criminality in relation to the type of criminal behavior, the characteristics of the perpetrators, etc. In *dynamic analysis*, the subject matter of research are statistical time variations (high-frequency data on *dynamic* processes). This method may be applied to discover or observe certain trends in the commission of crime, and ultimately to predict the criminality trends in the future. *Correlation analysis* enables the examination of two or more variables (phenomena) and assessing the correlation (interdependence) between them. In criminology, correlation analysis determines the relationship between criminality and other social phenomena, such as alcoholism, drug addiction, economic development, etc.

In addition to statistics, criminologists use inquiry to collect data on crime as a mass phenomenon. ***Inquiry*** is a method of data collection that is based on asking questions about criminal behavior, the delinquent and the victim (Konstantinović Vilić, *et al*, 2009: 65-67). Depending on whether the questions are asked orally or in writing, inquiry may be conducted in the form of an interview and a survey (Konstantinović Vilić, Nikolić Ristanović, 1998: 52). An *interview* may be conducted in the form of free conversation (semi-structured or unstructured interview) or in the form of pre-prepared questions (structured interview). To illustrate the use of interviews in criminological research, we may refer to the research on convict gangs in the Republic of Serbia (Kostić, Dimovski, 2013: 219-236). On the other hand, *a survey* is conducted in the form of pre-prepared questionnaires which the respondents fill out themselves. Surveys may include questions with a limited number of responses, (five-point) Likert-scale questions, multiple choice prompts, open-ended questions, where respondents are free to reply as they wish. (Stanojoska, Aslimoski, 2019: 50). To illustrate the use of surveys, we can refer to the research on the law students' attitudes to euthanasia conducted by professors from three Law Schools in the Republic of Serbia (Dimovski, Turanjanin, Kolaković-Bojović, Čvorović, 2020: 400-402).

The next quantitative method used in criminology is ***assessment***. It can be defined as assigning points to individuals according to pre-set rules, criteria or standards so that the results represent some characteristic features of the assessed individuals (Michell, 1999: 15). In criminological research, assessment is used when collecting data about a person. For example, numerous criminological studies have been conducted linking the level of intelligence and criminality, which confirmed that delinquents have a lower level of intelligence and contributed to explaining the causality of crime. In 1914, Goddard, the proponent of the intelligence testing theory and eugenics, published the results of his empirical research in the book "*The Feeble-mindedness – its causes and consequences*", where he asserted that a low level of intelligence makes criminals incapable of learning socially acceptable behavior and concluded that every feeble-minded criminal was a potential criminal. Considering that feeble-mindedness was inheritable, he proposed the sterilization of such individuals as a form of preventive policy (Dimovski, 2019: 54). Criminologist Zeleny came to similar results in 1933, claiming that low intelligence test results were twice more likely in criminals than in non-criminals (Marsh, Melville, Morgan, Norris, Walkington, 2006: 57). In the period from 1930 to 1936, Hartman and Brown tested 13,454 convicts in the reception department of the Illinois prison and came to the result that the inmates' average intelligence quotient (IQ of 90) corresponded to the mental age of a child of 13 years and 6 months (Korn, McCorkle, 1959: 264). However, other researchers arrived at different results. Thus, the commission of some forms of computer crime

(Dimovski, 2010: 208) or white-collar crime (Kostić, Dimovski, 2010: 24) indisputably calls for an average or high IQ.

The comparative method is a method used for exploring criminality as a mass social phenomenon and collecting data on criminality in different time periods, in various geographical areas or legal systems (Konstantinović Vilić, Nikolić Ristanović, Kostić, 2012: 62). Its importance is reflected in the possibility of comparing a group of delinquents with a group of non-delinquents, which should facilitate the discovery of the causality of criminal behavior (Konstantinović Vilić, *et al*, 2009: 68-69). The progressive development of this method has been recorded since the early 20th century but it was pioneered in the 18th century by criminologists Beccaria, Bentham and others, who compared the criminal justice system of their countries of origin with the systems in other countries. During the 20th century, the intrinsic value of the comparative method was emphasized by the renowned sociologist and criminologist Emil Durkheim, who emphasized a threefold use of this method: comparative analysis of variations in a society in a period of time; comparison of societies that are mutually similar but also partly different (focusing on different societies or the same society in different time intervals) or comparison of different societies having some common characteristics; and comparative analysis of radical changes within the same society over a period of time (Newman, 1977: 50). Although Durkheim primarily focused on the use of the comparative method in sociology, it is fully applicable in criminological research. However, it should be noted that in such cases there may be certain problems that limit the utility value of this method, particularly considering that there is no uniform way of collecting data on criminal offences and no uniform incrimination of crimes in different countries. In some countries, there is a ban on publishing such data. For example, in the USSR, the Stalin regime prohibited the public disclosure of information about criminality in 1933, and this ban remained in force until 1989 (Konstantinović Vilić, Nikolić Ristanović, 1998: 103). Thus, the comparative method is most effectively used for describing the similarities and differences in specific variables observed in the experimental group (delinquents) and the control group (non-delinquents) (Konstantinović Vilić, *et al*, 2012: 62-63).

In addition to quantitative methods, criminological research includes different **qualitative methods**, such as: observation, experiment, and focus groups (Kostić, Dimovski, Mirić, 2015). ***Observation*** can be defined as direct and indirect observation of facts related to the observed phenomenon. Criminologist can observe criminal behavior, the delinquent and the victim. The importance of observation is best evidenced by the opinion of criminologists Buckle and Farrington on the value of observational studies for criminology: "Our knowledge of the nature and incidence of offending would be greatly increased if more research projects were carried out in which crimes were observed as they occurred" (Lindegaard, Copes, 2017: 499). There are several forms of observation. One classification refers to direct and indirect observation. In *direct observation*, it is important that the criminologist's presence does not disturb the regular course of activity in progress. A special form of direct observation is *participatory observation*, which entails a possibility of the researcher's participation in criminal activities; but, in such a case, the researcher should ensure that he/she does not participate in the commission of a criminal offence. Although it is a rather complex procedure, there are cases where criminologists applied this type of observation in practice. In the empirical research for his book "*The Gang: A Study of 1,313 Gangs in Chicago*", the American researcher Frederick Thracher was a member of a Chicago gang (Milutinović, 1979: 57). *Indirect observation* implies observing the facts by examining the documents on criminal conduct, the delinquent and the victim. In illustration, we may refer to the research on the topic of juvenile delinquency, where

the researchers studied articles on juvenile delinquency published in the daily newspaper *Politika* from 1904 to 1941.[7]

Another classification is based on how data is collected, i.e. who performs the observation. In that regard, there are three forms of observation: direct participant observation, researcher observation and camera-recorded observation (Lindegaard, Copes, 2017: 501-503). These forms of observation raise the issue of the researchers' (disruptive) presence during the observation, (undue) influence in the data collection process, and systematic analysis of the collected data. In the *direct participant observation*, researchers observe the offenders in their immediate environment but without disturbing or interfering into the daily activities of the observed person. This form of observation was successfully applied by criminologist Alice Goffman in her study of African Americans (Goffman, 2014). In this form of observation, the researcher's influence tends to be most prominent and the collected data may be least systematic and impartial because researchers are prone to establishing communication with the observed persons in order to learn more about them. In contrast, such influence on the observed person is almost non-existent in camera-recorded observations, when the researcher may collect the most systematic and objective data. The most common form of observation in criminology is *researcher observation*. In this form of observation, the researcher conducting the observation keeps a proper physical distance from the observed person and does not disrupt or influence the observed persons conduct in any way. For example, Buckle and Farrington observed the criminal conduct of thieves (Buckle, Farrington, 1994: 133-141) while Bernasco and Jacques observed the conduct of drug dealers (Bernasco, Jacques, 2015: 376-408). The use of *camera-recorded observations*, pioneered by criminologists, is a relatively new development in criminological research. CCTV cameras have been used to study how criminal events unfold, including street fights (Levine, Taylor, Best, 2011: 406-412), violent demonstration (Nassauer, 2015: 3-23), etc. The main advantage of the camera-recorded observation is the possibility to review the recording as well as the opportunity for multiple researchers to analyze the same behavior and interactions.

The next qualitative method used in criminology is **experiment**, which may be defined as an observation of an artificially induced event or phenomenon (Stanojoska, Aslimoski, 2019: 53). Although widely used in the natural sciences, experiment has a limited application and effect in criminology because any artificially induced phenomenon which constitutes a criminal activity would be punishable under the law. In illustration, we way refer to the study of delinquent children who were placed in positive living conditions in order to monitor behavioral changes in relation to their previous delinquent behavior (Milutinović, 1979: 59).

Another qualitative method applicable in criminological research is the ***focus group*** method. A focus group may be defined as a group interview with a number of people (6–12) who share similar characteristics or needs (Konstantinović Vilić, *et al*, 2009: 7). The focus group meeting is moderated by a facilitator, for the purpose of addressing the pre-determined topic. Back in the 1930s, focus groups were used in market research. In the 1980s, they were quite common in several social sciences. In criminology, focus groups are used to study the ideas, experiences and perceptions of professionals involved in crime prevention. As focus groups can be dominated by one or more participants, researchers have recently started using online focus groups to offer anonymity, which serves as an incentive to some people when talking about sensitive topics, such as crime (Vander Laenen, 2021: 402-404).

[7] See:Kostić, Dimovski, Mirić, 2015

3. THE IMPORTANCE OF EMPIRICAL METHODS IN ECONOMIC ANALYSIS OF LAW

Economic Analysis of Law (abbr. EAL) is a relatively new but quite well-established and recognizable discipline that brings together two large scientific fields (Cooter, Ulen, 2016: 3). It is an economic discipline because it predominantly uses economic methodology to study various legal phenomena and institutions, such as property, contractual and matrimonial relations. Its primary purpose is to *uncover the underlying logic of all legal institutions* (Mackaay, 2013: 5), by assessing the effects and rationale of legal rules, and their desirability (Mackaay, 2013: 6-17). However, given the fact that legal norms are means of directing human behavior by setting specific normative standards, they have important implications for further development of EAL in the direction of incorporating behavioral insights and the gradual emergence of **Behavioral Law and Economics** (abbr. BL&E) (Zamir, Teichman, 2018).

EAL has developed from a discipline that studies only those branches of law that understandably accept economic reasoning (e.g. financial law or competition law) to a discipline that "dives" into branches of law (such as constitutional law, criminal law, civil law, and even procedural law)which are "untouchable" for economics. Today, the concept of "economic imperialism" implies that the economic methodology is applicable in all areas where individuals make a choice, regardless of the collectivity they belong to (Becker, 1976).

EAL is also known as *Law and Economics* (abbr. L&E). The term *Economic Analysis of Law* (EAL) clearly indicates the scientific areas of study and methods used in this discipline. However, the term *Law and Economics* is more appropriate if we want to emphasize that this discipline encompasses various social phenomena (economic, legal, political, etc.). Therefore, the term *Law and Economics* is more appropriate in analyzing various social phenomena (a broader subject matter), while the term *Economic Analysis of Law* is more applicable in analyzing legal phenomena (a narrower subject matter). Thus, we introduce a concise definition of L&E: *The term law and economics is defined as the application of economic theory and econometric methods to examine the formation, structure, processes, and impact of law and legal institutions* (Rowley, 1989: 125).

At the basic level, EAL poses the following question: *What are the effects of a legal norm on (human) behavior?* For instance, does the introduction of a mandatory peaceful dispute resolution before initiating litigation reduce the incentives for parties to sue and go to trial? EAL determines whether it is possible and what the effects of this impact are. In doing so, it uses descriptive (positive) analysis, without making any value judgments. However, EAL goes a step further by engaging in normative (prescriptive) analysis, thus creating a normative EAL. This type of analysis addresses the following questions: whether something is needed and desirable (in terms of law), and whether the effects of legal norms are socially desirable (in terms of EAL). For example, is mandatory peaceful dispute resolution through negotiation and settlement preferable to litigation and court ruling? This brings us to the question of criteria for making a value judgment, considering that the choice of criteria further determines the relation between EAL and legal science.

Lawyers are versed in justice, and they would most likely choose the principle of justice and/or fairness (Rawls, 1971: 60-65),[8] or the general principle of legal certainty over the

[8] The principles of formal justice imply equal treatment in equal matters, and unequal treatment in unequal matters. They are complemented by the principles of substantive justice, specifying which cases should be treated equally and which should be treated differently. The EAL literature most frequently refers to two principles of substantive justice, indicated by Rawls (1971): first, freedom is equally guaranteed to everyone as long as their

content and application of regulations.[9] Economists commonly use a different value rationale. They largely focus on efficiency, primarily allocative or Pareto efficiency (Pareto, 1906)[10] which concerns the satisfaction of individual preferences (Cooter, Ulen, 2016: 14). The problem with this criteria is that any legal change that produces even one loser would be judged as undesirable (Mackaay, 2013: 14). So, for practical policy-making reasons, EAL uses another criterion – the Kaldor-Hicks compensation test (Kaldor, 1939; Hicks, 1939). Its basic logic is that, if gains of a legal or any other change are large enough to offset the losses, the change would be considered desirable, even if no compensation actually occurs (Mackaay, 2013: 15). However, the principles of fairness and efficiency can collide. For example, the introduction of euthanasia into the legal system may ensure a more efficient allocation of resources (e.g. saving on treatment costs); however, is euthanasia ethically acceptable? A similar question may be raised about organ donation. Richard Posner, one of the founding-father of EAL, notes that there are different meanings of justice, such as distributive justice which commonly comes down to economic equality or even efficiency (e.g. the principle of unjust enrichment) (Posner, 1986: 25), while other EAL scholars state that the social welfare is the only criterion for evaluating legal norms (Kaplow, Shavell, 2006). However, Posner accepts the fact that there are still situations when it is not possible to apply only the principle of efficiency (Posner, 1986: 25-26). At the very least, legal and economic approaches are complementary since economics provides mathematical theories (such as price theory or game theory) and empirical methods (statistics and econometrics) for analyzing the effects of the law on human behavior (Cooter, Ulen, 2016: 3). As law has not developed its own empirical methods yet (Lawless, *et al*, 2010:2), borrowing them from economics can be quite useful in analyzing the effects of legal norms on human behavior.[11]

The Posnerian EAL direction follows the tradition of neoclassical economics as the science of rational (economic) choice (Posner, 1986). The basic assumptions underlying this tradition are: 1) resources are limited and have alternative uses; 2) human needs are unlimited; 3) people behave (choose) rationally (Begović, Labus, Jovanović, 2013: 36). The third assumption (rational behavior) is methodological by nature, which means that there is a convention among economists that people behave in such a rational way. However, rational behavior has caused and continues to cause controversy in scientific circles. For this reason, an increasing number of researchers endeavor to use **empirical methods** to prove whether people behave rationally. It has ultimately resulted in the development of Behavioral Economics.

Behavioral Economics (abbr. BE) is a branch of economics that provides a framework for understanding how people actually make decisions (Teitelbaum, Zeiler, 2018). These may be decisions in the economic sphere (e.g. decisions of producers), legal sphere (e.g.

behavior does not endanger the freedom of others (the concept of negative freedom); second, social and economic inequalities can exist in a society if they are likely to benefit all members, especially those who receive less than others. Fairness implies the adjustment of formal justice to the circumstanes of each specific case. Thus, judges should also show a sense of fairness by weighing the circumstances of each specific case.

[9] See the definition in: https://www.lexisnexis.co.uk/legal/glossary/legal-certainty

[10] The Pareto efficiency criterion means that a change leads to a Pareto improvement if at least one individual will be better off without making others worse off. When no further improvements are possible, there is a Pareto optimum (Pareto, 1906).

[11] We may refer to the empirical research from 2003 (Landes, 2003) which reveals that law-and-economics scholars conducted fewer empirical studies than economic scholars. One of the reasons is that law-and-economics scholars are more likely to choose theoretical projects than the empirical ones because the former hold out the prospect of greater rewards and lower costs (Landes, 2003: 168 and elsewhere).

decisions of litigants) or political sphere (e.g. decisions of bureaucrats). It may be more precise to say that BE studies and describes the decisions of individuals in different social contexts (Mojašević, 2020: 131-145). The study of decisions in the legal sphere generated the development of a special scientific and empirical discipline: **Behavioral Law and Economics** (Korobkin, Ulen, 2000: 1051-1144) which investigates *the legal implications of real, not hypothetical, human behavior* (Jolls, Sunstein, Thaler, 1998: 1476). BE and BL&E rest on realistic assumptions about human behavior, thus building a "real human" model. Those behavioral assumptions are: bounded rationality, bounded willpower, and bounded self-interest (Jolls & all, 1998: 1476). But, BL&E differs from BE in terms of predicting how law and legal institutions influence human behavior. To accomplish their tasks, BE and BL&E rely on behavioral insights. Behavioral insights entail empirical knowledge about what motivates people, how they make decisions, and how they make moral judgments (Zamir, Teichman, 2018: 7). Thus, BE draws upon psychology and uses its insights to investigate decision-making processes. This is supported by the fact that one of the founders of BE is a psychologist Daniel Kahneman, along with a lawyer Kass Sunstein and an economist Richard Thaler. The intellectual basis for the development of this new discipline was the ***Nudge Theory*** (Thaler, Sunstein, 2008) which introduced two new concepts: *nudge* and *choice architecture*. *"Nudge"* is a mechanism of steering people toward the right choices and/or better decisions from the point of view of decision-makers (Thaler, Sunstein, 2008: 5). The implicit assumption behind this rationale is that people do not make perfect decisions; in fact, they are prone to predictable cognitive biases in reasoning and decision-making (see: Samson, 2022: 142-170). *"Choice architecture"* means organizing the context in which decisions are made (Thaler, Sunstein, 2008: 3). Thaler and Sunstein state that politicians who design ballots for elections or doctors who prescribe alternative medical treatments for their patients act as choice architects. In a legal context, choice architects can be judges, mediators and lawyers (Mojašević, 2021: 80-83).

Traditional scholars usually try to add a "branch", regulating a narrow group of legal relations, to the "tree of legal science". Thus, with the development of social relations, "the tree of law" increasingly grows new branches of law, such as economic law, data protection law, etc. Can behavioral law be a branch of legal science? Given the fact that it includes the term "law", behavioral law should be a branch of legal science whose subject matter are the effects of legal norms on people's behavior. Human behavior is the subject matter of study in other disciplines, especially psychology and economics. Notably, law is a behavioral system because it tries to shape human behavior: to regulate, encourage and direct it (Ulen, 2014: 93). Yet, the development of new scientific knowledge in behavioral science has largely contributed to the change of paradigm in shaping human behavior, which increasingly moves away from the traditional one based on the threat of sanctions.

Behavioral Law originates from BL&E, which emerged from L&E, which is rooted in Economics. It follows that the development of Behavioral Law initially started in the field of Economics. However, in recent decades, numerous behavioral pieces of research, combining different social science methodologies, have gone beyond the economic approach and economic methodology (Engel, 2014: 125-142).[12] In general, it may be designated as the **social science methodology.** Therefore, Behavioral Law aspires to become a separate discipline with the aim of systematizing behavioral knowledge in law.

[12] For a review of different empirical methods in BL&E (field evidence, survey data, vignette, and lab experiment), and their pros and cons, see: Engel, 2014.

Certainly, the success of the behavioral program in law depends on the adoption of high-quality methodological standards (as in other empirical disciplines, such as criminology or law and psychology), and the development of discipline-specific empirical methods (Engel, 2014: 125-142). The strength of Behavioral Law lies in its insights which find their application in devising various legal policies, thus creating **behavioral law policy** (crime prevention policy, family and population policy, etc.). The future of Behavioral Law certainly rests on the strength of empirical research, whose credibility will radically change the traditional view of law and legal sciences.

4. LAW AS AN ALGORITHM: THE ROLE OF EMPIRICAL METHODS

The role of empirical data in legal research has significantly changed along the lines of the digitalization process, which underpins all levels of contemporary reality, including the legal sphere. The elements of new trichotomy of legal research are: text-driven law, data-driven law and code-driven law.[13] The foregoing trichotomy emerged as the result of an attempt to transform legal norms into a machine-readable algorithm for the purpose of coding/programming legal norms and applying them in the digital discourse. Differences among the elements of this trichotomy generate distinctive methods of legal presentation and legal reasoning: text-driven law is based on open-textured concepts (Barker, 2017: 4);[14] data-driven law applies statistical methods and closure, whereas code-driven law logic and logical closure are instrumental (Hildebrandt, 2020: 67-84).[15] The objective of the latter two types of legal research is the 'algorithmization of law'. Algorithmization is a process that allows the text of the legal document to be translated into a format that is understandable to software developers. Namely, legal norms embodied in natural language and contained in legal documents may be converted into algorithms in some stages of the legislative process (implementation, monitoring, control, interpretation). To this end, the use of the following methodologies is proposed: design of pseudo-code, application of formal logic's symbols and flowchart. Successful conversion of legal prose into code requires cooperation between lawyers and programmers. Algorithmization shall convert legal text from prose to code, while preserving its validity and efficiency (Cvetković, 2021: 15-34).

Legal rules in the form of text **(text-driven law)** cannot be formalized to its full extent; the reason lies in the interpretation of a legal norm as an indivisible part of its application. A legal norm is not isolated information in the sense of line of order contained in a program code; it is part of the structure of interconnected rules forming a complex legal system. Text-driven law interpretation is performed by humans; different interpretations are possible because the meaning of legal prose is open-textured. For this very reason, legal

[13] Text-driven law is traditional format of legal norms written in the prose. Data-driven law uses description and prediction to provide for legal advice and legal decision-making. Code-driven law either translates or directly writes legislation into a computer code. See: https://www.cohubicol.com/about/code-driven-law/

[14] Vecht (2020) notes that "Concepts are 'open-textured' if it is unclear whether they apply to some objects or not, not because of a vagueness in the concept but because the objects are new and unexpected in some way, and the concept is simply not capable of handling this odd case". This concept is *mutatis mutandis* applicable in legal discourse since the legal norm shall have a certain level of vagueness (see more in: Shauer, 2013). Code-driven law and data-driven law are part of Artificial Legal Intelligence, the label for all technologies capable of handling law-related tasks which were previously handled by humans.

[15] The issue of code-driven and data-driven law is upgraded with the problem of data-driven and code-driven normativity.

prose has a limited capacity to be presented in the algorithm (and further in the program code). The basic limitation is the reduced ability to convert complex legal standards and concepts into a program code. The major issue is how to codify behavior that is in line with standards such as "reasonableness", "best effort" or others used in legal texts. Translating them into a code or reducing them to an algorithm formula is difficult, if possible at all. The current level of development of Artificial Intelligence technology cannot provide for translating all contract clauses into the language of a program code. Many disputes based on written documents have their roots in the failure of creators to clearly define their meaning, but sometimes this omission is intentional (to ensure the flexibility of the norm in a given social, political, economic or other legally relevant context).

Code-driven law is defined as a set of rules articulated in computer code. The precision and adequacy of rules in the code-driven set of legal rules depends on empirical issues, i.e. whether the relevant rules and facts are considered and formalized correctly. The core idea behind code-driven law is based on the principle of defining calculation instruction set by a programmer for solving legal problems; information about the facts is fed into the computer, which uses it in order to recognize the relevant legal rules and calculates whether they have been fulfilled (Ashley, 2017: 38). The main methodological approach is deductive; what is needed is the existence of abstract rule structures which can then be applied (via deduction) in the coding environment. This requires a step-by-step translation (parsing) of the content of the norm concerned in order to be "driven" by the code lines. To illustrate, in a programming language, the word "delivery" is seen only as a "string",[16] not the label for the seller's obligation to deliver the goods to the buyer; "delivery" in a programming language is an object that requires formalized instructions and the definition of sequences of actions aimed at delivering goods from the seller to the buyer. The computer does not read the legal prose in the context of the written text but analyzes legal prose by parsing it, detecting patterns, and defining statistical data on the analyzed text. The modeled knowledge of various parts of the legal application process can also be mapped by using network graphs (Williams, 2022)[17] as well as flowcharts.

The prerequisite for being able to depict the process of applying a legal norm in a deductive system is to understand it as a logical process. This process should be carried out in a logical conclusion procedure, i.e. the legal syllogism. The legal syllogism deals with an abstract type of conclusion, which can be right or wrong, i.e. it represents the process of applying the law in a formal-logical manner (Wolff, 2022: 51). However, the condition for preserving functional equivalence between the application of law applied in traditional ("analogue") manner and the application of law in the format of a programming code is to express the legal norm in the form which is intelligible for the software developer, and thus eligible to be used as the specification for creating a program code. Accordingly, formalization/algorithmization designates the process of replacing natural language (written text) with symbol signs intelligible for program designers. A major hurdle in this process is identifying and applying a model of logical-formal legal language. The language of law is complicated because it includes many terms that are not suitable for the syllogistic

[16] In any computer programming language, a string is a sequence of characters used to represent text.

[17] The structure of a contract can be modeled as a network in which the terms of the contract are the nodes of the network and the interactions between the terms are the links (see: Williams, 2022).

approach.[18] The language of logic should be as close as possible to the informal language of law. In order to evaluate a statement in natural language, it must first be formalized, i.e. translated into the language of formal logic. Logic, in this sense, relies on a set of symbols. The legal rules can be converted into the form of propositional and predicate logic (Allen, 2013: 1-48). The basic concepts of propositional logic are a statement, truth value of the statement, and logical conjunctions (Madarász, 2012: 8). Predicate logic is an extension of propositional logic which can designate objects and properties of individuals in the form of statements, put them in a mutual relation, and define whether statements are valid for everyone, none or some of applicable cases (Hage, 2006: 69).

In addition of Code-driven Law, the "empiricism" of legal research is reflected in the importance of data collected via digitalization process of legal processes and implementation of norms. "*Big data*" is understood as the possibility, based on the digitization of large parts of the economy and society and the associated rapid growth in available data, to obtain value-adding and decision-relevant knowledge by collecting, storing and evaluating any data at low marginal costs and, if possible, to automate such data and use it in real time (Herbert, 2014: 728). Big data can be used to create a data-driven basis for decision-making, with the help of which better results can be achieved than with traditional data analysis. Data is the smallest unit of machine-readable coded information. The amount and quality of such data is decisive for the quality of the result of Big data analysis.

Data-driven law entails the possibility of the Artificial Legal Intelligence system (Hildebrandt, 2018: 12)[19] to function as a framework for automatic decision-making or predictions by using the statistical methods. In contrast to code-driven law, data-driven law is based on inductive methodology of finding statistical solution. Legal closure based on Big data analysis is the result of probability calculations achieved on the basis of pattern recognition, which recognize features in data and evaluate them according to the frequency and proximity of their joint occurrence with unknown data. In addition to the data-driven law, there is another structure using Big Data for the purpose of getting relevant data in order to enable adequate implementation of legal rules in algorithmic form: *data-guided law*. This structure is based on using the data set from the domain in which the law will be applied ("training data set" for the IT system concerned) (Sileno, 2022: 14). There are specific risks attached to both enlisted data-based structures used in the function of enabling adequate implementation of legal norms concerned, such as: legal dependency, insufficient amount of data, inappropriate data quality, and discriminatory effect of data-driven legal closure.

Weighting up facts, legal arguments, interpreting vague legal concepts and restricted possibility for parsing the legal norm into the code-eligible elements is a hurdle for algorithmization/formalization of legal prose into a computable form. Therefore, the algorithmic application of law by using either a deductive (code-driven) or an inductive (data-driven) approach cannot (for the time being) incorporate the foregoing aspects into the relevant analysis and subsequent application of the norm in the digital environment. Human decision-making is still required for further development of the law.

[18] Rule-based algorithms cannot make subtle differences as it is impossible to tailor algorithms to evaluate each and every disparity variant of possible situation; there are simply too many variants that a rule-based algorithm would have to include in its programming in order to be able to make decisions like a human being.

[19] The Artificial Legal Intelligence (ALI) system is based on an algorithmic understanding of law, celebrating logic as the sole ingredient for proper legal argumentation. For the definition of ALI, see: Hildebrandt, 2018: 12.

5. CONCLUSION

This Chapter presents the methodology of three distinctive disciplines: criminology, economic analysis of law, and algorithmization of law. Our research indicates that criminology is a well-established subsidiary legal discipline which has developed a specific criminological (empirical research) method but also applies appropriate methods shared by other scientific disciplines. Criminology is a scientific and academic discipline that is recognized among legal scholars and practitioners, and its presence and further development within legal science is indisputable.

The same cannot be said about the Economic Analysis of Law (EAL), considering that it is originally an economic discipline, which "shakes the foundations" of standard legal methodology and aspires to develop into an independent scientific discipline. As expected, the development of this discipline has generated resistance from legal scholars, which has weakened over time, especially with the development of behavioral law studies that can fit better into traditional legal studies. Resistance to the application of economic methodology comes from two sources: 1) insufficient economic education of lawyers (Cooter, Ulen, 2016: 1-3), [20] and 2) an ideological factor regarding the alleged superiority of the EAL over standard legal science (Posner, 1986: 24).[21] Regardless of the resistance, we see the Economic Analysis of Law and its extension in the form of behavioral studies as part of broader legal studies. This stance may be supported by two reasons: first, there is an imminent need for a deeper study of legal issues from this multidisciplinary perspective; second, the natural development of a scientific discipline always leads to breaking through the existing barriers. In this regard, we underscore Kuhn's well-known position that the success of a new theory in conflict with the old one or "a paradigm change" (as noted by Kuhn) depends not only on empirical findings but also on the ability of proponents of the new theory to attract as many supporters as possible; in Kuhn's opinion, this is achieved by occupying key positions at universities and editorial boards of leading journals in the given field (Kuhn, 2012). Diverse forms of empirical legal research seem to be gradually changing the legal paradigm, despite the flaws and controversies that accompany this field. The main critique[22] refers to the ways in which empirical legal research narrowly transplants methods from other social sciences into law; in particular, it refers to excessive reliance on quantitative methods while neglecting the qualitative ones, as well as discarding social science theory and its concepts (e.g. power, inequality, identity, cooperation, conflict, etc).

The "algorithmization of the law" indicates the aspiration to ensure reliance on empirical methods in law, primarily statistical methods and techniques, in order to meet the needs of modern man anchored in technology. The emerging area of "algorithm law" must rely on behavioral law because artificial intelligence is not sufficiently developed to make decisions like humans. However, the understanding and implementation of empirical methods in law shall in principle take into account the following: firstly, the need of using relevant data in parsed/pulverized format in order to enable it usage in the process of program code development (in the "code-driven law" format); secondly, the origin, veracity, representativeness and amount, among others, as the features of data used in the process of norm algorithmization (in the "data driven law" format).

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[20] This situation has dramatically changed in the second part of the 20th century, see: Cooter, Ulen, 2016: 1-3.
[21] For instance, it is considered that the EAL represents *conservative political bias*, see: Posner, 1986: 24.
[22] For more details, see: Pavone, Mayoral, 2020: 12-14.

All in all, these three disciplines have a lot in common as they use sound empirical research methods, primarily the statistical method. Further development of empirical methods mainly rest on closer cooperation among researchers from these disciplines. It will contribute to expanding and deepening the existing legal knowledge, but such collaboration also calls for changing the methodological paradigm in legal research. These changes are dictated by the emergence of empirical legal research (e.g. in criminology), the development of the Economic Analysis of Law (especially its behavioral law perspective), and the digitization and algorithmization of law, all of which clearly confirm the necessity and inevitability of using empirical research methods in law.

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ZNAČAJ EMPIRIJSKIH METODA U PRAVNIM ISTRAŽIVANJIMA: SLUČAJ KRIMINOLOGIJE, EKONOMSKE ANALIZE PRAVA, I PRAVA KAO ALGORITAM

Ovaj rad prikazuje empirijske metode primenljive u kriminologiji, ekonomskoj analizi prava i pravu oličenom u formi algoritama. Prvi deo rada prikazuje empirijske metode koje se koriste u kriminologiji. Fokusirajući se na osnovne karakteristike kriminološke metodologije, ovaj deo rada razrađuje fundamentalna i primenjena istraživanja. Drugi deo rada fokusira se na interdisciplinarnu metodologiju primenljivu u oblasti ekonomske analize prava (EAP) i ispituje prateće kontroverze i izazove izazvane razvojem biheviorističkih istraživanja koja su suštinski promenila nalaze EAP. Treći deo rada elaborira značaj empirijskih podataka u kontekstu prava kao algoritma i „nove trihotomije" koja odražava prirodu podataka: prava vođenog tekstom, prava vođenog podacima i prava vođenog kodom. Trihotomija nastaje kao rezultat pokušaja da se pravne norme transformišu u mašinski čitljive algoritme, kao i da se obezbedi primena ovih modaliteta u pravnom kontekstu. Autori raspravljaju o značaju empirijskih metoda u pravu i „proširenju" standardne pravne metodologije.

Ključne reči: *empirijski metodi, pravna istraživanja, kriminologija, pravo i ekonomija, pravo kao algoritam, veliki podaci.*

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Review Paper

BUBANJ MEMORIAL PARK: A MEMORIAL TO THE VICTIMS OF NAZI TERROR AND MASS EXECUTIONS IN WORLD WAR II

UDC 725.94:355.48(497.11 Niš)"1941/1945"
94(100)"1939/1945"

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Abstract. *The "Bubanj" Memorial complex, locate on Bubanj Hill at the outskirts of Niš, was built with the aim of marking the site of mass executions of the innocent victims of Nazism in the Second World War. It is a symbol of suffering but also of resistance, struggle and desire for freedom, embodied in the symbolic depiction of three huge clenched fists. The "Three fists" symbolize resistance and defiance against fascism. They are a recurrent reminder of the importance of freedom as the supreme human value. The paper first briefly presents the eugenics policy, which was the ideological basis of Nazism and ferocious Nazi crimes. Then, the authors outline the historical circumstances leading to the establishment of the Concentration Camp Crveni krst in Niš and Bubanj Hill as the execution site. The central part of the paper focuses on the construction of the Bubanj memorial complex, its importance in the post-war Yugoslav society, and its current position on the cultural map of Serbia. While calling attention to the agony sustained by victims of Nazi terror in these parts of Serbia, the authors highlight the strength and resilience of the people who endeavored to preserve and defend freedom and right to dignified life as ultimate human values.*

Key words: *Bubanj Memorial Park, "Three fists" monument, mass executions, World War II*

1. INTRODUCTION

The Nazi Germany invasion of Europe and atrocities committed during the Second World War caused enormous destruction and human suffering. Regardless of the fact that the Nazi ideology seems to have been defeated in the modern world, in recent years, we may observe different trends of reactivating the Nazi ideas by the extreme right-wing neo-Nazi groups in many countries under the guise of nationalism or patriotism (Mirić, 2015:

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114). Nowadays, considering the tendency of relativisation of fascist and Nazi crimes, it seems important to raise awareness of young generations about the importance of the anti-fascist struggle for freedom.

Monuments are silent witnesses of that struggle, which serve as reminders of the great sacrifices that human beings made for freedom. The Bubanj Memorial Park, renowned as the "Three Fists" monument on Bubanj Hill at the outskirts of the City of Niš (Serbia), is one of the memorial sites testifying about the struggle, sacrifice and suffering of the people in South-eastern Serbia during the Nazi regime. The Bubanj Memorial reminds us that racist ideologies about the supremacy of one nation, the extermination of "inferior" races, and the destruction of cultural diversity should forever remain defeated by the ideas of freedom, peace and tolerance. The memory of the Bubanj shooting victims obliges us to preserve and nurture freedom and the right to dignified life as the supreme values of humanity.

First, we briefly present the eugenics policy, which was the ideological basis of Nazism and ferocious war crimes. Then, we present the historical data on the establishment and operation of the Concentration Camp *Crveni krst* in Niš and the Bubanj Hill execution grounds. In the central part, we focus on the construction of the Bubanj Memorial complex, its importance in the post-war society, and its current position on the cultural map of Serbia. While calling attention to the Nazi atrocities in this part of Serbia, we highlight the strength and resilience of people who struggled to preserve and defend freedom and right to dignified life as ultimate human values.

2. Eugenics as the Ideological Basis of Nazi Germany

Eugenics was the basis of Nazi Germany policy. This policy may be traced through the development of criminology in Germany (Kostić, 2011). Etymologically speaking, the term *eugenics* (*eu*-good and *genera*-offspring) does not have negative connotations; it entails racial hygiene as one of the most important branches of social policy, i.e. the science examining the conditions that lead to the creation of physically and socially healthy offspring, and prevent the birth of unhealthy and unfit offspring (Vujaklija, 1986: 303). Eugen Fischer, the leading Nazi Germany eugenics researcher, claimed: "It is a rare and special good fortune for a theoretical science to flourish at a time when the prevailing ideology welcomes it, and its findings can immediately serve the policy of the state" (Rafter, Posick, Rocque, 2016: 198).[1] Thus, two scientific projects were developed within the framework of Nazi-oriented criminal biology: eugenics and racial hygiene. These two terms are frequently used as synonyms. The eugenics project aimed to improve the quality of the "the human race" by encouraging "superior" people to reproduce ("positive eugenics") and discouraging the reproduction of "inferior" ones ("negative eugenics") by forced exile, marriage bans, institutional confinement, sterilization or elimination. Generally speaking, eugenics was aimed at preventing the reproduction of all people having hereditary defects, for the benefit of all. During the 1930s, Jews were among those who were included in eugenics projects (in Germany or elsewhere); criminologically speaking, it led to the identification of hereditary criminals of all races and ethnicities, for the purpose of preventing their further reproduction. On the other hand, the racial hygiene program was aimed at identifying ethnic and racial groups, such as Jews or Roma, for the purpose of exterminating those of "impure "blood and ensuring the purity of

[1] Rafter, Posick, Rocque, 2016:198, quoted after Müller-Hill, 1988:18.

the “Aryan race”. From a criminological point of view, racial hygiene coincides with eugenics in the part where specific racial-ethnic groups were identified as genetically criminal entities (Rafter, 2008: 293; Kostić, 2011).

In the development of criminology in general, the field of criminal biology seems to be under-researched and it still raises numerous questions, such as: how the ideas of criminal biology fit into the explanations of crime committed during the Nazi era; what were the consequences of "Nazi" criminology, etc. Nevertheless, an insight into the former periodization of the development of criminology in Germany indicates that there is no single definition of the concept and the subject matter of its study, apart from precisely determined individual aspirations or development directions. Thus, there is a clearly stated methodological position that the process of defining the prominent direction or the science as a whole is necessarily coloured by "defining the content of its subject matter, the methods used in studying the subject matter, different ideological conceptions in examining natural and social phenomena, as well as its independent position in the system of sciences" (Konstantinović- Vilić, Nikolić-Ristanović, 1998: 4).

The immediate detrimental consequence of such pernicious ideological views on eugenics and the hegemony of the "Aryan race" were infamous Nazi concentration camps, mass extermination of “inferior races” and mass executions of innocent people in countless killing grounds throughout Europe. As human beings, we are all obliged never to forget the victims of these heinous war crimes. In the next part of the paper, we will present two infamous places of human suffering in the South-eastern Serbia during World War II: The Concentration camp *Lager Nisch* (at *Crveni Krst*, Niš) and the mass shooting grounds on Bubanj Hill at the outskirts of the City of Niš. These two places of human suffering and mass executions were also the places of struggle for freedom and the right to a dignified human life.

3. Bubanj Hill: a Place of Suffering and Defiance

The Concentration Camp at *Crveni Krst* (*Lager Nisch*) and the monumental complex of the Bubanj Memorial Park at the outskirts of Niš are inevitable reminders of the Nazi terror during World War II. In the tragic circumstances, the inextricable link between the Concentration Camp as a place of torture and suffering and Bubanj Hill as an execution ground has drawn a huge interest of local historians endeavoring to shed more light on the historical circumstances that led to establishing these two memorial sites as well as on the actual number of victims and their social and ideological characteristics. In this part of the paper, we present the historical facts whose validity the researchers commonly agree upon, and which are relevant for understanding the reasons for establishing the Bubanj Memorial Park and its development.

The Concentration Camp located near the *Crveni Krst* railway station in Niš (Gr. *Anhalter lager-Nisch)*, was established in April 1941 as a temporary detention centre for the Yugoslav Royal Army prisoners of war. It was quartered in the warehouse building of the former "*Miloš Obilić"* cavalry regiment barracks (built in 1930). In June 1941, it was designated to serve as a prison for captured political prisoners and opponents of the Third Reich (Ozimić, 2011: 3). The facility was completely adapted by September 1941 and officially instituted as a concentration camp by the *Feldkomandature* 809– Niš, based on the superior command to suppress the “Serbian insurgent movement" by taking urgent and ruthless repressive measures (hanging, shooting, taking hostages, deportation to concentration camps, etc.) (Milovanović, 1983: 62). According to the Report of the City Commission of the State Investigative Commission of SR

Serbia on War Crimes (1945)[2], more than 30,000 people were imprisoned in this concentration camp in the period 1941-1945 (Ozimić, 2011:37). The entire complex (1,5 hectares) was colloquially named the *Crveni Krst* Concentration camp.

Fig. 1 Nazi Concentration camp *Crveni krst* Niš (*Anhalterlager Nisch)* (1941-1944) *Source:* Archive photos of the *Crveni Krst* Concentration Camp (1942), IPCM Niš (Milovanović, 1988:70, 73)

From preserved primary historical material, published and unpublished eye-witness testimonies, and recorded conversations with survivors, we learn that the citizens of Nis watched with horror and immense grief the processions of tortured prisoners being taken to the concentration camp. Milovanović noted that "Germans, Bulgarians and members of the Quisling collaborators brought the non-combatant population into the camp by trucks, mainly elderly people over the age of 70 and children under the age of 10" (Milovanović, 1983: 66). In early October 1941, the German embarked on the mass persecution and detention of Jews and Roma from Niš and south-eastern Serbia (about 800 men, women and children in total). In mid-October 1941, it was followed by mass arrests of about 150 renowned citizens of Niš (doctors, pharmacists, lawyers, political leaders, retired officers, merchants, priests, teachers, etc.), and detention of communists and partisans in December 1941 (about 100 in total); hundreds of Serbs and Jews were imprisoned and held hostage for retaliation purposes. The conventional Nazi policy was to shoot 100 citizens for a killed German soldier and 50 citizens for a wounded one (Milovanović, 1983: 63, 91, 97). Prisoners performed different jobs in the camp or grave-digging works at the Bubanj execution grounds. Some prisoners were held in the camp temporarily, until being deported to other concentration camps (in Serbia, Poland, Germany) or forced-labour camps (in Austria, Germany, France, Sweden), or most frequently until being mass executed on Bubanj Hill (Ozimić, 2011: 5, 9, 32). The mass persecution and detention of Roma people from Niš and surrounding towns ensued in October 1942 (Milovanović, 1983: 195).

[2]The Report of the City Commission of the National Investigative Commission of SR Serbia on War Crimes committed by the Occupation and Collaboration Forces, no. 552 of 22 February 1945, Niš (Archives of the Institute for the Protection of Cultural Monuments- IPCM, Niš)

Fig. 2 a) Taking prisoners (Roma, Jews and Communists) to the Concentration camp *Crveni krst* Niš (Source: Historical Archives Niš), and b) the German Shooting Squad at Bubanj execution site (Source: The National Museum Niš)

The number and the structure of prisoners in the camp was constantly changing. The prisoners arrived to the Concentration camp *Crveni krst* Niš from all parts of Serbia, and very few of them were kept there for more than five months. In line with the German instructions on the organization and management of concentration camps, prisoners were classified into several groups: 1) prisoners sentenced to death in urgent proceedings in mock tribunals and serious offenders who could be shot in retaliation; 2) prisoners who were on the list for deportation to a concentration, internment or forced-labour camp; 3) prisoners for whose conviction there was insufficient evidence; and 4) detainees who were to be released (Milovanović, 1983: 66).

According to Milovanović, The Concentration camp at *Crveni krst* Nis was not a large one, as it could house around 2,000-2,500 prisoners at a time. It was guarded by 20 German soldiers and several German sheppards. Due to the constantly increasing number of prisoners, the Chief of the Gestapo in Nis selected the 6-ha space on Bubanj Hill (a former military practice site 3 km from Nis) to be used as the execution site (Milovanović, 1983: 67, 75).

According to the Report issued by the City Commission of the National Investigative Commission of SR Serbia on War Crimes (1945), the first shooting of a group of hostages at the Bubanj execution site took place in January 1942.[3] It is certain that the first mass shootings of the concentration camp prisoners occurred in the period from 16th to 20th of February 1942, when more that 1,000 people (Serbs, Jews and Roma) were killed at the Bubanj execution site in retaliation for the successful escape of 105 prisoners from the *Crveni Krst* Concentration camp on 12th February 1942 (while 42 prisoners were shot in the endeavour to flee). This event was recorded as the first major escape from a Nazi concentration camp in the occupied territory of Europe (Ozimić, 2011: 24). The shootings at the Bubanj execution site continued until the end of the war, but never in such large numbers.

Referring to the Report of the City Commission for War Crimes committed on Bubanj Hill (1945), Milovanović noted that the Germans destroyed all documentation about the Concentration camp at *Crveni krst* Niš and the number of people executed on Bubanj Hill; the official documents and announcements on the list of people to be shot were rare or fragmentary. In August 1944, immediately before liquidating the Concentration camp and retreating, the Gestapo took action to hide the traces of mass killings and the number and identity of victims by destroying the remains of the victims which were, as a rule, buried in common (mass) graves.

[3] This document also contains a record that the first shootings of individual detainees from the improvised prison at *Ćele Kula* (the Scull Tower) were executed on Delijski Vis (Delia Hights) from July to October 1941, and that their bodies were buried at the Military Cemetery. (Archives of the IPCM Niš).

The Concentration camp at *Crveni krst* Niš was officially liquidated on 14 September 1944.[4] In 1967, the former campgrounds were turned into the "*12th February*" Memorial Museum, to commemorate the date of the first escape from a Nazi concentration camp in Europe. In 1979, it was declared a Cultural Monument of Exceptional Importance (EHRI, 2012).[5]

ОБЈАВА

30-5-1944 године у 1³⁰ часова исклизнуо је из шина немачки војни воз Београд-Софија код Витковца (срез моравски Житковац) услед подметања три експлозива од стране једне комунистичке банде. После тога почели су комунисти да пуцају на путнике из пушака и машинских пушака као и да бацају ручне гранате. У току овог комунистичког напада рањено је 16 немачких војника и два бугарска, док је 8 немачких војника погинуло.

Као одмазда за тај напад према наређењу Војног заповедника за Југоисток стрељано је 20-VII-1944 године следећих 50 комунистичких талаца:

1. Милорад Костић из Ваљева;
2. Радослав Крстић из Ваљева;
3. Душан Томчић из Синковца;
4. Милан Кагић из Плавица;
5. Младен Даниловић из Параге;
6. Јакоб Стефановић из Св. Подрица;
7. Дамјан Иброцић из Ирига;
8. Драгутин Цорић из Бадуге;
9. Радован Јовић из Корацизе;
10. Љубисав Филиповић из Гаре;
11. Нећо Бановић из Гласинца;
12. Милош Пирић из Марибора;
13. Милутин Лушић из Гор. Милановца;
14. Мамут Басовић из Пријепоља;
15. Ђорђе Јовичић из Београда;
16. Танасије Петровић из [illegible];
17. Саво Несовановић из Пападица;
18. Живота Петровић из Добре;
19. Димитар Прица из Вел. Петровог села;
20. Зима Радовић из Крушевица;
21. Лазар Живановић из Доњ. Ковиља;
22. Трифун Симић из Кос. Митровице;
23. Живојин Светковић из Обилића;
24. Драгољуб Ђурашковић из К. Митровице;
25. Ђура Радуловић из Рогозине;
26. Ђура Аталић из Сумешина;
27. Ђуро Куролт из Бихаћа;
28. Јово Закан из Грбавице;
29. Мирко Сечковић из Србобрана;
30. Милан Витас из Поштеља;
31. Павле Грговић из Струмице;
32. Јован Радовић из Борковића;
33. Владимир Лисуловић из Вел. Кикинде;
34. Радомир Јелачић из Грињева;
35. Милорад Стојановић из Лесковца;
36. Живојин Нисић из Прилипорца;
37. Душан Симаковић из Пр-боја;
38. Слободан Поповић из Ћуприје;
39. Љубомир Павловић из Пирамкуше;
40. Војислав Пешић из Пирамкуше;
41. Драгутин Пешић из Пирамкуше;
42. Алекса Алексић из Пирамкуше;
43. Рада Кошутић из Приштине;
44. Вида Савановић из Крагова;
45. Мирко Секерић из Рамин Сора;
46. Ђорђе Васовић из Грачова;
47. Лазар Сидић из Сувараца;
48. Властимир Недељковић из Г. Јајине;
49. Драгутин Ивановић из Куршумлије;
50. Тодор Јанковић из Куршумлије.

Fig. 3 Public Announcement of *Feldkommandature* 809-Nis: List of communist hostages to be shot in retaliation (July 1944). *Source:* The National Museum Niš

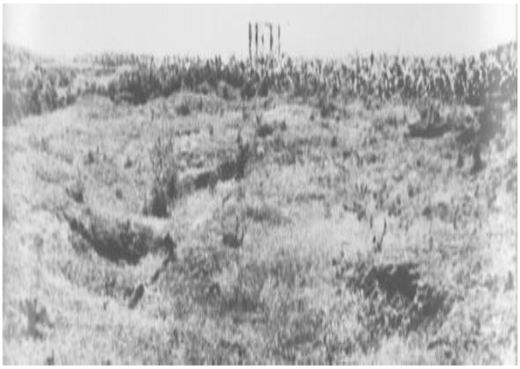

Fig. 4 Bubanj shooting and burial grounds (Feb.1945): Footage of the Commission for War Crimes, Pits and trenches where victims were buried, and later exhumed from and burnt in August-September 1944; *Source:* The National Museum Niš

At the end of the war, the City Commission for War Crimes (February 1945) established that the Nazis excavated the corpses, placed them in huge piles several meters wide, poured them with inflammable substance and burnt them, covered the pits and trenches with soil, and

[4] Logor *Crveni krst* Niš (blog), last updated 2017; http://logorcrvenikrst.wikidot.com/start; http://logorcrvenikrst.wikidot.com/zrtve; http://logorcrvenikrst.wikidot.com/venceslav-glisic-o-logoru (12.12.2022).
[5] EHRI (2012): Muzej "12. februar"/ Memorial Museum *12thFebruary* - former Concentration camp *Crveni krst* Niš, the National Museum Niš, 2012; https://portal.ehri-project.eu/institutions/rs-006503 (accessed 12.12.2022)

leveled the terrain with tanks and bulldozers. According to eye-witness testimonies, the process of concealing the evidence of the committed war crimes took more than two months while the burning of victims bodies alone took more than three weeks; citizens could see the smoke and smell the stench of the burning corpses for months (Milovanović, 1983: 77). In early September 1949, under the pressure of fleeing in front of the advancing liberation army units, the Germans blew up the remaining mass graves with mines and explosives (the IPCM Niš Archives). Considering the number of pits and trenches, their length, width and depth, several layers of burnt corpses, and the remains of human bones, hair, burnt clothing items and individual possessions, the Commission concluded that there was a huge number of victims (Milovanović, 1983: 77).

The statistical data compiled in recent research (Ozimić, Dinčić, Simović, Gruden-Milentijević, Mitić, 2014) cast more light on the tragic events, primarily through narrative account of survivors and eye-witnesses whose recollections helped identify some victims of Nazi terror, but the exact number of victims is most unlikely to be established with precision, given the lack of primary historical and documentary sources that the Nazis destroyed before retreating.

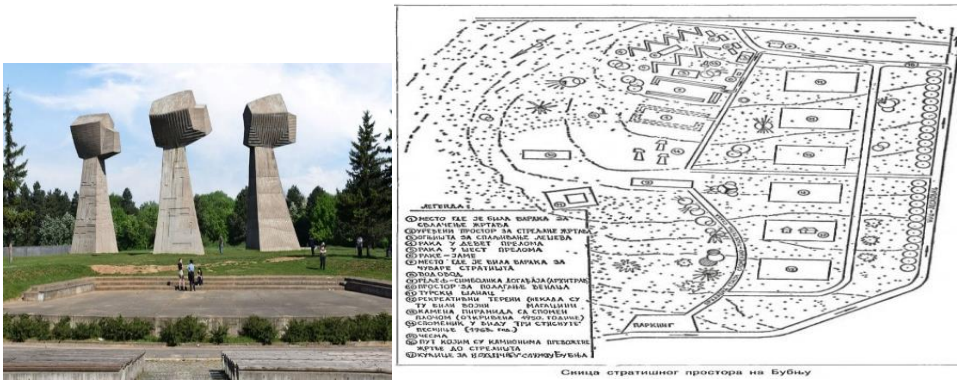

Fig. 5 Bubanj Memorial Park: A sketch of the Bubanj execution grounds (IPCM Niš). a) Bubanj Memorial Park; b) A Sketch of the Bubanj execution grounds *Source:* Porta1 105.rs, https://105.rs/spomen-park-bubanj (accessed 12.12.2022); Milovanović, 1988:78

The archives of the Institute for the Protection of Cultural Monuments (IPCM) in Niš contain documentation on material traces that confirm the exact positions of mass graves (pits and trenches where the victims were initially buried and subsequently exhumed and burnt), the former location of barracks where the victims were stripped off their clothes and possessions, and the buildings made of solid material where the execution site guards lived. The documents also contain the results of probe soil survey and investigation of several sites where mass graves were suspected to have been located (the IPCM Niš Archives). Milovanović presents parts of official reports submitted by the City Commission on War crimes (1945) which depict the situation encountered during the on-site investigation of the Bubanj execution site in the period 16-18 February 1945. These reports were primarily based on the written records kept by the Commission members during the investigation[6] and eye-witness testimonies and recollections of the tragic events, individual human destinies and acts of courage and defiance.

[6] The report (16-18 February 1945) described the investigation site in detail: "At the very entrance, on the right-hand side, there is a burnt-down building made of solid material, with visible foundation and wall remains, where

4. BUBANJ MEMORIAL PARK: THE PLACE OF REMEMBRANCE

The first memorial to the victims of mass shootings at Bubanj execution grounds was a truncated stone pyramid (2.5m high), installed on 7 July 1950, at the initiative of the Association of Peoples' Liberation Army Veterans of the City of Niš. The inscription on the memorial plaque commemorates over 10,000 victims of Nazi terror from all parts of Serbia (Andrejević, 1975).

Fig. 6 The truncated stone pyramid, the first memorial to the Bubanj mass shooting victims (1950)

Fig. 7 The Bubanj Memorial Park (1963). *Source*: Archives of the IPCM Niš.

The importance of Bubanj execution grounds in the post-war society may be illustrated by the fact that the conceptual project proposal for the Bubanj memorial park was being pursued for almost ten years. Namely, after the first public call for the Bubanj monument failed to yield adequate results (*Narodne novine*, 24 July 1954)[7], the proposals in response to the second public call were evaluated in 1959. In view of the stance that the memorial was to be an expression of the past, present and future, the project committee decided to

the guards of the Bubanj shooting range lived. On the left to this building, at a distance of 80 meters, there are the foundations of a burnt-down barracks building where the victims were stripped of their clothes and possessions. In front of that building, along the entire length of the front side (55m long), there is a sloping rampart 2.5m high, in front of which there is a leveled field 55m long, 12m wide on the northern side, and 6m wide on the southern side. On the south side of this plateau, there is the entrance, allowing for the passage of trucks and transportation vehicles. On this terrain, on the entire northern and northeastern side, there are trenches and pits. The first trenchis broken into six smaller zig-zagging sections (54m long in total and 2,5m wide). Beyond that trench, and running parallel to it, there is another zig-zagging trench, broken into nine zig-zagging sections (25m long in total and 2.5m wide). Between these two trenches, there is a large pit (21,5m long and 2,5m wide). Towards the northeastern side of the first-mentioned trench, there are two pits (5m long and 3m wide each), one next to the other. On the northeastern side of the barracks, at a distance of about 30 meters, there are two pits, running one after the other; the first one is 20m long and 5m wide. The soil in these pits has caved in; the pits are of concave shape, with visible surface traces left by a heavy vehicle, most probably a tank with track threads. On the eastern side of the parapet which protected the barracks, there is a huge hearth (about 50m long and 3m) wide, and further on, near the guards' building, there is another hearth (3m in diameter). There are remains of burned human bones on both hearths. The charred bones show the structure of bone cells." The Commision further reported: "The probe survey of the pits (250cm in depth) shows that the soil in the pits located north and north-west of the barracks is loose; according to the witness accounts, Jews and convicts from the Penitentiry Insitution were buried here. In all trenches and pits, all the way to the bottom, there are small pieces of human bones and hair, glued with lime, as well as objects made of materials that do not decay or burn easily (cigarete holders, pipes, buttons). In some layers of soil, there are visible calcareous traces of ash and coal, and a stinking substance in large quantities near and at the very bottom; thus, the bottom layer is grayish in color and completely soaked in rotting substances of organic origin and foul stench" (Milovanović, 1983: 76-77).

[7] Narodne novine (1954). *Prvi konkurs za spomenik na Bubnju nije uspeo* (The first public call for the Bubanj monument was unsuccessful), *Narodne novine* (newspaper), 24. jul 1954, Niš, p. 1.

accept the proposed conceptual design of the sculptor Ivan Sabolić from Zagreb (*Narodne novine*, 27 July 1959).[8]

The Bubanj Memorial Park complex was envisaged as a composite structure which would symbolically depict the tragic events. The central monument "Three fists" was to be proportional to the size of the victims who were executed at the Bubanj shooting grounds. As noted in the elaboration on the proposed project by Sabolić in 1961, it was designed to be a symbol of eternal struggle, defiance, resistance and freedom. The three impressive clenched fists, raised towards the sky in a proud and threatening gesture, symbolize the call for rebellion and uprising of all free people against terror (Sabolić, 1961). According to the proposed idea, the complex was to be used as a functional public park, where future generations could enjoy the progress brought about by freedom (*Narodne novine*, 14 September 1963). The construction of the Bubanj Memorial Park started in April 1962; it was completed and ceremoniously opened on 14th October 1963, the date commemorating the liberation of Niš in World War II (*Narodne novin*e, 12 October 1963).[9]

Fig. 8 The horizontal white marble bas-relief at the Bubanj Memorial Park, Niš Source: The Institute for Preserving Cultural Monuments, Niš (2017); *Spomenik Database*, https://www.spomenikdatabase.org/nis (accessed 12.12.2022)

The Bubanj Memorial Park is a unique and monumental architectonic complex which encompasses a memorial trail and access paths, a horizontal frieze panel with a marble bas-relief, a paved plateau leading to the central part of the memorial complex, and the imposing "Three clenched fists" composition. The marble bas-relief contains a five-panel composition, an abstract depiction of oppression and atrocities committed by the Nazis and their impact on the people, including the German "killing machine" (shooting squads), standing victims lined up for execution, the fallen bodies of victims, fists of defiance and rebellion raised against oppression, and the ultimate victory embodied in the steadfast forward movement. Behind the marble memorial wall stretches a terraced plateau leading to the central part of the memorial complex: "Three fists" (16m, 14m and 13m high) bursting from the grassy surface towards the sky. The three clenched fists are powerful and universal symbol of defiance, resistance, human struggle for freedom and against injustice (*Narodne novine*, 12 October 1963).

Given the fact that Bubanj Memorial Park covers 47 hectares of forested land, including the central memorial area, its preservation, maintenance and landscaping has been an issue which has been the subject matter of considerable debates since its construction. In addition to the professional security service which would secure the monument itself, there was an

[8] Narodne novine (1959). *Ocenjeni radovi sa konkursa za podizanje spomenika na Bubnju.* (Evaluated project proposals submitted in response to zhe public call for the Bubanj monument), *Narodne novine*, 27. jun 1959, p. 1
[9] Narodne novine (1963). *Spomenik u brojkama* (Monument Statistics), *Narodne novin*e, 12. oktobar 1963, p. 3.

interesting proposal (in 1963) to entrust the park to the maintenance of the Scouts Association of Niš, who would establish their encampment in part of the forest and "work on maintaining, preserving and revitalizing the park, and above all on organizing activities aimed at promoting the development of the Bubanj memorial tradition" (*Narodne novine,* 14 September 1963).

The documentation of the Institute for the Protection of Cultural Monuments in Niš shows that the Bubanj Memorial Park was managed and maintained by different city institutions. While the records from the 1960s show a satisfactory financial standing, the records from the 1970s show that none of the local institutions had the financial capacity to maintain and adequately preserve the memorial complex. Although the mention of the Bubanj Memorial Park was part of the regular political rhetoric at the time, and although the organization of appropriate commemorative, cultural and youth events was a common mechanism of ideological promotion, very small sums of money were allocated for maintenance and preservation purposes. Thus, the overall condition of the entire memorial complex gradually deteriorated. In 1973, the Bubanj Memorial Park was awarded the status of a cultural monument of exceptional importance[10], in an attempt to secure regular funding for the memorial complex.

After the disintegration of the SFRY (1991) and during the ensuing civil wars (in the 1990s), there was a prominent rise of ethnic nationalism in the former Yugoslavia regions. Gradually, all communist-socialist symbols from the SFRY era were removed, cities changed their population structure, and not all WWII memorials were preserved. Thus, due to the artistic conception of the Bubanj Memorial Park, its universal symbolism and the power of the local people's emotional heritage, the "Fists" exceeded the ideology of the time when they were built.

Nevertheless, during the last two decades, Bubanj Memorial Park was neglected and excluded from the cultural map of Serbia, considering the fact that the society paid more attention to other historical periods more closely related to the Serbian national identity and heritage. This is a consequence of the ubiquitous historical revisionism that has been the dominant historical discourse from the beginning of the 1990s to the present day. Due to the relativization of the importance of the Second World War victims, both the anti-fascist combatants and the civilians killed during the Nazi occupation, citizens became disinterested in the symbolic and real value of this monument. As a result, the memorial site experienced considerable neglect, degradation and deterioration. Alongside with the neglected values of anti-fascism, Bubanj Memorial Park has been a victim of nationalist and extremist (neo-Nazi and fascist) subculture groups, whose members vandalized and desecrated the memorial to the innocent victims of Nazi terror by shocking graffiti celebrating and glorifying the perpetrators and collaborators of the war crimes committed on Bubanj Hill. Such highly detrimental and socially dangerous discourse undermines the historical and architectonic importance of this significant monument and perverts the symbolic and real meaning of the memorial in public.

Today, the memorial complex is no longer perceived as an important historical and architectural asset, nor a significant point in city life; the entire area is largely used as a picnic area and recreation ground. Notably, in 2017, the competent Ministry provided financial support for a rehabilitation of the Bubanj Memorial complex (renovation of access paths, seating and recreational areas, information boards, lightening, landscaping a video surveillance system, conservation of the memorial wall and bas-relief, etc (*Niške vesti*, 17 October 2017).[11]

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[10] Decision of the Institute for the Preservation of Cultural Monuments Niš, no. 695/1 of 30.5.1973, *Official Gazette SRS* no. *14/79*.

[11] *Niške vesti* (2017): Spomen-park Bubanj zablistao (Bubanj Memorial Park shines), M. Vodeničarski, 17. 10.2017; https://niskevesti.rs/spomen-park-bubanj-zablistao/

5. CONCLUSION

The Concentration camp *Crveni Krst* Nišand the Bubanj Memorial Park complex are historical and cultural monuments of exceptional importance. During the Second World War, these two sites were places of torture, suffering and mass execution, which bear witness of the cruelty and bestiality of Nazi terror in south-eastern Serbia. The Concentration camp *Anhalter Lager Nisch* was established with the aim of suppressing the libertarian spirit of the Serbs, Jews and Roma who lived in the area of Niš and its surroundings for centuries. Historical researcher estimate that more than 30,000 people were imprisoned there in the period from April 1941 to September 1944, while more than 10,000 people were executed by German shooting squads at the Bubanj Hill execution grounds in the same period. The precise numbers are highly unlikely to be established, considering that the Nazis destroyed the primary documentary sources evidencing the atrocities. The identification of victims and event descriptions are largely based on eye-witness testimonies and recollections of the tragic events, individual human destinies and acts of courage and defiance. However, despite almost daily executions, the Nazis failed to suppress the desire for freedom, which is an intrinsic part of human nature. On 12 February 1942, 105 prisoners managed to escape from the camp, while 42 were shot in the attempt; this event was recorded as the first major escape for a Nazi concentration camp in occupied Europe. In retaliation, in the period 16-20^{h} February 1942, the Germans organized the first mass shootings of prisoners at the Bubanj execution grounds. Depending on the Gestapo classification, prisoners were either deported to other (concentration, internment, labour or death) camps or executed at Bubanj killing fields. In August-September 1944, the Germans tried to destroy the evidence of their war crimes by exhuming and burning the corpse at Bubanj Hill execution grounds.

In the post-war period, the Concentration camp *Crveni krst* was turned into a Memorial Museum in 1967. The Bubanj Memorial Park complex was completed in 1963. In the post-SFRY period, it was neglected, inadequately maintained and subjected to vandalism and desecration. The situation was slightly repaired during the last renovation works in 2017 but, given its historical, architectonic and symbolic importance, it still does not have the adequate place on the cultural map of Serbia. Today, eighty years after the prisoners' escape from the Concentration camp *Crveni Krst* and the subsequent mass shootings at the Bubanj execution grounds, these two historical sites represent places of torture, suffering and execution, but they are also symbols of defiance, resistance and rebellion. As such, they are constant reminders of our obligation to preserve freedom, through permanent struggle for justice and truth.

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MEMORIJALNI PARK BUBANJ: SEĆANJE NA ŽRTVE NACISTIČKOG TERORA I MASOVNOG STRADANJA U DRUGOM SVETSKOM RATU

Memorijalni kompleks „Bubanj" je sagrađen sa ciljem obeležavanja mesta stradanja nevinih žrtava nacizma u Drugom svetskom ratu. Predstavlja simbol stradanja, ali i otpora, borbe i želje sa slobodom, oličen u prikazu tri ogromne stisnute pesnice. „Tri pesnice" simbolizuju otpor naroda i prkos fašizmu. One su stalni podsetnik o važnosti slobode kao najveće ljudske vrednosti. One su stalni podsetnik na važnost slobode, kao najveće ljudske vrednosti. Autori u radu najpre ukazuju na politiku eugenike, kao ideološke osnove nacizma i svirepih nacističkih zločina, da bi se zatim osvrnuli na istorijske okolnosti koje su dovele do formiranja koncentracionog logora "Crveni krst" u Nišu i Bubnja kao stratišta. Centralni deo rada je posvećen analizi procesa izgradnje Memorijalnog kompleksa „Bubanj", njegovom značaju u posleratnom jugoslovenskom društvu i trebutnoj poziciji na kulturnoj mapi Srbije. Ukazujući na masovnost stradanja i patnje žrtava nacističkog terora u ovim krajevima Srbije, autori ističu snagu naroda koji je nastojao da očuva i odbrani slobodu i pravo na dostojanstven život, kao najvažnije ljudske vrednosti.

Ključne reči: *Bubanj memorijalni park, stradanje, Drugi svetski rat, spomenik „Tri pesnice".*

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Review Paper

DOMESTIC VIOLENCE AGAINST CHILDREN IN THE CIRCUMSTANCES OF THE COVID-19 PANDEMIC: Analysis of the Judicial Practice of the Basic Court in Niš

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340.142:347.91/.95](497.11 Niš)

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Abstract. *The subject matter of analysis in this paper is domestic violence against children, and abuse and neglect of children during the COVID-19 pandemic, which is observed through the judicial practice of the Basic Court in Niš in the period from 15 March 2020 to 1 March 2023. The paper aims to determine the number of criminal proceedings dealing with the criminal offense of domestic violence committed against a minor and the criminal offense of child abuse and neglect in the family, which were conducted and legally concluded in front of the Basic Court in Niš in the specified period, and to determine whether the scope of domestic violence against children, expressed through conducted and completed procedures in the specified period is higher than in the three-year period before the outbreak of the pandemic. Criminal proceedings in domestic violence cases instigated before the Basic Court in Niš during the COVID-19 pandemic were conducted and largely completed in the specified period. Domestic violence against children was manifested through different forms of physical or psychological violence, or a combination of both in some cases. When it comes to the criminal offense of child abuse and neglect, two criminal proceedings were conducted and completed in the specified period. Data from the civil society organizations and media reports account for an increase in domestic violence in general and violence against children in particular during the pandemic, but their data do not match the data from the judicial practice of the Basic Court in Niš.*

Key words: *domestic violence against children, child abuse and neglect, COVID-19 pandemic, criminal proceedings, judicial practice, Basic Court in Niš*

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1. INTRODUCTION

Domestic violence against children, including abuse and neglect of children in the family. is a social phenomenon that has been drawing attention of the professional and scientific public for the last twenty years. For a long time, domestic violence against children was perceived as a matter of private family relationship in which state institutions did not intervene. In the Republic of Serbia, this situation has significantly changed with the improvement of the system of legal protection of children against violence, abuse and neglect. Children's rights and their criminal and civil protection are regulated by numerous legislative acts. With the aim of recognizing, preventing and protecting children from violence, abuse and neglect, the legislator has adopted numerous protocols which contain guidelines for the actions of professionals from judicial authorities, educational institutions, social welfare institutions, the police, and the health care system.

The outbreak of the COVID-19 pandemic and the measures taken to protect the population and prevent further spread of the Corona-virus increased the risk of violence against children in the family. Prohibition and restriction of movement, introduction of curfew, fear of contagion, constant tension and uncertainty that accompanied the emergence and development of the epidemic are factors that contributed to parents' violent behavior towards children, or the increase of violence against children living in families where disrupted and violent and family relations had been recorded earlier.

The paper first presents the legislative framework on the legal protection of domestic violence against children, abuse and neglect of children in the Republic of Serbia. The next two parts of the paper outlines the response of state institutions to the declared COVID-19 epidemic, and the impact of the Corona-virus pandemic on the society as a whole and the living circumstances in the family. Then, the author presents the methodological framework of the conducted research on the judicial practice of the Basic Court in Niš in adjudicating the criminal offenses of domestic violence against children, including child abuse and neglect. After presenting and analyzing the research results, the author provides concluding remarks and considerations for further action.

2. LEGAL PROTECTION AGAINST DOMESTIC VIOLANCE AGAINST CHILDREN IN SERBIA

In the Republic of Serbia, children's rights are regulated in numerous legislative acts, containing provisions on their legal position, prevention and protection measures and procedures applied in cases of domestic violence against children, child abuse and neglect.

The crime of domestic violence is criminalized in the positive criminal legislation in Art. 194 of the Criminal Code,[1] which prescribes five forms of this criminal offense: one basic form, three more serious forms, and one less serious form. The legal incrimination of this criminal offense provides protection to children from physical and psychological violence, threats of attack against life and limb, insolent or ruthless conduct that endangers physical integrity or mental condition of a family member (child), which is punishable by a term of imprisonment ranging from three months to 3 years (Art. 194. para.1 CC). A more serious form of domestic violence exists in the following circumstances: 1) the crime was committed with the use of weapons, dangerous tools or other means suitable for

[1] The Criminal Code of the Republic of Serbia, *Official Gazette RS, no.* 85/2005, 88/2005–corr., 107/2005–corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

inflicting a serious bodily injury or seriously impairing one's health (Art. 194. para. 2 CC), which is punishable by imprisonment ranging from six months to 5 years; or 2) the committed violence resulted in grievous bodily injury or serious health impairment of a family member, or is committed against a child (Art. 194 papa.3 CC), in which case it is punishable by a term of imprisonment ranging from 2 to 10 years; or 3) the passive subject of the committed act of family violence is a minor (child) (Art. 194 papa.4 CC). In case the offence committed against a minor results in child's death, the offender shall be punished by imprisonment of at least 10 years (Art. 194 para.4 CC). Moreover, any violation of a measure imposed on the perpetrator of domestic violence is punishable by imprisonment ranging from three months to 3 years and a fine (Art. 194 para. 4 CC).

The criminal act of neglecting and abusing a minor is prescribed in Article 193 of the Criminal Code. The passive subject of this offense is a minor who is entitled to adequate family care and upbringing. The criminal offense exists in two situations: a) when a parent, an adoptive parent, a guardian or another person neglects the duty of care and upbringing by grossly neglecting a minor whom he/she is obliged to take care of, which is punishable by imprisonment of up to 3 years(Art.193, para.1 CC); and b) when the aforementioned persons abuse the minor, or force him/her to perform excessive physical labour, to beg or to do work that does not correspond to the minor's age, or for personal gain induce a minor to engage in other activities that are detrimental to his/her development, which is punishable by a term of imprisonment ranging from three months to 5 years (Art.193, para.2 CC).

The protection of children from family violence is also provided within the framework of civil legislation. Thus, Article 197 of the Family Act[2] stipulates that domestic violence is defined as inflicting physical injuries, psychological violence, forcing and inducing sexual relations with a person under the age of 14, restricting freedom of movement and communication with third parties, insults and other forms of reckless, insolent and malicious behavior. The Family Act also prescribes protection measures which are determined by the court for a family member who commits an act of violence against a family member.

In the national legislation, the victims of domestic violence are further protected through the implementation of the Domestic Violence Prevention Act (DVP Act).[3] Under this Act, domestic violence entails acts of physical, sexual, psychological or economic violence. The DVP Act regulates the actions of competent state bodies, social welfare centers, institutions for children's social protection, education, upbringing and health care, with the aim of preventing domestic violence and providing protection and support to victims of violence. The Act also prescribes a series of measures aimed at detecting the immediate danger of domestic violence and protection measures that are applied when the danger is detected. In the event of domestic violence, the Act prescribes the application of emergency measures against the offender, which are enforced by a police officer for 48 hours, and if necessary, extended by the court to a period of 30 days. By a court order, the perpetrator of domestic violence is temporarily removed from the family house/apartment and prohibited from contacting and approaching the victim. The DVP Act is also a valuable instrument for the prevention of domestic violence in criminal proceedings, in cases related to the criminal acts of neglect and abuse of minors (Article 193 CC) and domestic violence (Article 194 CC).

[2] TheFamily Act of the RS, *Official Gazette RS, no.* 18/2005, 72/2011 and 6/2015.
[3] The Act on Prevention of Domestic Violence, *Official Gazette RS, no.* 64/2016.

3. The Resposne of State Institutions in Serbia to the Declared COVID-19 Pandemic

The World Health Organization declared a pandemic caused by the emergence of the Coronavirus (COVID-19) on 11 March 2020, as a result of which countries around the world introduced a number of measures to combat the pandemic and protect their population.

In Serbia, the first positive Coronavirus case was detected on 6 March 2020. Due to the constant spread of the pandemic and the increase in the number of infected people, on 15 March 2020, the Republic of Serbia adopted the Decision declaring a State of Emergency on the territory of the entire country.[4] In order to suppress and prevent the spread of the infectious disease CIVID-19 and to protect the population from this disease, the Government of the Republic of Serbia, with the co-signature of the President of the Republic, adopted the Regulation on Measures during the State of Emergency[5]. The Regulation prescribes the protection measures which prohibited public gatherings and restricted the freedom of movement during the state of emergency. The bans and restrictions were reflected in introducing curfew hours and a quarantine for people over the age of 65.

On 17 March 2020, the Ministry of Justice issued Recommendations for the operation of courts and public prosecutors' offices during the state of emergency.[6] *Inter alia*, competent courts and public prosecutors' offices were recommended to act in criminal cases related to domestic violence during the state of emergency. In connection with the implementation of the Recommendation of the Ministry of Justice, the High Council of the Judiciary issued a Conclusion of 18 March 2020,[7] which stipulated that, during the state of emergency, courts should adjudicate only those (urgent) cases which could not delayed. In the Conclusion, the High Council of the Judiciary explicitly stated that trials in domestic violence cases were considered to be those that could not be delayed.

4. Serbian Society at the Time of the Coronavirus Epidemic

In Serbia and other countries worldwide, the COVID-19 pandemic exerted huge pressure on national health system and caused significant changes in the social, political, cultural and social aspects of human life. In order to prevent the spread of the Coronavirus, many countries introduced a range of preventive, protective and security measures: quarantines, lock-downs, curfew hours, home isolation, bans and restrictions on movement, bans on public gatherings, bans on leaving the state or city, closing borders, closing institutions, etc.

After declaring the state of emergency and adopting the Regulation on measures during the state of emergency, the Government of the Republic of Serbia introduced a wide range

[4] Decision on declaring a state of emergency, *Official Gazette of the RS, no.* 29, dated 15 March 2020; https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/predsednik/odluka/2020/29/1/reg

[5] Regulation on measures during the state of emergency, *Official Gazette RS, no.* 31/20, 36/20, 38/20, 39/20, 43/20, 47/20, 49/20, 53/20, 56/20, 57/20, 58/20, 60/20, 126/20, see: https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/uredba/2020/31/1/reg (accessed 10 May 2023).

[6] Recommendations of the Ministry of Justice for the operation of courts and public prosecution offices during the State of Emergency declared on 15 March 2020, dated 17 March 2020, https://www.mpravde.gov.rs/files/PREPORUKE%20ZA%20RAD%20SUDOVA%20I%20JAVNIH%20TU%C5%BDILA%C5%A0TAVA%20ZA%20VREME%20VANREDNOG%20STANJA.pdf (accessed May 10 2023).

[7] Conclusion of the High Council of the Judiciary no. 119-05-132/2020-01, dated 18 March 2020, https://vss.sud.rs/sites/default/files/attachments/%D0%97%D0%B0%D0%BA%D1%99%D1%83%D1%87%D0%B0%D0%BA.pdf (accessed 10 May 2023).

of measures to suppress and prevent the spread of infectious diseases. Thus, face-to-face instruction in pre-school institutions, primary and secondary schools, and higher education institutions was suspended, and institutions had to organize online/remote teaching modes. Employers were recommended to organize work from home. All sports facilities were closed down; the working hours of cafes and restaurants were limited, etc.

Due to the introduced curfew hours, bans and restrictions on movement, family members were bound to spend a lot of time at home. In the circumstances of ongoing frustration and fear of infection, when the entire educational process was organized online, when most parents worked from home, and when they had to share the same confined space for a prolonged period of time, there was a significant change in the family dynamics. The health crisis that occurred due to the pandemic, the loss of loved ones, the difficult economic situation in the country, parents' unemployment, general frustration and uncertainty (etc.) were risks that led to an increase in intolerance, family tensions, conflict and aggression in the family (Mahmutović, Škuletić, Malagić, 2021:71). In particular, all these factors contributed to further deterioration of the living conditions and mutual relations in broken or dysfunctional families whose members had previously been exposed to family violence. The children of such families generally spend most of their time at school and in extracurricular activities, thus avoiding violent parents. However, in the newly created conditions, they could not take shelter in the school environment which could recognize and provide support to children who had experienced violence and abuse by their parents or family members. In effect, the measures aimed at fighting the spread of the COVID-19 pandemic created an ideal environment for the increase in violent behavior due to the constant presence and control of the abuser over the victim (Grbić, Pavlović, 2020:3). The victims' position was further aggravated by changes in the operation of public institutions, social welfare centers, the police, public prosecution offices, and health care institutions which the victims could address for assistance. The circumstances of social isolation significantly reduced the possibility that a child would report violence and/or seek assistance, and the likelihood that competent services would urgently provide adequate child protection, support and assistance.

During the state of emergency, media reported on numerous cases of violence against children, abuse and neglect.[8] The data from civil society organizations and the National SOS telephone indicate that the risk of domestic violence increased during the pandemic.[9]

5. Methodological Framework of Research

The subject matter of research in this paper is the analysis of the judicial practice of the Basic Court in Niš concerning the criminal proceedings on the issue of domestic violence

[8] Radio Slobodna Evropa (2020): Žrtve porodičnog nasilja dodatno ugrožene tokom pandemije (Victims of domestic violence additionally endangered during the pandemic), 29. mart 2020, https://www.slobodnaevropa.org/a/%C5%BErtve-porodi%C4%8Dnog-nasilja-dodatno ugro%C5%BEene-tokom-pandemije/30515964.html; BBC News na srpskom (2020): Korona virus i nasilje u porodici: Šta da radite ako ste u izolaciji sa nasilnikom posle policijskog časa (Corona virus and Domestic violence: What should you do if you are in self-isolation with an abuser during curfew hours), M. Janković, 14 april 2020, https://www.bbc.com/serbian/lat/srbija-52109681 (accessed 14 May 2023)

[9] Fenomena (2021): Postupanje nadležnih institucija i službi za suzbijanje nasilja u porodici tokom epidemije (Action of competent institutions and services for suppression of domestic violence during the COVID-19 epidemic), 26. avgust 2021; https://www.fenomena.org/vesti/postupanje-nadlenih-institucija-i-slubi-za-suzbijanje-nasilja-u-porodici-tokom-epidemije-dr-sanja-opi-istraivaica-i-predsednica-upravnog-odbora-viktimolokog-drutva-srbije (14 May 2023).

which were conducted and completed during the COVID-19 pandemic, in the period from 15 March 2020 to 1 March 2023. The empirical part of the research included data collection and analysis of cases on domestic violence against minors and neglect and abuse of a minor which were adjudicated at the Basic Court in Niš in the specified period.

The aim of the empirical part of the research was to collect relevant data from the case databases kept by the Basic Court in Niš and analyze the judicial practice (selected cases, judgments and proceedings) in cases involving the criminal offense of domestic violence against minors (Article 194 para.4 CC) and the criminal offense of neglect and abuse of a minor (Article 193 CC). The research included a review and analysis of the phenomenological and etiological characteristics of both perpetrators and victims of these criminal acts.

The research methodology included the method of indirect observation (examination of court databases, case selection and data collection), and the case-analysis method applied in assessing the case content and final judgments in cases involving domestic violence against minors and the criminal offense of neglect and abuse of a minor.

In order to achieve the research objectives, the starting hypothesis was that the number of criminal proceedings conducted and completed in the period from 15 March 2020 to 1 March 2023 for the commission of the criminal offense of domestic violence against minors (Art. 194 para. 4 CC) and the criminal offense of neglect and abuse of a minor (Art. 193 CC) increased in comparison to the three-year period preceding the COVID-19 pandemic.

6. Research Results

In the period from 15 March 2020 to 1 March 2023, a total of 199 criminal proceedings were conducted in the Basic Court in Niš for the crime of domestic violence (Art. 194 CC). Out of this number, 11 criminal proceedings were conducted for the commission of the criminal offense of domestic violence involving a serious bodily injury or health impairment of a minor (under Article 194 para.3 CC). Out of these 11 criminal proceedings, a total of 8 proceedings (conducted against eight defendants) were legally concluded, ending in a final judgment; thus, these cases were included in the research sample and analyzed in this paper. The remaining three proceedings were not legally completed at the time of data analysis; thus, they were not included in the research sample. As for the criminal offense of neglect and abuse of a minor (Art. 193 CC), only two criminal proceedings were legally terminated in the specified period; thus, they were included in the research sample and analyzed in this paper.

6.1. Criminal offence of domestic violence (Article 194 CC)

In terms of different forms of domestic violence prescribed in Article 194 CC, the research sample shows that the largest numbers of criminal acts of domestic violence against children (5 offences) were a combination of the offence envisaged in Art. 194 para.1 CC (physical and psychological violence) and the offence envisaged in Article 194 para.2 CC (a inflicting serious bodily injury or serious impairment of child's health). In one case, the criminal offense of domestic violence (Art. 194 CC) was committed in conjunction with the criminal offense of extramarital union with a minor (Art. 190 para.1 CC). In two cases, the offense was committed independently, without concurrence with any other criminal offence.

The data from the research sample show that all offenders committed the crime independently; there was no form of complicity. The data also indicate that, in the largest

number of cases (7 cases), the criminal offense was committed in the city, at the perpetrator and victim's place of residence. In only case, the crime was committed in a village.

In terms of the *modus operandi,* this criminal offence entails different forms of physical and psychological violence, which are commonly used together. Thus, in four cases, violence against the child was carried out by using physical and physical violence, cursing and insulting the child/victim. In two cases, the offender used only physical violence (a blow to the face with an open fist and a blow to the back of the head with a slipper). In two cases, violence against the child entailed insolent and ruthless behavior, threats, insults by using derogatory names, and harassment via text messages. Further analysis of *the modus operandi* demonstrates diverse forms of perpetrators' violent, rough and callous conduct, which may be illustrated by some examples from the judicial practice of the Basic Court in Niš.

1) "The defendant (mother) beat the victim (daughter), cursed, pulled her hair, kicked her in the face, locked her on the terrace of the family apartment." (BC case 5K.no.458/21).[10]
2) "The defendant (mother) came to her parents' house, where the minor (injured party) previously took refuge when he ran away from her (in a torn t-shirt and tracksuit). She started shouting and asking for the child; in the meantime, the victim hid in the basement out of fear. As she could not find him, she took his keys to their family apartment from the table and told her mother that the minor victim could no longer return to her place. After that, she did not want to hand over his belongings when her parents called on her. Thus, the minor victim went to school in his grandfather's pants." (BC case 9K.no. 517/22).[11]
3) "The defendant (father) asked the minor victim (daughter) how it was at school, and she replied that there was no grading that day; as the defendant persisted, she said that she still has mark four (B); the defendant got angry, grabbed his slipper and hit the victim in the back part of the head" (occipital lobes *in the posterior cerebrum*). (BC case 7K.no. 962/20).[12]
4) "In a visibly intoxicated state, the defendant (extramarital partner) first started insulting the minor victim (girlfriend): "You wanna have sex with my father!?"; he punched her in the head several times with closed fists, and then kept punching her in the head and body, kicked her in the area of her thighs and pulled her hair" (BC case 3K.no. 869/20).[13]
5) "On 29 December 2019, the defendant (father, a drug addict) called the minor victim (daughter) from his mobile phone and threatened her: "I'll blow you all up if you do not bring me the money in 5 days! You will be no more! " When they saw each other in person, he grabbed the money from the minor victim, and shoved it in her face. Then, on 30 December 2019, he sent her a text message from his phone: " I'll hurt you all! This won't be the last you hear from this drug addict! You'll regret it all!". Then, on 3 January 2020, she received two text messages: "Just do it, keep driving me crazy! It will be your fault!";"No idea what I'll do, call whoever you want, let them arrest me. We are through! (BC case 5K.no.1014/21).[14]

[10] Judgment of the Basic Court in Nis 5K.no.458/21 of 24 March 2023, E-database of the Basic Court in Nis
[11] Judgment of the Basic Court in Nis 9K.no. 517/22 of 23 December 2022
[12] Judgment of the Basic Court in Nis 7K.no. 962/20 of 23 April 2021
[13] Judgment of the Basic Court in Nis 3K.no. 869/20 of 20 November 2020.
[14] Judgment of the Basic Court in Nis 5K.no.1014/21 of 27 October 2022

6) "On an unspecified day in April 2017, he (father) started yelling at the victim (son), saying that he is the same as his mother, that he is incapable just like her, that he is to blame for everything, that he does not have his own brain, that he is the same sort as his uncle; then, using his right hand, he took a swing at the victim in an attempt to hit him" (BC case 2K.no. 593/20).[15]

These examples show various family relationship between the offender and the minor victim: 5 offenders were the fathers of minor victims, 1 offender was the victim's mother, 1 offender was the victim's brother, and 1 offender was the victim's extramarital partner.

In the largest number of case, the domestic violence against minors was committed by male offenders (7 cases), while the offender was female in only one case. The age structure of offenders is diverse: young people up to the age of 30 (1 offender, aged 19 at the time); middle-aged people aged 30 to 60 (7 offenders); and elderly persons over the age of 60.

The research data also provide insight into the *marital status* of the perpetrators of this criminal offence: 4 offenders were married; 2 offenders lived in cohabitation; one offender was a widow, and one offender was a widower at the time the crime was committed.

When it comes to offenders' *property*, 4 defendants had no assets, 2 defendants owned an apartment/house, while there was no information on property for 2 offenders.

In terms of *education*, the largest number of offenders (5) had secondary education, 2 offenders had a university degree, and one offender had only primary school education.

In terms of *occupation*, the research data show that the perpetrators are people of different occupations: a food technician, an iron/metal turner, a worker, a doctor, a pediatrician, a carpenter, a merchant, a military person, and one person without occupation. As for the offenders' employment status, 4 persons were unemployed, 2 were employed, and one person was retired (a pensioner) at the time when the crime was committed.

On the basis of extracts from the criminal records on *prior convictions* provided, the research sample shows that there was a larger number of previously unconvicted persons (6 offenders) than those who had been previously convicted (2 offenders).

The data on the *perpetrator's sanity* at the time of committing the crime indicate that the largest number of offenders (6) were sane, without demonstrating any mental illness, temporary mental disorder, delayed mental development or some other serious mental disorder, nor did they suffer from any addiction disease. The data show that 2 offenders demonstrated a slightly reduced capacity to understand the significance of their act and manage their actions at the time of the commission of the criminal act. Thus, one of these two offenders committed the crime while intoxicated, which reduced his ability to be fully aware of the committed act and manage his actions, but not significantly. In this case, the Commission of Experts concluded (in its opinion) that this offender did not suffer from a mental illness, temporary mental disorder, mental impairment or serious mental retardation, nor addiction, and that the observed pattern of alcohol consumption in his case corresponded to harmful abuse of alcohol rather than to addiction. In case of the second offender with reduced capacity, it was established that the act of violence was committed as a consequence of his addiction to psychoactive substances rather than any mental disease, disorder or retardation. Namely, in the period before the crime was committed, the Social Welfare Center Niš was engaged in the procedure of establishing temporary guardianship over a minor child, due to a report of domestic violence against a minor child by the father, who used psychoactive

[15] Judgment of the Basic Court in Nis, 2K.no. 593/20 of 17 November 2020

substances, demonstrated unpredictable behavior, and was assessed as having a medium-degree risk of reoffending. i.e. repeating the act of domestic violence.

Considering the *causes of domestic violence* against minors, the analyzed research sample shows that disrupted family relations between the perpetrator and the victim were present even before the crime was committed (in 4 cases); disrupted family relations were reflected in various forms of physical and psychological violence. The presence of unacceptable conduct is commonly observed in dysfunctional families; for these reasons, according to earlier reports, the Social Welfare Center Niš had been working with these families.

In terms of *gender* of the victims of domestic violence against minors, the research data (from 8 cases) indicate that 5 victims were male children, and 3 were female children.

When it comes to the *victim-perpetrator family relations*, the data show that the victims of violence were male children/sons (in 4 cases), female children/daughters (in 2 cases), a minor extramarital partner (in 1 case) and the offender's minor brother (in 1 case).

The analysis of data on the *health status* of children-victims indicate that 7 children were physically and mentally healthy, and that one child had a congenital heart defect.

In terms of convictions, from the total of 8 criminal proceedings which were conducted and completed (by rendering the final judicial decision), the offenders were convicted for the commission of the criminal offense of domestic violence against a minor in 4 cases; in two case, the offenders were acquitted; in the remaining 2 cases, the criminal charges were dismissed on the basis of the public prosecutor's withdrawal from the prosecution (in compliance with Article 422 para.1, item 1 of the Criminal Procedure Code of the RS).

In terms of imposed *sanctions*, in the four criminal cases where the court convicted the offenders, they were sentenced to a term of imprisonment prison. In one case, the offender was sentenced to one year in prison, which would be served at the offender's home (house arrest), without the use of electronic-monitoring device (electronic bracelet).

6.2. The Criminal offence of neglect and abuse of a minor (Article 193 CC)

As for the criminal offense of neglect and abuse of a minor prescribed in Art. 193 CC, only two criminal proceedings were legally terminated in front of the Basic Court in Niš in the specified period. These two cases were included in the research sample and analyzed.

The research data show that both criminal offences of neglect and abuse of a minor were committed in the city. They were committed without concurrence with any other criminal act. The perpetrators committed these acts independently; there was no form of complicity.

In terms of the *modus operandi*, the data related to the first case show that the offender (mother) committed the crime of neglecting and abusing a minor "by forcing her minor child (son) to do work that did not correspond to his age for a period of 8 days, waking him up every morning and telling him that he had to get up and earn his bread, and sending him to a street intersection where the minor spent all day wiping the windshields of vehicles that stopped at the traffic lights; in the evening, the minor had to hand over the money to the defendant" (BC case 2K.no. 265/20). [16]

In the second case, the research data show that the defendant (mother) "for a long period of time, grossly neglected her duties of care, upbringing and education, and abandoned her minor child, whom she is obliged to take care of", which was not in compliance with the provision of Article 68 of the Family Act. The Court concluded that the defendant committed

[16] Judgment of the Basic Court in Nis 2K.no. 265/20 of 2 July 2020.

the offence: "by neglecting the educational needs of a minor child, who did not attend classes in the first grade of elementary school; by neglecting her basic nutritional needs because she did not provide her with adequate food, for which reason the minor child was malnourished, pale, emaciated, exhausted and drained; by neglecting the child's hygienic needs because she did not take care of the regular hygiene of the child, did not maintain adequate hygiene in the apartment where she lived with the child, because the apartment where they lived was messy, dark, dirty and cluttered with personal belongings and dusty furniture; by neglecting the child's needs regarding clothes and shoes because she did not buy clothing and footwear adequate to the child's age, so that the child mostly wore pajamas and a hoodie which was not the right size, and shoes which were two sizes smaller, for which reason she had difficulty walking. For all these reasons, there is a high degree of risk to the life, safety, health and further development of a minor child" (BC case 5K.no.512/20).[17]

In terms of *gender*, both offenders are female. In terms of *age*, they fall into the group of middle-aged offenders (30-50 years old). In terms of *victim-offender relationships*, both offenders are mothers of the minor children who were the victims of this criminal offence.

The data on the offenders' *marital status* show that one offender was married, while the other one was single at the time the crime was committed. Regarding their level of *education*, one defendant was illiterate (as she never attended school), and the other one had a secondary school diploma. Both offenders had no property and income.

In terms of *previous convictions*, the extracts from the criminal records show that one offender was an unconvicted person (without a previous criminal record), while the other one had been previously convicted multiple times for various criminal acts.

As for the offenders' *sanity* at the time of committing the criminal offense, the data show that one offender was sane (without any mental illness, disorder or retardation), while the other one was considered incompetent because she had the mental illness of schizophrenia and was unable to understand the consequences of her act and manage her conduct.

When it comes to the *gender* structure of the victims of these criminal offences, in both case the victims were minors (children): a girl aged 11, and a boy aged 16. At the time of the commission of crime, both children were physically and mentally healthy persons.

As for the criminal *sanctions* imposed on the offenders, one offender was sentenced to two months in prison (as she pleaded guilty and agreed to serve the proposed sentence). In the second case, where the offender was established to be mentally incompetent (insanity) due to the mental illness of schizophrenia, she was not found guilty and sentenced for the commission of the criminal act of gross neglect and abandonment of a minor. Instead, in accordance with Article 81 of the Criminal Code and Article 526, para.4 of the CPC, the court imposed the security measure of mandatory psychiatric treatment and custody in a health care facility, which will last as long as there is a need for such treatment.

In the three-year period that preceded the outbreak of the COVID-19 pandemic (in the period from 15 March 2017 to 15 March 2020), a total of 277 criminal proceedings for the crime of domestic violence (Article 194 CC) were conducted and legally concluded (by rendering a final judgment) in front of the Basic Court in Niš. Out of that number, there was a total of 22 criminal proceedings for the commission of the crime of domestic violence against a minor (Art. 194, para.3 CC), which were legally terminated (by a final judgment).

[17] Decision of the Basic Court in Nis 5K.no.512/20 of 12 December 2022

The statistical data show that 6 criminal proceedings were concluded in 2017, 7 criminal proceedings in 2018, and 9 criminal proceedings in 2019 (BC Niš database, 2023).[18]

Regarding the criminal offense of neglect and abuse of a minor (Art. 193 CC), the statistical data covering the 2017-2020 period show that 3 criminal proceedings were legally terminated: 2 criminal proceedings were concluded in 2018 and one in 2020. (BC Niš database, 2023).

Comparing this data with the data from the research sample, it can be concluded that the total number of criminal proceedings that have been legally terminated for the commission of the crime of domestic violence against a minor (Art. 194 para. 3 CC) in the period from 15 March 2020 to 15 March 2023 proves to be by 36.4% lower than the total number of criminal proceedings on this crime in the three-year period before the COVID-19 pandemic. The total number of legally terminated criminal proceedings on the criminal offence of neglect and abuse of a minor (Art. 193 CC) also proves to be by 6.67% lower during the pandemic than in the three-year period before the outbreak of the pandemic.

The above data point to the conclusion that the starting hypothesis (on the increase of legally terminated criminal proceedings on these crimes during the COVID-19 pandemic) was not confirmed. The collected and analyzed data from the research sample show the exact opposite: the number of criminal proceedings that were legally terminated in the period from 15 March 2020 to 1 March 2023 significantly decreased when compared to the three-year period (2017-2020) preceding the outbreak of the COVID-19 pandemic.

7. Conclusion

The outbreak of the COVID-19 pandemic in March 2020, followed by the introduction of a state of emergency, quarantine, self-isolation, restrictions on movement, and limited access to institutions in charge of ensuring protection to victims of violence are factors that had a negative impact on reporting violence, abuse and neglect of children in the family.

The research results presented in this paper show that the number of criminal proceedings involving the commission of the criminal offenses of domestic violence against children (Article 194 CC) and abuse and neglect of a minor in the family (Article 193 CC) which were legally terminated (by issuing final judgments) in front of the Basic Court in Niš during the COVID-19 pandemic, in the period from 15 March 2020 to 1 March 2023, considerably decreased when compared to the three-year period (2017-2020) before the outbreak of the pandemic. On the other hand, data from non-governmental women's organizations and civil society organizations speak of an increase in the number of women-victims of domestic violence who sought assistance during the state of emergency and throughout the pandemic. In the three-year pandemic period, the media also reported on numerous cases of domestic violence, violence against children, and various cases of child abuse and neglect. Although the collected research data presented in this paper cannot be the basis for a comprehensive analysis of the spread of violence against children after the outbreak of the COVID-19 pandemic, they indicate that there is a discrepancy between the data from judicial practice and the data presented by the civil society organizations and the media. In terms of domestic violence against minors, it seems that the judicial practice does not reflect the reality.

Faced with a large-scale medical, social and economic crisis, competent institutions apparently failed to provide relevant information to citizens (in a clear, timely and transparent manner) about the competent services that could provide protection and assistance to victims of

[18] Electronic database of the Basic Court in Niš (accessed May 2023)

domestic violence in the circumstances of a state of emergency and ongoing pandemic (Nikolić, Ristanović, 2021:168). There was also a lack of information and support for victims of violence through public announcements, media, web-portals (etc.), which would enable them to report violence, regardless of the extraordinary pandemic circumstances.

As a final conclusion from the above, it follows that the existing legal solutions, protocols, strategies and measures still do not ensure an effective and timely prevention of domestic violence against children, nor adequate response of competent institutions in providing assistance and support to victims of violence. In extraordinary circumstances, such as the Coronavirus pandemic, the problems come to the fore. This indicates that there is a need for specialized state institutions and organizations which would take action in emergency situations, aimed at preventing violence, providing assistance and support to victims of violence, informing the public about the services, and informing the victims about available forms of assistance and how to attain them (Viktimološko društvo Srbije, 2021:47). The media, social networks and web-platforms play a special role in emergency situations as they may be used as an instrument for a rapid and massive dissemination of valuable information about the impact of the pandemic on the increased risk of domestic violence, abuse and neglect of children in the family.

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NASILJE NAD DECOM U PORODICI U USLOVIMA ŽIVOTA U PANDEMIJI COVID-19: Analiza prakse Osnovnog suda u Nišu

Predmet rada je analiza nasilja nad decom i zlostavljanje i zanemarivanje dece u porodici u uslovima života u pandemiji Covid 19 kroz sudsku praksu Osnovnog suda u Nišu, u vremenskom periodu od 15.03.2020.godine do 01.03.2023.godine. Cilj rada je da se utvrdi broj krivičnih postupka koji su u naznačenom vremenskom periodu vođeni i pravnosnažno okončani pred Osnovnim sudom u Nišu za krivično delo nasilje u porodici izvršeno nad maloletnim licem i krivično delo zlostavljanje i zanemarivanje dece u porodici, te utvrditi da li je obim nasilja nad decom izražen kroz vođene i okončane postupke za navedena dela u periodu od 15.03.2020.godine do 01.03.2023.godine veći u odnosu na trogodišnji period pre izbijanja pandemije. Za vreme pandemije koronavirusa, pred Osnovnim sudom u Nišu najčešće su vođeni i okončani krivični postupci za krivično delo nasilje u porodici kod kojih se nasilje ispoljavalo kroz oblike fizičkog ili psihičkog nasilja, a u nekim postupcima su se javljala udruženo oba oblika nasilja. Kada je reč o krivičnom delu zlostavljanje i zanemarivanje dece, u pomenutom periodu okončana su dva krivična postupka. O porastu nasilja u porodici i nad decom u vreme pandemije Covid-19 govore podaci organizacija civilnog društva i medija, ali se oni ne poklapaju sa podacima iz sudske prakse Osnovnog suda u Nišu.

Ključne reči: *nasilje nad decom, zlostavljanje i zanemarivanje dece, pandemija Covid-19, krivični postupci, sudska praksa, Osnovni sud u Nišu.*

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Review Paper

TYPES OF DAMAGES UNDER THE CISG

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Abstract. *The breach of a contract of sale may cause damage. Naturally, the aggrieved party may claim damages as a result of the breach of the contract of sale. Therefore, the Vienna Convention on International Sale of Goods (CISG, 1980) regulates damages in Articles 74 -78 of the CISG. Article 74 provides foreseeability and full compensation principles as general principles for determining damages resulting from all types of breaches. Articles 75 and 76 regulate damages resulting from the fundamental breach caused by the avoidance of a contract of sale. Article 77 puts the injured party under the obligation to mitigate damage. Article 78 regulates the issue of determining interest rates. Although these provisions seem comprehensive at first glance, they do not cover some important issues. Case law, legal doctrine, and gap-filling rules are very important for the interpretation of these provisions. The purpose of this paper is to draw a line in the interpretation of these provisions on damages for breach of contract. The doctrinal research methodology shall be employed in this paper.*

Key words: *CISG, damages, loss of profit, market price rule, incidental damage*

1. INTRODUCTION

The legal consequences of a breach of contract are the focal point of contract law (Magnus, 2014: 257). If the defaulting party breaches the contract of sale, damage may occur as a result of the breach of the contract of sale, and the defaulting party has to recover the damages of the damaged party. In national legal systems, damages constitute one of the most essential remedies after a breach of contract of sale has occurred, as compensation may be claimed by the damaged party through any other available remedies, such as specific performance, suspension of performance, and avoidance of the contract (Eiselen, 2005: 32). Without remedies, there is no effective contract law (Magnus, 2014: 257). The

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UN Convention on International Sale of Goods (hereinafter: the CISG)[1], adopted in Vienna in 1980, regulates damages for breach of contract in Articles 74 - 78 of the CISG. These provisions, regulate the basic principles in determining damages for breach of contract in international sales law.

2. The Sphere of Application of the CISG Damages Provisions

The first issue an arbitral tribunal or a court has to settle in cases involving breach of contract in international law of sales is whether the CISG is the applicable law or not. In case the CISG is the applicable law, Article 74 of the CISG regulates the damages as a result of the breach of the contract of sale. Articles 75 and 76 CISG regulate the consequences of damages as a result of avoidance of the contract of sale. According to Article 74 CISG, the basic rule on damages is that it only emerges in case of a claim under the Article 45(1)(b) or 61(1)(b) CISG).[2] These two articles state that, if one party fails to perform its contractual obligations in the contract of sale, the other party may claim damages based on Articles 74-77 CISG. Article 74 CISG is always applicable whether the contract of sale has been avoided or not (Galvan, 1998: 22-23). Therefore, these three provisions are essential to determine the scope of damages in the CISG.

If the parties decide, the principle of freedom of contract may shape the content arising out of damage as a result of breaching the contract of sale. Pursuant to Article 6 CISG, it is clearly stated that the parties may vary or exclude the effects of the CISG provisions as a result of the principle of party autonomy. In the ICC Court of Arbitration Case No. 7585 of 1992, a Finish buyer and an Italian seller agreed on the payment of a "compensation fee" equivalent to 30% of the contract price where there is a contractual breach, even in case of a *force majeure*. The arbitral tribunal accepted this clause although an impediment beyond the parties' control occurs (Galvan, 1998: 24). Therefore, the buyer and the seller may vary the conditions governing damages.

2.1. Requirement for the Award of Damages under Article 74 of the CISG

Article 74 of the CISG is the most important provision which applies to all types of damages in the CISG. Pursuant to Article 74 CISG, "*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*."

Thus, under Article 74 CISG, a claim for damages must meet two criteria. First, a contractual breach must cause actual damage. There must be casual relation between breach of contract of sale and damage. The damage can be covered through full compensation (damages for breach of contract). Naturally, it excludes punitive damages from common law systems. The

[1] UN Convention on Contracts for the International Sale of Goods (CSIG), Vienna 1980, UN Commission on International Trade (UNCITRAL), United Nations, New York, 2010;

[2] Article 45(1)(b) CISG: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) …….....; (b) claim damages as provided in articles 74 to 77
Article 61(1)(b) CISG: "If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) .....……. ; (b) claim damages as provided in articles 74 to 77."

second necessary criterion is foreseeability of-the-breaching-party which means that a reasonable person in the same situation ought to have foreseen a possible consequence at the time of the concluding the contract (Eicher, 2018:32). Thanks to foreseeability, in the course of the formation of a contract of sale, a party is held liable for foreseeable damage and cannot be held liable for unforeseeable events (Baş, 2021: 961). This criterion is applied in the light of the facts which that party knew or should have known (Lookofsky, 2007:75). However, there is an opposite view in the legal doctrine which entail the opinion that the seller must have knowledge that tradable goods are sold to a third merchant (Schwartz, 2006:3). The risk of those losses falls in the knowledge of the breaching party as an experienced merchant (Eicher, 2018:31). As a result, foreseeability and full compensation rules are limitations for the calculation of damages in Article 74 CISG (Singh, Zeller, 2007:217). However, the legal doctrine and the case law determine the precise line of this principle in the CISG (Munoz, Ament-Guemez, 2017:201).

2.1.1. Types of Damages

2.1.1.1. Incidental Damage (Consequential Damages)

Incidental or consequential damage means that a party bears the additional costs as a result of the damage sustained by the aggrieved party. It includes any kind of non-performance of obligation which may cause additional damage arising from a particular situation and the arrangements that a party had already performed. In this regard, as noted by the Court of Appeal in Celle, Germany (2 September 1998), consequential damage implies damage that is triggered by the fact that the promisee's liability bears the cost against a third party as a result of the contract of sale (Zaheeruddin, 2016:53). The compensability of consequential damage is not explicitly mentioned in Article 74 CISG. However, the aggrieved party may recover consequential damages, such as costs borne in storing, repairing, and preserving the defective goods, the inspection of non-conforming goods, and shipping and customs costs incurred when returning goods (Zaheeruddin, 2016:53).

2.1.1.2. Loss of Profit

Loss of profit is a type of damage that is expressly stated in Article 74 CISG. The reason behind this specific provision in Article 74 CISG is that some legal systems do not state the loss of profit concept (Nielsen, 2022:19). This profit exists if the goods are not resold by the buyer as a result of the seller's breach of the sales contract and the loss of resale is normally foreseeable (Huber, Mullis, 2007:276). Moreover, the full compensation is a limitation on the loss of profit. In this situation, the buyer has the burden of proof over the seller for the loss of profit. It must be proved with reasonable certainty (Huber, Mullis, 2007: 276). It is very easy to prove it for the buyer if both parties add a contractual clause that the seller admits that the buyer purchases the goods to sell to the third person. Otherwise, in order to prove loss of profit against the aggrieved party, the buyer may submit a revolving letter of credit to its long-standing buyer to sell the subject matter of goods.

Article 74 of the CISG does not include a provision regarding the calculation of loss of profit. In order to examine the loss of profit, the arbitral tribunal must take into account the principle of full compensation, foreseeability, and the prevention of any increase in profit in connection with the breach of contract of sale (Nielsen, 2022:19). However, there are various calculations methods for loss of profits envisaged in Article 74 CISG. In the case *Chrome-Plating Machines Production-Line Equipment (12 July 1996)*, a Swiss seller and

a Chinese buyer concluded a contract of sale to provide for the sale of a set of chrome-plating production line equipment at an agreed price CIF Shanghai. The buyer failed to pay the contract price. It triggered the seller to resell at a lower price than the seller's original price. The arbitral tribunal accepted the calculation method that the difference in machine prices between the resale price and the contractual price if the contract had been fully performed (Singh, Zeller, 2007:219-220).

In the case *Tin Plate* (17 October 1996), a Korean seller and Chinese buyer concluded a contract for the sale of Korean Tin Plates. The seller failed to deliver the goods. The buyer filed an arbitral case against the seller and sought compensation of 432.000 yuan for the loss of expected profit. The calculation method was the determination of the domestic sales contractual amount less the cost under the present contractual and other expenditures. However, import duties and gains taxes were not deducted. Upon this situation, the seller claimed that they should have been added to the calculation. The arbitral tribunal accepted the majority of the seller's calculations. The loss of expected profits was awarded as the difference between the contractual price and the price under the contract of sale. However, the arbitral tribunal emphasized the amount of the loss of expected profit should be considered the contractual price for the domestic contract of sale: the sum of the price in the contract, customs price, and gains taxes (Singh, Zeller, 2007:220). As a result, there is no single calculation method to examine the loss of profit envisaged in Article 74 CISG. Gap-filling rules may also be applied for the calculation of the loss of profit under Article 74 CISG.[3] By analogy, even calculation methods envisaged in Articles 75 and 76 can be applied for the loss of profit specified in Article 74.

2.1.1.3. Legal Costs

After the arbitral tribunal proceeding and the civil proceeding are instituted, parties have to bear legal costs including attorney fees and court fees. There are two opposite approaches regarding the allocation of attorney fees: the loser-pays rule and the American rule. According to American rule, each party involved in a civil case bears its own costs regarding the litigation process; according to the loser-pays rule, the losing party pays all legal costs to the winning party partially or completely (Pınarbaşı, 2018:182). At first glance, it seems that the principle of full compensation supports the compensation of legal costs but legal costs are not compensable under the CISG. One of the main reasons behind this situation revolves around whether the recovery of legal costs is a procedural law issue or a substantive law issue governed by the CISG (Schwenzer, Hachem, 2008:103). Legal costs arise after a dispute occurs. Article 74 CISG covers costs in the prelitigation term (Schwenzer, Hachem, 2008:104). Moreover, Article 74 CISG does not clearly include a provision for the recovery of legal costs by an aggrieved party. In the case *Zapata*, Justice Posner stated that "*the Convention is about contracts, not about procedure. The principles for determining when a losing party must reimburse the winner for the latter's expense of litigation are usually not a part of a substantive body of law, such as contract law, but a*

[3] Article 7 CISG: *"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*

part of procedural law." (Pınarbaşı, 2018:183-184). This is one of the reasons that legal costs are not compensable under the CISG.

If legal costs are claimed as damage, it must be based on Article 74 CISG. The foreseeability criterion is a limitation on legal cost. At first glance, the attorney's fee is foreseeable when the contract of sale is concluded but this is part of the undertaken risk. It is not certain which party will win the case if the loser-pays rule is applied. Court costs and arbitral tribunal fees depend on cases variously. Therefore, there are uncertainty and unforeseeability for the calculation of legal costs under Article 74 (Schlectriem, 2002:208).

2.1.1.4. Pre-contractual Liability

Pre-contractual liability occurs for matters which have occurred in negotiations before the parties have concluded a contract of sale. A party may suffer some loss when the other party break negotiations suddenly after having confidential information regarding the aggrieved party's trade practice. Different national legal systems have a different scope of dealing with pre-contractual liability (Nielsen, 2022:41). Therefore, "*culpa in contrahendo*" falls outside the scope of the CISG. Although the Convention is not the applicable law, the injured party has legal remedies in national legal systems (Galvan,1998:23).

2.1.1.5 Non-pecuniary Loss (Non-pecuniary Damages)

Material (pecuniary) damage is damage that lessens the current and potential assets of the company. Traditionally, non-material (non-pecuniary) damage includes loss of amenities, suffering mental distress, pain, and psychological injury. Non-pecuniary damage is damage that affects the trader's enjoyment of commercial life and reputation, and it is not excluded under the Convention (Nielsen, 2022:40). It is not impossible to imagine that the aggrieved party may lose his potential customers as a result of breaching the contract of sale (Nielsen, 2022:36). In one doctrinal view, non-pecuniary loss takes only the form of damage of goodwill, often called the reputation of goods, or damage to the reputation of a firm in business law (Busctöns, 2015:39). However, loss of goodwill is very difficult to measure because it is very difficult to prove "a sum equal to the loss" under Article 74 CISG with reasonable certainty (Nielsen, 2022:36).

In an arbitration case, the US buyer brought action to the Russian seller in connection with the contract of sale concluded between the buyer and the seller in January 1998. The buyer claimed that the breach of contract in the first instalment caused a delay in selling and a reduction of prices of the goods in the second instalment. It caused the loss of reputation of goods and goodwill on the market. The arbitral tribunal declined this claim for the following reasons: 1) the causal link does not exist between damage and breach; 2) the buyer could not prove the amount of the commensurate claim with breach; 3) the foreseeability was not proved (Zaheeruddin, 2016:54).

Unlike the second rejection of the aforesaid arbitral tribunal decision, the Helsinki Court of Appeal[4] granted damages for different damage, including loss of goodwill, on the basis of the following estimate: *"[i]n estimating the loss resulting from loss of goodwill, the Court of First Instance has taken into consideration the fact that the [buyer] has not done business in this trade sector before the coming about of the business relationship now in question. … The Court of First Instance has estimated the damage caused to [the buyer]*

[4]Helsinki Court of Appeals, Helsingin Hoviokeus, S 00/82, 26 October 2000.

on the basis of a rule laid down [in] the Civil Procedure Act (section 17)." (Buschtöns, 2015:40-41). This judgment shows that the award of damages for loss of goodwill is indeed a pecuniary value without demonstration of actual losses. In these decisions, it is agreed that non-pecuniary losses are recoverable but it is very hard to prove the actual amount due to their non-material nature and the lack of proof (Galubovic, 2013:15).

2.2. Requirements for awarding damages under Articles 75-76 of the CISG

2.2.1. Determining Damages through Substitute Transactions

Pursuant to Article 75 of the CISG, the party claiming damages may recover the difference between the price in the contract of sale and the price in a substitute transaction carried out by the injured party. Supposing that the second transaction is the substitute transaction for the first transaction, there would be insignificant or no loss if the cover price gained in the second transaction exceeded the price stipulated in the breached contract (Al-Hajaj, 2015:222). Therefore, it may be deduced that the buyer can receive the difference between the price in the original contract and the price that it accepted from the sale to some other buyer of the goods determined in the avoided contract under the assumption that the price of the original contract would be higher than the latter price. The reason behind this rule is that the aggrieved party who has declared the contract of sale avoided will look for a substitute transaction since avoidance of the contract of sale releases the buyer and the seller from their contractual obligations. It is normally expected that the buyer buys substitute goods or the seller resells the goods to a different buyer. Moreover, encouraging the aggrieved party to reach the conclusive purpose of the contract of sale in substitute performance is likely to cause the minimization of the damages breached by the contract of sale (Al-Hajaj, 2015:222).

Pursuant to Article 75 CISG, there are two necessary conditions to calculate the damage formula. The substitute transaction must be carried out in "*a reasonable manner*", and it must be completed within "*a reasonable time after avoidance*" (Al-Hajaj, 2015:222). It should be emphasized that there is a limitation that a substitute transaction is compensable to the extent that it has been made in "*a reasonable manner and within a reasonable time after avoidance*." How should the term "reasonable manner" be understood? Schlechtriem interprets it as follows: "*If the promise acted as a careful and prudent businessman and observed the relevant practice of the trade concerned*" (Galvan, 1998:37). Therefore, it is allowed for the substitute goods to deviate from the original goods as long as the deviation is reasonable. As for the time limit, it is only certain that it starts running from the moment of avoidance of the contract of sale. Due to the nature of international trade, it is decided on the case by case basis. In a German case, a German shoe buyer did not sell until two months after the contract of sale was avoided. This duration was considered a reasonable time by the German court (Galvan, 1998:37). A buyer who is aggrieved by a seller's breach may not simply cover the transaction and an aggrieved seller may not resell goods at any price or at any time. If these conditions are not met, the aggrieved party may cover the loss as if the substitute transaction has not been made (Al-Hajaj, 2015:223).

It is very difficult to prove damage, especially when it involves specific goods, when there is no pre-order for the resale of goods, or when a new business enterprise has no record of sale with comparable prices, because the proposed calculation method here only requires knowledge of the price at which the goods were sold by the seller to the second buyer (Munoz, Ament-Gimenez, 2017:216).

2.2.2. Determining Damages on the basis of the Market Price

Pursuant to Article 76 of the CISG, the party claiming damages may recover the difference between the price stipulated in the contract and a current (market) price for the goods at the time of avoidance of the contract of sale. This rule assumes that the goods have not been taken over (by the party claiming damages) under the breached contract. However, if the goods have been taken over by the party who claims damages before the contract of sale was avoided, the current (market) price at the time of such taking over should be taken into account instead of the current (market) price at the time when the contract of sale was avoided (Al-Hajaj, 2015: 226). Article 76 CISG is applied in the calculation of damage if there is no purchase for the buyer or no resale for the seller under Article 75 CISG (Zaheeruddin, 2016:51).

Article 76 of the CISG is applied at the time of avoidance of contract of sale when the aggrieved party does not conclude a substitute transaction with a third party. The market price is the general price in the market for the same kind of goods at the place of delivery of goods. In international sale of goods, the market place is designated place where the first carrier hands over the goods to the buyer. There is a suitable place for a seller to measure the market price when the shipment is obstructed as a result of the buyer's breach. If there is no (market) price at the place of delivery of goods, the aggrieved party may claim the current price of comparable or similar goods at different market places, if such a price may be a reasonable substitute (Al-Hajaj, 2015:226). The term "reasonable substitute" has not been. It depends on the situation and must be examined on the case-by-case basis in view of the interest of both parties (Al-Hajaj, 2015:227). In the case *Silicate-Iron Case CIETAC-Shenzhen Arbitration, China* (18 April 1991)[5], the arbitral tribunal did not accept the quotations (on terms of sale and payment) published in an international *commerce* magazine because the reported quotations were written for markets which differ from the market place of the delivery of goods. Therefore, the arbitral tribunal accepted the price agreed by the aggrieved seller in a substitute transaction which was not ultimately made (Al-Hajaj, 2015:227).

2.3. The Duty to Mitigate the Loss under Article 77 of the CISG

Pursuant to Article 77 of the CISG, the aggrieved party has an obligation to take relevant measures to mitigate the loss, but this provision is subject to the limitation envisaged in Article 74 CISG (Schneider, 1997:236). Article 77 CISG states: *"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated*."

Considering that the first sentence of Article 77 CISG imposes an obligation on the aggrieved party to mitigate the damage (loss) resulting from the breach of contract, courts or arbitral tribunals may require such mitigation by allowing a set-off in favour of the breaching party as a result of the failure of the non-breaching party to mitigate. According to the second sentence, there is no intention to place liability on the aggrieved party for the failure of avoidance of damages (Schneider, 1997:236). However, it means precluding an aggrieved party from covering damages that could have been avoided by taking reasonable measures (Schneider, 1997:236). In this situation, the aggrieved party's performance

[5] Silicate-Iron Case CIETAC-Shenzhen Arbitration, China (18 April 1991).

interest can be protected with a lower amount of damages, and the breaching party can enjoy the remaining money in business life (Saidov, 2008:126-127). In accordance with these interpretations, there is a third interpretation of Article 77 CISG, which is that "*mitigation of loss can become a sword as well as a damages shield – by drawing on the "general principles" provision of the CISG Article 7(2) to create a duty of "loyalty to the other party to the contract*." (Schneider, 1997: 236-237). Therefore, failure to mitigate damage (loss) may constitute a breach of the contract of sale and cause recoverable damages (Schneider, 1997:237).

2.4. Interest Rate under Article 78 of the CISG

The interest rate has the economic function to preserve the value of money for the injured party (Kizer, 1998:1288). It is an important issue to calculate total damage in detail. Thus, Article 78 of the CISG refers to the interest rate regarding damages, stating as follows:

"*If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74*."

It is evident that a party may request interest on a sum owed by the other party and that this does not have an effect on claiming damages under Article 74 CISG (Galvan, 1998:39). Yet, this provision is silent on the calculation of the interest rate, based on the amount of damage and other factors. (Schneider, 1997:230-231). Therefore, case law determines interest rates in CISG disputes on the basis of relevant factors, the gap-filling rule, equity, and trade usage. Two different approaches may be observed in the case law of arbitral tribunals.

Firstly, the interest rate is determined in conformity with the CISG general principles (Schneider, 1997:234). In the ICC case No. 8611/1997, interest on interest is not accepted in a CISG dispute (Galvan, 1998:39) because this type of interest is not compatible with the full compensation principle envisaged in Article 74. This basic principle is applied in an arbitral decision[6] as follows: "*One of the general principles underlying the CISG is that of 'full compensation' of the loss. It follows that, in the event of failure by the debtor to pay a monetary debt, the creditor, who as a business person must be expected to resort to bank credit as a result of the delay in payment, should therefore be entitled to interest at the rate commonly practiced in its country*…" (Schneider, 1997:234).

Secondly, by virtue of the principles governing the conflict of law in the forum (*lex fori*), the interest rate is determined as a result of applicable law rules. Then, the law of the forum determines the interest rate without reference to its conflict of law principles (Schneider, 1997:234-235). When determining the interest rate, some connecting factors play decisive roles, such as the law of the place of payment, the law of the debtor or creditor, and the law of the place of actual loss (Schneider, 1997:235). In an ICC case involving a dispute between an Italian debtor and a Yugoslav creditor over the sale of cow hides, the arbitrator ruled that the creditor was entitled to get interest from the debtor under Article 78 CISG but noted that there was no single internationally determined interest rate in international business life. However, the arbitrator emphasized that the creditor's place of business was the connecting factor in determining the interest rate for damage incurred due to delayed payment in Private International Law. Thus, the Yugoslav interest rate was awarded in the dispute (Kizer, 1998:1298).

[6] For the full text of this decision see Unilex database 1995/II, d. 1994-13(English translation of German text)

3. CONCLUSION

The UN Convention on International Sale of Goods (CISG) regulates damages for breach of contract in Articles 74-78 of the CISG. Article 74 of the CISG is the basic rule including principles for the calculation of damages. Although it does not offer a calculation method, it has established two criteria: the principle of full compensation and foreseeability. These criteria are applied to all types of damages, and gap-filling rules cannot be incompatible with these criteria. While full compensation excludes overcompensation (Akşin, 2016:23), the purpose of the foreseeability requirement is to ensure that parties are precluded from claiming gross liability, except for possible economic risks in the course of formation of a contract of sale (Karabaş, 2018:71). Therefore, the aforesaid types damages types are assessed under these two criteria. Unlike Article 74 of the CISG, Articles 75 and 76 offer a calculation method when the contract of sale is avoided as a result of a fundamental breach of contract of sale. Under Article 75 CISG, the party claiming damages may recover the difference between the price stipulated in the contract of sale and the price in a substitute transaction carried out by the damaged party. Under Article 76 CISG, the party claiming damages may recover the difference between price in the contract and a current (market) price (Al-Hajaj, 2015:222-226). The application of Articles 75 and 76 CISG is more limited than the application of Article 74 CISG. Article 77 CISG obliges the aggrieved party to mitigate the loss in case the damage occurs as a result of the breach of the contract of sale. Thanks to this provision, the damaged party is precluded from becoming indifferent in the aftermath of a contractual breach while the breaching party expects the payment of all accruing damages or losses (Rostila, 2017:46). Article 78 CISG regulates the interest rate for the calculation of all damages, but this provision it is not very detailed. In practice, the interest rate is determined according to the national applicable law by referring to the conflict of law rules of the forum state (Atamer, 2013:15-16).[7]

Therefore, although the CISG provisions are quite comprehensive, there are a few legal issues that have not been covered. These issues constitute gaps in the CISG which should be interpreted pursuant to Article 7 CISG (Eiselan, 2005:32). Case law and legal doctrine play an important role in the interpretation of Article 7 CISG. It is possible to draw a precise line on the issue of damages in each case through case law, gap-filling rules and legal doctrine.

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[7] See: CISG Advisory Council Opinion No. 14 Interest under Article 78 CISG (Rapporteur: Yeşim Atamer İstanbul Bilgi University, Turkey), 2013, pages 15-16.

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CISG Advisory Council Opinion No. 14 Interest under Article 78 CISG (Rapporteur: Yeşim Atamer, İstanbul Bilgi University, Turkey), adopted by the CISG Advisory Council following its 18th meeting in Beijing (China) on 21 and 22 October 2013

VRSTE NAKNADE ŠTETE PREMA BEČKOJ KONVENCIJI O MEĐUNARODNOJ PRODAJI ROBE

Kršenje ugovora o prodaji može prouzrokovati štetu. Naravno, oštećeni može tražiti naknadu štete zbog kršenja ugovora o prodaji. Bečka konvencija o međunarodnoj prodaji robe (Convention on International Sale of Goods/CISG, 1980) reguliše naknadu štete odredbama koje su sadržane u članovima 74-78 ove Konvencije. Član 74 predviđa punu naknadu štete i predvidivost kao opšte principe za utvrđivanje obima štete kod svih vrsta povreda ugovora o prodaji. Članovi 75. i 76. Konvencije regulišu naknadu štetu za bitnu povredu ugovora do koje je došlo raskidom ugovora o prodaji. Član 77. Konvencije obavezuje oštećenog da ublaži štetu. Član 78. Konvencije uređuje pitanje utvrđivanja kamatnih stopa za obračun naknade štete. Iako ove odredbe na prvi pogled izgledaju sveobuhvatne, one ne pokrivaju neka važna pitanja. Za tumačenje ovih odredbi veoma su važne sudska praksa, pravna doktrina i pravila za popunjavanje pravnih praznina. Svrha ovog rada je da se podvuče crta u tumačenju odredbi o naknadi štete zbog kršenja ugovora o prodaji. U pripremi rada korišćena je metodologija teorijskog istraživanja.

Ključne reči: *Bečka konvencija o međunarodnoj prodaji robe, naknada štete, gubitak dobiti, pravilo tržišne cene, slučajna šteta.*

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Book Review

BIHEVIORISTIČKO PRAVO I EKONOMIJA (*BEHAVIORAL LAW AND ECONOMICS*)

Authors: Eyal Zamir, Doron Teichman

Dosije studio Beograd, Univerzitet u Novom Sadu, SeCons–grupa za razvojnu inicijativu, Beograd (662 pages)

UDC 34:159.9.019.4+330.1:159.9.019.4 Zamir E.(043.9)
34:159.9.019.4+330.1:159.9.019.4 Teichman D.(043.9)

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The book ***Behavioral Law and Economics.*** co-authored by **Eyal Zamir and Doron Teichman**, was originally published in English by Oxford University Press in 2018.[1] In this book review, we will focus on the Serbian translation of this monumental work in the field of behavioral law and economics.[2] This book is part of a corpus of books published within the ERASMUS+ project "*Public Policy Making and Analysis* (PPMA)", which was funded by the European Commission and aimed at lifelong learning in the field of public policies in Serbia.

The entire edition created within the Project framework was aimed at promoting knowledge about the elements of public policies. In our scientific, professional and general public, it is necessary to study the domain of public policies and to observe it as a decision-making system in the public sector. Public policies are part of public administration management concerning the relations, processes and activities of public administration. More specifically, public policy entails the process of making decisions in the public interest, not in the private interest (Dimitrijević, Vučetić, 2021: 51). On the other hand, the foundations of public policies are the value judgments of its actors; it implies the choice of values which are implemented in order to achieve the goal determined by the political authorities. The key features of public policy action, program and measures are its goals, the instruments used and their results, as well as the implementation of a public policy, its consequences and the socio-economic and institutional environment (Dimitrijević & Vučetić, 2021: 52).

The textbook ***Behavioral Law and Economics*** aims to provide a systematic and comprehensive knowledge in the field of behavioral law and economics and depict their

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[1] Eyal Zamir, Doron Teichman. (2018). *Behavioral Law and Economic*s. Oxford University Press.
[2] Ejal Zamir, Doron Tajhman. (2022). *Bihevioristično pravo i ekonomija*, [*Behavioral Law and Economic*s], Dosije studio Beograd, Univerzitet u Novom Sadu, SeCons–grupa za razvojnu inicijativu, Beograd (662 str.).

influence on legal theory and the creation of public policies. Zamir and Teichman note that no comprehensive textbook or discussion on this matter had been written to date. The book was designated as a textbook, a treatise "whose goal is to provide a general overview of this field, including its economic and behavioral background, methodology, normative and public policy implications, as well as examples in various legal fields" (Zamir, Tajhman, 2022: 19).

Structurally, the textbook comprises five distinctive parts and a total of sixteen chapters. Each part included a number of chapters.[3]

The first part, titled *Economic and Psychological Background* contains two chapters: 1. Economic Analysis of Law: An Overview (pp. 27-39); 2. Behavioral Studies (pp. 41-170).

The second part, titled *Behavioral Law and Economics,* contains three chapters: 3. An Overview of Behavioral Law and Economics (pp. 173-189); 4. Normative Implications (pp. 191-233); 5. Behavioral Insights and Basic Features of the Law (pp. 223-233).

The third part, titled *Private and Commercial Law,* contains five chapters: 6. Property Law (pp. 237-273); 7. Contract Law (pp. 275-3209); 8. Consumer Contracts (p. 321-367); 9. Tort Law (pp. 369-400); 10. Commercial Law: Corporate Law, Securities Regulation, and Antitrust (pp. 403-440).

The fourth part, titled *Public Law,* contains three chapters: 11. Administrative, Constitutional, and International Law (pp. 443-483); 12. Criminal Law and Enforcement (pp. 485-517); 13. Tax Law and Redistribution (pp. 519-548).

The fifth part, titled *The Legal Process,* contains three chapters: 14. Litigants' Behavior (pp. 551-581); 15. Judicial Decision-Making (pp. 583-625); 16. Evidence Law (pp. 627-662).

Each of the sixteen chapters within the five parts includes an introduction and a conclusion. A list of acronyms is provided at the end of the book.

The principal value of this capital book is that it can be read by anyone: economists, lawyers, engineers, doctors. This book is a kind of a guide for learning about the world around us, unraveling the heavy veils of law and economics individually, separating them completely from the concept of everyday life, and making them completely independent areas with their own functional mechanisms. This book teaches us that we can influence the world around us and that there are no invisible forces pulling the strings. Relying on the authors' vast content knowledge presented in a comprehensible style, clear language and facts, the book removes the hazy veils covering the relationship between law and economics.

The professional public in Serbia will be deeply grateful to the publishers for publishing this important textbook in Serbian language within the grandiose ERASMUS+ project.

The book was translated by Danijela Ivanović, and the translation was professionally edited by Prof. Aleksandar Mojašević, LL.D., Associate Professor at the Law Faculty, University of Niš.

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[3] All names of parts and chapters are taken from the English edition of the book.

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