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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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EDITOR'S INTRODUCTORY NOTE

Dear Readers,

We are excited to announce significant accomplishments for the journal *Facta Universitatis, Series: Law and Politics* in this year. We are now officiailly indexed in ERIH+, a key journal index in the field of Social Sciences and Humanities, which is widely used by the European academic community. *Facta Universitatis: Law and Politic*s is also included in EBSCO's Legal Source database and in Sherpa/Romeo database. The importance of indexing the journal in HeinOnline and ERIH+ is reflected in the fact that the journal is recognized in accreditatiton standards for doctoral academic studies in social sciences in Serbia. Furthermore, partnership between all these databases is an excellent opportunity to raise awareness about our publications and to increase visibility, likelihood of citation and the impact factor.

We hereby extend sincere gratitude to all authors and reviewers who have substantially contributed to this journal issue. We are glad that our new editorial policy has increased the quality of the journal, which is internationally recognised, and we hope that it will be fully recognised on the national level as well.

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We hope you will enjoy reading the scientific articles in our new issue on legal and political matters that our writers have chosen to address..

Editor-in-Chief

Maja Nastić, LL.D.

Niš, 20th May 2024

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Review Paper

STATE IDENTITY IN THE CONSTITUTIONS OF EUROPEAN COUNTRIES

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Abstract. *The provisions on the state identity of individual countries in Europe are usually set out in the introductory articles of their constitutions. These provisions are usually concise, comprising only a brief designation of state identity, but some constitutions include more extensive descriptions. State identity is primarily defined by referring to its form of government, but also by explicit claims pertaining to its democratic system, social justice, national independence, sovereignty, and the rule of law. Constitutions also specify that some European countries are nation-states, while others are civic states. In constitutions, states are also designated as unitary states or federations. Some European states recognize that their constitutional identity is, among other elements, based on the protection of human rights and fundamental freedoms. In most cases, there is a combination of plural components of a state's identity, but the number of those elements may vary immensely.*

Key words: *state identity, constitution, Europe*

1. INTRODUCTION

The provisions establishing the elements of a European state's identity are usually laid out in the first articles of the constitution. Rarely are the elements of the definition of the state scattered throughout the document as is the case with the Constitution of Russia (1993). Constitutional definitions of state identity are usually short, comprising only a couple of elements. Yet, some constitutions include more extensive provisions, such as those contained in the constitutions of Portugal (1976) and Romania (1991), comprising about 40 words. This serves as an example of a justified claim that, in the political sense of the word, national identity is a category of dynamic nature (Gacinović, 2011: 25).

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Elements of the constitutional definition of the state include the *classic* attributes of the state. This means that a state is defined as *independent*, *social*, or the *state of law*. In addition, a state is officially designated by referring to the specific form of government: "republic", "kingdom", "grand duchy", or "principality". Nevertheless, one should bear in mind that more than half of the European countries have for a while been facing a phenomenon of a "dual identity": a national constitutional identity combined with the European Union constitutional identity. Both are recognised by some national constitutional courts, but tend to be mutually conciliated (Fines, 2021: 2-3, 10-13). In France, for example, "the jurisprudence of the constitutional court has raised awareness about the concept of constitutional identity during the legal debate pertaining to the European construction which, in the eyes of the Eurosceptics, can be analyzed as a regional avatar of the globalization process" (Viala, 2011: 1).

The most numerous elements of the definition of the state (as many as 11) are contained in the Constitution of Portugal (1976). That document set the bar high, but several constitutions followed suit. The number of elements vary; there may be nine,[1] eight,[2] or six[3] of them. On the other hand, some European states are constitutionally defined by a *single* element. This solitary component is "federal state",[4] "constitutional monarchy",[5] or "a Republic with parliamentary government".[6] It is interesting that Belgium effectively became a federal state after governmental structures concluded that the unitary state model belongs to the past, considering that "the structures of a unified political society have gradually disappeared, thanks to an evolution which has continued for around thirty years and which is not yet complete" (Weerts, 2004: 33).

2. Basic Provisions Serving as a Guide for Getting to Know a State

One of the standard constitutional definitions of a European state is invariably related to the *form of government*. Thus, a state is defined either as a republic[7] or as a monarchy. Less frequently, it is defined in more explicit terms, such as "Hungary's form of government shall be that of a republic"[8] or "the fundamental aims and duties of the State are to safeguard (…) the Republic".[9] Furthermore, Albania is defined as "a parliamentary republic",[10] as is Greece.[11] Bulgaria is defined as "a republic with a parliamentary form of

[1] The Constitution of Turkey of 1982 (Art. 2).
[2] The Constitution of Romania (Art. 1 § 1-3) and the Constitution of Montenegro of 2007 (Art. 1 § 1-2).
[3] The Constitutions of Ukraine of 1996 (Art. 1 and Art. 5 § 1) and the Constitution of Serbia of 2006 (Art. 1).
[4] Art. 1 of the Constitution of Belgium (1994).
[5] Art. 2 of the Constitution of Denmark (1953).
[6] Art. 1 of the Constitution of Iceland (1944).
[7] This is the case with: the Constitution of Austria (Art. 1); the Constitution of Azerbaijan of 1995 (Art. 7 § 1); the Constitution of Estonia of 1992 (Art. 1 § 1); the Constitution of Georgia (Art. 1 § 2); the Constitution of Italy (Art. 1 § 1); the Constitution of Latvia (Art. 1); the Constitution of Lithuania of 1992 (Art. 1); the Constitution of Hungary (Art. B § 2); the Constitution of Moldova of 1994 (Art. 1§ 2); the Constitution of Montenegro (Art. 1); the Constitution of Portugal (Art. 1); the Constitution of Romania (Art. 1 § 2); the Constitution of Russia (Art. 1 § 1); the Constitution of San Marino of 1974 (the Preamble); the Constitution of Slovenia (Art. 1); the Constitution of Turkey (Art. 1); the Constitution of Ukraine (Art. 5 § 1); the Constitution of Finland of 1999 (Art. 1 § 1); the Constitution of France (Art. 1).
[8] Art. B, Para. 2 of the Constitution of Hungary (2011).
[9] Art. 5 of the Constitution of Turkey.
[10] Art. 1 Para. 1 of the Constitution of Albania (1997).
[11] Art. 1 Para. 1 of the Constitution of Greece (1975).

government",[12] and Iceland is defined as "a Republic with a parliamentary government".[13] Cyprus is defined a "Republic with a presidential regime"[14] while "the political system of Andorra is a parliamentary Coprincipality".[15]

European monarchies are also explicitly self-defined as constitutional monarchies. Hence, in Denmark, "the form of government is constitutional-monarchic"[16]; this formulation was probably borrowed from the Constitution of Norway, which specifies that in this Scandinavian state "the form of government is limited and hereditary monarchy".[17] In Monaco, "the principle of government is hereditary and constitutional monarchy".[18] Similarly, Liechtenstein is "a constitutional hereditary monarchy on a democratic and parliamentary basis (*auf demokratischer und parlamentarischer Grundlage*)".[19] Quite similarly, "Swedish democracy (…) is manifested through representative and parliamentary statehood",[20] and "the political form of Spanish state is parliamentary monarchy (*la Monarquía parlamentaria*)".[21]

Some (rare) countries are defined in their constitutions as *secular states*,[22] or as the state is "laïque"[23] in one of the most respectable and influential constitutions in the world. Even more exceptional are the states constitutionally defined as *free*: "The Grand Duchy of Luxembourg is a democratic, free (…) State",[24] and "the Kingdom of Norway is a free (…) realm".[25] In Europe, there is also a country self-defined as an "ecological state".[26]

There are also relatively *simple* modalities of the constitutional definitions of European states. Such is the case when a constitutional provision *merely* sets out a country's official name. Accordingly, "the official name [of the state] is the Principality of Andorra",[27] and "the name of the State is Éire, or, in the English language, Ireland".[28] The constitution-framer must have been proud to be authorized to claim that "the name of OUR COUNTRY shall be Hungary", with the emphasis on *capital letters*, which is a solitary example among the constitutions of European states (the use of capital letters was not spared in the Constitution of Hungary). A reader could sneak a smile when informed that "'Georgia' is the name of the state of Georgia", but this wording is the full and exact content of the Constitution of Georgia.[29] Similarly, "the Russian Federation – Russia (*Российская Федерация – Россия*) is a democratic federative law-governed state with a republican form of government", bearing in mind that "the names Russian Federation and Russia are equivalent".[30]

[12] Art. 1 Para. 1 of the Constitution of Bulgaria (1991).
[13] Art. 1. of the Constitution of Iceland.
[14] Art. 1 of the Constitution of Cyprus (1960).
[15] Art. 1 Para. 4 of the Constitution of Andorra (1993).
[16] Art. 2 of the Constitution of Denmark (1953).
[17] Art. 1 of the Constitution of Norway (1815).
[18] Art. 2 of the Constitution of Monaco (1962).
[19] Art. 2 of the Constitution of Liechtenstein (1921).
[20] Art. 1, Para. 1, Sec. 2. Instrument of Government of 1810, Sweden.
[21] Art. 1 Para. 3 of the Constitution of Spain (1978).
[22] Such provisions exist in the constitutions of Azerbaijan (Art. 7 § 1), Russia (Art. 14 §1), and Turkey (Art. 2).
[23] Art. 1 Para. 1 of the Constitution of France.
[24] Art. 1 of the Constitution of Luxembourg (1868).
[25] Art. 1 of the Constitution of Norway.
[26] Art. 1 Para. 2 of the Constitution of Montenegro.
[27] Art. 1 Para. 1 of the Constitution of Andorra.
[28] Art. 4 of the Constitution of Ireland (1937).
[29] Art. 2 Para. 1 of the Constitution of Georgia (1995).
[30] Art. 1 Para. 1-2 of the Constitution of the Russian Federation/Russia.

In some constitutions there is an intriguing lack of coherence in using the country's name For example, the term "Republic of Armenia" is used in some provisions of the Constitution of Armenia[31] but, in other provisions, the term "State" is used as a synonym.[32] Similar inconsistencies may be found in the Belgian Constitution: some provisions refer to "the Kingdom",[33] while others refer to "the federal state"[34] or simply "the State".[35] The identical inconsistencies (causing readability issues) may be observed in the constitutions of: Greece (*Πολιτεία*, *Κράτος*, and *Χώρα*), Italy (*Paese*, *Repubblica*, *Stato*), Latvia (*Latvija*, *Valsts*), Liechtenstein (*Fürstentum*, *Land*, *Staat*), Lithuania (*Lietuvos Respublika*, *Lietuvos valstybei*, *Valstybės*), Norway (*Fædreland*, *Kongeriget*, *Norge*, *Stat*), Portugal (*Estado*, *Portugal*), Romania (*Romania*, *statul*, *statul roman*, *tara*), Turkey (*anavatanla*, *Türk Devlet*, *Türkiye Cumhuriyeti*, *ülken*, *vatan*), and Spain (*Estado*, *Estado Español*, *España*, *país*).

3. Democracy, Social Justice, Independence, and Sovereignty as Components of Constitutional Identities

In constitutional documents, the terms "democratic, social and independent" country essentially implies a law-governed, social-welfare, and sovereign state. European countries generally tend to be perceived as such, at least when it comes to the use of constitutional phrases. The self-identification of a European state is additionally confirmed by the constitutional provisions referring to the rule of law, territorial integrity, as well as political and/or military neutrality.

In the largest number of constitutions, the *democratic* nature of the state is usually expressed in a simple statement that a given country is a "democratic state".[36] In some constitutions, it is further explained; for example, in the Constitution of Portugal, Portugal is defined as a democratic state "based on the dignity of the human person and the will of the people, and committed to building a free, just and solidary society" and "to achieving economic, social and cultural democracy and deepening participatory democracy".[37] Serbia is defined as a state based on "principles of civil democracy",[38] while Luxembourg is a state "placed under a regime of parliamentary democracy (*placé sous le régime de la démocratie parlementaire*)".[39] Under the German Constitution, the constitutional order of

[31] Art. 1-2, Art. 3 Para. 1, etc. of the Constitution of Armenia
[32] E.g., Art. 10 § 1 of the Constitution of Armenia: "The subsoil and water resources shall fall under the exclusive ownership of the State."
[33] E.g., Art. 4 § 2 of the Constitution of Belgium.
[34] Art. 1. of the Constitution of Belgium.
[35] Art. 7 of the Constitution of Belgium.
[36] This is the case with constitutions of: Andorra of 1993 (Art. 1 § 1), Armenia (Art. 1 § 1), Austria (Art. 1), Azerbaijan (Art. 7 §1), Belarus (Art. 1 § 1), Bosnia and Herzegovina (Art. 1 § 2), Croatia (Preamble, and Art. 1 § 1), Czech Republic of 1992 (Art. 1 §1), Estonia (Art. 1 § 1), France (Art. 1), Georgia (Art. 1 § 3), Germany (Art. 20 § 1), Hungary (Art. B Para. 1) Ireland (Art. 5), Italy of 1947, Latvia (Preamble, and Art. 1), Liechtenstein (Art. 2), Lithuania (Art. 1), Luxembourg (Art. 1), Malta of 1964 (Art. 1 Para. 1), Moldova (Art. 1 § 3), Montenegro (Art. 1 § 2), North Macedonia of 1991 (Art. 1), Poland (Art. 2), Portugal (Art. 2), Romania (Art. 1 § 3), Russia (Art. 1 § 1), Slovakia of 1992 (Art. 1 § 1), Slovenia of 1991 (Art. 1), Spain (Art. 1 § 1), Turkey (Art. 2), and Ukraine (Art. 1).
[37] Art. 1-2 of the Constitution of Portugal.
[38] Art. 1 of the Constitution of Serbia (2006).
[39] Art. 51, Para. 1 of the Constitution of Luxembourg (1868, as amended in 1948).

each federal unit (*Länder*) in Germany "must conform to the principles of a republican, democratic and social state".[40]

There is compelling comparative evidence that almost half of the European countries are constitutionally identified as *social states*.[41] In this regard, some statements are rather distinctive. Thus, Latvia is "a socially responsible state",[42] Montenegro is "the state of social justice",[43] and Serbia is "based on social justice".[44] Poland is defined as a state devoted to "implementing the principles of social justice",[45] while Portugal is "committed to building a free, just and solidary society (*uma sociedade livre, justa e solidária*)".[46] Italy is "founded on labour" (*fondata sul lavoro*),[47] and so it is Malta.[48] Turkey is defined as a "social state" (*sosyal Devlet*), although this expression is to be understood within the legal framework of several notions, including "national solidarity and justice".[49]

In the constitutions where state independence is expressly declared, it is commonly done by specifying that a country is an *independent*[50] and/or *sovereign* state.[51] In this regard, formulations tend not to be too excessive, but there are certain exceptions. Thus, Monaco is defined as "a sovereign and independent State within the framework of the general principles of international law and the particular conventions with France".[52] Under the Turkish Constitution, one of the "the fundamental aims and duties" of the state is "to safeguard the independence and integrity of the (…) Nation".[53] Similarly, the Swiss Constitution stipulates that the state "shall protect the liberty and rights of the people and safeguard the independence and security of the country".[54]

Some constitutions comprise *references to influential historical events and figures*. It is important to underline that these references are usually envisaged in the *normative* parts of constitutions, rather than in the preamble, which is a common part of the constitution for introducing historical references. Under the Romanian Constitution, Romania is a state where "supreme values" are esteemed "in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989".[55] Under the Turkish Constitution, Turkey is "a (…) state (…) loyal to the nationalism of Atatürk".[56]

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[40] Art. 28, Para. 1 of the Constitution of Germany (1949).
[41] Social states are constitutionally defined in: Latvia (the Preamble), France, North Macedonia, and Ukraine (Art. 1), Andorra, Armenia, Belarus, Croatia, and Spain (Art. 1 § 1), Romania (Art. 1 § 3), Slovenia and Turkey (Art. 2), Russia (Art. 7 § 1), and Germany (Art. 20 §1).
[42] Preamble of the Constitution of Latvia (1992).
[43] Art. 1, Para. 2 of the Constitution of Montenegro (2007).
[44] Art. 1. of the Constitution of Serbia (2006).
[45] Art. 2 of the Constitution of Poland (1997).
[46] Art. 1. of the Constitution of Portugal.
[47] Art. 1 Para. 1 of the Constitution of Italy (1947).
[48] Art. 1 Para. 1 of the Constitution of Malta (1964).
[49] Art. 2 of the Constitution of Turkey.
[50] This term is used in the constitutions of Cyprus, Latvia, Lithuania, Luxembourg, and North Macedonia (Art. 1); Andorra, Estonia, Georgia, and Moldova (Art. 1 §1); Hungary (Art. B § 1), and Ireland (Art. 5).
[51] This term is used in the following constitutions: Croatia (Preamble), Cyprus, North Macedonia, Portugal, and Ukraine (Art. 1); Armenia, Czechs, Estonia, Finland, Moldova, Montenegro, Romania, Slovakia (Art. 1 § 1); Ireland (Art. 5), and Belarus (Art. 19).
[52] Art. 1 Para. 1 of the Constitution of Monaco.
[53] Art. 5 of the Constitution of Turkey.
[54] Art. 2 Para. 1 of the Constitution of Switzerland (1999).
[55] Art. 1 Para. 3 of the Constitution of Romania.
[56] Art. 2 of the Constitution of Turkey. (Mustafa Kemal Atatürk was the founder and the first President of Turkey, 1923-1938).

4. UNITARY, FEDERAL, NATION-STATES, AND CIVIC STATES

Some European countries are constitutionally designated as *unitary*[57] and *indivisible*[58] states. In some constitutions, the unitary nature of the state is safeguarded by a provision stipulating that the enforcement of the principles of local autonomy "may not alter the unitary character of the State",[59] or by the provision that there is "there is single citizenship".[60] The unity and indivisibility of a particular state is explicitly entrenched in the results of the national constitutional referendum.[61]

A country may also be self-defined as *federal* state. Formally, six European states are organized on a federal political model (Austria, Belgium, Bosnia and Herzegovina, Germany, Russia, and Switzerland). However, not more than four of them are constitutionally established as such.[62] The Principality of Liechtenstein, the sixth smallest nation in the world which cannot easily be assessed to be federated (by theoretical criteria), decided to publicly present its "business card" (i.e. the constitution) claiming that it *is* a federation. Liechtenstein is defined as "a state association (*Staatsverband*) consisting of two regions (*Landschaften*) with eleven communes (*Gemeinden*)".[63]

Some countries in Europe are formally defined as *nation-states*, in the sense that notions of the ultimate political organization and ethnicity are mutually compatible at the highest level of hierarchy of legal norms. This certainly does not imply that modern constitutional definitions of the state as a *nation-state* ignores the question of the true *locus* for constitution-making because "modern nation-state is no more a "privileged place" for resolving important constitutional decisions" (Basta Fleiner, 2014: 21). However, formally speaking, Latvia is a "national state",[64] as is Romania.[65] Serbia is defined, *inter allia*, as "a state of Serbian people and all citizens who live in it".[66] Similarly, Croatia is "established as the national state of the Croatian nation and the state of the members of autochthonous national minorities (…) who are its citizens, and who are guaranteed equality with citizens of Croatian nationality".[67]

On the other hand, some countries are defined as *civic* states, in the sense that none of the ethnic (national) groups can justifiably be identified with the state in question. More precisely, "civic identity is based on citizenship, respect for laws, political participation, etc. (traits which are formally defined and therefore accessible to everyone)" (Lazić, Pešić, 2016:28). However, "Montenegro is a civic, democratic (…) state of social justice, based on the rule of law".[68] It should be noted that the process of the adoption of Montenegrin

[57] This refers to: Norway (Art. 1); Belarus, Czechs, Georgia, Moldova, and Romania (Art. 1 § 1); Albania (Art. 1 § 2); Estonia, and Ukraine (Art. 2 § 2); Poland (Art. 3); Portugal (Art 6 § 1); Azerbaijan (Art. 7 § 1).
[58] This refers to: France and Luxembourg (Art. 1); Croatia, Georgia, Moldova, and Romania (Art. 1 Para 1); Albania (Art. 1 § 2); Bulgaria (Art. 2 § 1); Italy (Art. 5).
[59] Art. 1 Para. 1 of the Constitution of Moldova. Similarly, the provision contained in the Constitution of Bulgaria, stipulating that "no autonomous territorial formations shall be allowed to exist [within the state]" (Art. 2 Para. 1).
[60] Art. 1 of the Constitution of Ukraine.
[61] Art. 1 para. 1 of the Constitution of Georgia.
[62] Austria is *ein Bundesstaat* (Art. 2 Para. 1 of the Constitution of 1920), as is Germany (Art. 20 Para. 1), and Russia is *федеративное* (...) *государство* (Art. 1 Para. 1). According to Art. 1 of the Constitution of Belgium, Belgium is a "federal state" (*een federale Staat*; *un État fédéral*; *ein Föderalstaat*).
[63] Art. 1. para. 1. of the Constitution of the Principality of Liechtenstein (1921)
[64] Para. 4 of the Preamble of the Constitution of Latvia
[65] Art. 1. para. 1 of the Constitution of Romania
[66] Art. 1 of the Constitution of Serbia (2006)
[67] Preamble, Part I, Para. 2, Sec. 14 of the Constitution of Croatia (1990)
[68] Art. 1. Para. 2. of the Constitution of Montenegro

Constitution was the subject matter of a complex and years-long discussion, focusing on "a set of 'identity issues'", pertaining to state symbols and the official language (Đukanović, 2014: 115). The Constitution of Poland stipulates that Poland "shall be the common good of all its citizens".[69] Slovenia is designated as "a state of all its citizens, and is founded on the permanent and inalienable right of the Slovene nation to self-determination".[70]

5. States Based on the Rule of Law and Human Rights and Liberties

Not many European countries have officially declared themselves as states where the rule of law is qualified as a constituent element of their identity. *Only* seven states are self-declared as such, including three countries with the youngest constitutions in Europe (Serbia, 2006; Montenegro, 2007; and Hungary, 2011) and three countries whose constitutions were adopted in the last decade of the 20th century (Andorra, 1993; Armenia, 1995; and Belarus, 1996). Thus, "Andorra is a Democratic and Social independent State abiding by the Rule of Law"; Armenia "is a sovereign, democratic, social state governed by the rule of law"; Belarus "is a unitary, democratic, social law-governed State".[71] According to their constitutions, Montenegro and Serbia are based, *inter alia*, "on the rule of law". The Hungarian Constitution states that Hungary "shall be (…) governed by the rule of law".[72]

On the other hand, two European countries are identified as *states of law* (this theoretical concept is rooted in the German term *Rechtstaat*). Thus, Spain is "a social and democratic legal state" (*Estado social y democrático de Derecho*), where justice is included in "the supreme values of the legal order".[73] Bosnia and Herzegovina "shall be a democratic state, which shall operate under the rule of law".[74]

Although the fundamental rights and freedoms are protected in civil proceedings, and may be the subject matter of adjudication at the European Court of Human Rights, human rights and liberties are used as an element in the constitutional definition of several European states. Thus, a state can be "founded on respect for the rights and freedoms of man and of citizens",[75] or based on "respect for the fundamental rights and freedoms of the individual",[76] or "respect for and the guarantee of the effective implementation of fundamental rights and freedoms",[77] or "human and minority rights and freedoms".[78]

Some formulations are less explicit but they ultimately have the same objective. Thus, Monaco is "committed to fundamental freedoms and rights".[79] In the Spanish Constitution, "freedom" is one of the "supreme values", i.e. the first of the enlisted five highest values in the Spanish legal order.[80] The Constitution of Switzerland is a bit more reserved,

[69] Art. 1. of the Constitution of Poland
[70] Art. 3. Para. 1 of the Constitution of Slovenia (1991)
[71] The constitutions of Andorra, Armenia, and Belarus (Art. 1 para. 1);
[72] the Constitution of Serbia (Art. 1); the Constitution of Montenegro (Art. 1 para. 2), and the Constitution of Hungary (Art. B para. 1).
[73] Art. 1 § 1 of the Constitution of Spain (1976)
[74] Art. I § 2 of the Constitution of Bosnia and Herzegovina (1995)
[75] Art. 1 § 1 of the Constitution of the Czech Republic
[76] Art. 1 § 1 of the Constitution of Malta
[77] Art. 2 of the Constitution of Portugal
[78] Art. 1 of the Constitution of Serbia
[79] Art. 2 § 1 of the Constitution of Monaco
[80] Art. 1 § 1 of the Constitution of Spain.

specifying that the state "shall protect the liberty and rights of the people".[81] The Constitution of Turkey stipulates that the state "*respects* human rights (…)";[82] the scarce wording may indicate almost *suspicious skepticism* of the state when it comes to the public duty to protect human rights and liberties.

6. Final Remarks

The constitutions of most European states comprise a range of different components aimed at defining the constitutional identity of a specific state. The country-specific provisions on state identity, usually miniature by substance, are enshrined in the introductory articles of their constitutions. The statements on state identity envisaged in the constitutions of individual country abound with phrases referring to independence, sovereignty, social justice and functions of the state, as well as references to a particular form of government and the constitutional system based on the rule of law. In addition, constitutions commonly refer to democracy, social protection and human rights and liberties as very important functions of the state in modern European constitutionalism.

In the context of ever-present tensions between the political power and the religion, several European states have chosen to identify themselves as secular states. It may come as a surprise that some states have chosen to introduce names of particular historical events and figures in the normative part of their constitutional texts, which is a practice that European constitutionalism is not prone to. Another important component of constitutional state identity is the differentiation between a federal and a unitary state model, as well as the classification of states into nation-states and civic states.

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[81] Art. 2 §1 of the Constitution of Switzerland.
[82] Art. 2 of the Constitution of Turkey (the italics are used by the author of this paper).

IDENTITET DRŽAVE U USTAVIMA EVROPSKIH ZEMALJA

Elementi zvaničnih definicija pojedinačnih evropskih država obično su sadržani u uvodnim članovima njihovih ustava. Po pravilu, ove definicije su sažete i sačinjene od svega nekoliko reči, mada postoje i veoma dugačke odredbe koje obrađuju isti taj predmet. Identitet države prvenstveno je određen navođenjem oblika vladavine, ali i izričitim identifikovanjem država sa demokratskim uređenjem, socijalnom pravdom, državnom nezavisnošću, suverenošću i vladavinom prava. U ustavima su pojedine evropske zemlje potvrđene kao nacionalne države, a druge kao građanske. Neke evropske zemlje su ustavom definisane kao federacije, a druge kao unitarne države. Određene države povezuju svoj ustavni identitet i sa zaštitom ljudskih prava i osnovnih sloboda. U najvećem broju slučajeva, primenjena je kombinacija nekoliko elemenata identiteta države, ali, uopšteno posmatrano, broj ovih elemenata veoma je raznolik, od jedne države do druge.

Ključne reči: *identitet države, ustav, Evropa.*

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(IM)PERMISSIBILITY OF AMENDING THE EMPLOYMENT CONTRACT IN THE CIRCUMSTANCES OF A CHANGE OF EMPLOYER

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Abstract. *The employer and the employee voluntarily enter into an employment contract, mutually agreeing on its content and essential elements, and accordingly undertaking to perform it in its entirety as it reads. However, in case of circumstances that make the obligations of one contracting party difficult to fulfill, or in case the employment contract no longer meets the expectations of the contracting parties, labour legislation recognizes the possibility of amending the employment contract. The institute of amending the employment contract contributes to establishing a balance between the originally concluded employment contract and the circumstances that occurred after its conclusion. The difficulty of establishing a fair balance of the above interests is further complicated if the request to amend the employment contract is made in the circumstances of a change of employer. Then, the question arises whether it is permissible to amend the employment contract at all if the reason for amending the change in the legal identity of the employer, and if so, whether there are certain conditions for its validity and which aspects of the employment relationship could be subject to change. In this paper, the author addresses these and other related questions by analyzing legal solutions, judicial practice and the doctrine.*

Key words: *amending the employment contract, change of employer, transfer of undertakings*

1. INTRODUCTION

Due to a change in the legal identity of the employer, employees may encounter problems concerning a different organization of labour, operations and working conditions. Although one of the basic contract law rules is that any contract may be changed by mutual agreement of the contracting parties, most comparative labour legislations that comprise the institute of change of employer limit this seemingly widespread rule. It may be explained by the fact that most of these labour laws are based on the same legal ground: the Council

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Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or business, or parts of undertakings or businesses[1] (hereinafter: Directive 2001/23/EC) which recognizes the principle of preserving the acquired rights; in the event of a change of employer, it implies the right of employees to preserve not only the employment relationship but also the working conditions agreed when concluding the contract with the transferor (prior employer). Therefore, after amending the original employment contract, the transferee (subsequent employer) should guarantee the exercise of the employees' acquired rights and ensure the employees' protect against dismissal for reasons related to the change of employer. This primarily means that "all rights, powers, obligations and responsibilities under or in connection with contracts are transferred to the transferee" (Elias, Bowers, 1996: 43), which entails the entire legal position (contractual status) of the transferor, including the rights and obligations that he has towards employees on the basis of an individual employment contract, or another contract or legal act (e.g. decision) on employment, as well as the rights and obligations arising from a collective agreement or unilateral general legal acts adopted by transferor (e.g. labour rulebook), and the rights and obligations that employees are entitled to in connection with the employment contract or the employment relationship under the law (in the field of labour law protection and social insurance) (Dragićević, 2022: 386). In addition, the change of employer *per se* may not be a reason for the termination of the employment contract by the transferee, nor may it be a reason for changing the stipulated working conditions at the detriment of the employee. However, the question arises whether the legislator prohibits any change to the employment contract if the reason for amending the contract is the change of the employer's legal identity, or whether some additional conditions need to be met to ensure its validity. In terms of validity, there is the question how long such a ban would be valid, and whether it applies to all or only some aspects of the employment relationship. Bearing in mind the conflicting interests of the subjects of the employment relationship in this legal situation, the comprehensive regulation of these important issues is not an easy task.

2. Positions on Amending the Employment Contract

A contractual relationship is a legal bond of a personal nature because it exists between certain persons: the debtor and the creditor (Radišić, 2008: 374). These persons voluntarily (of their own free will) create a legal norm that binds them to certain mutual conduct. This norm is the result of their mutual consent and it has the force of law for the parties (Radišić, 2008: 73). The stability of contract law is very important because, if the contract content or the contracting parties could be changed freely, neither the contracting parties themselves nor any third party would be able to predict their (future) rights and obligations (Gao, 2015: 227). Thus, laws provide protection to contractual parties by prescribing liability for non-performance or delayed performance of contractual obligations. However, after the conclusion of the contract, the (business) needs of the contracting parties may change, as well as the circumstances under which the contract was concluded. It may significantly aggravate the performance of the obligation of one of the contracting parties, or undermine the purpose

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or business or parts of undertakings or businesses, *Official Journal* L 82, 22.03.2001, 16-20.

of the contract. If the circumstances change to such an extent that it is obvious that the contract no longer meets the expectations of the contracting parties, or if there is a general opinion that it would be unfair to keep it in force as it is, the obligation law rules allow the party who finds it difficult to perform the contractual obligation, or the party who cannot achieve the purpose of the contract due to changed circumstances, to seek termination of the contract (rescission). On the other hand, instead of termination/rescission, the other contracting party may offer or agree to the modification of the contract content to new circumstances, or to have respective contract conditions equitably amended.[2]

The aforementioned rules of obligation law are also applied in the field of labour law. Namely, as the bearer of management authority, the employer organizes tasks within his sphere of activity in the way he/she considers most effective for achieving the best economic results (Kovačević, 2022:45). It implies making numerous decisions, many of which concern the issues that cannot be known or predicted in advance. Hence, the employer has the legally recognized authority to manage the work of employees by issuing orders and instructions that should ensure the best possible organization of labour, as well as the use of the employees' abilities in the best interest of the working environment (Kovačević, 2016: 440). The specification of work operations and detailed designation of the scope of employees' tasks is not always possible in advance, but the employee's duty is to keep performing the tasks that are in accordance with his/her working capacity (Kovačević, 2022: 46). Thus, given the fact that the performance of these contracts extends over time, employment contracts are classified in the group of contracts involving permanent performance of obligations. For this reason, these contracts may be affected by various circumstances of an objective nature, which may aggravate the performance of the contract to such an extent that the contract no longer corresponds to the interests of the contracting parties (Živković, 2005: 10) due to "the fundamental alteration of the contract equilibrium " or "excessively onerous" performance of the obligations (Perović, 2012: 193). Therefore, the obligation law rules which are applied in the field of labour law allow for amending the contract due to changed circumstances, which entails the necessary adjustment of these rules to the special nature of the employment contract (Kovačević, 2015: 825). In that regard, it may be stated that the institute of amending the employment contract contributes to establishing a balance between the contract and the circumstances that occurred after its conclusion, which may be economic, organizational, technological or other in nature (Kovačević, 2016: 440-441).

3. On the (Im)Permissibility of Amending the Employment Contract in the Circumstances of a Change Of Employer

The first segment of the protection of employees' rights in the event of a change of employer is the rule on *ex lege* transfer of rights and obligations arising from the employment relationship contracted with the transferor (prior employer) to the transferee (subsequent employer); thus, in the case of a transfer, "the employee rights and obligations arising from his employment contract are *automatically* transferred" (Blanpain, 2010: 720). Pursuant to the provisions of Article 3 (1) of Directive 2001/23/EC, "the transferor's rights and obligations arising from a contract of employment or from an employment relationship

[2] Article 133 of the Obligations Act, *Official Gazette of the SFRY*, 29/78, 39/85, 45/89-Supreme Court decision, and 57/89, *Official Gazette of the FRY*, 31/93, *Official Gazette of SC*, 1/2003- Constitutional Charter, and *Official Gazette of RS*, 18/2020.

existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee". This rule on the continuity of the employment relationship is inspired by the idea of "universal legal succession" which has been known for centuries in civil and commercial law (Kalamatiev, Ristovski, 2019: 277). In contrast to singular succession, where the legal successor enters into one or more precisely determined rights of his legal predecessor, in universal succession, all rights that make up the property of one person are transferred from the legal predecessor to the legal successor (Kovačević Kuštrimović, Lazić, 2008: 203). This way of acquiring rights was later accepted in labour law, first in France and then in other European countries. Applied to the case of a change of employer, it means several things. *First*, the set of rights and obligations arising from the employment contract or employment relationship are transferred to the transferee as a whole (*en bloc*), not individually. As the whole (employment contract, or employment relationship) is transferred from the transferor to the transferee, the transfer of the whole implies the indirect transfer of individual rights and obligations that make up that whole (Dragićević, 2022: 354-355). *Second*, the transfer of rights and obligations rests on the statutory law. Therefore, it is not necessary to conclude "new" employment contracts because it is a matter of transferring previously concluded employment contracts, which is grounded in the statutory law (Kalamatiev, Ristovski, 2019: 277). *Third*, only one act of transfer (*uno actu*) is sufficient for the acquisition of rights and obligations as a whole, and it is not necessary to transfer each right and each obligation separately (e.g. to assign each claim separately). *Fourth*, the rights and obligations arising from the employment contract or employment relationship pass from the transferor to the transferee at a specific moment defined by the law itself. *Finally*, the rights and obligations pass from the transferor to the transferee at that given moment by force of law (*ipso iure*) (Dragićević, 2022: 355). Thus, "this type of succession does not depend on the will of the respective entities; it occurs automatically as a matter of law as soon as the prescribed conditions are met" (Kovačević, Kovács, 2019: 115). The transfer occurs without the need for any additional action by the transferor and the transferee: the succession occurs directly on the basis of the law (Cf. Radović, 2018: 119-120). Thus, it is indisputable that the introduction of rules on the automatic transfer of rights and obligations has contributed to the protection of the employee position in terms that any change in the employer's legal identity cannot affect either the employment relationship or the employee's position in it.

In addition to the *ex lege* transfer of employment contracts, one of the most important issues for both employees and employers is the issue of amending transferred employment contracts. Due to a change in the employer's legal identity, a new employer (transferee) may establish a different work organization, practices or less favorable working conditions than those that the employees enjoyed with their prior employer (transferor). Thus, the level of employees' protection would be significantly reduced if the transferee had the possibility to change the contracted working conditions. On the other hand, transferees tend to amend the employment contracts of transferred employees in order to harmonize them with the working conditions of their previously employed persons. For them, this is important in terms of administrative benefits, good industrial relations and, primarily cost savings (Barnard, 2012: 606), i.e. the achievement of economic goals. Given the conflicting interests of employees and employers, this issue is not easy to regulate in a principled way.

3.1. Labour legislation

The European Union labour law approaches the problem of protecting the rights of employees in case of a change of employer from the "static" and "dynamic" perspective. This is confirmed by the aforementioned Article 3 of Directive 2001/23/EC, which provides for the "static" protection of employees in terms of preserving the employment relationship as it exists on the day of the transfer of the undertaking, i.e. on the day of change of employer. On the other hand, the protection provided by Directive 2001/23/EC also has "dynamic" aspects in terms of the possibility of regulating working conditions after the transfer of the employment contract, in accordance with the provisions of the new collective agreement concluded with the transferee (Ales, 2019: 180). Namely, according to Article 3(3) of Directive 2001/23/EC, "following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement". In doing so, "Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year" (Article 3 (3) Directive 2001/23/EC). The obligation of the transferee to apply the collective agreement that was valid in the transferor's legal entity for at least a year is a guarantee of preserving the (prior) working conditions. Thus, the collective agreement concluded with the transferor becomes the legal ground for regulating labour relations between employees and the transferee, as a result of which is working conditions cannot deteriorate after a change of employer for the guaranteed period of one year at least (Kovačević, 2019: 239). Moreover, taking into account that the collective agreement concluded with the transferor produces indirect effects even after the deadline, some segments of this prohibition may last longer if more favorable working conditions and rights are incorporated into the original employment agreement (Blanpain, 2012: 400). However, according to the provisions of Directive 2001/23/EC, the transferee's obligation to respect the working conditions contained in the collective agreements of the transferor lasts only until the date of termination or expiry of the collective agreement, or the entry into force or application of the new collective agreement.

The first situation, which frees the transferee from the obligation to apply the collective agreement, is fairly simple. Given the fact that collective agreements in certain labour law systems are concluded for a certain period of time, upon the expiry of the validity period, the transferee ceases to be obliged to apply them (Bojić, 2017: 763). However, starting (probably) from the fact that imposing the obligation to apply the collective agreement concluded with the transferor until the expiry of its validity could be too much of a burden for the transferees (in situations where the validity period is quite long), Directive 2001/23/EC gives the opportunity to the member states to limit that period in time, but not shorter than one year. This opportunity has been used by a large number of European countries (Germany, Austria, Spain, Portugal, Poland, the Czech Republic, Italy, Cyprus, Slovenia, Latvia, Hungary, Sweden, Croatia), as well as numerous countries aspiring to EU membership (Serbia, Montenegro Gora, Republika Srpska, North Macedonia, etc.), which limit the period of application of the collective agreement (concluded with the transferor) by the transferee to a minimum of one year determined by Directive 2001/23/EC; only in France is the period of validity extended for 15 months from the date of change.[3] Thus, if the

[3] However, in some countries (such as Estonia, Luxembourg, the Netherlands and Slovakia), no time limit has been introduced for the validity of the collective agreement with the transferee from the moment of the change.

collective agreement concluded with the transferor does not expire before the expiry of the one-year period, i.e. 15 months from the date of change, upon the expiry of this period the transferee is no longer obliged to apply the said collective agreement even though it may still be valid.

Another situation in which the collective agreement concluded with the transferor ceases to be valid is the entry into force or application of the new collective agreement. In such a case, after the change has been made, the transferee can invite the representative union to negotiations with the aim of concluding a new collective agreement. This will probably occur in the event that the provisions of the new collective agreement are more favorable to the employees than the provisions of the collective agreement concluded with the transferor, as the employees cannot be expected to accept working conditions that are less favorable than the conditions stipulated in the previous collective agreement (Bojić, 2017: 763). Certainly, there is a possibility that a transferee decides to take that step in order to improve transparency and systematicity of the legal rules contained in the autonomous sources of law, and to avoid the existence of a large number of collective agreements that apply to different groups of employees. In any case, the collective agreement concluded with the transferor ceases to be valid upon the entry into force of the new collective agreement.

Bearing in mind the disparity between the static and the dynamic perspective of employee protection, it is not completely clear whether it is permissible under the provisions of Directive 2001/23/EC to change employment contracts after a change of employer, and if so, whether there are any limitations and conditions that have to be met to ensure its validity. In other words, can the transferor amend the employment contract that the employee concluded with the transferor, especially the so-called solid core, i.e. provisions on salary, title and job description, or is such a change prohibited if it is caused by the change of employer? The aforementioned issue is further complicated by the provision of Article 4 (2) of Directive 2001/23/EC, whose scope of application is not easy to understand. This Article reads: "If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship" (Article 4(2) of Directive 2001/23/EC). One of the possible interpretations of this provision could be that changes to the employment contract to the detriment of the employees are not allowed if they are caused by the change of employer itself. However, in case the employer, despite this prohibition, offers the employee an amendment to the employment contract which includes a significant change in the working conditions to the detriment of the employee, and the employee refuses to give consent, the employer can fire the employee. The possibility of refusal is also available to the employee who is subject to the employer's attempts to impose new, changed working conditions despite the fact that the employee refused to give consent to change the employment contract (Cf. Kovačević, 2015: 832). In both cases, the employer will be considered responsible for the termination of the employment relationship because then the employment relationship does not end due to the fault of the employee but because the employer unilaterally made a significant change in the working conditions to the detriment of the employee, and against the employee's will.

In their legal systems, the provisions of the collective agreement concluded with the transferor will be applied until the expiry of the period for which the contract was concluded, provided that the transferee does not conclude a new collective agreement with the representative union (Sargeant, 2001: 30-44).

However, in labour law theory and judicial practice, there are also different interpretations of the aforementioned provisions of Directive 2001/23/EC, which will be considered in the next part of the article in an attempt to provide a comprehensive answer to the question about the (im)permissibility of amending the employment contract in the circumstances of the change of employer.

3.2. Judicial practice

Serious uncertainties regarding the interpretation of the provisions of the Articles (3 and 4) of Directive 2001/23/EC prompted the national courts of the EU member states to request several preliminary judgments from the European Court of Justice, in order to clarify the normative core of Directive 2001/23/EC. This resulted in judgments in which the Court of Justice seems to have tried to find a certain balance of conflicting interests, referring at the same time to both the "static" and the "dynamic" aspects of the protection guaranteed by Directive 2001/23/EC. In this sense, the Court emphasized that the real objective of the Directive 2001/23/EC in question is to "to ensure, *as far as possible*, that the employment relationship continues unchanged with the transferee, in particular by obliging the transferee to continue to observe the terms and conditions of any collective agreement (Article 3 (2)) and by protecting workers against dismissals motivated solely by the fact of the transfer (Article 4(1))".[4] Although the Court did not explicitly indicate, it seems that the expression "*to ensure, as far as possible*" refers both to the continuation of the employment relationship as such and to continuation without changes to the contracted working conditions (Ales, 2019: 187).

Such an understanding of the stated position was confirmed by the Court of Justice in the *Daddy's Dance Hall* case, where the Court assessed that the protection offered by Directive 2001/23/EC is a matter of public policy and, therefore, independent of the will of the parties to the employment contract. The Court stated: "The rules of the Directive, in particular those concerning the protection of workers against dismissal by reason of the transfer, must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".[5] Employees, therefore, are not entitled to waive the rights conferred on them by Directive 2001/23/EC and these rights cannot be restricted even with their consent.[6] According to the Court, this interpretation is not affected by the fact that, as in this case, "the employees obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before".[7] However, "insofar as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, in particular as regards their protection against dismissal, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer".[8] Since, by virtue Article 3(1) of Directive 2001/23/EC, "the

[4] Case C-19/83, *Knud Wendelboe and others v L.J. Music ApS, in liquidation*, ECR 1985, 00457, § 15.
[5] Case C-324/86, 10.02.1988, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* A/S, ECR 1988, 00739, § 14. This position was reiteratted in: Case C-209/91, 12. 11. 1992, *Anne Watson Rask and Kirsten Christensen v Iss Kantineservice A/S*, ECR 1992 I-05755, § 27-28; Case C-343/98, 14. 09. 2000, *Renato Collino and Luisella Chiappero v Telecom Italia SpA*, ECR 2000 I-06659, § 52.
[6] Case C-324/86, *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall* A/S, ECR 1988, 00739, § 14.
[7] *Ibid* ,paragraph 15.
[8] *Ibid*, paragraph 17.

transferee is subrogated to the transferor' s rights and obligations under the employment relationship, that relationship may be altered with regard to the transferee to the same extent as it could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment".[9]

The same interpretation can be found in the *Martin* case, where the Court, after confirming that the protection guaranteed by Directive 2001/23/EC is a matter of public policy, stated that "the rules of the Directive must be considered to be mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees".[10] The Court also pointed out "that employees are not entitled to waive the rights conferred on them by the Directive and that those rights cannot be restricted even with their consent",[11] and reiterated that "insofar as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking, such an alternative is not precluded merely because the undertaking has been transferred in the meantime and the agreement has therefore been made with the new employer".[12] However, "since the transfer of undertaking is indeed the reason for the unfavourable alteration of the terms of early retirement offered to the employees of that entity, any consent given by some of those employees to such an alteration is invalid in principle".[13] The Court did not answer whether it is necessary to wait for a certain period of time to pass in order to consider that the transfer of the undertaking is not a reason for changing the employment contract. It also remained unclear whether the transfer of the undertaking must be the only or the main reason for changing the working conditions in order for the change to be considered illegal, or whether it is enough that the transfer was only one of the reasons for the change. Yet, on the basis of the two judgments cited above. it may be concluded that employment contracts can be amended, even in a way that is unfavorable to employees, provided that the national law allows such amendments, and that the reason for amendments is not the change of employer or some other reason related to that change. This is a true example of "balancing" performed by the Court in order to keep together "the static safeguard of working conditions and the dynamic freedom of the employer to rearrange regulations after the transfer" (Ales, 2019: 188).

More recent cases indicate that the Court of Justice is beginning to soften its approach to the detriment of employees, thus marking a new unwanted direction in the interpretation of Directive 2001/23/EC. For example, in the *Scattolon* case, the Court of Justice assessed that Article 3(3) of Directive 2001/23/EC must be interpreted as meaning that it is lawful for the transferee to apply, as of the date of the transfer, the working conditions laid down by the collective agreement in force in his legal entity, including the terms concerning remuneration.[14] Therefore, if the transferee has a collective agreement in force (signed either at the branch level or at the employer level), the provisions of that agreement can replace the collective agreement that was in effect at the transferor. According to the Court of Justice judgment, "the implementation of the option to replace, with immediate effect, the conditions which the transferred workers enjoy under the collective agreement with the transferor with those laid down by the collective agreement in force with the transferee

[9] *Ibid*, paragraph 17.
[10] Case C-4/01, *Serene Martin, Rohit Daby and Brian Willis v South Bank University*, ECR 2003, I-12859, § 39.
[11] *Ibid*., paragraph 40.
[12] *Ibid*., paragraph 42.
[13] *Ibid*., paragraph 45.
[14] Case C-108/10, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, ECR 2011, I-07491, § 74.

cannot therefore have the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the transfer".[15]

This extraordinary position of the Court of Justice suggests that the rule on the prohibition of changing the contractual working conditions to the detriment of employees for reasons related to the change of employer, which was previously considered absolute, is not so absolute. Although the Court "denies the absoluteness of the principle of automatic substitution of the collective agreement applied by the transferor" (Ales, 2019:191) and makes the immediate replacement of the collective agreement concluded with the transferor by the collective agreement in force with the transferee conditional on respecting the working conditions that the transferred employees enjoyed before the change of employer, the Court does so by using standards *in principle*, thus leaving room for the details of the working conditions to be less favorable for the transferred employees. This opens space for different interpretations and assessments, and a large number of court proceedings where the courts will have to assess "the overall extent of the worsening conditions brought about by the new collective agreement" (Ales, 2019:191). As we may expect long processes of harmonizing the collective agreements provisions, the legal security of employees may be impaired.[16]

3.3. Legal Doctrine

As shown before, the original practice of the European Court of Justice prohibited any amendments to employment contracts to the detriment of employees for reasons related to change of the employer. In legal literature, however, there were opinions that this position of the Court (perhaps) goes too far in that it does not permit amendments to the employment contract to the detriment of the employees for reasons related to the change of employer even if the employees agreed to the amendments. In other words, the question arose as to why an employee can validly refuse the transfer of an employment contract or employment relationship to a transferee, but he/she cannot agree to the amendments to the working conditions under the amended or new employment contract? (Smith, 2001: 242). In contrast, the opposite opinion points out that, regardless of the fact that the legislator might believe (and state) that both parties to the employment contract have equal rights and opportunities to conclude and/or amend employment contracts, an employee who voluntarily agrees to amendments to the employment contract is often a myth (Smith, 2001: 243). Where there is a choice between signing an annex to the employment contract or losing the job, it is clear that the employer and the employee do not an have equal bargaining power. In this sense, "legal provisions against unfair dismissal can be easily circumvented if the employer is given the

[15] *Ibid*., paragraph 76.

[16] In addition, it seems that imposing the application of the collective agreement in force at the transferee would only make sense if it provides a greater scope of rights and more favorable working conditions than the rights and working conditions contained in the collective agreement concluded with the transferor. In some countries, such as Spain, the law stipulates that if the conditions of collective agreements enjoyed by the employees of the transferee are more favorable than the working conditions of the employees of the transferor, the employees of the transferor will enjoy better conditions (Sargeant, 2001: 33). The legislations of Cyprus, Hungary and Lithuania include similar provisions (Sargeant, 2001: 30-44). However, in the explanation of the judgment in the *Scattolon* case, the Court of Justice specifically pointed out that, under the Directive 2001/23/EC, the transferee is not obliged to apply the collective agreement that is in force in his entity to the transferred employees if his collective agreement contains greater rights and more favorable working conditions. Moreover, "that directive does not prevent there being certain differences in salary treatment between the workers transferred and those who were already, at the time of the transfer, employed by the transferee. Case C-108/10, 06.09.2011, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, ECR 2011, I-07491, § 77.

freedom to exert pressure on workers to resign instead of being fired" (Kovačević Perić, 2015: 370). Therefore, it is believed that, for the benefit of the employees, it is necessary to introduce a ban on waiving the rights and working conditions that existed before the change of employer, i.e. to envisage that the employee's consent to the amendments of the employment contract, which includes a change of working conditions to the detriment of the employees, will be invalid. Otherwise, if amendments to the employment contract which are generally not less favorable than those previously valid (which is the latest position of the Court of Justice) were made permissible, the question is how the comparative positions of the employee before and after the change of employer would be weighed. In addition, it places a powerful tool in the hands of the employer, who may easily get rid of unwanted or surplus employees, under the pretext of the requirements of the work process and organization (Kovačević Perić, 2015: 370).

In the event that the employer, despite the employee's refusal to accept an offer for a significant change in working conditions to the detriment of the employee, *via facti* imposes an amendment to the employment contract and the employment relationship is terminated as a result (either by the employer or the employee), the employer will be considered responsible for termination of employment. According to the views of the Court of Justice, a significant change in the working conditions implies providing the employee with worse working conditions, such as substantial reduction in the employee's remuneration or a refusal to guarantee that already existing rights will be maintained.[17] In the Court's opinion, " t does not mean that Member States must guarantee to the affected employees that their pre-existing level of financial compensation will not be affected by a transfer; it only means that if the employees' financial compensation is changed to their detriment, and any employee for that reason chooses not to continue with the employment relationship, then that counts as a 'dismissal' for which the transferee is liable under the Directive" (Countouris, Njoya, 2014: 440). In other words, reduced remuneration is the grounds for claiming compensation for unlawful dismissal but does not grant the employees an entitlement to actually receive the same level of remuneration from the transferee (Countouris, Njoya, 2014: 440). Contrary to the stated opinion that is widespread in the legal literature, Riesenhuber believes that this provision is not concerned with changes of terms and conditions of employment which are transferred to the transferee under Article 3(1) and (3) of Directive 2001/23/EC (Riesenhuber, 2012: 598). A change of these conditions to the detriment of the employee is prohibited by the Directive and would thus be unlawful. If Article 3 of Directive 2001/23/EC, in principle, prohibits any change in terms and conditions of employment, it would be inconsistent for Article 4(2) of Directive 2001/23/EC to provide a sanction only for a substantial change in working conditions. In addition, the sanction would not be adequate either: a termination triggered by a substantial change in working conditions is not only to be attributed to the employer but must also be considered unlawful (Riesenhuber, 2012: 599). Hence, Riesenhuber concludes that the scope of application of Article 4(2) of Directive 2001/23/EC can be explained in the sense that it refers to: 1) any inevitable factual changes (within the possible legal framework, e.g. under the direction of the transferee) which may be embodied in a change of workplace for example (although such changes will usually be below the threshold of "significant" changes); and 2) any permissible legal changes

[17] Joined cases C-171/94 and C-172/94, 07.03.1996, *Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA*, ECR 1996 I-01253, paragraph 38; Case C-425/02, 11.11.2004, *Johanna Maria Delahaye, née Delahaye v Ministre de la Fonction publique et de la Réforme administrative*, ECR 1996 I-10823, § 35.

envisaged in the provision of Article 4(1)(1) of Directive 2001/23/EC; 3) and any permissible legal changes under Article 3(3) of Directive 2001/23/EC, such as those that occur when the applicable collective agreement changes (Riesenhuber, 2012: 599). Interpreted in this way, Article 4(2) of Directive 2001/23/EC actually provides for the extension of protection in case the permitted change in working conditions has "significant" effects that are detrimental to the employee (Riesenhuber, 2012: 599).

4. Conclusions and Final Considerations

Considering all the above, it is clear that a difficult policy decision must be made about whether to permit amendments to the employment contract in the circumstances of a change of employer and, if it is necessary, under what conditions it should be done and what aspects of the employment relationship could be subject to change. When making this decision, it seems that the starting point should be the question of whether the purpose of the provisions on preserving employment is achieved by introducing such a possibility or not. In this sense, it should be recalled once again that the primary goal of the provisions on the *ex lege* transfer of the employment contract (from the transferor to the transferee) in the event of a change of employer is to ensure the protection of the rights and obligations arising from the employment contract or employment relationship of the employees affected by changing the employer. This protection is a matter of public policy and any limitation should be carefully considered. The provisions protecting the rights of employees in case of transfer of an undertaking seek to minimize the impact of a change in the legal entity or a natural person (responsible for running the business) on the employees concerned. The purpose of these provisions is not to provide protection to transferred employees above the level of protection enjoyed by any other employee in any other employment situation. Their goal is to ensure that employees preserve the working relationship and conditions they had before the change in the legal identity of the employer. Therefore, the effect of these provisions should not be to prohibit any modification of the employment contract, without exception. Transferred employees should be in exactly the same legal position after the change of employer as before the change, and changes to the employment contract that are allowed under national legislation before the change of employer should be possible after the change, even if they are unfavorable for the employees (Smith, 2001: 245).

In this sense, the amendment of the employment contract in the circumstances of a change of employer is not allowed only if three conditions are met: 1) if it refers to essential elements of the employment contract; 2) if it is done to the detriment of employees, i.e. if it is unfavorable for employees; and 3) if the reason for changing the employment contract is the change of employer. In the legislation and jurisprudence of those countries that differentiate between the amendment of the employment contract and the amendment of the working conditions, the first condition does not have to be underscored because the amendment of the working conditions that does not concern the essential elements of the employment contract is not considered an amendment of the employment contract but an expression of the employer's authority, which the employee consents to from the moment of concluding the employment contract. Consequently, it further implies that the change of the working conditions is not considered to be a change but rather the execution of the employment contract (Kovačević, 2016: 442). In this sense, the change of the so-called of secondary elements of the employment contract would be allowed, even if the reason for

the change is the change of employer itself, provided that it does not represent an abuse of the employer's *ius ius variandi*. The second condition for the impermissibility of changes to the employment contract refers to the quality of changes; thus, the prohibition applies only to changes to the employment contract that are detrimental to the employees, even if the employee agrees to it. The latest positions of the European Court of Justice favor a more flexible approach, according to which some changes to the employment contract are allowed even if they are caused by the change of employer itself, provided that the working conditions offered are in principle not less favorable than the working conditions that were guaranteed to them before the change of employer. However, it should be noted that accepting this interpretation would mean that the court or some other competent authority must decide on the question of whether the changed working conditions are generally less favorable for the employee or not, which is certainly not an easy task. Such an approach would open space for different assessments by the competent authorities, as a result of which the legal security of employees would be undermined. Finally, the third condition for the validity of the ban on changing the employment contract is that the reason for the change is the change of employer. This means that changes to the employment contract are allowed, even if they are unfavorable for the employees, provided that the national legislation of a particular country allows such changes, and that the reason for the change in the employment contract is not the change of employer.

If all three of the aforementioned conditions are met, the amendment of the employment contract for reasons related to the change of employer is not allowed, even with the consent of the employee and at least within a guaranteed period of one year from the date of the change of employer. Considering that the protection of employees provided by Directive 2001/23/EC is a matter of public policy, it is independent of the will of the parties to the employment contract. The rules of the Directive, especially those aimed at preserving employment and working conditions, must be considered binding, and employers may not deviate from them in a way that is unfavorable for employees. Employees cannot waive the rights granted to them by the Directive, and these rights cannot be limited, even with the employees' consent. The social-economic component of the employment relationship has a wider social value because it establishes the necessary balance between economic progress and the demands of social justice and social balance (Kovačević, 2022: 48). Therefore, legislative intervention in the field of changing employment contracts for reasons related to the change of employer is extremely important for employees, as it ensures minimum predictability of working conditions and prevents possible abuses (Cf. Čolić, 2002: 137, Kovačević Perić, 2015: 370).

In case the employer, despite the aforementioned prohibition, arbitrarily changes the employment contract, there is a breach of contract, the implications of which include but are not limited to compensation claims that the employee could successfully assert (Cf. Lazarevic, 2015: 18). In this situation, it should also borne in mind that the employee can also terminate the employment contract, which is attributed to the employer. In other words, the employer is considered responsible for the termination of the employment relationship since the employment relationship in this case is not terminated due to the employee's fault but because the employer unilaterally made a significant change in working conditions to the detriment of the employee, without the employee's consent.

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(NE)DOPUŠTENOST IZMENA UGOVORA O RADU U OKOLNOSTIMA PROMENE POSLODAVCA

Poslodavac i zaposleni svojom voljom zaključuju ugovor o radu, saglasno mu odredivši sadržinu i bitne elemente, te se u skladu s tim obavezuju da ga izvršavaju u celosti onako kako glasi. Međutim, kada nastupe okolnosti zbog kojih ispunjenje obaveza jedne strane ugovora o radu postane otežano ili zbog kojih ugovor o radu više ne odgovara očekivanjima ugovornih strana, radno zakonodavstvo priznaje mogućnost njegove izmene. U tom smislu, institut izmene ugovora o radu doprinosi uspostavljanju ravnoteže između ugovora o radu kakav postoji na dan zaključenja i okolnosti koje su nastupile po njegovom zaključenju. Sva teškoća uspostavljanja pravične ravnoteže navedenih interesa se dodatno komplikuje ukoliko se zahtev za izmenu ugovora o radu postavi u okolnostima promene poslodavca. U tom smislu, postavlja se pitanje da li je uopšte dopuštena izmena ugovora o radu ako je razlog za izmenu sama promena pravnog identiteta poslodavca, te ako jeste, da li postoje određeni uslovi njene punovažnosti i koji aspekti radnog odnosa bi mogli biti podložni izmenama. U ovom radu, autor će pokušati da odgovori na ova i druga povezana pitanja analizirajući zakonska rešenja, stavove sudske prakse i doktrine.

Ključne reči: *izmene ugovora o radu, promena poslodavca, prenos.*

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Review Paper

DIGITAL LEARNING IN LEGAL EDUCATION: EDUCATIONAL POLICIES, PRACTICES, AND POTENTIALS OF PEDAGOGY-DRIVEN DIGITAL INTEGRATION

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Abstract. *This review research paper provides an insight into the broad framework of Digital Learning. The first part of the paper presents the conceptual, structural and pedagogical framework of Digital Learning, with reference to global, regional and national policies, instruction models and underlying digital integration processes. The second part examines Digital Learning in legal education and practices in developed countries, in Serbia, and at the Faculty of Law, University of Niš, before, during and after the Covid-19 pandemic. Based on the research findings and experiences from the first e-learning experience at the LF Niš (March 2020-May 2022), the author provides a brief analysis of Digital Learning and outlines the opportunities for a systemic integration of flexible Digital Learning formats into the contemporary legal education for academic, professional and work-related training purposes.*

Key words: *Digital Learning, policies, legal education, practice, pedagogy, integrated instructional design*

1. INTRODUCTION

The history of education demonstrates constant evolution of educational technology, instructional design and, most recently, digital technology. *Educational technology* refers to the ethical use of knowledge (educational theory, research, best practices) and instruments (devices, resources, tools, media, methods, strategies, processes and environments) that facilitate teaching/learning and improve instruction and performance through strategic design, management, implementation and assessment (AECT, 2024;[1] Janusewski, Molenda,

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[1] AECT (2024). A new definition of Educational Technology, https://aect.org/news_manager.php?page=17578

2008:1). In addition to *analogue technology*,[2] the evolution of Information and Communication Technologies (ITC) in the 20th and the 21st century engendered the conceptual framework of *digital technology. Digital technolo*gy encompasses digital devices (hardware), applications (software), environments (platforms), computer-based and web-based media, tools and resources[3] used to create content and present, process, record, store, circulate, send/receive it in a digital form (Mirrlees, Alvi, 2019:2; OUP, 2021).[4] As the effective use of both educational and digital technology rests on context-related educational purposes, pedagogy and curriculum design, *Instructional Design* (ID) is a systematic approach to planning, designing, developing, managing, implementing, analyzing and evaluating the entire system and individual elements of learning-centered instruction by using diverse ID models (Wagner, 2018: 2). The rapid advancement of digital technology in the 21st century has engendered the concept of ***Digital Learning,*** encompassing different forms of learning designed, supported, mediated, facilitated and delivered by using digital technology (CIPD, 2021:2). The Covid-19 pandemic (2020) has prompted educators to reassess the challenges and potentials of Digital Learning for contemporary learners and devise new opportunities for integration of digital technology for the purpose of learning, training and development.

In this context, the paper presents the conceptual, structural and pedagogical framework of Digital Learning, referring to global, regional and national policy frameworks, underlying processes and instruction models. The second part explores Digital Learning in legal education, including the practices in developed countries, in Serbia, and at the Law Faculty in Niš before, during and after the COVID-19 pandemic. Relying on research findings and insights from the first institutional form of e-learning at the LF Niš (March 2020-May 2022), the author provides a brief SWOT analysis and outlines the opportunities for a systemic integration of Digital Learning into the instructional design for the purpose of facilitating flexible learning in different academic, professional, workplace, and international contexts.

2. The Conceptual, Structural, and Pedagogical Framework of Digital Learning

2.1. The Conceptual Framework of Digital Learning

Digital Learning (hereinafter: DigLearning) is an umbrella term for different formal and informal models of learner/learning-centered, technology-supported learning designed, developed, mediated, facilitated and delivered in different digital environments by using a range of digital technologies (Wheeler, 2012:1109), but it may also be a combination of online and onsite instruction, depending on the available infrastructure, environments, devices, resources, etc. The development of DigLearning was triggered by rapid technological

[2] ***Analogue technology*** refers to organic devices for presenting, recording, storing, sending/receiving information by turning an image/sound into electrical/radio signals, image and data of the same (analogous) type (CUP, 2021; OUP, 2021), e.g., radio, television, photocopier, record players, vinyl records, VHS tapes, tape/video recorder, printer, etc.

[3] E.g. e-books/readers, floppy disks, CDs, DVDs, Internet, collaboration tools (wikis, blogs, forums), smartphone apps, social media, gamification, etc. (Sutori/Seaton, 2021), and most recently: robotics, blockchain technology, cloud-computing, machine learning, artificial intelligence, virtual/augmented reality, quantum computing (PcW, 2023).

[4] In the context of digitalization, the term *EdTech* (digital technology in education) refers to EdTech industry, the providers of hardware (devices, servers, gadgets), software (operating systems, application, services) and learning platforms (Canvas, Blackboard, Moodle, Google Classroom) facilitating digital learning (Mirrlees, Alvi, 2019: 2,4).

developments, the emerging challenges to provide equal access to cost effective and supportive education, the need to address the learning habits/needs of 'millennial" learners and facilitate a flexible, dynamic, personalized, instruction, and the need to provide efficient professional training for the labour market through tailor-made programs reflecting real-life settings (Means, Bakia, Murphey, 2014:3-5).

The development of DigLearning in the 20th and 21st century has been embodied in various learning models using different digital technologies, pedagogical approaches and instruction models. As some of them are often confused, they are briefly clarified in the footnotes: Computer-Assisted Learning/CAL; Technology-enhanced learning/TEL[5]; Distance Learning/DL, Online Learning, E-Learning[6]; Flipped Learning/FL, Blended Learning/BL or hybrid learning[7]; Mobile Learning/ML, Virtual Learning/VL[8], Machine/Artificial Intelligence Learning).[9] The latest trends are the AI technology and *Immersive technologies*[10] which

[5] ***Computer-Assisted Learning*** (CAL) uses computer-based technology (software, floppy disks, CDs, DVDs) to support or supplement learning, commonly organized offline. In the 1990s-2000s, ***Technology-enhanced Learning*** (TEL) entailed the use of both analogue devices (OHP, video/audio players) and digital devices (computers, CDs, DVDs) to enhance learning in low-tech classrooms without the Internet. More recently, it refers to flexible spaces (open-source LMS, websites, apps, online resources, social media) to store or present material, provide discussion, collaboration and assessment tools (Bates, 2019:524) and video-conferencing platforms (Skype, MS Teams, Zoom).

[6] ***Distance Learning*** **encompasses different forms of remote instruction conducted at a distance (physically separated learners and instructor) and delivered in synchronous (real-time) and asynchronous mode** (at different times and locations)**: a) print-based correspondence courses (1860-1970s); b) educational radio programs (1920-1930s); c) television-broadcasted programs (1960s); d) computer-assisted learning (1990s); and e) web-based learning (2000s) via LMSs,** VLEs, MOOCs, **OER**, webinars, **social media,** smartphones, video-conferencing platforms (Bates, 2019: 325-327).

Online learning or ***e-learning*** **is** *web-based* instruction fully designed and delivered electronically via the Internet, LMS platforms (Canvas, Moodle), video-conferencing tools (Zoom, Skype), virtual learning spaces (VLEs) or cloud-based 3D virtual worlds (*Second Life*). It may be formal/informal, synchronous/asynchronous, instructor-guided or self-paced, with content management, communication, collaboration, assessment, learning analytics (Learning Ladders, 2021).

[7] ***Blended Learning*** **(BL) is a flexible blend of online and onsite instruction, which may be held in several formats: a)** ***Technology-enhanced learning (TEL)*** -fully offline technology-enhanced instruction in class (PPT, online resources);

b) ***LMS-supported learning*** (Moodle, G-Classroom) for storing content, assignment submission, assessment, but classes are onsite (Bates, 2019:524-526); **c)** ***Flipped classroom:*** using pre-recorded content for self-study online and onsite classes for communication; **d)** ***mainly onsite instruction*** **(80%) with some online work (20%)** via LMS, smartphones, VC tools**; e)** ***hybrid learning*****: integrating onsite (50-70%) with online classes (30-50%), or online classes (50-70%) with onsite practice (30-50%), or alternating offline and online classes (e.g. 2 weeks/months each); f)** ***flexible learning*** **-mainly online with onsite lectures, lab or practice work (Means, Bakia, Murphy, 2014: 6-7).**

[8] ***Mobile Learning*** entails the use of mobile devices (smartphones, tablets, i-pads, social media, apps). ***Virtual Learning*** refers to virtual learning environments/VLEs: virtual worlds, animations, simulations (Bates, 2019: 339, 669, 400).

[9] ***Machine learning*** refers to descriptive, predictive and prescriptive technologies enabling computers to identify patterns, analyze data, solve problem, generate results, make diagnostics/predictions, propose solutions without human input (e.g. smartphone diagnostics, predictive text, e-mail spam, Google search, Google translate, AI-language apps).

Artificial Intelligence (AI) is the capacity of intelligent machines to mimic human thinking, language and conduct, analyze data, perform automated tasks, make decisions without human interference (Columbia Engineering, 2023): e.g. smartphone assistants, customer-support chatbots, virtual tutors, writing assistants (*Grammarly)*, content-writing ChatGPT.

[10] ***Immersive technologies*** refers to XR technologies (VR, AR, MR) experienced via a head-set. **VR** creates a completely artificial environment via a computer-generated simulation. **AR** augments the real world by overlaying virtual computer-

facilitate interactive learning experiences via real-time simulations in virtual Extended Reality (XR) environments: Virtual Reality (VR), Augmented Reality (AR) and Mixed Reality (MR). Commonly used in scientific research, simulated training and education, they facilitate innovative and personalized learning in authentic contexts, **developing AI/VR literacy,** virtual tutoring, etc. **(UNESCO, 2023).**

2.2. Evolving 21st century learning frameworks for Digital Learning

The advancement of digital technology and the changing needs of "millennial" learners prompted the process of reconsidering traditional education and devising a new 21st Century Learning Framework. It was first envisaged in the UN Sustainable Development Agenda (2002) and developed in subsequent documents: the P21 Framework for 21st Century Learning (2009)[11], the UNESCO's Integrated Learning for Sustainable Development (2012), the UN Sustainable Development Agenda 2030 (Goal 4: equitable quality education and life-long learning) (UNGA Resolution, 2015), the OECD Learning Compass 2030 (2015)[12], the OECD Global Competence Framework (2018), and the UNICEF Transferable Skills Framework (2019) (OECD, 2023a).

At the EU level, the EC ***Digital Agenda for Europe*** (2010)[13] proposed harnessing the ICT potentials for developing the *digital society* (EC Digital Agenda, 2010:3).[14] Confident, critical and creative use of ICT for learning, employability, personal/professional growth and social inclusion was supported in the EP/EC Recommendation on Key Competences (2006),[15] which envisaged *digital competence* as one of the 8 key life-long learning competencies.[16] The EC Joint Research Center devised the ***Digital Competence Framework*** (2013) and a self-assessment tool (*DigComp Wheel*, 2015).[17] The framework includes 21 competencies classified in 5 competence areas: 1) *Information and data processing* (identify, retrieve, store, organize, analyze, evaluate data relevance); 2) *Communication in digital environments* (collaborate, share content; cross-cultural awareness, digital identity, netiquette); 3) *Content creation* (process/ create/edit content, integrate prior knowledge; copyright); 4) *Safety and protection* (protect digital identity, data, privacy, mental health); 5) *Problem-solving* (make informed decisions) (Kluzer, 2015:4). The *DigComp Framework for Citizens* (2022) correlates DigComp with life-long learning competencies[18] (Vuorikari, Kluzer, Punie, 2022:51).

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generated content onto the real-world object (e.g. to display interactive 3D model). **MR** blends the virtual (VR/AR) content and the real world in an interactive experience (Northeastern University, 2023).

[11] The P21 Framework (2009) includes: 1) *Learning and Innovation skills* (communication, collaboration, critical thinking, problem-solving, creativity); 2) *Information, Media & Technology Skills* (information, media and ICT literacy); and 3) *Life & Career Skills* (knowledge, cross-cultural skills, social skills: flexibility, self-direction, productivity, leadership), as well as teacher-support: standards, curriculum, environments, assessment, professional development (P21, 2009:3-9).

[12] The OECD learning framework (2015) focuses on pedagogical objectives (knowledge, skills, attitudes, values), curriculum design, learner agency and competencies (OECD, 2019:4-7), as well as on the teaching framework, teacher competencies, learning environments, and curriculum implementation (OECD, 2023a).

[13] EC/European Commission (2010). A Digital Agenda for Europe, COM/2010/245, Brussels, 19.5.2010.

[14] The *Digital Agenda* (2010) addressed security and privacy issues, digital literacy, competences, inclusion, open access, transparent management, investments in research, infrastructure, etc. (EC Digital Agenda, 2010: 5-6).

[15] EP/EC Recommendation on Key Competences (2006/962/EC), L394, *OJ. EU,* 30.12.2006.

[16] They are: mother tongue, foreign languages; basic STEM/science, technology, math competences; digital competence; learning to learn; social/civic competences; entrepreneurship; cultural awareness (EP/EC Recommendation, 2006:7).

[17] *See:* Digital Competence (2023a). ***Digital Competence Wheel***; https://digital-competence.eu/.

[18] E.g. *see:* EC-JRC (2023). Personal, Social, Learning to Learn competence framework for individuals (*LifeComp*); Open Education framework for HE institutions (*OpenEdu).*

In 2015, the EC-JRC issued the ***DigComp framework for Organisations*** (*DigCompOrg*) and a self-reflection tool (*Selfie for Schools*).[19] The DigCompOrg includes: 1) *Leadership & Governance*: mission, strategy, governance, stakeholders); 2) *Infrastructure:* digital technologies, physical and virtual spaces, tech support, safety, privacy, inclusion; management, learning analytics); 3) *Teaching & Learning*: digital competencies, instructional design, staff/student agency); 4) *Content & Curricula*: digital content, open resources, redesigned curricula, authentic learning; 5) *Collaboration & Networking:* staff-student communication, collaboration, knowledge exchange; 6) *Continuous Professional Development:* teacher-training courses, webinars; 7) *Assessment:* formative/summative, self/peer-assessment, personalized feedback; recognition of prior formal/informal/open learning; digital certification tools (digital badges). It also includes a sector-specific element, which is adaptable to particular institutional contexts. DigCompOrg offers a map for addressing technological, organizational and pedagogical issues at the institutional level, but it may also help policy makers design, implement and assess policy programs/projects (Kampylis, Punie, Devine, 2015:5-6,17-20).

In 2017, the EC-JRC developed the ***DigComp framework for Educators*** *(DigCompEdu*), covering 22 competencies in 3 areas (professional competence, pedagogic competence, and learner's digital competence) and 6 aspects of using technology: 1) *Professional Engagement* (to communicate, collaborate, reflect on practices; professional development); 2) *Digital Resources* (select, create, modify, share resources); 3) *Teaching/Learning* (use technology in teaching, learner guidance, collaborative/self-regulated learning); 4) *Assessment* (analyze evidence, assess learning, provide feedback, plan further action); 5) *Empowering Learners* (enhance accessibility, inclusion, engagement, personalized and differentiated learning); 6) *Learners' Digital Competence* (promote learning, information/media literacy, critical thinking, problem-solving, content creation, ethical use of tools for communication/collaboration) (Redecker, Punie, 2017:16). The DigCompEdu is accompanied by a self-reflection tool (*Selfie for Teachers*)[20] and a self-assessment tool (on the A1-C2 CEFR scale).[21] In line with the labour market requirements, there are also free online self-assessment tools for assessing digital skills for employment purposes (Europass, 2024) and work-based learning (EC, 2023c).[22]

Early in 2020, the EC *Digital Education Action Plan* (2021-2027)[23] envisaged two strategic priorities for digital education: 1) to foster the development of *digital education ecosystems*, and 2) to enhance digital competencies for *digital transformation* (EC DigEdu Action Plan, 2020). It calls for a brief clarification of the key digital agenda processes: digitization, digitalization, digital transformation, digital divide, digital disruption, and the concept of digital learning ecosystems.

2.3. Processes underlying the integration of Digital Technology in education

Digitization is the process of converting *analogue* data (sound, image, text, video) into *digital* formats readable by computers (jpg, pdf, zip files). Digitized data are "interactive, distributive, replicable and reusable"; thus, the process enables handling, processing and storing data for subsequent use, display, reproduction, adaptation, and control (Brennan,

[19] *See*: EC (2023a). ***Selfie for Schools,*** https://education.ec.europa.eu/selfie**.**
[20] *See:* EC (2023b). ***Selfie for Teachers***; https://educators-go-digital.jrc.ec.europa.eu/
[21] Digital Competence (2023b). *Self Assessment tool*, https://digital-competence.eu/digcompedu/en/survey/qid-8430
[22] Europass (2024).Test your digital skills! (online test), https://europa.eu/europass/digitalskills/screen/home; EC (2023c). *Selfie for work-based learning (WBL),* https://education.ec.europa.eu/selfie/selfie-for-work-based-learning
[23] EC/European Commission (2020). Digital Education Action Plan 2021-2027, European Union, 2020.

Kreiss, 2014). Digitization of (cultural, historical, scientific) data is crucial for preserving the accumulated knowledge for posterity in the form of digital heritage. Thus, digitization facilitates digitalization.

Digitalization is a process of integrating digital technology in order to provide new opportunities, improve institutional capacities and personal competencies, increase effectiveness, reduce costs, introduce change or innovative practices (Brennan, Kreiss, 2014). It entails holistic planning, organization, management, collaboration, and related considerations: a) organizational change (administration, leadership, funds); b) digital infrastructure (Internet, digital services, devices, resources); c) digital support (tech staff); d) digital management, e) digital pedagogy; d) digital competences, etc. (Pettersson, 2021:189). The ultimate goal of digitalization is digital transformation.

Digital transformation is "the cultural, organizational and operational change of an organization, industry or ecosystem through a smart integration of digital technologies, processes and competences across all levels" (i-Scoop, 2021). It entails a systematic approach to planning, organizing, instituting and controlling digital transformation processes. Culture, workforce and technology shifts generate "new educational models and transform strategic directions, operations and values", promote the ***digital mindset*** and stakeholders' agency, and create a new quality (Brooks, McCormack, 2020:3). Yet, as paradigm shifts affect the existing structures, digital transformation inevitably includes two related phenomena: digital divide and digital disruption.

Digital divide was initially a gap between digital natives and digital nomads, proponents and opponents of digital technology, active users and non-users or reluctant users. Today, it refers to a disproportionate access to digital technology, resulting in social inequality, insufficient funds, inadequate resources, lacking opportunities (OUP, 2021).[24] Bridging the digital divide commonly implies ensuring equal learning opportunities by promoting digital infrastructure, competencies, digital rights (to access, use, control, protect data), etc. (UNICEF, 2021:5).

Digital disruption may be related to: a) the disruptive nature of digital technologies (AI, XR, Blockchain); b) disruptive social phenomena (policy changes, emergencies, pandemics); c) users' expectations, conduct and use of technologies; d) disruptive use of technologies to institute change (i-Scoop, 2021). These disruptive factors have to be considered in devising DigLearning.

The integration processes have also generated the concept of ***Digital Learning Ecosystems.*** By analogy with ecosystems in biology, a *learning ecosystem* is defined as "a dynamic, evolving and interconnected network of educational spaces", provided in physical and digital environments offering engaging, personalized, self-directed learning opportunities for knowledge-sharing, innovation and development (Hannon, Thomas, Ward, Beresford, 2019:9,11-13). These learning networks are well-structured, decentralized, learner-driven, adaptable and outcome-oriented systems, based on users' needs and distributed governance. They include: multiple stakeholders; physical/digital infrastructures, services, resources and data repositories; structural/organizational/pedagogical design (Hannon, *et al.*, 2019:26,82,86). In view of technology integration, ***a digital learning ecosystem*** (DLE) is "an adaptive socio-technical system" facilitating interaction between "digital species" (infrastructure, learning spaces, services, resources) and "communities of users" (learners, educators, service providers, institutions, experts, employers, local/regional/global communities) in different educational,

[24] OUP (2021). Oxford Dictionary: digital divide; https://www.oed.com/view/Entry/52611#eid6774712

social and cultural settings (Laanpere, Pata, Normak, Põldoja, 2014:422-423). DLEs enable learners to share knowledge, create new content, collaborate in problem-solving/joint projects,[25] obtain micro-credentials (digital badges) for future learning/employment purposes, etc. As DLEs constantly evolve, they call for a new system-thinking mindset, "reconfiguration" of conventional education, and a robust physical, digital and organizational "architecture" for learning, research and innovation (Hannon, *et al.*,2019:8,18,81).

The presented DigLearning framework clarifies the key technology-related concepts and integration processes, but it also maps the structural, organizational and pedagogical components of DigLearning, which will be summarized in the next subsection.

2.4. The Structural and Organizational Framework of Digital Learning

The structural and organizational framework of DigLearning includes a range of essential components that have to be considered in designing effective DigLearning programs:

1. ***Digital Strategy and Action Plan*** at both national and institutional level: identify the mission, values, goals; digital capacity planning, management, development, innovation; investment in digital infrastructure, devices, services, resources, competences; learning environments, community networks; learning analytics; stakeholders' roles (OECD Edu, 2020:6-7);
2. ***Digital Infrastructure, Connectivity*** and ***Digital Learning Environments***: high-speed Internet, Wi-Fi connectivity; digital devices (computers, laptops, tablets, smartphones); educational hardware/software, cloud storage, tech support; digital environment (learning platforms, management systems, digital ecosystems, resources, social media) (OECD Edu, 2020:7-12);
3. ***Data Management and Learning Analytics:*** collection, analysis and use of data to address specific problems, tackle the digital divide, promote inclusion, cooperation and learning through internationalization, global/regional/local partnerships; open data standards, AI policy, digital assessment and credentials (OECD Edu, 2020:12-15);
4. ***Digital Security, Ethics and Privacy***: data protection and safety in digital education, personal data security and privacy; ethical conduct in the digital environment, ethical guidelines on the use of data and training in using AI in research and teaching/learning (OECD Edu, 2020:22);
5. ***Digital Learning Plan:*** comprehensive, strategic plan: objectives, actionable goals, action steps, stakeholder roles, management, implementation, delivery, assessment/evaluation, monitoring/supervision; incorporating technology across the curriculum; integrating blended learning, virtual learning (VLE,VR,AI), collaboration projects (Hanover Research 2017:6);
6. ***Digital Literacy***: students/teachers' information/data/media literacy; teaching/learning skills; management skills, self-reflection; 4C skills: communication, collaboration, critical thinking/problem-solving, creativity/content-creation in digital environments (OECD Edu, 2020:18-20);
7. ***Digital Competences:*** enhance learners' digital skills, self/peer-evaluation, autonomy, leadership, life-long learning; enhance teachers' professional development: digital

[25] *See:* Hannon, *et al*, 2019:30,61,64; DigL ecosystems at the city, municipal and university level*: Remake Learning*, Pittsburgh, Pennsylvania (p.64); *Educació360*, Catalonia (p.30): *LenPolyGrafMash*, St.Petersburg, Russia (p.61).

design, content-creation, classroom management, delivery, self-reflection/assessment (OECD Edu, 2020:17-20);

8. ***Digital Resources:*** e-textbooks, audio, video, interactive software applications, games; digital lesson-planning, collaborative, feedback/assessment tools; open online resources/ courses, platforms, learning hubs, digital ecosystems, AI/VR learning resources, etc.;
9. ***Digital Content****:* high quality digital content, materials, interactive content-based activities; digitization of learning materials; open access to contents; digital skills training for handling content; tech-supported ecosystems for developing quality content (OECD Edu, 2020:12);
10. ***Digital Pedagogy:*** instructional design for integration of digital technologies, professional development, digital skills (design, content-creation, presentation, delivery, assessment); self-assessment tools; guided, differentiated teaching/learning, etc. (OECD Edu, 2020:7-23).

Each of these aspects may be a huge challenge as well as an opportunity in the process of developing and implement DigLearning programs. Yet, as the purpose of digital integration is not technology *per se* but effective and purposeful learning supported and facilitated by digital technology for personal/professional growth and social inclusion, the instructional design necessarily entails a number of pedagogical and methodological considerations.

2.5. The Pedagogical and Methodological Framework of Digital Learning

The DigLearning pedagogical framework rests on the principles of several learning theories: 1) behaviorism (tech-based habit formation); 2) experiential/situated learning (learning by doing/being); 3) cognitivism (inquiry/problem-based learning by discovery); 4) connectivism (peer-learning through interaction); 5) constructivism (learning by constructing knowledge); 6) collaborative learning (community/project-based); 7) game-based learning (learning by playing); 8) Multiple Intelligences (ample ways of learning), including Digital Intelligence (DQ Institute (2019); 9) competency-based learning (outcomes/performance/ evidence-based); 10) open learning (equitable, open to people, places, methods); 11) adaptive, personalized, self–directed, differentiated, negotiated learning (Bates, 2019).[26] Thus, DigLearning inevitably entails a flexible *integrated instructional design ba*sed on several ID models,[27] which may be tailored to specific needs.

In the context of designing a digital learning ecosystem, Laanpere *et al.* (2014) proposed a the pedagogy-driven design based on three components: 1) *technolog*y (software with in-built tools); 2) *functionality* (user-friendly technical, social-interaction, learning functions), and 3) *pedagogy.* Pedagogy-driven design is seen as a blend of four approaches: a) *task-based instruction* (problem-based, situated learning in authentic contexts); b) *collaborative learning* (knowledge-sharing); c) *self-directed learning* (learner-driven, self-regulated); and d) *competence-based learning* (demonstrated knowledge/skills/attitudes/values). Activities include: a) *receptive* tasks (reading/listening/viewing); b) *information* tasks (data

[26] Bates, 2019: 74, 78, 82, 86, 125/126, 139, 145/146, 170, 179, 281, 368, 414/415, 453,458, 544, 566/588.

[27] In the US: ADDIE, SAM, ASSURE, Dick&Carey's (systems) model, Kemp's (holistic) model, Backward Design (EduTechnology, 2015), Universal Design (CAST, 2018), SAMR for integrating digital technology (EduTechnology, 2023); in the EU: *ABC-Learning Design* (acquisition, investigation, practice, discussion, collaboration, production); and *Four Components for Instructional Design*: tasks, support info, procedure, sub-tasks (Henderikx, Ubachs, Antonaci, 2022:33,36).

gathering/handling); c) *adaptive* task (engaging/modeling); d) *experiential* tasks (inquiry/ practice); e) *productive* tasks (individual/group, oral/written creation); f) *communicative* tasks (discussions/presentations/role-play/simulations) (Laanpere *et al.*, 2014:424-425).

In terms of ***quality assessment***, many states have instituted common national standards for instructional design.[28] In Europe, there are: *Standards and Guidelines for Quality Assurance in the European Higher Education Area* (ENQA, 2015), *Handbook for Quality in e-learning Procedures* (EADTU, 2015)[29], and *Quality Assessment for E-learning: a Benchmarking Approach* (EADTU, 2016)[30]. The last one offers an *E-xcellence instrument* for assessing the key components: 1) Strategic management; 2) Curriculum design; 3) Course design; 4) Course delivery; 5) Staff support; and 6) Student support. Each component contains a checklist of benchmark statements, indicators, and guidance notes (EADTU, 2016: 13), which are applicable in any HE context.

The rapid technological development and the Covid-19 pandemic period (2020-2022) have contributed to raising awareness about DigLearning. Before this period, many countries promoted digital education through policies and interventions.[31] In the Covid-19 period, governments and institutions worldwide were compelled to institute some form of e-learning.[32] After the pandemic, the OECD Digital Education Outlook 2023,[33] including country-specific reports on managing digital transformation (OECD, 2023b), shows diverse approaches to DigLearning, exposes various digital divides, and indicates the need to reconsider the learning framework and improve the resilience and response of education systems in both emergency and regular circumstances.

3. DIGITAL LEARNING IN LEGAL EDUCATION

Legal education is traditionally rather conservative, hesitant and even reluctant to change practices deeply rooted in a specific legal tradition (Thomson, 2008:15; Weinberger, 2021:2013). This section explores the development of DigLearning in legal education, with reference to practices in developed countries, in Serbia, and at the Law Faculty in Niš.

3.1. An overview of Digital Learning practices in developed countries

The history of US legal education shows that it initially rested on *ex-cathedra* lectures, the Socratic method (1775), and the case study method (Harvard, 1870) (Hirsh, Miller, 2004:3). In the 20th century, law schools started introducing courses on practical skills. After World War II, they introduced analogue technology, legal clinics (1960s), legal databases (Lexis, 1970), lawyer skills (1980s), computer-assisted instruction (CALI, 1992),

[28] *E.g. see*: NSQ (2007). National Standards for Quality Online Teaching; National Standards for Quality Online Programs, National Standards for Quality Online Courses (USA); QAA (2020). Digital Learning Taxonomy (UK).

[29] EADTU (2015) focuses on developing policy, student-centered pedagogy, course design, design skills, LMS/VLE management, learner-support, learning analytics, certification, etc.(Williams, Ubachs, Bacsich, 2015:2-3).

[30] EADTU (2016) provides a common assessment framework at 3 levels: a) macro-level (governance, theories, methods); b) meso-level (institutions, management), and c) micro-level (teaching/learning) (Zawacki-Richter, Jung, 2022:4).

[31] *See, e.g.* Conrads, Rasmussen, Winters, Geniet, Langer, 2017: 23-25.

[32] *See, e.g.*: EADTU (2022). The Envisioning Report for Empowering Universities (No.6), (ed.. G. Ubachs), European Association of Distance Teaching Universities, the Netherlands; https://doi.org/10.5281/zenodo.6511424

[33] *See:* OECD (2023 b). Country Digital Education Ecosystems and Governance: A companion to Digital Education Outlook 2023; https://www.oecd.org/education/country-digital-education-ecosystems-and-governance-906134d4-en.htm

and integrating web-based technology (Hirsh, Miller, 2004:3-4; Thomson, 2008:18). In the early 21st century, many law schools started providing distance learning via LMSs (2005), open MOOC courses (2012), and blended learning (2015). The integration of instructional technology was supported by relevant policy, pedagogy, design guidelines, web resources (*LegalED*), synchronous/asynchronous learning (tutorials, streaming, discussion boards, wikis, blogs, quizzes, collaboration groups, chat rooms, learning communities), online mentoring (*LawMeets*), virtual forums (*LawWithoutWall*s) for solving real-life problems in collaboration with lawyers, etc. (Pistone, 2015:593-602, WG on DL in LE, 2015:6).

An empirical research on DigLearning in legal education in the period 2010-2020 (Storr, McGrath, 2023) offers a glimpse into practices in the US, UK, Australia, New Zealand, Columbia, Sweden): flipped, blended and online learning, game-based learning, virtual learning (*Second Life*) for virtual law clinics and simulations, and various tools (podcasts, digital flashcards, e-portfolios). The article also stresses the need for promoting teachers' digital literacy, content-design skills and digital pedagogy (Storr & McGrath, 2023: (Storr, McGrath, 2023:128-129, 133).

In the UK, Ryan & Mcfaul (2020) report on digitalization in legal education, research and practice. Besides offering legal technology modules, some law schools integrate social media and virtual spaces into the curriculum and clinical education. The Open University created an online law clinic (Open Justice Centre, 2016), where students promoted their digital and employability skills by developing understanding of legal ethics, case management and client communication skills in real-life settings (Ryan & Mcfaul, 2020:4-6). The trainees also used mobile technology to disseminate information on discrimination and employment law, and a smartphone app (Open Justice VR, 2017) to practice presentation skills in simulated settings (Ryan & Mcfaul, 2020:7). Many UK law schools offer online degree programs.[34] In practice, the integration is reflected in the digitalization of evidence and judicial system (2016), digital services (divorce, pleas submission), virtual hearings in high criminal courts (2018), the Online Dispute Resolution platform (2016)[35], and AI-based contract management platform (Ryan, Mcfaul, 2020:2-3).

In legal education and training, there are many virtual learning opportunities: *virtual campuses* for online courses/degrees[36]; *virtual exchanges* for international collaboration[37]; *virtual internships* for work-based learning[38]; case-law databases (HUDOC)[39]; online portals (E-Justice)[40] and professional networks (EJTN)[41] providing access to resources, services, learning spaces; and *digital learning ecosystems* connecting multiple stakeholders, providing services, and enabling collaboration, knowledge exchange or self-regulated learning (Harvard, 2024).[42]

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[34] S*ee:* UKStudyonline.com (2023). Online Law Courses; https://www.ukstudyonline.com/subject/law/

[35] *See*: EC (2023). Online Dispute Resolution; https://ec.europa.eu/consumers/odr/main/?event=main.home2.show&lng=EN

[36] S*ee:* Learn.org (2023). Criminal Justice and Law Degrees, https://learn.org/directory/category/Legal_Studies.html

[37] See*:* EC (2020). Erasmus+ Virtual Exchanges; https://erasmus-plus.ec.europa.eu/programme-guide/part-b/

[38] *See:* Virtual Internships (2023). FAQs for Interns, UK; https://www.virtualinternships.com/interns/faqs; Leo Cussen Centre for Law (2023). Virtual Internships, Australia; https://www.leocussen.edu.au/virtual-legal-internships (It offers free, self-paced, simulated-environment lawyer-skills training in human rights, family and criminal law contexts).

[39] *See:* ECtHR (2023). HUDOC database, ECtHR Strasbourg, https://www.echr.coe.int/hudoc-database

[40] *See:* E-Justice (2023). The European E-Justice Portal; https://e-justice.europa.eu/home?action=home&plang=en;

[41] *See:* EJTN (2023). European Judicial Training Network; https://ejtn.eu/about-us/ ; https://ejtn.eu/publications/

[42] *E.g.* Harvard DigLearning ecosystem: Harvard Legal Heritage; Harvard Digital Library; Harvard University Press, HU open courses (in law, government, public policy, leadership) (Harvard Uni, 2024), HLS Library (HLS, 2024).

AI-technologies (AI-assistants, generative Open-AI ChatGPT, 2022) are increasingly used in legal research, case analysis, legal writing, drafting documents, etc. (BPP University, 2023). The immersive extended reality (XR) technologies are reported to have a huge potential in training and research, but their wider use is still limited by many factors: hardware/software costs, tech and curriculum support, teacher training, safety, privacy and ethical concerns on effects of their application (Satre, 2022:21-28). Aware of the increasing use of technology in legal practice, some universities introduce legal technology, data analytics, e-discovery, blockchain technology, and AI-related legal research and writing courses in their curricula (Michigan State University, 2024),[43] open MOOC courses on AI-related legal issues in different areas of law (Lund University, 2024),[44] or optional courses for teaching staff and students on AI and VR/AR technologies (Michigan Online, 2024a).[45] To facilitate students' hands-on learning experience in simulated VR/AR settings, some universities provide optional courses in soft skills (leadership, workplace communication skills, feedback in legal contexts, Academic English) (Michigan Online, 2024b).[46] Yet, most law schools do not provide either general courses or access to these technologies, and interested students have to resort to self-directed learning (Connell, Black, 2019:15) via open MOOCs or open AI ChatGPT.

These technologies have already found many applications in legal research, training and practice. There are reports on using immersive VR/AR technologies in criminology (delinquency, risk-assessment, sex crimes) (Van Gelder, 2023:5), digital forensics (crime investigation, reconstruction, processing evidence), law-enforcement training for the police (P&SN, 2020) and correctional facility officers (BSD XR, 2024). EdTech companies provide accounts on benefits for students, trainees, employers, practitioners and the judiciary (IFour, 2024).[47] In addition to automated applications (Amber Alert)[48] and AI legal assistants (Ross, 2016; Eve, 2023)[49] with large databases of statutory and case law in different legal areas (Connell, Black, 2019:14), the adaptive and autonomous AI-powered Law ChatGPT (2023) can analyze data, perform complex tasks, deliver multi-perspective arguments, and improve lawyer's efficiency.[50] While some legal practitioners warn about legal and ethical issues (copyright, data protection, privacy, health, safety) (BUSE/Wilucki, 2023), legal inaccuracies

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43 *E.g.* Michigan State University, College of Law (2024). Course Offerings in Technology and Innovation in Law; https://www.law.msu.edu/lawtech/Courses.html

44 E.g. Lund University, Faculty of Law (2024). MOOCs: AI and Law; https://www.law.lu.se/study/mooc-massive-open-online-courses; available via Coursera: https://www.coursera.org/learn/ai-law

45 E.g. s*ee:*. Michigan Online (2024a). Teach-outs, Centre for Academic Innovation, Michigan University;

46 E.g. s*ee:* Michigan Online (2024b): XR Innovation Projects, AI online courses, Soft skills

47 This tech company provides an insight into possible applications of VR/AR/MR technologies in the legal sector:
a) *for law students*: 3D visualizations, interaction with 3D models, analysis of complex cases, presentation models, argumentation; debates, court proceedings and legal roles; "shadowing" lawyers and judges in daily work, etc.
b) *for employees/employers*: leadership, social communication, workplace and employability skills (presentation skills with feedback, interviews), junior staff training in simulated settings, process and exchange information, etc.;
c) *for trainees and lawyers*: crime scene investigation; discover evidence, prepare cases, test strategies, practice advocacy skills; observe outcomes in simulated trial; improve client engagement, prepare clients/witnesses for court;
d) *for the judiciary*: improve the justice system efficiency, enable witnesses, jurors, attorneys and judges to explore the crime scene, understand the case/processes and make better decisions (IFour, 2024).

48 *See:* Amber Alert (2019). Amber Alert Factsheets, Oct.2019 (a warning system on abducted/missing persons)

49 *See:* Ross Intelligence (2016); https://www.youtube.com/watch?v=ZF0J_Q0AK0E; Eve.legal (2023) Introducing Eve; https://www.eve.legal/ ; https://www.eve.legal/blogs/introducing-eve

50 See: Law ChatGPT (2023). Meet Law ChatGPT, https://lawchatgpt.com/blog/6-ways-to-use-law-chatgpt-for-legal-studies

and "problematic" results generated by Law ChatGPT (Perlman, 2022: 1), others strongly believe these technologies which will be part of the 21st century legal world. Thus, in order to prepare prospective lawyers for practice, law schools should include such courses in the curricula and provide hands-on training experiences (Connell, Black, 2019:17).

The diverse efforts exerted in developing countries to integrate digital technology in legal education, training and research may be briefly compared with the situation in Serbia.

3.2. An overview of Digital Learning practices in the Republic of Serbia

In Serbia, the Internet was made publically available in early 1996.[51] Digitization started in 2002, in order to preserve the national heritage and enable access to digital resources (Ognjanović, 2022:2). The normative framework for digitalization has been established since 2005 by adopting various documents[52] promoting the ICT integration (Mitrović, 2017:4). In line with the 2015 UN Sustainable Development Goal 4 (education), the current National Strategy for the Development of Education by 2030 (2021)[53] highlights the role of ICT in raising the quality of education at all levels. The accompanying Action Plan (2021-2023) elaborates on specific goals: research, innovation, human resources, quality assurance, internationalization, and life-long learning (Government RS, 2021: 80-86). Digitalization has been supported by many normative acts[54] aimed at promoting quality Digital Learning. In particular, the digitalization of higher education (HE) refers to investing in infrastructure, digital competences, digital/hybrid instruction, and internationalization of study programs. The Ministry of Education adopted the *Digital Competence Framework* (2019),[55] which envisages teacher training, piloting digital books, innovating curricula/syllabi, using e-gradebooks and S*elfie* tools (for teachers' competencies). Relevant public institutions[56] have endeavoured to provide infrastructure, resources and teacher training, but these activities have been largely aimed at primary and secondary schools.

Although Serbian public HE institutions receive financial support in terms of infrastructure (Internet via academic networks, devices), scientific research projects, conferences and mobility (via EU Erasmus+ project), very limited support is provided for teacher-training and professional development opportunities related to DigLearning. HE institutions are largely left to their own resources and initiatives. Most HE staff are unaware of available self-assessment

[51] The first academic Intranet was established in 1992 at the University in Belgrade, which was linked to the European academic network in 1995, but the Internet was publicly available since 1996 (RTS video, 2016; Nova energija.net, 2016).

[52] Strategy for the Development of the Information Society (2006, 2010); Telecommunications and ITC Services Act (2006); Strategy for Sustainable Development (2008); Strategy for Scientific and Technological Development (2010); Strategy for the Development of Education (2012) (Mitrović, 2017: 5-6).

[53] Government RS (2021). National Strategy for the Development of Education by 2030, O*fficial Gazette RS*, no.63/2021.

[54] Social inclusion Strategy (2016); Information Security Act (2016, 2017, 2019); Personal data Protection Act (2018), National Qualification Framework Act (2018, 2020); Science and Research Act (2019); Strategy for developing Artificial Intelligence (2019); Strategy for developing the Public Information System (2020); Strategy for developing the Digital Competence (2020) (see: Government RS (2021). National Strategy for Education by 2030.

[55] Ministry of Education RS (2019). *Digital Competence Framework: Teacher for the Digital Age* (2019).

[56] The Ministry of Public Administration (MPA), the Ministry of Education, Science and Technological Development (MEST), the National Institute for Advancement of Education (NIAE), the National Institute for Quality Assessment (NIQA) have developed supporting infrastructure: e-learning platforms, digital classroom, e-gradebooks, publications, guidelines, and recommended the use of *Selfie* assessment tools for teachers (S*ee:* MPA, MEST, NIAE, NIQA websites).

tools and useful guidelines for designing flexible blended learning.[57] HE qualifications are aligned with EU standards but there are no benchmarks, pedagogical guidelines or profession-specific resources for digital integration. The staff in subject-specific areas often lack technical and pedagogical training. As there is no systemic approach to promoting and supporting effective DigLearning, enhancing teachers/students' digital competencies and integrating DigLearning across the curriculum, digital transformation at HE institutions is either sluggish or standing at a standstill.

At the outset of the Covid-19 pandemic (mid-March 2020), HE institutions were taken by surprise: they had to "go digital" on the fly. The HE institutions which had already been using the open source Moodle LMS platform[58] simply kept using it. HE institutions without such an option had to resort to available tools: Google Classroom and video-conferencing platforms (Zoom, MS Teams, Skype, Google Meet). For most students and teachers, it was the first online learning/teaching experience. As for law schools in Serbia, there are very few articles on law students/teachers' experiences from this period.[59] The next part of the paper briefly presents the forms of instruction at the Law Faculty in Niš, before, during and after the Covid-19 pandemic.

3.3. An overview of Digital Learning practices at the Law Faculty in Niš

The LF Niš Computer and Information Centre was established in 1997 to provide technical support for administration, scientific research, education and student services. LF Niš is linked to the academic network (via the University of Niš) and has local Intranet and WI-Fi services.[60] In the pre-pandemic period, e-learning had not been part of educational practices but teachers used *technology-enhanced instruction* (computers and OHPs) in class since early 2000s and the Internet has been available since 2013.[61] The LF tech staff occasionally organized teacher-training on digital tools but there are no courses on digital competencies, digital content design, or emerging (AI/VR/AR) technologies. LF teaching staff are largely self-taught in using digital technology.

The first institutional form of online learning at the LF Niš was organized in the emergency circumstances of the Covid-19 pandemic (in March 2020). Due to the changing safety situation, LF Niš organized online instruction from mid-March 2020 to May 2022; the first two terms were fully held online, while the next two terms were held in a *hybrid* format (most students attended classes online but some students opted to attend classes at LF Niš). The instruction was provided via G-Classroom (for material sharing and assessment) and video-conferencing platforms (Zoom, Google Meet for online communication and collaboration). LF teachers were provided tech support on using Zoom and creating G-Classrooms, and given a week to get organized and prepare content for initial classes. Most teachers resorted to flipping the existing teaching materials and posting them in G-Classrooms on a class-to-class basis, while some teachers used pre-recorded files or online materials to

[57] *See*: NIQA (2023). Guidelines for Online and Hybrid Learning; Moodle; Assessment; Open Education Resources, etc.
[58] *See:* RCUBeLearning (2024) and websites of Law Faculties in Serbia using Moodle (see links in final references).
[59] A Google search yielded very few results: a) one conference report on students' views on using MS Teams (Počuča, Matijašević, Zarubica, 2021), and one on teachers' experiences in online instruction (Matijašević, Carić, Škorić, 2021); and b) an extensive empirical research on law students and teachers' experiences at LF in Niš (Ignjatović, 2022).
[60] *See*: Pravni fakultet u Nišu (2024). Computer and Information Center.
[61] For the lack of official records, the data are based on the oral accounts of the LF Computer Centre staff (26. 2.2024).

support their instruction. Colloquia, tests and exams were organized when the pandemic subsided. The experiential learning by doing proceeded throughout the first term. The subsequent semesters provided a chance to revise the material and reconsider instructional design. This *ad hoc* approach was challenging for all participants: state administration, LF management, tech staff, teachers and students. It may be best illustrated by the results of an extensive empirical research (Ignjatović, 2022) on LF Niš students and teachers' experiences in this period (March 2020-May 2022). For the purposes of this paper, we may briefly review the respondents' perceptions on some important components of DigLearning.

On average, LF students assessed online instruction (mid-March 2020-May 2022) as follows: Ss' prior online learning (16,66%); positive attitude to e-learning (71.8%); digital skills (66.4%); digital platforms G-Classroom/Zoom (84.6%); quality of instruction (82.05%); Ts' agency (92%). LF teachers (N=22; 48%) assessed different stakeholders' agency (November 2020) as follows: ME (25.5%); LF Management (57.7%); LF tech staff (86.36%); LF teachers (80.5%), LF students (50%). Different aspects of online instruction were assessed as follows: LF digital infrastructure (80.9%); LF strategy/action plan/supervision (40.9%); learning platforms: G-Classroom (66.45%) and Zoom (82.6%); LF tech support for digital content-creation (40.96%); LF digitalization level (65.5%); Ts' prior online experience (22.5%); Ts' digital competences (63.6% in March 2020; 86.3% in May 2022; 71.9% in November 2022); Ts' perception of Ss' activity (41%) and learning (54.5%); Ts' use of formative (54.5%) and summative (49.9%) assessment; additional online applications, databases, tool (50%); Ts' attitude to e-teaching/learning (95% for hybrid learning) (Ignjatović, 2022:70-83).

The presented data clearly illustrate the strengths and shortcomings of e-learning at the LF Niš during the Covid-19 pandemic. Most importantly, they indicate the areas which should be addressed in future efforts to develop viable DigLearning opportunities and enhance digital transformation in legal education. Although the first-e-learning experience contributed to raising awareness about the relevance, benefits and potentials of DigLearning, the progress attained in digital integration has not been furthered in the post-pandemic period. Legal education at the LF Niš has largely relapsed into the traditional onsite instruction. It seems promising that quite a number of LF Niš teachers have kept using available online platforms (G-Classroom, G-Meet),[62] either for the sake of convenience (posting material and communication) or in an effort to preserve a form of blended learning. Notably, the international scientific conference annually hosted by the LF Niš has been held in a hybrid format (both onsite and online) since 2021. Yet, there is still a lack of systemic approach, investment and thorough consideration of flexible DigLearning options which may be integrated across the LF Niš curricula.

3.4. A brief SWOT analysis of Digital Learning

We may briefly review the strengths, weakness, threats and opportunities of DigLearning.

The presented conceptual, structural and pedagogical framework, as well as legal education practices worldwide, indicate many ***strengths and benefits*** of DigLearning:

a) it is *flexible and adaptable* to specific contexts because it enables instruction: in different learning environments, via diverse digital tools, by using integrated instructional

[62] Based on the data from the LF Niš students' services, obtained by the Computer Centre administrator (26. 2.2024), Google Classroom is used in 31 undergraduate courses, 46 master degree courses, and 2 doctoral degree courses.

design, in various formats (BL/ML) and modes (synchronous/asynchronous, virtual/live, online/onsite);

b) it is relatively *inexpensive and cost-efficient* as it may be provided even by using modest open source tools and resources (free open resources, courses, books, whiteboards, etc.);
c) it entails *collaborative, negotiated and differentiated learning* processes and *changed roles* of all stakeholders who are perceived as partners in the digital integration project;
d) its multidimensional framework enables the integration of *pedagogy-driven* instructional design in authentic contexts and open *digital learning ecosystems* for life-long learning.

In DigLearning, teacher is no longer "a sage on the stage" but "a guide on the side" (Bates, 2019:554) who facilitates meaningful instruction in authentic contexts. Students are proactive agents who take full responsibility for their learning and have a voice and choice in the process. Competent authorities, LF management and tech services have the key role in providing strategic, financial, structural, organizational and technical support for the digital technology integration.

On the other hand, DigLearning entails ample ***challenges and shortcomings***:

a) insufficient strategic, financial, structural, organizational and pedagogical support;
b) multiple lacks, insufficiencies and inequalities in integrating digital technology and resources for specific educational, professional and personal development purposes;
c) the intrinsic complexity of integration processes (digitization, digitalization, digital divide, disruption, transformation) which may aggravate and slow down the stakeholders' efforts.

In terms of *state authorities*, the major drawbacks are insufficient funding and promotion of DigLearning at HE level, lacking strategy/action plan for digital integration, lacking profession-specific benchmarks and guidelines for pedagogy-driven integration of relevant digital tools, etc. As for *LF Nis*, the major challenges involve insufficient funds, capacities and resources, teacher/student training on digital skills and new technologies, slow-paced development, etc. As for *LF Nis students*, their first online learning experience demonstrated average learner agency and awareness of DigLearning opportunities; although their competencies certainly improved, they need student-training courses on new digital technologies and online subject-specific courses promoting e-learning for educational purposes. As for *LF Niš teachers*, the surveyed teachers (48%) demonstrated a huge commitment to provide purposeful instruction in the given extraordinary circumstance and a considerable growth in digital competencies, but they also expressed the need for further teacher-training and ongoing tech support in the digital integration. Yet, as half of the LF teachers did not participate in the survey, it may be interpreted as resistance to Digital Learning, which remains an issue for further institutional consideration.

In addition to strategic (policy), financial, structural/organizational and pedagogical issues, there are ample technological, social, affective, personal and professional concerns which may adversely affect DigLearning.[63] The major ***threats*** are related to safety, privacy, data protection, mental health, ethics and values, which are additionally at risk by the rapid development and use of disruptive AI and XR technologies. These risks have to be addressed in DigLeaning design.

Despite all challenges and risks, the provided examples from legal education worldwide show that DigLearning offers flexible ***opportunities*** for scientific research, knowledge-exchange, education and training in various academic, professional, work-related and social contexts, both in regular and emergency circumstances. To put them into practice,

[63] For more, s*ee:* Ignjatović, 2022: 83-84, 86-88, 90-92.

there is a need for genuine *partnership* of all stakeholders which may eventually lead to changing the conventional mindset and instituting a paradigm shift, in line with the declared HE educational goals in DigLearning.

4. Considerations for Promoting Digital Learning in Serbia and at LF Niš

In spite of evident digitalization efforts, Serbia is lagging behind the developed countries in many respects. The current level of digital integration in legal education may be assessed as average, and it is likely to decline if DigLearning potentials are not fully recognized by all stakeholders. Considering the observed strategic, financial, structural, organizational, pedagogical and technological issues, the presented strengths, benefits and challenges may serve as a starting point for reflection, reconsideration and joint action in addressing the shortcomings and risks, and devising viable solutions for improving the quality of DigLearning in higher education.

Given the multidisciplinary and interdisciplinary nature of legal education, the integration of technology inevitably entails an *integrated instructional design* approach, based on pedagogy- driven integration and subject-specific requirements in terms of knowledge, competencies, attitudes and values envisaged in the LF undergraduate, graduate and post-graduate curricula. The presented practices in legal education worldwide and prior experiences of LF teachers and students may offer practical solutions for integrating DigLearning across the LF Niš curricula. We may sum up some opportunities by revisiting the key components of DigLearning design:

1. ***Digital Strategy and Action Plan:*** at the national level, it is essential to adopt separate national policy documents: *Strategy and Action plan for the Development of Higher Education,* and *Digital Transformation in HE* (including clear standards, benchmarks, indicators, goals, and guidelines for digital capacity planning, investment, management, development, innovation, security, stakeholders' agency), which may be subsequently used for developing digital integration strategy, action plan and learning plans at the institutional level;
2. ***Digital Infrastructure, Connectivity*** and ***Digital Learning Environments***: ensure relevant support and investment in digital infrastructure (high-speed Internet, WI-FI connectivity in classrooms, hardware, software), access to digital environments via academic networks, etc.;
3. ***Data Management and Learning Analytics:*** ensure safe collection, analysis and evidence-based use of data to promote DigLearning, inclusion, internationalization of learning, global/regional/local partnerships; use learning analytics as support for technology integration; introduce institutional self-assessment via the EU *DigComp Selfie for Schools*;
4. ***Digital Security, Ethics and Privacy***: ensure data protection, privacy and personal data safety; provide guidelines on ethical conduct/use of digital tools in education and research and teacher/learner training courses on security and privacy issues;
5. ***Digital Learning Plan:*** devise a holistic technology integration plan for collaborative, blended learning, virtual learning, open resources; devise design guides (with clear benchmarks, competences, goals, delivery modes, assessment) to be used in syllabus design and planning;

6. ***Digital Literacy***: there is a need to promote students/teachers' information, data, media and digital literacy, as well as communication, management, content-creation, AI-literacy skills by organizing regular training courses and stand-by tech support;
7. ***Digital Competences:*** promote students' competencies (data/media/digital literacy) and self assessment via DigComp tools; promote teachers' competencies (digital design, content-creation, classroom management, assessment) and self-assessment via the *DigComp Selfie for Educators;* provide professional development options and recognize digital credentials;
8. ***Digital Resources:*** provide access to varied resources (open resources, databases, digital textbooks, interactive apps, games, collaboration/assessment tools); promote informal learning (virtual courses, internships, exchanges, professional networks, learning ecosystems);
9. ***Digital Content****:* promote material digitization; devise high quality digital content; ensure access to OER contents and ecosystems for developing quality content; provide content-creation training; devise interactive content-based activities and authentic assessment tools;
10. ***Digital Pedagogy:*** ensure teachers' ongoing professional development/training (in instructional design, content-creation, delivery, assessment); promote the use of self-assessment/self-reflection tools for educators; facilitate effective instruction in authentic contexts; correlate cognitive, affective, social and technical aspects of technology-based instruction; ensure systematic technology integration across the syllabus/curricula and knowledge/good practices exchange; use learning analytics for prospective development and innovation.

In the digital age, in addition to the traditional classroom settings, Digital Learning offers ample spaces, resources and tools for purposeful and innovative collaborative as well as differentiated and self-regulated learning mediated by digital technologies or technology-enhanced approaches (e.g. Blended Learning). Thus, instead of resorting to *ad hoc* approaches in emergency situations, it may be high time to reconsider the existing policies and practices, and ensure a more extensive, well-planned and well-supported integration of flexible DigLearning in Serbian legal education. The process of instituting quality DigLearning requires strategic and concerted action of all stakeholders as partners and active agents, genuinely committed to harnessing the available potentials to ensure new learning opportunities. If strategically postulated and funded (by authorities), adequately structured, managed and monitored (by institutions), properly blended with onsite instruction (by teachers) on the principles of pedagogy-driven design, and genuinely recognized (by students) as a life-long learning model, the DigLearning may provide highly meaningful and effective learning experiences in various formal/informal educational, professional development, scientific research, and authentic work-related or subject-specific contexts. Besides enhancing the systemic agency of all stakeholders, this interdisciplinary and transdisciplinary model may promote the development of various global, communicative and professional competencies, transferable and life skills in line with the contemporary learners' real-life needs. Finally, the systematic integration of DigLearning across the curriculum may contribute to developing the digital mindset and eventually lead to digital transformation in legal education, in line with the envisaged global and regional DigLearning frameworks and the 21st century sustainable development goals in HE.

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DIGITALNO UČENJE U OBRAZOVANJU PRAVNIKA OBRAZOVNE POLITIKE, PRAKSE I POTENCIJALI ZA INTEGRACIJU ZASNOVANU NA PEDAGOŠKOM PRISTUPU

Ubrzani razvoj digitalnih tehnologija uslovio je potrebu da se preispita tradicionalno shvatanje obrazovanja, prepoznaju potrebe novih generacija studenata i osigura implementacija milenijumskih ciljeva održivog razvoja u oblasti obrazovanja. Nova paradigma podrazumeva integraciju digitalnog učenja (Digital Learning) u korpus pedagoških pristupa. Početkom 2020.godine, suočene sa pendemijom Korona virusa (Covid-19), obrazovne institucije širom sveta bile su prinuđene da pribegnu nekom vidu online učenja. Digitalno učenje predstavlja spoj digitalnih tehnologija, infrastrukture, resursa, okruženja za učenje, interaktivnih alata, kompetencija, sadržaja, pedagogije i nastavnog dizajna.

Ovaj pregledni rad predstavlja rezultate istraživanja o digitalnom učenju u obrazovanju pravnika. Prvi deo rada predstavlja konceptualni, strukturalni i pedagoški okvir digitalnog učenja, sa osvrtom na obrazovne politike o digitalnom učenju (na globalnom, regionalnom i nacionalnom nivou), različite vidove digitalne nastave i procese u okviru digitalne integracije. Drugi deo rada istražuje primenu digitalnog učenja u pravnom obrazovanju u razvijenim zemljama, u Srbiji i na Pravnom fakultetu u Nišu pre, tokom i nakon pandemije. Na osnovu istraživanja i kratkog prikaza iskustava studenata i nastavnika PF u Nišu sa online nastave tokom Kovid pandemije (2020-2022), autorka daje kratku analizu prednosti, izazova, rizika i potencijala digitalne nastave. U završnim napomenama se ukazuje na aktivnosti koje bi omogućile efikasnu i kvalitetnu integraciju digitalnog učenja zasnovanog na pedagoškim principima integrisanog nastavnog dizajna. Umesto ad hoc pristupa online nastavi u vanrednim okolnostima, ova saznanja mogu biti od koristi u procesu planiranja, organizovanja, kreiranja i implementacije fleksibilnih formata digitalnog učenja na institucionalnom nivou kao i na nivou individualnih predmeta. Rad ima za cilj da podstakne saradnju svih aktera u cilju unapređenja digitalnog učenja za potrebe obrazovanja pravnika, naučnih istraživanja, profesionalnog usavršavanja i budućeg pravnog poziva.

Ključne reči: *digitalno učenje, obrazovne politike, obrazovanje pravnika, prakse, pedagogija, integrisani nastavni dizajn.*

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Review Paper

PUBLIC POLICY AND REGULATORY IMPACT ASSESSMENT IN THE SERBIAN LEGAL FRAMEWORK

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Abstract. *Impact assessment of public policy documents and regulations is an analytical process aiming to assess the positive and negative effects that public policy measures or solutions enacted in regulations can have on the population and economic entities. Depending on whether the impact assessment takes place in the process of developing documents or after their adoption, application and evaluation of the achieved results, there are ex-post and ex-ante impact assessments. In the Republic of Serbia, this area is regulated by the Act on the Planning System and the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents. The latest amendments to the Act on the Prohibition of Discrimination have introduced provisions that emphasize the obligation and importance of public authorities to take into account the principle of equality when conducting an ex-ante impact assessment. By applying the normative method, the author presents the basic elements of the planning system of the Republic of Serbia and the procedure for conducting impact assessment, indicating that this process is identical for both public policy documents and regulations.*

Key words: *public policy, regulation, impact assessment, planning system*

1. INTRODUCTION

Every decision made by an individual or a group of people (a family, a private company or a government) has different effects on many areas of everyday life (economy, labor market, environment, air pollution, etc.). These effects can be positive or negative. Negative effects cannot always be fully eliminated but good planning and assessment can mitigate or minimize them. Every government intervenes trying to resolve different social problems by using public policies. Legislative intervention is one of the public policy

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instruments which may be used beside other options, such as the provision of goods and infrastructure or economic incentives. In the process of developing public policies and regulations, governments use impact assessments whose aim is to find the best possible solution with the least negative effects that may cause difficulties in achieving specific public policy goals.

This article analyses the impact assessment of public policies and regulations[1] in the Republic of Serbia by assessing the provisions of the Act on the Planning System (hereinafter: the Planning System Act, PS Act 2018)[2], and the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents[3] (hereinafter: Regulation 8/2019). The paper aims show that there is no difference between public policy documents and regulations in the process of impact assessment. For the first time since 2018, there is a subject-specific law which regulates the entire planning system in the Republic of Serbia and its elements, and the accompanying Regulation which prescribes in detail the impact assessment procedure introduced in 2019.

2. The Planning System Act and Types of Planning Documents in the Republic of Serbia

Under the Planning System Act (PS Act, 2018), there are five elements of the planning system of the Republic of Serbia: 1) planning documents; 2) planning system participants; 3) the public policy system management process; 4) the process of aligning the content of planning documents with the content of other planning documents and regulations; and 5) linking public policy adoption and implementation process with the mid-term[4] planning process"(Article 2 §1, point 2, PS Act). There are two types of planning system participants: a) the National Assembly, the Government and the local state authorities which enact the public policy documents by adopting them in accordance with their responsibilities and mandate, and, b) other planning system participants which participate in the process of developing public policies in accordance with their mandate, but they do not enact them (e.g. ministries, the Public Policy Secretariat of the Republic of Serbia). The public policy system management process encompasses different elements and actions. It may be defined as "the process of public policy planning, impact assessment, planning documents preparation and adoption, coordination, public policy implementation, implementation monitoring of public policy, public policy performance evaluation aimed at reviewing and improving it, policy improvement based on performance evaluation findings, and reporting on public policy performance" (Article 2 §1, point 5, PS Act). The process of development and implementation of planning documents is based on a number of principles, which aim is to provide: cost-effectiveness of planning documents; fiscal sustainability; realistic assessment of established policies' possibilities and limitations; relevance and reliability; consistency and conformity; planning continuity of the policy cycle;

[1] The term *regulation* in this article is used for both laws (legislative acts) and by-laws (regulatory acts).
[2] Act on the Planning System, *Official Gazette RS*, No. 30/2018
[3] Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, *Official Gazette RS*, No. 8/2019.
[4] A mid-term plan is defined as "a comprehensive planning document covering a period of three years and enabling linking of public policies to a medium-term expenditure framework" (Article 25, para.1 of the Planning System Act, *Official Gazette RS*, No. 30/20182018). The mid-term planning process is regulated in the accompanying Regulation on the Methodology of Drafting Mid-Term Plans (*Official Gazette RS*, No. 8/2019).

proportionality in *ex-ante* and *ex-post* impact assessments; preventive and the precautionary measures to minimize negative effects; equality and non-discrimination of proposed policies and their measures; coordination and cooperation among planning system participants; transparency and partnership in consultation processes; responsibility of institutions in charge of implementing the public policy; a time frame (time-limits) for the implementation of a public policy document and execution of provided measures/activities; and integral and sustainable growth and development (Article 3 PS Act).

The Act on the Planning System defines a planning document as "an act where planning system participants set goals, establish public policy priorities and/or plan measures and activities for achieving them, within their respective competences and in connection with their functioning" (Article 4 §1 PS Act). There are three types of the planning documents: 1) development planning documents; 2) public policy documents; and 3) other planning documents (Article 4 §2 PS Act). This classification is based on the broadness scope of their regulation and the level of importance for the authority which develops and establishes a specific public policy.

Development planning documents are defined as "planning documents of the broadest scope and the highest importance for the statutory authority" (Article 5 §1 PS Act). There are four types of development planning documents: 1) Development Plan[5]; 2) Investment Plan; 3) Spatial Plan of the Republic of Serbia and other spatial plans, general urban plan; and 4) Development Plan of the Autonomous Province and development plan of a local government unit (Article 5 §2 PS Act).[6] A public policy document is defined as "a planning document where planning system participants set or elaborate already established public policies in accordance with their respective mandate" (Article 10 § 1 PS Act). There are four types of public policy documents: 1) strategy; 2) programme; 3) policy concept paper; and 4) action plan (Article 10 § 2 PS Act).[7]

In line with other planning documents, the Act on the Planning System recognizes the following documents: the Government's Programme, the Action Plan for the Implementation of the Government's Programme, the Government Annual Work Plan and the National Programme for the Adoption of EU *acquis*. For instance, the Action Plan for the Implementation of the Government's Programme 2023-2026,[8] adopted by the Government RS in 2023, includes four implementation groups: IG1 Sustainability; IG2 Innovations and the Digital Age; IG3 Development; and IG4 A Fairer Society. The Action Plan envisages mechanisms for monitoring the implementation of the Government's priority goals which are part of the Government Programme 2023-2026[9] presented by the candidate for the Prime Minister and adopted by the National Assembly of the Republic of Serbia in 2022.

[5] The adoption procedure and other details are prescribed in the Regulation on the Procedure for the Preparation of the Draft Development Plan of the Republic of Serbia (*Official Gazette RS*, No. 54/2023).

[6] The adoption procedure and other details are prescribed in the Regulation on Mandatory Elements of the Development Plan of Autonomous Province and Local Self-Government Unit (*Official Gazette RS*, No. 107/2020).

[7] The map of the current public policy documents in the Republic of Serbia is available at the Public Policy Secretariat website: https://rsjp.gov.rs/cir/sema-jp-mapa/ (access: 24. 08. 2023).

[8] The Action Plan for the Implementation of the Government's Programme is available at the following link: https://rsjp.gov.rs/wp-content/uploads/APSPV-2023-2026-1.pdf (access: 24. 08. 2023).

[9] The Government Programme 2023-2026 (25 October 2022) is available at the following link: https://rsjp.gov.rs/wp-content/uploads/ana-brnabic-ekspoze-1022_cyr.pdf (access: 24. 08. 2023).

3. Impact Assessment of Public Policy Documents and Regulations

Public policies are used by governmental institutions for solving concrete social problems which are recognized as priorities in a society (Jovanić, 2019: 20). For instance, if a country deals with a problem of air pollution,[10] high levels of domestic violence, or there is a need to decrease the level of some preventable illnesses among general population, a government will introduce specific actions through a public policy with implementation measures. Concrete social problems may be treated in different ways. Due to limited resources, it may be necessary to conduct an impact assessment and find the best possible solution.

The Planning System Act defines public policies as "courses of action of the Republic of Serbia, the Autonomous Province and local government unit, in specific areas, aimed at achieving desired goals in the society" (Article 2 §2, point 1 PS Act). Based on this definition, public policies have the following common characteristics: they are actions which are taken by all levels of state authorities, including the central/national authorities, autonomous province and local governments units; public policies are created in specific fields (in Appendix 11, the Regulation 2019 recognizes 18 fields of planning and implementation of public policies); a public policy aims to achieve specific goals. Relevant literature identifies other common characteristics of public policies: they are developed in the political decision-making processes (Jovanić, 2014: 98); they are closely connected with the executive power (Flin & Asker, 2021: 62); and it is important to emphasize other social actors which participate in the process of development of public policies, such as non-governmental organizations, stakeholders and target groups (Knil & Tosun, 2021: 27).

Impact assessment is an analytical tool for assessing potential positive and negative effects of concrete measures envisaged in public policy documents or solutions envisaged in regulations and selecting the best possible option to achieve the concrete goals/aims. Based on the provided definition, impact assessment is one of the elements of the public policy management system. In the Planning System Act, impact assessment (analysis of effects) is defined as "an analytical process carried out in the course of planning, formulating and adopting public policy and legislation in order to identify the change to be achieved, its elements, cause-effect relationships, and to select the optimal measures to achieve the public policy goals (*ex-ante* impact assessment), as well as during and after the implementation of adopted policies and regulations in order to evaluate performance, review and improve the public policy and/or legislation (*ex-post* impact assessment)" (Article 2 §1, point 7 PS Act). This definition includes several characteristics of impact assessment: a) it is an analytical process; b) it is applicable to both public policy documents and regulations in an equal manner (Bradaš & Sekulović, 2020b: 9); c) it is performed throughout the entire public policy and legislative cycle, including the development, formulation, adoption, implementation and evaluation of public policy and legislation effects. In this regard, we can distinguish *ex-ante* and *ex-post* impact assessment. In terms of methodology, the impact assessment process is identical for public policy documents and regulations; the only difference is the object of assessment (Dimitrijević & Vučetić, 2021: 87). This approach was accepted in the legal provisions of the Planning System Act (2018) and the Regulation (08/2019). The Regulation stipulates that an *ex-ante* analysis is not mandatory in specific cases when public policy documents do not have a high impact

[10] The impact assessment of public policies and regulations on environment protection is one of the oldest impact analyses which has been put into practice, first by the USA and then by the EU (Bradaš & Sekulović, 2020a: 6).

on society and/or do not represent a high priority[11], and in other cases recognized by the Regulation (8/2019).

An *ex-ante* analysis can be performed in the form of a basic or detailed assessment, which depends on the level of impact and priority (envisaged in Appendix 1 of the Regulation) as well as on the complexity and range of measures to be implemented (in line with the principle of proportionality and precaution).[12] A detailed analysis will be performed if a proposing party envisages that a document will have a significant impact on society.[13] A detailed impact assessment of regulations pertaining to gender equality and micro, small and medium-sized enterprises[14] will be performed when the test results indicate the need for such analysis.[15] In case it is considered that measures or solutions from proposed public policy documents or regulations will not cause significant effects, the impact assessment is performed through the process of answering the questions contained in Appendices 2-10 of the Regulation (8/2019) [16]; otherwise, the impact assessment is conducted through the prescribed steps of an *ex-ante* analysis in accordance with Chapter III of the Regulation.[17]

It is important to mention the Act on the Prohibition of Discrimination[18] (hereinafter: the Anti-Discrimination Act, AD Act), whose last amendments included new provisions on the *ex-ante* impact assessment based on the implementation of the principle of equality.[19] The Anti-Discrimination Act stipulates that the public authority will be responsible to conduct an *ex-ante* analysis of regulations or public policy documents in the context of their compliance with the principle of equality when these documents are important for ensuring the exercise of the rights of socio-economically vulnerable persons or groups of persons (Article 14 §4 AD Act). The Anti-Discrimination Act stipulates that the conducted analysis should contain the following elements: "1) comprehensive description of the situation in the concrete field with special reference to socio-economically vulnerable persons and groups of persons; 2) assessment of the necessity and proportionality of the intended changes in accordance with the principles of equality and the rights of socio-economically disadvantaged persons and groups of persons; 3) risk assessment for the rights, obligations and legally based interests of persons and groups of persons in

[11] In that case, the *ex-ante* assessment is performed on the basis of results of the impact test which is an integral part of the Regulation (Appendix 1). Article 6 of the Regulation enlists the specific cases when an *ex-ante* analysis is not mandatory (Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, *Official Gazette RS*, No. 08/2019).

[12] Article 8, paragraphs 1-2 of the Regulation No.8/2019.

[13] Article 8, para. 4. of the Regulation No.8/2019.

[14] Impact assessment tests on gender equality and micro, small and medium-size enterprises are available at the Public Policy Secretariat website: https://rsjp.gov.rs/sr/alati-za-sprovodjenje-analize-efekata/ (access: 25. 08. 2023).

[15] Article 8, paragraph 5 of the Regulation No.8/2019.

[16] Appendices 2-10 of the Regulation contain the key assessment questions in the following fields: Appendix 2 - Key questions for the analysis of the existing situation and correct definition of the change being proposed; Appendix 3 - Key questions for identifying goals and objectives; Appendix 4 - Key questions for identifying public policy options; Appendix 5 - Key questions for the analysis of financial impact; Appendix 6 - Key questions for the analysis of economic impact; Appendix 7 - Key questions for the analysis of social impact; Appendix 8 - Key questions for the analysis of environmental impact; Appendix 9 - Key questions for the analysis of governance impact; Appendix 10 - Key questions for risk analysis.

[17] Article 8, para. 6 of the Regulation No.8/2019.

[18] Act on the Prohibition of Discrimination (Anti-Discrimination Act), *Official Gazette RS*, No. 22/2009 and 52/2021

[19] For more details about the impact assessment through the implementation of the principles of equality and non-discrimination, see: Mihajlović, A. 2023. *Vodič za primenu procene uticaja propisa i javnih politika na socioekonomski najugroženije građane i građanke*. Beograd: A11 – Inicijativa za ekonomska i socijalna prava.

accordance with Article 14 § 3 of the AD Act" (Article 14 §5 AD Act). In particular, the Anti-Discrimination Act recognizes the following socio-economically vulnerable persons or groups of persons: persons with disabilities, national minorities, underprivileged women and men, persons of different sexual orientation or gender identity, elderly persons, and others, with special emphasis on their position the field of labor and employment (Article 14 §3 AD Act).

The authority which is responsible for the *ex-post* analysis will monitor the implementation and effects of a particular public policy document or regulation. Based on the findings, the authority can propose concrete amendments to these documents. The state authority in charge of monitoring the quality of the conducted an *ex-ante* analysis and issuing an opinion on the quality of *ex-ante* analysis is the Public Policy Secretariat of the Republic of Serbia. Its opinion is based on the report about the conducted *ex-ante* impact assessment submitted by a proposing party. The Public Policy Secretariat delivers an opinion stating that an impact assessment is: a) complete; b) partial; c) insufficient; d) unnecessary, i.e. there is no need for an impact analysis.[20]

4. Participation of Stakeholders and Target Groups in the Process of Developing Public Policy Documents

The process of developing public policy documents must be transparent and inclusive for all interested parties to express their needs, comments and a vision what a new public policy document should include. The lack of participation of all stakeholders and target groups in the process of creating public policies and regulations may hinder their efficient and effective implementation in practice, and necessitate a new legislative intervention (CRTA, 2018: 7).

Notably, the Planning System Act (2018) has introduced the mandatory process of conducting consultations at all stages of the development of public policy documents and regulations, including cases when impact assessment analysis is not mandatory. Article 34 § 5 of the PS Act envisages that, in case the impact assessment is not done, an annex which contains information on the consultation process will be part of a public policy document or regulation draft. Article 36 of the PS Act stipulates that a public debate in the process of developing public policy documents shall be held in accordance with the Government act regulating public debate in the process of drafting legislation.

The Planning System Act recognizes two groups of interested parties that participate in the process of developing public policies: stakeholders and target groups. Stakeholders are defined as "authorities and organizations, and natural and legal persons having an interest in the public policy measures". A target group is defined as "a group of natural and/or legal persons and/or other stakeholders affected by the public policy measures" (Article 2 § 2, points 15-16 PS Act).

Stakeholders and target groups are entitled to submit an initiative to the Public Policy Secretariat for the implementation of a specific consultation process method. After the submission of this initiative, the Public Policy Secretariat may propose to a public administration authority which is an authorized proposer "to implement a specific consultation method during consultations, and to include certain stakeholders and target groups in the

[20] Article 49, para.1, point 1-4 of the Regulation No. 8/2019.

working group for the preparation of the public policy document" (Article 35 § 1 of the PS Act). The Regulation (8/2019) recognizes different consultation process techniques: focus group; round table; semi-structured interview; panel; survey; submission of written comments.[21]

There is a difference between a consultation and a public debate process in developing public policy documents and regulations: *a consultation* is used in the initial stage when a draft document is still being developed and when it is necessary to collect data from the interested parties; *a public debate* is the next stage when a draft document is completed and used to inform the wider audience, including stakeholders and interested parties, on the proposed measures and to collect additional suggestions for the final intervention in the document. The Government of the Republic of Serbia has established a platform "eConsultation" (*srb. eKonsultacije*)[22] where stakeholders and interested parties can participate in the process of developing concrete documents, leave their comments and monitor the transparency of the entire procedure how a draft document is created.

5. CONCLUSION

The planning system of the Republic of Serbia and its elements have been regulated by the Planning System Act (2018), and the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents (2019). Public policies are seen as courses of action by the central and local authorities aimed at achieving concrete goals in the society. Impact assessment is one element of the planning system and creation of public policies and regulations. As different solutions have different effects on various segments of everyday life, it is very important to formulate and choose those solutions with the least negative effects. Impact assessment can be performed as an *ex-ante* or *ex-post* analysis, depending on whether it is conducted in the process of developing and adopting or in the process of implementation and evaluation of the effects of concrete public policy documents and regulations. The Public Policy Secretariat of the Republic of Serbia is the state authority in charge of monitoring the quality of conducted *ex-ante* analysis and issuing an opinion, which is part of the public policy documents and regulations adoption procedure. The last amendments to the Anti-Discrimination Act introduced additional rules which strengthened the quality of implementing the *ex-ante* analysis from the perspective of human rights and application of the principle of equality. The described process of impact assessment is identical for public policy documents and regulations. The method of assessing public policy documents and regulations is the same; the only difference is the object of assessment (a public policy document or a regulation) and the sequence of assessment. Namely, the impact assessment of public policies will be done first; if it demonstrates the need for regulatory intervention, the impact assessment of regulations will be performed. Yet, this is not always a rule and the procedure will depend on concrete documents and fields of state intervention.

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[21] Article 41§ 2 of the Regulation No. 8/2019.
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ANALIZA EFEKATA DOKUMENATA JAVNIH POLITIKA I PROPISA U PRAVNOM PORETKU REPUBLIKE SRBIJE

Analiza efekata dokumenata javnih politika i propisa jeste analitički proces koji ima za cilj procenu pozitivnih i negativnih efekata koje mere javnih politika ili rešenja u propisima mogu da imaju po stanovništvo i privredne subjekte. Zavisno od toga da li se analiza efekata odvija u procesu razvoja dokumenata ili nakon njihovog usvajanja, primene i evaluacije ostvarenih rezultata, razlikujemo ex-ante i ex-post analizu efekata. Ova oblast u Republici Srbiji je regulisana Zakonom o planskom sistemu Republike Srbije i Uredbom o metodologiji upravljanja javnim politikama, analizi efekata javnih politika i propisa i sadržaju pojedinačnih dokumenata javnih politika. Izmenama i dopunama Zakona o zabrani diskriminacije uvedene su odredbe kojima se posebno naglašava obaveza i značaj organa javne vlasti da prilikom sprovođenja ex-ante analize efekata imaju u vidu poštovanje načela jednakosti. Primenom normativnog metoda, cilj rada je da se prikažu osnovni elementi planskog sistema Republike Srbije i postupak sprovođenja analize efekata, kao i da se ukaže da je ovaj postupak identičan kako za dokumente javnih politika tako i za zakone i uredbe.

Ključne reči: *javne politike, regulacija, analiza efekata, planski sistem.*

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Original Scientific Paper

LEGAL ASPECTS OF IMPLEMENTING DIGITAL SIGNATURES IN PAPERLESS BANKING

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Abstract. *Integrating electronic signatures into paperless banking projects offers a transformative opportunity to streamline transactions and increase efficiency. However, this innovation is not devoid of legal challenges, especially within the framework of the eIDAS Regulation. This article examines the key legal hurdles encountered when implementing electronic signatures in paperless banking under the eIDAS Regulation. We examine the following topics: the legal validity of electronic signatures, the identification and authentication of signatories, and the establishment of secure electronic signature systems that comply with eIDAS requirements, as well as the liability and evidentiary considerations associated with electronic transactions. We highlight the need for financial institutions to put in place robust mechanisms to ensure compliance with eIDAS standards while navigating the complex legal landscape surrounding electronic signatures in paperless banking. By addressing these challenges, financial institutions can realize the full potential of electronic signatures to revolutionize the banking industry while maintaining legal integrity and regulatory compliance.*

Key words: *digital signatures, electronic signatures, paperless banking, Serbia, eIDAS Regulation, legal risks.*

1. INTRODUCTION

Regardless of whether it is a bank statement, reports, documents for opening a bank account or even signing a contract with a bank, paper has been an indispensable tool for banks over the last two centuries. Digitalization and paperless banking now make it possible to effectively reduce paper usage. What does "paperless" signify? It is not solely about imposing

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a strict prohibition on paper but, rather, it involves considering whether printing or manual form filling at each stage of work is truly the most efficient approach. By prioritizing digital tools, banks allocate more time to serving their customers, enhance the quality of advice and data, and streamline error tracking. Additionally, banks promote resource conservation, setting a significant environmental example. While acknowledging that paper remains necessary in certain scenarios, we anticipate a huge reduction in excessive paper consumption in the future.

After 10 years since the adoption of eIDAS Regulation[1], banks are still trying to tackle the obstacles in order to fully realize one of their main goals when it comes to ESG projects (on environmental, social, and governance issues) and incorporating sustainable development into their businesses – paperless banking. Although the letter E in ESG (referring to environmental measures) may not seem to have a huge impact when it comes to measures imposed directly on banks and their organization, as they neither produce nor sell products which could be harmful for the environment (except the bank cards, which are made of plastic material and therefore non-recyclable), they still provide and sell services, which also entail the use of paper. It raised the key question about paper usage: To what extent is the use of paper necessary? To answer this question, banks started analyzing every single process that is performed by the organization and tried to remove the paper usage from the "equation". Very soon they concluded that most of the processes involving paper could be digitalized, with only one important factor determining the possibility of paperless process – the risk of possible legal issues because of the document's sole existence in digital form. The document by itself does not raise the question of validity, but the electronic signature and other forms of electronic identification (electronic seals, time stamps, etc.), which are on that document and which are usually mandatory, do. Nowadays, the term "digital signature" includes a wide spectrum of forms in which it can appear, and which have different legal validities. The forms of a digital signature can differ, ranging from a typed name on a document and a scanned handwritten signature to a digital signature made through public key cryptography, whereas even a click on the "I agree" button counts as an electronic signature. As long as there is a means to identify the signer, and it reflects one's intention regarding the content of the electronic communication, all these signature forms meet the requirement akin to signatures on paper (Prokić, 2016:274). Therefore, in this article, we will focus on two situations, each of which may entail unique legal problems:

1) the situation where the document was physically hand-signed and then digitalized;

2) the situation where the document is digitally signed.

As for banking, it should be noted that this sector also uses all three types of electronic signatures prescribed by the eIDAS Regulation (2014), and that different types of electronic signatures are used for different bank documents. The goal of the "Paperless Banking" project is to enable legal transactions to be carried out and concluded with as little paper as possible, which would not be possible without a valid electronic signature that the bank or a client would sign via a specific device. There is also the question of choosing the type of electronic signature to make the legal transaction valid. This project is further complicated by the fact that the catalog of documents issued by the bank to both individuals and legal entities often exceeds over a thousand types. As the law is rapidly changing, it implies constant changes in the catalog of documents, whose number can fluctuate significantly during the year.

[1] Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (hereinafter: the eIDAS Regulation, 2014)

2. LEGAL FRAMEWORK FOR DIGITAL SIGNATURES IN PAPERLESS BANKING

Although the Directive 1999/93/EC[2] was in force for one and a half decade, the technological advancements expanded at such a rapid rate and to such an extent that the legislation simply could not keep up with such development. The advancement of technology in electronic commerce opened up a number of legal gaps which had to be precisely regulated. Soon, there was the need for a new and more precise regulation in the field of the electronic commerce and everything related to it (incl. electronic signatures). Thus, the eIDAS Regulation was passed in order to achieve certain goals more quickly.

As stated in the introductory part of the eIDAS Regulation, one of the main goals is to enable natural and legal persons to use national electronic identification mechanisms when using electronic services in any of the countries that make up the single market. The inherent characteristics of electronically stored data render it more susceptible to manipulation when compared to conventional data formats, thus necessitating detailed regulations on the preservation and validation of data integrity throughout its acquisition and exchange, ensuring that electronic evidence remains unaltered from its inception, storage, or transmission (Biasiotti, 2017: 3). In addition, the aim of the eIDAS Regulation is to create a single market for (electronic) trust services: qualified electronic certificates, seals, time stamps, and electronic document delivery. The ambition of this project is to ensure the legal security of using various trusted services that are both safe and easy to use, as this is a prerequisite for the adoption of these services by citizens as well as small and medium-sized enterprises. Only then would the world be able to overcome the lack of trust, in particular lack of legal certainty, that makes consumers, businesses and public authorities hesitate to carry out transactions electronically and to adopt new services. (Smedinghoff, Bro, 1999:728)

On the basis of the eIDAS Regulation (2014), Serbia passed a new law in 2017, the Act on Electronic Document, Electronic Identification and Trust Services in Electronic Business (hereinafter: the Electronic Document Act)[3], which regulated electronic business and electronic signature. Thus, the Republic of Serbia took an important step in harmonizing Serbian law with EU law regarding electronic business. Compared to the countries of the European Union, Serbia started to regulate this matter relatively late but with this law Serbia clearly expressed the commitment to EU membership. The Electronic Document Act also distinguishes different types of electronic signature, whereby the terms and definitions of all electronic signatures are copied from the eIDAS Regulation.

The eIDAS Regulation defines three types of electronic signatures: simple, advanced and qualified electronic signature. All types of signatures are legally binding, but their evidentiary value varies. The simple electronic signature does not have to contain any identification information and is, therefore, hardly provable. Even if it is legally valid, it is not relevant to most business processes. As for advanced electronic signatures, the data recorded in a signature enable the signature to be assigned to the signatory. This form of signature is most frequently used in electronic commerce because it is easy to create, legally secure and provable. The qualified electronic signature requires identification before signing. This form takes more time and is, thus, typically used only for contracts where the law requires a written form. It means that the signature must be made on paper or via qualified electronic signature.

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[2] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

[3] Act on Electronic Document, Electronic Identification and Trust Services in Electronic Business, *Official Gazette RS*, 94/2017 and 52/2021.

3. DOCUMENTS HAND-SIGNED AND THEN DIGITALIZED

The Electronic Document Act stipulates that an electronic document created by digitizing an original document whose form is not electronic is considered a copy of the original document (Article 10 § 4 of the ED Act). A document that has been digitized has the same evidentiary value as the original document if the following conditions are cumulatively met:

1) the digitization was carried out in one of the following ways, i.e. under supervision:
   (1) a natural person or an authorized person of a natural person in the capacity of a registered entity or an authorized person of the legal entity whose document it is, or
   (2) a person authorized to certify signatures, manuscripts and transcripts in accordance with the law governing the certification of signatures, manuscripts and transcripts, or
   (3) persons who are authorized by special law to certify the digitized document.
2) the identity of the digitized document with the original one is confirmed by a qualified electronic seal or a qualified electronic signature of the person referred to in points (1)-(3) of this paragraph, or the person who was transferred the competences based on which the document was adopted (Article 11 § 1 of the ED Act).

On the basis of the aforesaid article, we see that the conditions for recognizing the equal evidentiary value of a digitized document can be very complex and that, in certain situations, it can create a huge problem for banks in the evidentiary procedure. Thus, in Serbia, in the period from 2019 to 2022, banks had a big problem when their clients started massively filing lawsuits against banks due to unjustified processing of loan costs. In that period, it is estimated that over 200,000 proceedings regarding these disputes were initiated before the court (N1 Info/Ilić-Krasić, 2022). The magnitude of this problem was influenced by a number of factors. First of all, the lawsuit for establishing nullity (which clients submitted in order to partially annul the provisions of the contract regulating the costs of loan processing) does not have a preclusion or limitation period in which it can be filed, so the clients also filed lawsuits regarding the contracts that the banks concluded with them since 2003 onwards.

This led to a situation where banks no longer had the original documentation in their possession, but submitted a copy of the scanned originals as evidence instead, which is under the Electronic Document Act regarded as a copy of the original document (this solution was also envisaged in earlier laws in Serbia). Therefore, their evidentiary value depended on whether the opposing party (i.e. the client) would dispute the authenticity of such a document by claiming that he neither signed that document nor that his signature was on that document. In such situations, the Civil Procedure Act (CPA)[4] states that, if the document is submitted as a copy, the court will, at the request of the opposing party, order the applicant to submit the original document to the court, and the opposing party will be allowed to familiarize themselves with its contents. When it is necessary, the court will issue a decision on the deadline in which the document must be submitted, i.e. reviewed in the original or in a certified copy. No appeal is allowed against that decision (Article 100 § 3 and § 4 CPA).

Therefore, in any situation where the opposing party doubts the authenticity of the document, the court will ask the bank to submit the original document, which will inevitably result in a loss of the dispute for the bank whenever the document has been destroyed, either because the mandatory storage period has passed or because the original

[4] Civil Procedure Act, *Official Gazette RS*, 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020 and 10/2023.

was digitized and then immediately destroyed (without being certified in terms of Article 11 Electronic Document Act). The obligation to attach the original is provided primarily for the eventual expert examination of the said document, given that the subject of the graphologist's expert examination can never be a copy of the document but only the original. This is also confirmed in the following legal reasoning of the Supreme Court judgment: "In the proceedings, the plaintiff, in order to prove his claim, proposed a graphological expert examination on that circumstance, but that expert examination was not carried out since it was established that the will was lost, and the court expert did not accept the graphological expertise to conduct the expert examination on the basis of a photocopy... As the original document of the will was not found, the prosecutor was unable to conduct an appropriate expert examination in a separate lawsuit and thus prove that the testator's signature on the will was forged."[5]

Given that the banks in these disputes often did not have original documentation precisely because the mandatory period for keeping such documentation had passed, they lost the dispute for the following reasons: "Since the authenticity of this document is disputed and the original or a certified photocopy of the said document has not been produced, the facts cannot be established on the basis of such a document, in which case it is the crucial fact, especially when the existence of such document and its veracity is essential, whereas the facts cannot be established based on other records".[6] Due to such situations, banks should refrain from destroying the original documentation containing the signatures of any third parties, especially clients in situations where they digitize the document because such a move could cost them a legal case in the future if the digitization of that document was not preceded by an attestation. This is because the court can always accept the authenticity of the document issued by the bank, which includes only the signatures of employees or the seal of the bank, because such a document does not have signatures or any identification elements of third parties who would later contest the authenticity of such a document in a dispute.

Furthermore, the Civil Procedure Act of Serbia stipulates that, if the court doubts the authenticity of the document, it can request from the authority that issues such a document to declare it. (Article 238 § 4 CPA). It can be seen from this provision that the bank's statement alone will be sufficient for the court to determine the authenticity of the document, even in a situation where the original is no longer available, but there is only a digitized copy of the original, because in that situation there are no third party signatures which could be disputed, but only the signature an authorized person, i.e. an employee of the bank. Hence, it is certain that at some point in the near future, the issue of certification of the digitized paper documents will be a very important topic, bearing in mind that the current practice in Serbia regarding this procedure is almost non-existent, that the procedure itself is very complicated, and that in Serbia there is still no entity that is authorized by a special law to certify a digitized document based on the previously mentioned Article 11 § 1 (item 1, point 3) of the Electronic Document Act, and that the Register of Qualified Trust Service Providers does not show that such a service is performed by currently active registered providers (Ministry of Information and Telecommunication, 2024). Under the Act on the Registration Procedure with the Serbian Business Registers Agency (RP Act),[7] there is only one case where the attorneys who represent

[5] Judgement of Supreme Court of Cassation Rev 4898/2020 dated 18.02.2021
[6] Judgement of Higher Court in Novi Pazar Gž 504/22 dated 28.07.2022
[7] The Act on the of Registration Procedure with the Serbian Business Registers Agency, Official Gazette of RS, 99/2011, 83/2014, 31/2019 and 105/2021

a legal entity in the registration procedure with the Serbian Business Registers Agency can certify a copy of a digitized document, but only providing that they represent the legal entities in that registration procedure. Only in this case can an attorney certify the digitized document with his own electronic signature or qualified electronic stamp (Article 11a RP Act).

4. Documents Created and Signed Digitally

When it comes to documents that were created in electronic form and signed digitally in one of the ways provided for electronic signature, it should be noted that Article 25 of the eIDAS Regulation stipulates that an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures. This article was directly inserted into the Serbian Electronic Document Act (Article 50). Further on, we will focus on the analysis of electronic signatures that are created in banking, considering that there are two most common ways of creating electronic signatures in this sector.

The first way is a digital signature pen pad which the client uses when signing the document. A signature pen pad is a small computer input device used to electronically record handwritten signatures. This means that it is an external hardware for signature digitization using a sensor (similar to a touchpad on a laptop), including input devices such as pens. This also includes monitors and/or monitor extensions with pen input, so-called pen displays (Signotec, 2024: 2). With this device, the client signs the document with his handwritten signature by pressing with a special pen on the surface specially designed for signature, which accurately records every movement of the pen as well as the pressure. It is important to keep in mind that such a signature does not physically leave a permanent trace anywhere but is automatically converted into an electronic form and saved as such on a document previously opened for signing, leaving a permanent trace only in digital form and in a specific document. What gives security to such a signature is that such a device usually registers the time when such a signature was made, but it does not necessarily have to be affixed to the document that was signed (it can be just one of the internal records that the device makes). What distinguishes this type of electronic signature is the identical procedure as the one in which the client signs his signature on paper.

The advantage of this type of signature is that its procedure is quite simple, and such a signature does not take more time when compared to a handwritten signature that the client would give on paper. Such devices are able to compare the signature with a previously saved copy (if the client has previously signed some documents), and to reject the signature or to request additional control by a bank employee, if there is no similarity with the saved copy. One of the most common situations where such a signature can be found is when withdrawing or transferring money from a savings account with a password (comprising one or two words) that the client must write via the signature pad, where the software can compare the signature with the previous one at the time of its entry, recognize the word through OCR technology, analyze the handwriting with the previous copy, and check if there is a high percentage of equivalence between the two signatures. Notably, with this type of savings account, money can also be withdrawn by a person who is not the account owner but who knows the password. In that case, entering the password via the signature pen pad records the handwriting of the person entering the password as well, which leaves the possibility of expert examination of that same password handwriting in court procedures in order to prove the identity of the person which entered that password.

Signatures given in this way are considered to be advanced electronic signatures because they enable a higher certainty in terms of the level of identification of the person giving the signature and provide additional security during the entire process of entering the signature into the document (the security of the interface and the internal records kept by the device). This method fulfills all the requirements for advanced electronic signature stipulated in Article 26 § 2 of the eIDAS Regulation (2014), which states that an advances electronic signature is: "a) uniquely linked to the signatory; b) capable of identifying the signatory; c) it is created by using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and, d) it is linked to the data in such a way that any subsequent change in the data is detectable."

The question arises as to the possibility of expert examination of such documents by a graphologist in case the client disputed such a signature. In our opinion, a graphologist should not refuse the expert examination of such a document, considering that such a document does not represent an ordinary copy of the original, because the document was created in electronic form, including the signature as well. Considering that in such a situation the signature was given manually on a device that automatically converted that signature into an electronic one, it could be compared with other signatures made by the client on paper because an expert may compare the specifics and equivalence of such an electronic signature and handwritten signature on paper (font size, handwriting, letter spacing, etc.). The expert examination of such a signature would not only be the task of a graphologist but also of an expert in the field of information technology because a graphologist can only examine certain types of document alteration (e.g. mechanographic activities) but cannot determine whether the signature was altered by mechanographic or computer activities, and thus falsified (e.g. by using a software) (Šarkić, Nikolić, 2014:131).

When it comes to the banking sector, there are several drawbacks of such a signature. The first one is reflected in the fact that such digital signature devices can only be used by the client inside the bank's branch office, bearing in mind that each of these devices is directly connected to the bank's computer and that each of them contains identification data which may be used later for determining the specific device on which a certain signature was given (which can also serve as evidence in court proceedings). Therefore, giving a signature remotely via this device is not possible. Another negative aspect of this type of signature is reflected in the fact that the client loses additional time due to coming to the branch office to sign the document. Thirdly, this signature is not considered a qualified electronic signature because the device through which the signature is given was not issued by an entity that provides a qualified trusted service, and the device itself is unable to request a prior fingerprint or facial authentication on the basis of which it authorizes the client to provide a signature, as is the case with a qualified electronic signature (although bank employees previously establish the person's identity on the spot with an official identification document). There is also a question regarding the fulfillment of written requirement when using this device, considering that the declaration text is not displayed on the signature pen pad but on the monitor of the corresponding computer; therefore, the signature is not placed below the declaration text. Our opinion is that this type of signature should meet the requirement of the written form because the intention of the signer in this situation is to agree and become legally bound by the text of the contract the moment when he gives the signature. We certainly believe that this type of signature will be among the qualified electronic signatures in the future, as soon as the banking sector finds an effective way to eliminate some of the previously mentioned shortcomings.

Another way clients can provide electronic signatures is through m-banking (the bank's mobile application) or through e-banking (the bank's internet portal). Due to the efficient implementation of electronic signatures in m-banking and e-banking, clients mainly sign and approve different types of documents and transactions. Thus, clients are able to sign a certain document at any time of the day and carry out the desired transaction without going to the bank (*Lečić-Cvetković*, *Omerbegovic-Bijelović*, *Zarić*, *Janičić*, 2016:765). It is important to point out that a qualified electronic signature can also be given in this way. Simply put, qualified electronic signature is just an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures. The validity of a qualified electronic signature hinges on the verification process applied to it. It remains valid if, during signing, the accompanying certificate is a qualified one for electronic signatures, issued by an accredited trusted service provider and valid at the signing moment. Additionally, its validation data must match the data supplied to the relying party, along with a unique dataset representing the signatory as per the certificate. The integrity of the signed data remains intact provided that the creation tool for the qualified electronic signature is employed, and the prerequisites for advanced electronic signatures are fulfilled, thus preventing compromise (Vukotić, 2021:153). It should be noted that this does not imply entering a handwritten signature, as was the case with the signature pen pad; the document is signed with a single click on a button designated as "Sign" or "I agree". However, what makes it qualified is not the handwritten signature but the previous procedure of establishing the identity of the person giving the signature, as well as the protection of the platform where the entire procedure takes place. The possibility of providing such a signature proves that validity of the signature depends on the function it performs, not necessarily the form a signature takes (Mason, 2016:208). Therefore, for signatures given in m-banking or e-banking to have the legal effect of a qualified electronic signature, the m-banking application or the e-banking platform must implement some type of qualification tool for creating a remote electronic signature and possess a qualified certificate.

Given that banks are not authorized to perform such a qualified trust service themselves, when creating such an application or platform, it is necessary that a recognized provider of qualified trust services participate in the development of the m-banking application or e-banking platform (the list of providers is determined by the Ministry of Information and Telecommunications). In this way, banks are able to create a qualified electronic signature based on a smart card, USB key, or cloud. Bearing in mind that banks are guided by the efficiency of signature implementation, the most common way of implementing a qualified signature will be through the cloud. Thus, the entire electronic documentation is stored on the cloud server, without the risk of losing the "key" which is in the form of a smart card and a USB drive. Clients receive a document within the application or platform; they can read the content and, when signing, establish their identity by entering an additional code that they receive via SMS or email (in case of a two-factor authentication), facial authentication or a fingerprint, along with the app pin code or platform user password (Đurić, 2021:90).

Another way to establish identity is a face-to-face video call that clients have with a bank employee when opening an account. During the video call, they are asked to show their ID to the camera and make certain head movements or a certain hand gesture, in order for the bank employee to establish that it is a real-time transmission, and not a previously recorded video of that person. At the same time, one should be aware of the growing trend in the use of artificial intelligence which may be misused in such identification procedures (Boljanović, 2019:31). Due to the huge potential and risks underlying the use of AI, it is

quite reasonable to expect new laws or changes to the existing laws in the near future, which will additionally and more strictly regulate the application of electronic signatures and personal identification.

Due to the multitude of factors involved in the process of authenticating a person, it is certainly true that a qualified electronic signature makes this signature the most secure, and that is why this signature is equated with a handwritten signature when it comes to evidentiary value. The issue of concern in such processes is the validity of the feature that such a signature can never be given unintentionally. While a signature via the signature pen pad can certainly never be given unintentionally, for a qualified electronic signature (which is given with a single click) an argument could be made in front of court that the signature was mistakenly given through the application. The prior authentication process would not leave much room for such an argument because the process of authenticating the person giving the signature is set immediately before giving the signature itself, i.e. immediately before pressing the "Sign" or "I agree" button, and the person who does not intend to sign the document will certainly not enter the previously described authentication procedure.

Therefore, in the application, it is important to separate the process of familiarizing yourself with the content of the document and the process of giving a signature because, if both processes were preceded by only one authentication, the client could really argue that he/she signed such a document by an unintentional click while reading the content of that document, and thus try to prove that there was a lack of will. Namely, under the Civil Obligations Act[8], the will shall be declared freely and seriously (Art. 28 § 2), and the will is considered declared and the contract is concluded at the moment when it is signed by all contracting parties (i.e. by the last party) assuming contractual obligations (Article 72 § 1). Since at that moment the internal and external (declared) will of the client did not match, it would mean that there was a deficiency of will; thus, one could argue in front of court that such a contract should be annulled for that reason (Mijačić-Cvetanović, 1982:180-181). It is also important to point out that this signature cannot be the subject matter of expert examination by a graphologist because it is not a handwritten signature that was created in electronic form but a combination of letters and numbers that the certificate automatically generates together with the name and surname in form of a plain text. Therefore, such a signature could only be examined by an expert in the field of information technology (Oparnica, 2016:143). It could be argued that proving the authenticity of a digital item involves examining claims and building trust. It is not about proving that an 'original' exists, especially with dynamic things like databases but about presenting enough evidence to convince someone that the retrieved item is a faithful representation of what is claimed to be the original, or a reliable version of what the creator used (Mason, Seng, 2017:230).

5. Determining the Necessary Type of Electronic Signature

When talking about business within the banking sector, it is important to point out that there is no *numerus clausus* of documents that require a specific signature, but banks most often use the principle of written form in evaluating the use of signature types. This is one of the leading criteria used by the bank because the legislator often uses the written form as one of the essential elements of the contract that needs to be secured for the benefit of

[8] The Civil obligations Act (Act on Contracts and Torts), *Official Gazette SFR Yugoslavi*a, 29/1978, 39/1985, 45/1989, 57/1989, 31/1993.

both the contract (contracting parties) and third parties; such a document has a strong evidentiary force before the authorities (*ad solemnitatem* document). Thus, whenever the law prescribes that a certain type of documents or contracts should either be hand-signed or in a written form, it is safe to assume that qualified electronic signature is the required form since it is the only one that has the equivalent legal effect as a handwritten signature.

Once it is confirmed that there is no legal requirement for such a contract or legal transaction to be in written form, only then can the bank use any form of electronic signature that may be sufficient from a legal point of view. When choosing an electronic signature and communication channel, it is necessary to prioritize the verifiability of the content and ensure the agreement of the contracting parties, and to base the choice on this factor. Simply put, while electronic signatures do offer the flexibility, it is vital to consider the formal requirements, ensure the integrity of the content, and evaluate the associated legal risks when choosing an appropriate signature method (Höller, 2021:1089).

The complexity of the document issuance process should be another factor in determining the right type of signature. The more complex the process is, the better it is to use a higher form of electronic signature. For example, some documents require the four-eyes principle in order to be issued. The four-eyes principle means that a certain decision, transaction (etc.) must be approved by at least two people working in the bank. From the external point of view, even the simple electronic signatures would make no legal risk for the bank, as long as it reaches the customer through a trusted and secure communication pathway (e.g. through the bank app); from the internal point of view, in order to evade a potential risk of one employee abusing the process and typing in the name of the second person without his/her knowledge, each employee should put his/her qualified electronic signature on the document so that it cannot be forged by the other person.

As for other documents which entail a simple procedure when it comes to issuing them, the simple electronic signature should be sufficient since the bank document usually lists the responsible employee on the letterhead. In addition, the program usually automatically generates the user data of the employee in the footer of the document which was created or printed by the employee.

6. CONCLUSION

According to the Electronic Document Act, the integration of electronic signatures, electronic identification and trusted services in electronic business holds a promise of the significant expansion of paperless banking in Serbia. With the increasing adoption of mobile banking (m-banking) and electronic banking (e-banking) among bank customers for their transactions and business affairs, the legal framework surrounding electronic signatures is becoming increasingly important. Based on the report of the National Bank of Serbia (hereinafter: the NBS), in the period from 2014 to 2018 alone, the number of e-banking users increased from 1,153,611 to 2,465,904, while the number of m-banking users increased from 179,724 to 1,426,825. This also indicates that paperless banking was still in the initial stage of development at that time, especially the banking apps (Nikolić, Nikolić, 2019:213-215). The latest NBS report from 2024 records that, at the end of 2023, the number of e-banking users was 4,093,621, while the number for m-banking users was 4,044,375 (National Bank of Serbia, 2024). Based on this report, in 2024, the number of m-banking users is expected to exceed the number of e-banking users for the first time due to a higher growth rate of m-

banking. This indicates that banks should invest as much as possible in the development of mobile banking, and electronic signatures through these mobile applications. Despite the progressive legal framework that ensures the validity and legal equivalence of electronic signatures with traditional handwritten signatures, there are still challenges in their practical application. We can certainly conclude that there is still a certain degree of unfamiliarity and reluctance among judges and state authorities to fully accept electronic signatures, sometimes preferring traditional documentation in printed form. Efforts to increase awareness and understanding of electronic signature laws among stakeholders, especially in the banking sector, are essential to foster trust and acceptance of electronic signatures. In addition, simplifying procedures and expanding the availability of qualified electronic signature providers can facilitate the wider use of electronic signatures in paperless banking transactions. As paperless banking continues to expand in Serbia, joint efforts between government authorities, financial institutions, legal experts, and the business community are of utmost importance to navigate through the challenges and unlock the full potential of electronic signatures in modernizing and facilitating banking transactions in the digital era.

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PRAVNI ASPEKTI IMPLEMENTACIJE DIGITALNIH POTPISA U BESPAPIRNOM BANKARSTVU

Integracija elektronskih potpisa u bankarske projekte bez papira nudi transformativnu priliku za pojednostavljenje transakcija i povećanje efikasnosti. Međutim, ova inovacija nije lišena pravnih izazova, posebno u okviru eIDAS Uredbe. Ovaj članak ispituje ključne pravne prepreke sa kojima se banke susreću pri implementaciji elektronskih potpisa u bespapirnom bankarstvu u skladu sa eIDAS Uredbe, gde ćemo ispitati sledeće teme kao što su pravna valjanost elektronskih potpisa, identifikacija i autentifikacija potpisnika i uspostavljanje bezbednih sistema elektronskih potpisa. koji su u skladu sa zahtevima eIDAS Uredbe, kao i sa odgovornošću i razmatranjima u vezi sa dokazima u vezi sa elektronskim transakcijama. Takođe naglašava potrebu da finansijske institucije uspostave snažne mehanizme kako bi osigurale usklađenost sa standardima eIDAS Uredbe dok se kreću kroz složeni pravni pejzaž koji okružuje elektronske potpise u bankarstvu bez papira. Baveći se ovim izazovima, finansijske institucije mogu da ostvare puni potencijal elektronskih potpisa da revolucionišu bankarsku industriju uz održavanje pravnog integriteta i usklađenosti sa propisima.

Ključne reči: *digitalni potpisi, elektronski potpisi, bespapirno bankarstvo, eIDAS regulativa, Srbija, pravni rizici.*

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Review Paper

DEVELOPMENT OF CONTRACT FORM IN ROMAN LAW ILLUSTRATED BY STIUPULATION AS A VERBAL CONTRACT

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Abstract. *As the first and fundamental verbal contract in Roman law, stipulation (stipulatio) emerged and developed under the influence of various socio-economic conditions that shaped the development of the Roman state. Originating in pre-classical Roman law under the influence of religion and customs, this verbal contract was subject to changes, such as acquiring the characteristics of a written contract during the period of classical Roman law and experiencing the most significant changes during the period of post-classical Roman law. By observing and analyzing the development of stipulation as a verbal contract, we can observe several general tendencies in Roman law. Thus, we can eventually respond to the following question: how the strict formalism of Roman contract law gave way to the primacy of causality, i.e. how the process of transition from strict formalism to consensualism and the transition from the oral to the written form of contract conclusion took place.*

Key words: *stipulatio, a form of contract conclusion, verbal contracts, contracts, unitas actus.*

1. INTRODUCTION

Starting from the form as a criterion for distinguishing contracts, during the long Roman history of almost thirteen and a half centuries, Roman law developed four types of named (nominate) contracts: verbal (oral), real, literal (written), and consensual contracts. A special category of contracts are unnamed (innominate) contracts (Ignjatović, 2022: 335).

Under Roman law, verbal contracts were formal contracts which were concluded by uttering solemn words (formula) (Ignjatović, 2022: 335). The basic feature of these contracts is that the contractual obligation arises regardless of the economic goal of the concluded legal transaction, indicating their formality and abstractness. Verbal contracts in Roman law included the following contracts: *nexum, stipulatio, adstipulatio, dotis dictio, iusiurandum libertati,*

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and praediatura. These types of verbal contracts did not originate simultaneously. Depending on the social and economic conditions in the development of the Roman state, there were different stages (periods) in which these contracts originated. The first stage is characterized by the appearance of verbal contracts of old Roman law – *ius civile* (*nexum, vadiatura, and prediatura*); the second stage covers verbal contracts of classical Roman law (*dotis dictio* and *iusiurandum libertati*), while the last stage in the development of verbal contracts covers contracts that were related to stipulation (*stipulatio*) as the most important verbal contract of Roman contract law.

In the first part of the paper, the author strives to explain the emergence and development of stipulation as a verbal contract in the Roman legal history (pre-classical, classical, and post-classical periods). The second part examines the nature and basic characteristics of this contract. In the third part of the paper, we will discuss the institutions where stipulation was applied. The fourth and the final part of the paper will focus on the basic characteristics of literal (written) contracts, another type of formal contract in Roman law, which replaced stipulation; considering that stipulation as the most important verbal contract changed its basic characteristics, it gradually took the form of a literal contract (*instrumentum stipulationis*).

Stipulatio was the first and fundamental verbal contract of Roman law. It represents the essence of Roman contract law because it was the legal ground of obligation in other branches of private law as well. The paper aims to underscore its importance for Roman contract law and to indicate the most significant changes in the nature and characteristics of Roman contract law in the course of thirteen centuries of Roman history, by using stipulation as an example.

2. Development of Stipulation through Roman Legal History

As the first and fundamental verbal contract of Roman law, stipulation (*stipulatio*) emerged and developed under the influence of various socio-economic conditions that shaped the development of the Roman state. Originating in the pre-classical Roman law under the influence of religion and customs, this verbal contract changed its basic characteristics. During the classical Roman law period, it acquired the characteristics of a literal (written) contract, while during the post-classical Roman law period, it underwent the most significant changes.

2.1. Stipulation in Old Roman Law (the pre-classical period)

Stipulation (*stipulatio*) was a verbal contract of Old Roman law that originated from the creditor asking a solemn question and the debtor giving a solemn reply following the formulation of the question (Ignjatović, 2022: 336). As a contract of Old Roman law, stipulation emerged before the enactment of the Law of the Twelve Tablets in the form of *sponsio* and was closely related to religion and good Roman customs (*mos, mores maiorum*)[1].

[1] In Old Roman law, legal regulations (*ius*) did not differ from the rules of a religious character (*fas*) since all rules were of a sacred character and constituted religious law. However, a distinction was made between norms that were considered to be of human origin and norms that were of divine origin. The development of the state and the emerging needs for legal norms made it possible to develop *ius* or secular law from the norms of human origin. For more, see: Bujuklić, 2012: 639.

The form *sponsio* was a kind of a contractual oath that contractual parties took when concluding a legal transaction by using the verb *spondere*.[2] The formula for concluding *sponsio* was "*Spondesne mihi dare – Spondeo*."[3] Since it involved a kind of a contractual oath closely linked to religion, fear of divine punishment and fear of community condemnation for not fulfilling the contractual obligation, no witnesses were required to witness the conclusion of this legal transaction.[4] Moreover, patricians mainly entered into relationships with other patricians, whom they trusted, relying on their *fides*, which is another reason why no mechanism was established for securing evidence and protection against abuse.

In Old Roman Law, legal transactions concluded in the form of *sponsio* were *stricti iuris*, meaning they were the privilege of Roman citizens. During this period, unlike transactions *per aes et libram* and *in iure cessio*, stipulation was not used in other branches of law but was a legal transaction exclusively used in the law of contracts and torts (Eisner, Horvat, 1948:313).

2.2. Stipulation in Classical Roman Law (the classical period)

The period of Classical Roman Law encompasses a period of two centuries of the Roman Republic and the entire era of the Principate. During this period, there was a rapid expansion of the Roman state, development of trade, and monetary economy. The newly emerged socio-economic relations necessitated new legal solutions since the law of the previous period was inadequate, religiously tinted, and did not correspond to the circumstances of the society at that time. On the other hand, due to the discrepancy between existing legal rules and newly emerged social relations, the given word "*sponsio*" was increasingly disregarded, often leading to deception in concluding legal transactions based on the given word. The weakening role of religion in society resulted in the lack of fear of religious sanctions, which in the previous period had ensured the fulfillment of obligations undertaken by stipulation.

To protect the conscientious debtor, towards the end of the Republic period, the praetor introduced a procedural remedy called *exceptio doli*, or plea of fraud, which protected the conscientious debtor in cases where there was no legal basis for the contract. With this plea, the debtor could oppose the initiated lawsuit.

In classical law, the essential element of contracts became the agreement of the wills of the contracting parties (*consensus*), while the form of contract became less significant, as evidenced by the possibility of concluding this contract even in the Greek language.[5] The possibility of concluding stipulation in other languages was caused by frequent conquests, which necessarily imposed the need to enable stipulation to be concluded in other languages

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[2] Until the discovery of the Antinopolean fragments of Gaius' Institutions, it was believed that there was no mention of stipulation in the Law of the XII Tablets because it did not exist then. However, although the name stipulation probably began to be used later, it is noticeable in the Law that the legal force of nuncupation is emphasized, and the form was probably still reserved only for citizens of Rome, as *sponsio*. The term 'stipulation' began to be used later, after the verb that began to be used to ask a question and give an answer. The will of the party was completely neglected, and at no point was it taken into account. For more, see: Пухан, 1974: 300.

[3] The formula for making a *sponsio* read: "Do you promise to give me – I promise." See: Zimmerman, 1996:69.

[4] The given word, *sponsio*, was the manner all legal transactions were made in Old Roman law. It was of a purely religious character and denoted the one who receives an obligation before the gods, i.e. it meant that debtors bound themselves to the gods to pay or do what they promised. The word itself had a magical effect, which also reflected the binding force of the concluded legal affair. A common saying used in this period was that "the word of a Roman is law even without witnesses." For more, see: Ignjatović, 2022:69.

[5] In the old Roman law, the stipulation contract as a privilege of Roman citizens had to be concluded in Latin because it was a legal transaction *stricti iuris*. In the period of classical law, stipulation lost its strictly formal character due to the primacy of consensualism over formalism.

as well, primarily those spoken by *peregrini* who, with the expansion of the Roman state, entered into legal relations with the Romans. On the other hand, there was a wider application of stipulation contracts, which were also used within family and inheritance law.[6]

2.3. Stipulation in Post-Classical Roman law (the post-classical period)

The post-classical period in the development of Roman law encompasses the Era of Dominate, where the ruler was both the master and god, and thus all of his decisions had the force of law. In such circumstances, it is difficult to speak of the creative side in the domain of law.[7] Yet, in this period, stipulation as a legal affair experienced the greatest changes. The post-classical period in the development of Roman law was a period in which there was a departure from the strict formalism of stipulation, which was a characteristic of Old Roman law. In the post-classical period, when concluding legal deals, great importance was attached to the (mutual) agreement of wills of the contracting parties, at the expense of the presence of the parties at the time of concluding the legal deal and the pronunciation of solemn words in the expressly prescribed form.[8]

In post-classical law, stipulation produced legal effects regardless of the language in which the question was posed or in which the answer was given.[9] This is evidenced by a passage from Justinian's Institutions stating that two Greeks could enter into an obligation in Latin.[10] As for the presence of the contracting parties, it was sufficient for the document to state that the contracting parties were present, regardless of the accuracy of this information (Karlović, 2011:924).

3. STIPULATION CONTRACT

3.1. Definition of *Stipulatio*

Stipulation (*stipulatio*) was a strictly formalistic and verbal contract of Old Roman law, concluded by the creditor (*stipulator*) posing a solemn question and the debtor (*promissor*) solemnly responding properly to the form of the question.[11] Stipulation was a unique legal transaction which was concluded by uttering solemn words, which included asking the question

[6] Being formal, but not excessively formal (such as *forma per aes et libram*), stipulation was suitable for concluding a contract even in the classical era. In this period, stipulation played a very prominent role as it was used to conclude a wide variety of contracts, not only within the law of contracts and torts but also in other branches of law. For more, see: Eisner, Horvath, 1948:309.

[7] During the Era of Dominate, trained lawyers represented a very significant part in the bureaucratized state, but only in terms of the successful functioning of the state administration and not in terms of the creation, interpretation and application of law. For more, see: Ignjatović, 2016.

[8] "Although it is said that stipulation is made between those present, it also produced legal effect if both parties were in the same city on the same day when the document was drawn up, unless the one who claims that they were absent or that both parties were absent prove this with clear evidence – preferably in writing, but also with reliable witnesses against whom no objection can be raised, that they or their assistant were not in the city that day, but such documents will be taken as true for the benefit of the parties". C. J. 8,37,14,2 (Translation: Karlović, 2011:902).

[9] The contracting parties knew both languages or communicated through an interpreter. See:: Ignjatović, 2022:337.

[10] „Utrum autem Latina an Graeca vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum huius linguae habeat: nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere: quin etiam duo Graeci Latina lingua obligationem contrahere possunt“ (Даниловић, Станојевић, 1993:60).

[11] This contract began to be used during the period of validity of the old *ius civile* and continued to live across thirteen centuries, with certain changes.

whether the debtor undertakes to give or do something and giving an answer to the question: "*Spondesne mihi dare*? – *Spondeo*." It was also used as a means to conclude the contract.

Over time, stipulation underwent numerous changes. Solemn questions could be posed using different words and in different languages: "*Promittis*? *Promittio*"; "*Fideipromittis*? *Fideipromittio*"; "*Dabis*? *Dabo*"; "*Facies*? *Faciam*" - I promise, I do, I give).[12]

3.2. Subject matter of the Stipulation Contract

From the earliest period, stipulation did not necessarily require that the purpose of the contract (*causa*) be stated. It further meant that the subject matter of the contract was not visible, which is why this type of contract represented an abstract legal transaction. The abstruseness of stipulation provided the possibility of its wider application. In addition, the oral form of contracting as a key feature of Old Roman law meant that the recital of solemn formulas was sufficient for the validity of the contract.

3.3. Contracting Parties

To validly conclude a stipulation contract, certain conditions had to be met. The first essential element of the stipulation contract was the competent contracting parties, who had contractual capacity and ability to hear and speak (utter words); thus, deaf and mute parties could not conclude this contract.[13] The second essential element was mental capacity; a stipulation contract could not be concluded by mentally ill persons because they were not aware of the consequences of the concluded legal transaction. Third, a person of a lower rank was not allowed to enter into a contractual obligation with his/her immediate superior (a person of a superior rank or authority), nor was a person with *potestas* (in a position of power or authority) allowed to contract with his/her subordinates (persons of a lower rank); on the other hand, slaves, persons in *mancipium*, daughters in the family and women under *manus* were completely forbidden to enter into contractual relations.[14]

By the very nature of stipulation, the contracting parties had to be present at the moment of concluding the contract. After being asked the question "Do you promise?", the debtor had to respond immediately by saying "I promise", which meant that the promissor unconditionally accepted what the creditor demanded from him/her.[15] The words of response had to include and exactly match the words used in the question; thus, it was not allowed to utter any other word with the same or similar meaning, nor to use conclusive actions or remain silence.

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[12] The possibility of concluding stipulation in other words and in another language implied that *peregrini* were not allowed to conclude a stipulation contract. Although stipulation was a formal contract that required the fulfillment of precisely defined elements of the legal affair, it was also a flexible contract because the contracting parties could use other words. For this reason, stipulation was widely used in other branches of private law. See: Ignjatović, 2022:337.

[13] Gaius III 105: "Mutum neque stipulari neque promittere posse palam est. Idem etiam in surdo receptum est; quia et is, qui stipulatur, uerba promittentis, et qui promittit, uerba stipulantis exaudire debet." Available at: University of Grenoble (n.d), https://droitromain.univ-grenoble-alpes.fr/Responsa/gai3.htm#100

[14] *Gaius* III 104, translated by Станојевић, 2009: 232.

[15] *Stipulatio* was not considered concluded if the debtor's answer did not follow the form of the question. Gaius specifies the cases in which stipulation was invalid - *stipulatio inutilis*. Thus, stipulation produced no effect when someone is asked if they give a certain sum of money, and they declare that they give another sum, as well as when they give under a condition. (*Gaius* III 102, translated by Станојевић, 2009: 232).

3.4. Rights and Obligations of the Contracting Parties

As stipulation was a verbal contract, it required both contracting parties to be present at the conclusion of the contract (Eisner, Horvat, 1948:313). In classical Roman law, contracting parties were considered present if they were in the same city on the day of concluding the contract. With the development of stipulation as a literal (written) contract, it became possible to conclude the contract even without the presence of the contracting parties because the document (*cautio – instrumentum stipulationis*) was sufficient for the contract to be concluded.

3.5. Termination of Obligations from Stipulation

The obligation from stipulation did not cease by fulfilling the obligation; rather, it was necessary to fulfill the requirements of the form for the obligation to cease. In order for the obligation from stipulation to cease, an act of release was required that was the opposite of the act of conclusion – *contrarius actus*. The end of obligation was reached by *acceptilatio*, a fictitious payment during which the creditor released the debtor from the debt owed by answering affirmatively to the debtor's question "*Did you receive what I promised you*?". The debtor had to ask the creditor if he had received the first and last pound that was promised, to which the creditor would answer in a precisely specified manner (Stanojević, 2010: 271).

In Roman law, we may find statements about *acceptilatio* in the writings of various legal authors. Gaius states that "everything created by a legal act ceases by a *contrarius actus*").[16] Ulpian mentions that "there is nothing more natural than for an obligation to cease in the same manner as it arose".[17] Pomponius states that "as it was contracted, so it must be paid".[18]

However, the great formality expressed through the form of *acceptilatio* impaired the speed of legal transactions; thus, in the period of the Republic, the prevailing view was that the assumed obligation ceased to exist by mere fulfillment, without the need for a formal act.

3.6. Procedural Instruments

As *stipulatio* created the right to sue, it was another reason why it was so frequently used, especially for securing protection in those legal relationships that were not protected by lawsuits at the time, mostly arising as a consequence of societal changes (Stojčević, 1985:244). As a strictly formal contract, *stipulatio* was protected by various procedural instruments. The most common ones were: *exceptio doli, querella non numeratae pecuniae, exceptio non numeratae pecuniae, condictio certae pecuniae, and condictio certae rei.*[19]

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[16] "Omnia, quae iure contrahuntur, contrario iure pereunt" (D. 50, 17, 100); available at: The Latin Library (n.d.) Digesta, available at: https://www.thelatinlibrary.com/justinian/digest50.shtml

[17] "Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est" (D. 50, 17, 35)

[18] "Prout quidque contractum est, ita et solvi debet: ut, cum re contraxerimus, re solvi debet: veluti cum mutuum dedimus, ut retro pecuniae tantundem solvi debeat. Et cum verbis aliquid contraximus, vel re vel verbis obligatio solvi debet, verbis, veluti cum acceptum promissori fit, re, veluti cum solvit quod promisit. Aeque cum emptio vel venditio vel locatio contracta est, quoniam consensu nudo contrahi potest, etiam dissensu contrario dissolvi potest." (D. 46, 3, 80); available at: https://www.thelatinlibrary.com/justinian/digest46.shtml

[19] *Exceptio doli* was a procedural means of praetorian protection that protected a debtor who had stipulated to return a certain item or money, but who had never received the item or money. *Querella non numerate pecuniae* was a procedural means of protection that could be raised by a debtor due to unpaid money within one year, or two in Justinian's era. *Exceptio non numeratae pecuniae* was a procedural means that served a debtor against whom a claim was filed for the fulfillment of an obligation. *Condictio certae creditae pecuniae/rei* was a

In case of a dispute between the contracting parties, legal protection in Old Roman law was ensured through legislative proceedings, via *sacramento* and *iudicis postulationem*. In classical Roman law and post-classical Roman law, legal protection was achieved through *condictio;* if the obligation was monetarily determined, it was secured by *condictio certae creditae pecuniae*, and if it concerned a thing, it was secured by *condictio certae rei*.

The legal protection provided in the stipulation contract supports the claim that stipulation was in use throughout the entire history of Roman law, from the Law of Twelve Tablets to Justinian's law.

4. Application of Stipulation in Other Legal Institutes

The stipulation contract was also widely used in other branches of Roman private law because, as an abstract legal transaction, it was valid without specifying the legal ground for entering into the contract. Thus, stipulation could also appear in the form of transfer of a claim to heirs (*adstipulatio*), a solemn promise of dowry (*dotis dictio*), an oath of manumitted slaves (*iusiurandum libertati*), and surety (*vadiatura*).

4.1. Adstipulation (*adstipulatio*)

Adstipulation was a contract used in the field of inheritance law. This contract transferred a claim to an heir in case of the stipulator's (creditor's) death. The debtor was first obliged to the principal creditor and then to the adstipulator (heir).

Adstipulation was concluded in the following manner: after the stipulation contract was concluded, the debtor would assume the obligation to the adstipulator (heir) in the same or a lesser amount. The formula for concluding this type of legal act was: "*Idem mihi dare spondes*? – *Spondeo*".[20] In this context, it was crucial to use the word "*idem*" (the same), as otherwise it would be considered two types of obligations. Hence, the legal position of the adstipulator was the same as that of the principal creditor, provided that they did not behave contrary to the principal creditor.

In classical law, adstipulation was actionable on the basis of the relationship between the principal creditor and the adstipulator. In Justinian's law, it ceased to be used because all instances of stipulation made in favor of heirs were legally valid.

4.2. Solemn Promise of Dowry (*dotis dictio*)

The solemn promise of dowry was a unilateral, formal and straightforward promise made during betrothal (*sponsalia*). Considering the definition of betrothal as an agreement made through demands (*stipulationes*) and mutual promises (*sponsiones*), we could say that it was rooted both in *mos* and *ius*.[21] *Mos* was a custom that imposed the obligation of marriage on the betrothed, while *ius* was an act imposed on the betrothed by the collective itself (*consortium*).

In Old Roman law, the father betrothed his daughter by responding "*spondeo*" based on the solemn question "*spondes tibi gnatam tuam uxorem fili meo*". This first *sponsio*,

procedural means of protection used in case the performance entailed giving a certain amount of money or handing over a certain item.

[20] "Do you promise to give me the same?" I promise". For more, see: Eisner, Horvath, 1948:366.

[21] *Hoc mores atque iure solita fieri scripsit Servius*. For more, see: Astolffi, 1989:12.

which mainly expressed the personal aspect of this relationship, would be followed by another *sponsio*, in which the father would promise a certain amount of money to the *fiancé* in case the betrothal failed through. The first *sponsio* allowed the injured party (suitor) to seek protection from the censor in case of failed betrothal. The second *sponsio*, where money was promised, provided the opportunity to seek protection through a multi-step judicial process in the form of *legis actio per iudicis arbitrive postulationem*,[22] as envisaged by the Law of Twelve Tablets.

In classical law, *sponsalia* expressed more prominent characteristics of the Roman spirit.[23] Towards the end of the period of the Republic, the consensus of betrothal was reflected in the agreement of wills of both betrothed parties, which was freely expressed. There was no requirement for the presence of other witnesses, nor did the will have to be expressed in precise words.[24] The prevalence of consensus in concluding betrothal gradually led to the disappearance of *sponsia* as a form of concluding betrothal. Thus, in the classical period, betrothal (as a prenuptial contract) evolved from a real contract into a consensual contract.

In post-classical law, *promissio dotis* was stipulation on the basis of which the party giving the dowry (father, brother) undertook to transfer certain dowry property to the betrothed, the future spouse. Just as in pre-classical Roman law, the father betrothed his daughter against her will, and his promise regarding the future marriage was binding even after his death. In this period, even when the daughter reached the age of 25 and thus became an adult, she was still bound by her father's promise, or the promise of her mother or relatives in those situations where such a promise was made by those persons for legally justified reasons (Ignjatović, 2009:146).

4.3. Oath of Manumitted Slaves (*iusiurandum libertati*)

The oath of manumitted slaves was a religious ceremony by which a slave, upon being freed from slavery, solemnly committed to their master that he/she (even though free) would work for a certain number of days each year without pay. In classical law, this type of contract was widely used due to the mass emancipation of slaves that marked this period.

4.4. Surety (*praediatura / vadiatura*)

Surety (*praediatura*) was a verbal contract in Old Roman law where the guarantor vouched in the *legis actio per sacramentum* procedure before the state magistrate that the contracting parties would fulfill the promised obligations.[25] This type of contract was not typical of classical and post-classical law due to the obsolescence of the *legis actio* procedure.

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[22] For more, see: Ignjatović, 2009, 127-156

[23] However, at the end of the 2nd and the beginning of the 3rd century, Roman betrothal showed the influence of different provinces of the world. For more, see: Astolfi, 1989:35.

[24] That is why the betrothal of the classical period is referred to as a consensual contract, since the agreement of the expressed wills of the contracting parties is the basic and the only form for the validity of a consensual contract.

[25] The magistrate asked the question "*Praes est*?" ("Are you a guarantor?"), to which the guarantor answered "*Praes sum*." ("I am a guarantor.") As in the case of *vadiatura*, *praes* was not an accessory debtor who was liable in case the main debtor did not fulfill the assumed obligation; *praes* was an independent debtor, the only one who could be sued in case the main debtor failed to fulfill the obligation towards the state. For more, see: Стојчевић, 1985:245.

Vadiatura was a verbal contract in which the guarantor (by uttering specific words) undertook to ensure that the debtor would appear before the state magistrate or continue the trial before the court if the proceedings could not be concluded on the same day.[26]

5. Stipulation as a Literal (Written) Contract

Due to the development of legal and economic transactions and the geographic expansion of the Roman state, verbal contracts no longer satisfied the needs of developed legal transactions. *Sponsio* as a form of verbal contracts was a suitable ground for the development of various types of abuses because the expressed words were not perceived to be reflecting the legal ground.

Due to the development of trade and the weakening influence of religion, creditors had to find another method, in addition to stipulation, to ensure the fulfillment of their claims. Thus, in the period of the Republic, there was a need for a written record of concluded legal transactions. At the beginning of the Republic, witnesses began to be called to appear in court and testify about the content of the spoken words in case of disputes. The obligation undertaken publicly, (before witnesses) emphasized the creditor's claim, while the debtor feared public condemnation.

In classical Roman law, as literacy increased, spoken words started being recorded, and a written contract (*instrumentum stipulationis)* was drawn alongside *stipulatio*. Thus, stipulation changed over time and became a special type of contract − a literal (written) contract.

5.1. Instrumentum Stipulationis (*cautio – instrumentum stipulationis*)

After the adoption of Caracalla's Constitution in 212, which extended the use of Roman law to peregrini, the distinction between civil and praetorian contracts was no longer made.

Stipulation as a former institute of civil law was equated in its effect with literal contracts *chirographum* and *syngraphae*, which were concluded by peregrini. Thus, a clause stating that the obligation was assumed by stipulation was entered into chirographs and syngraphs. As a result, a new institution was created − *instrumentum stipulationis*, a document on the executed stipulation.

At the beginning of its application, *instrumentum stipulationis* had only evidentiary force and was not a condition for the validity of the concluded stipulation, but later it represented a strong presumption of the executed stipulation. In Justinian's time, it was almost an irrefutable proof that stipulation was executed, which actually proved that *stipulatio* was transformed into a literal contract (Eisner, Horvat, 1948:106).

As a result of the original method of conclusion, the document on the executed stipulation usually contained the statement "Since I was asked, I answered that I undertake..." The oral part of stipulation eventually disappeared completely, and stipulation became a written contract with traces of an oral formula (Stanojević, 1966:46).

The legal nature of stipulation changed along with the form of concluding stipulation, as it was transformed from an abstract legal transaction into a casual legal transaction. Thus, in Justinian's law, it became a unique causal transaction that was void in case consideration (*causa*) was missing or void (Kaser, 1984:207).

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[26] The creditor asked "*Vas es*?", and the guarantor replied "*Vas sum*." For more, see: Стојчевић, 1985: 245.

6. CONCLUSION

By tracing the development of stipulation from Old Roman law, through classical law, to post-classical law, we may observe the expansion of the circle of people to whom *ius civile* applied, including non-Roman citizens. The extension of the personal validity of the rules of *ius civile* to peregrini caused other changes in the legal nature of stipulation (*stipulatio*).

Through the example of stipulation, we may also observe the transition from abstractness (as the basic feature of Old Roman law) to causality, which gained predominance in the classical and post-classical periods. The relationship between the principles of formalism and consensualism is directly related to this change. Although strictly formal in nature, stipulation was concluded by uttering short formulas. This probably contributed to the fact that stipulation endured longer than other methods of contract conclusion that emerged in the earliest Roman law period (such as *mancipatio*). Over time, it was allowed to conclude stipulation by uttering other words (not just *spondeo)* in various languages.

Examining changes in the form of concluding stipulation, we may observe a gradual transition from oral to written form of contract. In classical law, the content of stipulation was recorded in order to serve as evidence of the assumed obligation but, over time, the recording of the content of stipulation became a requirement for the contract validity.

The basic requirement for the validity of stipulation (personal presence of the contracting parties) was relativized after the transition to the written form of the contract. In the post-classical period, it was enough for the document to state that the contracting parties were present, regardless of whether this information was actually correct. Moreover, the requirement for *unitas actus* was relaxed so that, by the post-classical period, the promissor was no longer required to answer immediately after being asked a question.

Based on the research findings presented in this paper, we can draw a general conclusion. Stipulation was of great significance and importance for Roman contract law. It was the first and fundamental verbal contract in Roman law, representing the core of Roman contract law. However, it was used not only in contract and tort law but also in other branches of private law. Moreover, the development of stipulation from a verbal into a written contract illustrates the evolution of the legal form of Roman contracts in the course of 13 centuries of Roman history.

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RAZVOJ FORME UGOVORA U RIMSKOM PRAVU NA PRIMERU STIPULACIJE KAO VERBALNOG KONTRAKTA

Kao prvi i osnovni verbalni kontrakt rimskog prava, stipulacija (stipulatio) je nastala i razvijala se pod uticajem raznih društveno-ekonomskih prilika koje su uslovile razvoj rimske države. Nastao u pretklasičnom rimskom pravu pod uticajem religije i običaja, ovaj verbalni kontrakt menjao je svoje osnovne karakteristike na taj način što je u periodu klasičnog rimskog prava dobio karakteristike literarnog (pisanog) kontrakta, da bi u periodu važenja postklasičnog rimskog prava ovaj kontrakt doživeo najveće promene. Posmatrajući i analizirajući razvoj stipulacije, kao verbalnog kontrakta, možemo da uočimo mnoge generalne tendencije u razvoju forme ugovora u rimskom pravu. Na taj način možemo doći i do odgovora na pitanje kako je strogi formalizam rimskog ugovornog prava ustupio primat kauzalnosti, odnosno kako je tekao proces tranzicija od strogog formalizma do konsensualizma i prelazak sa usmene na pisanu formu zaključenja ugovora.

Ključne reči: *stipulatio, forma zaključenja ugovora, verbalni ugovori, kontrakti, unitas actus*.

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Review paper

BETWEEN THE RELATIVE AND ECLECTIC THEORY OF PUNISHMENT: THE PURPOSE OF PUNISHMENT IN SERBIAN POSITIVE CRIMINAL LAW

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Abstract. *The Criminal Code of Serbia is one of the few criminal codes that regulates the purpose of punishment and criminal sanctions. The latest amendments to the Criminal Code (2019) include a new provision on the purpose of punishment: to achieve fairness and proportionality between the criminal sanction and the committed crime. Until 2019, the purpose of punishment was purely preventive because the legislator accepted the relative theory on the legal purpose of punishment, which entails general and special prevention as the only legal goals. The situation has changed by introducing this new purpose of punishment, which entails the acceptance of the mixed or eclectic theory of punishment. Yet, the issue is still debatable. This paper aims to present a different standpoint on the new provision on fairness and proportionality between the criminal sanction and the committed crime. Although these concepts are intuitively related to the talion principle and thus to retribution, the author attempts to thoroughly argue the viewpoint that fairness and proportionality can also be understood as limitations of the repressive aspect of punishment. Retribution is often mistakenly used as a synonym for repressiveness, although the first term is related to the purpose of punishment and the second one represents the essence of punishment. The author will also consider the protective function of criminal law and some general principles, such as legitimacy.*

Key words: *purpose of punishment, repression, retribution, prevention, eclectic theory*.

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1. INTRODUCTION

The Criminal Code of the Republic of Serbia was significantly amended in 2019.[1] The amendments were based on the need to prescribe a fairer punishment for perpetrators of crimes against sexual freedom, especially when these crimes are committed against minors. In that regard, the most significant change in the Serbian Criminal Code (CC) is the introduction of life imprisonment into the penal system of Serbia. In addition, there are other changes in the General part of the Code, primarily in the sections dedicated to penalties and special rules for determining penalties. The purpose of punishment has also undergone changes (Article 42 of the CC).

The Serbian Criminal Code is one of the few criminal codes that regulates the purpose of punishment. Article 42 of the Criminal Code (CC)[2] explicitly prescribes the purpose of punishment within the general purpose of criminal sanctions and the purpose of individual types of punishment. Article 3 of the Criminal Code regulates the protective function of criminal law (the principle of legitimacy) by prescribing the basis and the scope of criminal law repression. This principle is important for considerations presented in this paper. The general purpose of prescribing and imposing criminal sanctions is to suppress the commission of criminal acts that violate or endanger the values which are protected by criminal legislation (Article 4 of the CC). Within this general purpose of criminal sanctions, the purpose of punishment is: 1) to prevent the perpetrators from committing criminal offences and deter them from future commission of criminal offences; 2) to deter others from committing criminal offences; 3) to express social condemnation of a criminal offence, enhance moral strength and reinforce the obligation to respect the law; and 4) to achieve fairness and proportionality between the committed offence and the severity of the imposed criminal sanction (Article 42 of the CC). The last provision is a newly introduced purpose of punishment (Art. 42 (4) CC).

The aim of this paper is to examine the meaning and effects of the newly introduced purpose of punishment. Until 2019, the purpose of punishment was exclusively preventive. The question arises as to how the situation has changed with the latest amendments. In particular, it is necessary to consider whether the added purpose of punishment is in fact an expression of retributivism, or whether it essentially means something else. In this paper, it will be done through the linguistic, logical, systemic and teleological interpretation of the new provision of the Serbian Criminal Code, as well as the analysis of the legislator's explanation on this new institute. On the basis of conclusions drawn from the interpretation, the question arises as to whether the provision on fairness and proportionality of the criminal sanction and the committed act was added in the right place, or whether it would have been more appropriate and meaningful to include it in some other article of the Criminal Code. The author attempts to address this question with reference to the distinction between retribution as the purpose of punishment and repression as the essence of punishment.

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[1] Zakon o izmenama i dopunama Krivičnog zakonika (Act amending and supplementing the Criminal Code), *Službeni glasnik* RS, 35/2019

[2] Krivični zakonik (Criminal Code), Službeni glasnik RS, br. 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019; available in English at https://www.mpravde.gov.rs/files/Criminal%20%20%20Code_2019.pdf

2. THEORIES ON THE LEGAL PURPOSE OF PUNISHMENT

While the criminal law science is primarily focused on examining the legal purpose of punishment, legal philosophers explore the ethical justification of punishment. One can debate whether legal scholars and philosophers are working on the same question, namely, whether the purpose of punishment and its justification are one and the same thing. In this field, the concepts of the purpose of punishment, the aim (goal) of punishment, and the justification of punishment intertwine. These terms are often used interchangeably due to the fact that perspectives on the justification of punishment and its overall purpose and individual goals branch out in two almost identical directions. Absolute theories on the legal purpose of punishment are essentially based on retributivism, while relative theories are based on utilitarian justification of punishment (Jovašević, 2018: 235-236).

Closely related to this issue is the question of the legal basis of punishment, i.e. the origin, nature, and scope of the state's right to punish. At this point, we may draw a parallel between the state's right to punish and the offenders' right to be punished. Hegel, along with Kant, is considered a classical representative of retributivism (Milevski, 2014: 36). In his retributive theory of *punishment*, Hegel perceived the state's right to punish as the other side of the offender's right to be punished and thus "reconcile with the law" (Čejović, 2008: 157), but Hegel did not deny the state's right to be the holder of the right to punish, which is vested in the state authorities for the sake of achieving absolute justice. Through its mechanisms, the state negates the negation of rights (Jovašević, 2018: 234). Hegel's concept of reconciliation with the law, which he sees as the right of the criminal to be punished, bears a striking resemblance to the understanding of punishment in ecclesiastical law (Orthodox church law), which is perceived as reconciliation with the will of God (Milaš, 2004: 528). Such a resemblance cannot go unnoticed as there is an opinion that retribution as a purpose of punishments represents the common feature of criminal and church law's views on punishment (Vuković, 2014: 153).

Absolute theories on the purpose of punishment consider repression, retaliation or harm inflicted on the offender/wrongdoer as the sole purpose of punishment because offenders have inflicted harm upon society through their unlawful and delinquent conduct. For the state or society, punishment represents retaliation, revenge, and thus the wrongdoer bears the consequences of his/her actions (Jovašević, 2018: 235). Legal literature includes the view that this theory of retaliation lacks any real purpose because it "is not interested in the outcome and empirical effect of punishment" (Stojanović, 2021: 227). This is in contrast to the utilitarian views which find the justification of punishment in its social utility. The utility of punishment lies in its preventive effect. Hence, relative theories on the purpose of punishment rest on utilitarian views and perceive preventive action as the sole purpose of punishment. While the essence of the absolute theories of punishment can be summed up in the maxim "the offender is punished because he erred", relative theories of punishment are based on the idea that "the offender should be punished to prevent further wrongdoing" (Jovašević, 2018: 235-236). The preventive function of punishment should primarily impact the wrongdoers, by preventing their recidivism. However, punishment should also have a broader impact on society, by deterring potential criminals and thus contributing to the suppression of crime on a larger scale. Relative theories on the purpose of punishment further branch into special prevention and general prevention theories.

In special prevention theories of punishment, preventive action is primarily achieved through deterrence. The method of executing punishment must not and should not involve

torture but the implementation of the imposed punishment, involving either the deprivation of liberty (a term of imprisonment) or a monetary fine, implies placing the convicted individual in an undesirable position that is worse than the one they were in before the punishment (Milevski, 2014: 25-28). However, punishment should also have a corrective impact on the criminal offender. Imprisonment as a punishment is now conceptually conceived and normatively shaped as individualized penitentiary treatment, aimed at eliminating the criminogenic factors in the offender's personality and working towards their overall rehabilitation. The third theory within the relative theory framework of special prevention views punishment as a form of state supervision and care over the perpetrators of criminal acts, aimed at making them resilient to challenges, opportunities and antisocial tendencies within themselves, and teaching them to live without breaking the law (Jovašević, 2018: 236).

In general prevention theories of punishment, preventive action can be divided into positive and negative aspects. In the Serbian Criminal Code, the general preventive action expressed in positive terms is explicitly stated as the purpose of punishment, which entails expressing societal condemnation of the criminal act, strengthening morals, and reinforcing the obligation to respect the law (Article 42 CC). On the other hand, the general prevention expressed in negative terms involves exerting influence on other members of society not to commit punishable acts (deterrence). How can an individual, a potential criminal offender, be deterred from engaging in criminal activities? The general preventive action inherently rests on the fact that specific behavior is criminalized and that punishment is prescribed for such behavior. This perspective is referred to as the theory of psychological compulsion. The execution of punishment towards a person who has already been criminally convicted can be intimidating and discouraging. In addition to the theory of psychological compulsion, there is the theory of moral compulsion. Essentially, it represents positive general prevention. i.e. an attempt to remind broader social circles that committing criminal offences is not only punishable by the law but also immoral, and it calls for strengthening morality and the obligation to respect the laws. The preventive action embodied in punishment and its utilitarian justification contribute to the protective function of criminal law. According to sociological theories, this social role of criminal law is considered as the ground of the state's right to punish (Jovašević, 2018: 235).

In comparative law,[3] the contemporary criminal law aims to move away from the classical repressive mechanisms and institutes, considering that the classical criminal has not yielded significant results. Such views naturally push prevention theories to the forefront of discussions on the theories of punishment. If punishment cannot be avoided altogether, these views put forth the relative (utilitarian) theory, where preventive action is the sole purpose of punishment. However, making prevention the sole purpose of punishment carries risks. Unlike repression or even retribution, which can be limited and theoretically and normatively controlled, prevention is unconstrained (Stojanović, 2011: 3). Could it be concluded that prevention is a good servant but a bad master? On the one hand, giving importance to prevention as the purpose of punishment precludes the infiltration of security-driven tendencies into criminal law; on the other hand, repression (limited by certain requirements, such as justice and proportionality) is still the only counterbalance to prevention. "Although the key aspect of the preventive action of criminal

[3] In the contemporary comparative law, " the purpose of punishment must follow the modern tendencies of criminal policy, which aims to reduce the use of prison sentences, expand the application of alternative sanctions and diversification measures, of course, with full respect for the rights of victims" (Miladinović Stefanović, 2012: 230).

law is its application, it does not mean that it is justified to strive for the application of criminal sanctions to everyone who has committed (any) criminal offense. It suffices that it be done to an extent where the threat of punishment becomes serious, primarily in relation to serious criminal offenses. Moreover, excessive application of criminal law does not contribute to prevention and, on the other hand, represents too heavy a burden for any society" (Stojanović, 2011: 20). It seems that the scientific and professional community has been so focused on the flaws, inefficiency and harshness of retribution that it has overlooked the fact that crime prevention[4] can also have its flaws and undesirable consequences. Stojanović warns that the idea of purely preventive criminal law is dangerous, and proposes introducing a retributive element into contemporary criminal law of democratic states. The question arises whether the intention of the Serbian legislator was to introduce the retributive element in the amended Criminal Code (2019) by including the requirements of fairness and proportionality in the provision on the purpose of punishment.

Although eclectic theories on the purpose of punishment can be criticized for inconsistency (Stojanović, 2021:228), they still exist and persist, combining within themselves the two aforementioned maxims of absolute and relative theories of punishment. Thus, offenders are punished both because they have erred and to prevent them from erring again. It is important not to forget that criminal law is *ultima ratio*[5] for the protection of society from criminality, and its mechanisms can only be employed after the commission of a criminal act. A criminal offence serves as the occasion for punishment, and the culpability of the perpetrator is the basis of punishability. Although based on opposing conceptions, absolute and relative theories can still coexist, each having its own complementary role within a mixed (eclectic) theory. According to some interpretations, the eclectic theory was embraced in the latest amendments to the Criminal Code of Serbia (2019). The presented theoretical and philosophical perspectives on punishment and its purpose were provided to clarify the views and arguments of the existing scientific theories. In the next part of this paper, the author will analyze in more detail the new provision on the purpose of punishment envisaged in Article 42 (4) of the CC.

3. New Provision on the Purpose of Punishment: Article 42 (4) of the CC

It is important to start the central part of this paper by interpreting the new provision on the purpose of punishment, envisaged in Article 42 (4) of the CC, and to support one's conclusions with an analysis of the authentic interpretation of this institute, provided by the legislator in the Explanation of the Draft Act amending and supplementing the Criminal Code.[6] Notably, both the provision and its explanation are filled with ambiguities and

[4] For more on the concept, fundamental principles and typologies of crime prevention, see: Jovašević, Kostić, 2012.

[5] Security measures (which by their nature significantly differ from punishments) cannot be applied *ante delictum*, even if the danger (temible state) that will later lead to the commission of a criminal act is indicated and manifested in some other way. The reason for this is that the characteristic features of some security measures involve repression and still represent a criminal sanction, not a societal measure. Kant, as a classic retributivist, did not deny the preventive action of punishment, although he was strongly opposed to making prevention its sole or predominant purpose. In this opinion, punishment is always imposed against the offender of the comitted crime , and that the offender must be considered punishable even before contemplating the societal benefit that might stem from that punishment. For more, see: Kant, 1993: 133.

[6] The Draft Act and the explanation of the Draft Act were downloaded from the official website of the Ministry of Justice of Republic of Serbia; https://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php (access 11. 4.2023).

inconsistencies. It may also be disputed whether such an exceptionally theoretical question, which is normatively regulated by the Code, deserves such effort in analysis. The newly introduced purpose of punishment does not produce any harmful or even new consequences for judicial practice, and the question is whether they have any practical implications at all. However, it must be noted that the purpose of punishment has a significant impact on judicial practice because it has a direct impact on sentencing. Fairness and proportionality certainly have the status of criminal law principles, and although they were not explicitly mentioned in the Code until recently, it is difficult to imagine that judges were not guided by these principle in determining sentences on a daily basis. Therefore, the theoretical and even philosophical nature of this question is not a sufficient argument to abstain from this analysis. Such an approach underestimates the question of the purpose of punishment, and legal science should not undermine the importance of this issue, especially if it is known that the legislator has had this underestimating approach. In the Explanation of the Draft Act, the legislator devotes much more attention to changes that might be more significant, such as life imprisonment or new rules for sentencing recidivism and multi-recidivism. If our legislator has already elevated this philosophical question to the rank of a legal norm with legal force, then this question deserves attention. If the legislator has approached this matter without due diligence, it should be noted by legal science by illuminating the causes of such mistakes and offering a solution. For Serbian criminal law, the purpose of punishment is not only a theoretical and philosophical issue, but also a practical question.

Article 4 (point 4) of the CC includes a new provision on the purpose of punishment: to achieve fairness and proportionality between the committed criminal offence and the gravity of the imposed criminal sanction. Even at the first glance, we may notice a mistake in this formulation. The provision envisages the principles of fairness/justice and proportionality of criminal sanctions with the criminal offense. What was the legislator's intention: did the legislator intend to supplement the general purpose of criminal sanctions but mistakenly placed this provision in the article about the purpose of punishment, or was it just *a lapsus linguae?* It may be easier to accept this mistake as a matter of careless misuse of terminology. Prof. Stojanović believes that justice and proportionality should not be understood as part of the general purpose of criminal sanctions, given that justice and proportionality cannot and should not be the purpose of certain types of sanctions, especially certain security measures (Stojanović, 2021: 229).[7] These are just some conclusions drawn from the analysis of this provision. Therefore, if the provision itself is taken into account and interpreted systematically (i.e. compared to the provisions on the general purpose of criminal sanctions and the purpose of individual types of sanctions) in the context of the entire spirit of the Serbian system of criminal sanctions, it is more acceptable to conclude that the provision should remain where it is, and that the legislator's mistake should be attributed to a careless misuse of terminology. However, these conclusions are not final.

Taking a step further involves the analysis of the explanation of this institute, i.e. its authentic interpretation. Unfortunately, the explanation does not meet expectations and does not resolve the ambiguity arising from the provision itself; instead, it creates new uncertainties. In the third section of this explanation, which contains the authentic explanations on the fundamental legal institutes and individual solutions from the general part of the

[7] Moreover, security measures (especially the curative ones) are determined in relation to the specific perpetrator and the circumstances that entail certain danger to perpetrators themselves and the environment, rather than being determined on the basis of the nature and gravity of the criminal offense (Stojanović, 2021: 229).

Code, the new purpose of punishment is explained as follows: "Article 42 of the Criminal Code is supplemented by Article 1 of the Draft Act, introducing another *goal* to be achieved by the purpose of punishment, namely, to achieve fairness/justice and proportionality between the committed offence and the severity of the criminal sanction. In this way, *guidelines* are provided to judges to take this provision into account when determining the sentence, with the aim of achieving the purpose of punishment in each individual case."

How does the legislator perceive the new purpose of punishment? Is it seen *as a new goal* to be served alongside the existing purpose of punishment, as *guidelines* for achieving that goal, or as *reasons* (*circumstances*) that judges should consider when determining the sentence? This is a citation from the explanation of the newly introduced purpose of punishment. Considering the structure of this explanation, which should clarify rather than further complicate the matter, what is most concerning is that it seems that the legislator is not even aware of the logical problems he has created. If the legislator does not know or at least does not give the impression (by his approach to the institute) that he knows what he intended to achieve by introducing this amendment, then how can jurisprudence approach this question?

The provided explanation gives an impression that fairness/justice and proportionality should represent a separate (independent) goal that is beyond the purpose of punishment even though the legislator may not have intended to do that. As it is clearly visible, this goal should serve the already existing preventive purpose of punishment. Taking into consideration the opinion of Prof. Stojanović that fairness/justice and proportionality cannot be a constituent part of the general purpose of criminal sanctions, the question remains: where does this provision belong, where is its rightful place, where it would make sense, and where it could produce the desired effect? It is also possible that the legislator wanted to regulate fairness/justice and proportionality as circumstances in determining the sentence because the explanation states: "In this way, guidelines are provided to judges to take this *reason* into account when determining the sentence..." It remains unclear which reason the legislator had in mind, and whether the legislator sees fairness and proportionality as reasons/circumstances that affect whether the punishment should be lighter or harsher. On the other hand, fairness/justice and proportionality are also labeled as *guidelines* when determining the sentence. The assumption that fairness/justice and proportionality should be taken as circumstances when determining the sentence is unsustainable. The simple reason is that the circumstances that influence the determination of the sentence relate to the criminal offense or the offender, not the sentence that the court determines on the basis of objective and subjective circumstances. Therefore, the most acceptable approach is to understand fairness/justice and proportionality as *guiding principles* for determining the sentence, which is in line with the nature of these concepts; justice and proportionality are essentially criminal law principles.

Unfortunately, these explanations have not resolved all the ambiguities regarding the new purpose of punishment. Even if fairness/justice and proportionality (as interpreted in the explanation) are understood as guiding principles (guidelines) for determining the sentence, (which would be the least incorrect answer to the question of what the legislator intended to achieve by introducing the new purpose), it cannot be ignored that these terms are simultaneously designated as the *goals* of punishment. Thus, how is it possible for fairness/justice and proportionality to be both the goals and the guidelines for effectively achieving that the intended aim? The legislator does not reject either of these two approaches in his explanation; rather, he presents them cumulatively and on an equal basis.

Thus, if we discard the understanding of fairness/justice and proportionality as part of the general purpose of criminal sanctions and the view on fairness/justice and proportionality as circumstances for determining the sentence, there are several remaining options (which are ranked here from the easiest to the more demanding one): 1) to completely discard this provision and delete it in the next amendments to the Criminal Code; 2) to correct the mistake and replace the phrase "criminal sanctions" with the word "punishment," thus aligning the content of the provision with its heading; and 3) to find a more appropriate place for this provision. The provision may also remain unchanged, as there are always other issues to be addressed (either in the general or the special part of the Code) which may be perceived as more important and require greater attention in subsequent amendments than the norm regarding the purpose of punishment, which is almost declaratory in nature.

4. In Search of the True Meaning and Suitable Context of the Provision on Fairness and Proportionality

It is challenging to examine the third possibility and offer an answer to the question of where the provision on the fairness and proportionality of a criminal offence and the criminal sanction would be better incorporated in the legislation in order to make sense and achieve proper meaning and effect. The answer to this question has already been indicated. Fairness and proportionality might be better suited within the provision on the basis and scope (limits) of criminal repression (Article 3 of the CC). The argumentation for this stance can take two directions. First, in the criminal law science, fairness and proportionality are understood as legal principles closely related to the principle of individualization of punishment, as well as the principle of legitimacy (Jovašević, 2018: 25, Stojanović, 2021: 40). In the given context, it is safer to confine the argumentation to punishment, leaving aside other types of criminal sanctions. Punishment must be proportionate to the gravity and nature of the criminal offense, adapted to the personality of the offender, and simultaneously in line with the intended purpose of punishment and within the prescribed limits. Thus, an individualized punishment is a just punishment, and fairness is the characteristic that gives legitimacy to punishment, rendering it just and acceptable.

Truth be told, we are dealing with highly complex concepts and legal institutions (fairness, legitimacy, justification of punishment) that are almost impossible to define with precision, let alone restrict them within the boundaries of valid norms, legal standards, and philosophical categories. The question of what constitutes a just punishment is a topic in itself, more suited for the realm of legal philosophy. As this paper focuses on the purpose of punishment in Serbian criminal law, the concept of just punishment should be based on the intuitive and commonsense understanding of this concept by the judicial practice. Following this logic and respecting the limits within which the criminal law science deals with this question, it is justified to view fairness as a principle which is fulfilled by achieving the purpose of punishment in every individual case in practice. Therefore, the legislator perhaps did not err when he justified fairness and proportionality (perhaps unconsciously?) as an independent goal attained by achieving the purpose of punishment. This establishes a connection between the legitimacy of punishment and its purpose.

The principle of legitimacy is formulated in Article 3 of the Serbian Criminal Code (on the basis and scope of criminal law repression), which envisages that the protection of

individuals and other fundamental societal values constitutes the basis and the limits for determining criminal offenses, prescribing criminal sanctions, and their application to the extent necessary to suppress these offenses. For this reason, the author believes that the provision on fairness and proportionality should be placed within the norm on the restriction of criminal law repression, rather than within the norm concerning the purpose of punishment. Lastly, these two criminal law principles are closely related in theoretical sense, so why shouldn't they be interconnected within the same norm of the Criminal Code.

The second argument actually builds upon the first. In domestic literature, there is an opinion that, by introducing fairness and proportionality as the purpose of punishment, our criminal law has embraced a mixed theory of the purpose of punishment (Stojanović, 2021: 228). This standpoint implies that fairness and proportionality are expressions of retribution, which has transformed the previously prevalent relative theory of punishment (embodied in purely preventive purposes) into an eclectic theory of punishment. The scholars aligned with this point of view do not justify or explain why they view fairness and proportionality of punishment as a retributive purpose. In his "Commentary on the Criminal Code" (2021), Prof. Stojanović noted: "In addition to general and special prevention, retribution as a purpose of punishment can be acceptable if its content is determined through the principle of fairness and the principle of proportionality, which must be respected in criminal law" (Stojanović, 2021: 229). In this quote, we underline the term "*content*." Fairness and proportionality should serve as factors limiting retribution as a purpose of punishment. Would it be wrong to perceive fairness and proportionality as factors that restrict the *content* of the punishment itself, which is embodied in repression? The repressive element of punishment almost entirely fulfills its content. It is a *sine qua non* feature of punishment, without which punishment would not be punishment.

It is hard to imagine that fairness and proportionality mentioned in Article 42 of the Criminal Code have any connection to absolute theories on the purpose of punishment. As explained, absolute theories view retribution as the sole purpose of punishment: vengeance, responding to evil with evil, and the act of punishment satisfying the sense of justice. "Absolute theories consider the essence of punishment to be its inner righteousness, which demands revenge for a certain evil with another evil, through punishment" (Subotić, 1910: 10). The principle of talion (*lex talionis*), which retribution is based on, implies "Legal Equality of Evils", an eye for an eye, a tooth for a tooth (Subotić, 1910: 7). Thus, it is clear why fairness and proportionality are linked to retribution. However, this connection should be viewed as a historical determinant, and it is quite reasonable to question whether it has been revitalized through the amendments to the Serbian Criminal Code (2019).

When introducing fairness and proportionality as the purpose of punishment, did the Serbian legislator intend to introduce retaliation (vengeance) as the purpose of punishment? A reasonable response to this question seems to be negative. The proportionality that was intended to be achieved through the principle of talion between retaliation and the committed crime is not the proportionality that the Serbian legislator had in mind. In the "civilized" states governed by the rule of law, those who committed murder cannot be sentenced to death, nor can sexual offenders be castrated, although comparative law literature includes ideas on introducing such measures for combating this type of crime. Notably, in scholarly discussions, the principles of fairness and proportionality are linked to the utilitarian nature of criminal law (Jovašević, 2018: 24). Given the fact that relative theories on the preventive function of punishment are labeled as utilitarian, this stance is diametrically opposed to the idea expressed in the new provision which introduces a

retributive aspect of the purpose of punishment in our jurisdiction. As noted by Montesquieu, "Utility is the highest justice; unnecessary punishment that does not serve the interests of the offender or society is mere tyranny" (Čejović, 2008:158).

Instead of striving to reconcile these two approaches, which would be quite ambitious considering their intrinsic opposition, the author will attempt to provide a different perspective on the following question: whether the newly introduced purpose of punishment is a formulation of retribution or rather a factor limiting the repressive nature of punishment.

The answer to this question would be clearer if the criminal law theory provided a more clear distinction between the essence, the nature of punishment, and the purpose of punishment. For example, these categories are much more clearly differentiated in ecclesiastical criminal law, thanks to the dedicated work of Bishop Nikodim Milaš in this area (Milaš, 2004: 104-114). Taking into consideration the essential and substantial differences between state and ecclesiastical law, it would not be inadequate to examine the conclusions that such an approach to punishment would lead to in the realm of state criminal law. In short, as previously discussed, the repressiveness (as a characteristic feature of punishment) is often neglected because it is so apparent and uncontested. To be more precise, its significance as a fundamental, *sine qua non* feature without which punishment would not be punishment, is disregarded. In that regard, evil (which is certainly embodied in repression) constitutes the essence of punishment; yet, it does not simultaneously imply that evil represents the purpose of punishment. Punishment is a repressive measure by which certain human rights and freedoms are restricted or taken away from an individual who committed a criminal offence, contrary to (or regardless of) that individual's will. Many authors agree on this, not only the scholars in the field of criminal law (Živanović[8], Jovašević[9], Stojanović, Čejović) but also philosophers[10] (Flew, 1954: 293). Although there have been debates on whether punishment should inflict pain upon the offender, or whether the essence of punishment is to put offenders in a situation they would never wish for themselves, punishment undeniably represents the deprivation or restriction of certain rights or freedoms (Milevski, 2014: 25-30). This fact is objective and does not lead to the conclusion that punishment would not be punishment if the offender did not perceive it as pain or evil. Conditioning the nature of a measure by subjective experience and the individual's attitude towards that measure would be incorrect, at least in the context of criminal law science.

In this paper, the author advocates for the standpoint that it is more accurate to view the new provision on fairness and proportionality as limitations on the repressive nature of punishment, rather than as a provision introduced for retributive purposes. In criminal law, there is a thin but clear line between the essence and the purpose of punishment, and it is necessary to constantly emphasize this difference. There is a strong and close connection between these concepts, but it does not mean that they should be mixed or equated. The practical implications of the regulated purpose of punishment are certainly conditioned by its nature and characteristics. Thus, a judicial warning as a measure of admonition cannot

[8] Toma Živanović spoke openly about punishment as an evil in his works *Ground problems of the criminal law – higher general part of criminal law* (1930) and *The Basis od Criminal Law of the Kingdom of Jugoslavia* (1936).

[9] Prof. Jovašević states that, in addition to the formal concept of punishment, the material concept of punishment is determined on the basis of its social role, i.e., as a measure to protect the society from crime. Nevertheless, it is and will always be a repressive, coercive measure. Yet, the repressive nature of punishment does not deprive punishment of the possibility of producing socially desirable effects. The repressive nature of punishment does not preclude its utilitarian effects. For more about the general and special features of punishment, see: Jovašević, 2011.

[10] Philosopher Antony Flew is known for his definition of punishment, which distinguishes five elements that are very similar to the general elements of punishment recognized in the criminal law science.

achieve the effects of even the mildest monetary penalty, while the public announcement of a verdict as a security measure has a different purpose than a judicial warning. It is logical that the effects of different types of criminal sanctions depend on their characteristics and nature. Although punishment essentially entails evil (repression, deprivation, objective limitation of certain rights and freedoms), it does not mean that it can only achieve retribution and not other socially beneficial goals. Kant, as an explicit representative of retributivism, did not contest the possibility of the preventive effect of punishment as retribution, with the caveat that he saw the preventive effect of punishment as useful but secondary to the punitive effect, "because one must never deal with a human being merely as a means to the purposes of another..." (Kant, 1993: 133). [11]

Article 3 of the Criminal Code prescribes the basis and the scope (limits) of criminal repression, specifying that repression is justified only to the extent necessary for the suppression of criminal offences. We have observed the connection between the necessity of repression and the proportionality of punishment, as well as the relationship between the purpose of punishment, justice, and the legitimacy of punishment. Another connection between the provisions on the limits of repression and the purpose of punishment is prevention; the limits of repression are set to allow for legitimate suppression of criminal acts, which also represents the purpose of punishment, in terms of both general and special prevention. Thus, considering the argumentation presented in this section, if the stance were accepted that the principles of fairness and proportionality are essential factors limiting criminal repression, it could be concluded that the Serbian Criminal Code still adheres to the relative theory of the legal purpose of punishment. The fact that the provision on fairness and proportionality was added to the norm on the purpose of punishment does not preclude the possibility of arriving at the correct interpretation of that provision through systematic and teleological interpretation. Thus, the conclusion that retribution (perceived as retaliation) would become one of the purposes of punishment in Serbia with the newly introduced provision seems to be superficial or rather intuitively based on the historical connection between fairness/justice and proportionality with retribution.

In the author's opinion, understanding fairness/justice and proportionality as limiting factors of repressiveness (as the fundamental characteristic of punishment) deserves to be considered. This new perspective shall be considered from the following viewpoint: "Besides the predominantly utilitarian condition, preventive interests should never contradict the principle of fairness/justice and proportionality; their realization must always be within the framework of an appropriate response to criminal acts. This means recognizing the necessity of introducing a retributive element even in prevention-oriented criminal law. However, this does not lead to a mixed theory, nor does it mean that retribution should be placed on the same level as prevention" (Stojanović, 2011: 22).

5. Conclusion

With reference to the latest amendments to the Serbian Criminal Code (2019), the central question addressed in this paper is whether the purpose of punishment has become eclectic, shifting from purely preventive goals to a combination of preventive and repressive aims. The answer to this question depended on the essence and meaning of the newly

[11] For more about Kant's retributivism and the justification of the death penalty from a philosophical point of view, see: Budić, 2017.

introduced provision on the purpose of punishment, envisaged in Article 42 (4) of the CC. Given the fact that relevant literature has only presented the view that Serbian criminal law has adopted a mixed (eclectic) theory on the purpose of punishment, without providing the explanation why fairness and proportionality are perceived as retributive aspects of the purpose of punishment, it was necessary to examine the new provision on the purpose of punishment from different angles. In that context, the paper discussed the theoretical concepts on the legal aim of punishment and some philosophical doctrines on the justification of punishment. In order to ensure that the perspectives in this paper were well-founded and elaborated, the author analyzed the criminal law theories and the new provision with reference to authentic legislative statements and interpretations. The first step was certainly a linguistic interpretation of the legal norm, and the final position on its true meaning was based on systematic and teleological interpretation.

Clearly, in comparison to other newly introduced or modified institutes in the general part of the Criminal Code, the legislator did not invest much effort or attention in shaping the new purpose of punishment or explaining it. It is legitimate to question the legislator's intention, why the purpose of punishment was supplemented by this provision, and why it was essential to do so at that time. The significance of amending the provision on the purpose of punishment could be sought and interpreted in the context of other changes which, even at a cursory glance at the Act amending and supplementing the Criminal Code (2019), indicate that Serbian criminal law is moving towards stricter solutions and penal mechanisms. The conclusion could be that the amendment on the purpose of punishment was a side change, accompanying the main amendments such as the introduction of life imprisonment and rules on sentencing multi-recidivists. This approach may be subject to further interpretation.

Considering all argumentation presented in this paper, we may draw the following conclusions. Serbian criminal law still fundamentally adheres to the relative theory on the purpose of punishment. Even after the amendments to the Criminal Code (2019), the predominant (if not sole) purpose of punishment is general and special prevention of crime. The author believes that it is more accurate to view fairness and proportionality primarily as general principles of criminal law that essentially act as factors limiting criminal repression. This viewpoint is based on differentiating between the repressive nature of punishment and the retributive purpose of punishment. The fact that repressiveness is an inherent (*sine qua non*) characteristic of punishment does not exclude the possibility of achieving utilitarian goals with such measures, without negating the preventive aspects of punishment. Indeed, the repressiveness of punishment is a factor that should deter potential criminal offenders from engaging in such punishable conduct (i.e. a factor of negative general prevention).

The author believes that the provision on fairness and proportionality could be added to Article 3 of the Criminal Code, which regulates the protective function of criminal law (i.e. the principle of legitimacy). In this paper, the author has explained the connection between the purpose of punishment, fairness and proportionality, the legitimacy of punishment, and the protective function of criminal law. The definitive answer has been provided by a systematic, particularly teleological interpretation of the provision on fairness and proportionality between the committed crime and the criminal sanction. This provision could be reformulated in such a way as to avoid the use of the terms "punishment" and "criminal sanctions", in order not to repeat the mistake that Prof. Stojanović warned about: fairness and proportionality cannot be the purpose of individual types of criminal sanctions. Thus, the legal principles of fairness and proportionality should complement the

principle of legality, i.e. the protective function of criminal law, prescribed in Article 3 of the Criminal Code. Following this logic, fairness and proportionality would be introduced as desirable characteristic of all law-prescribed mechanisms of criminal repression. This approach would link these two general principles of criminal law into a meaningful normative whole, analogous to their theoretical and legal correlation.

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IZMEĐU RELATIVNE I MEŠOVITE TEORIJE: SVRHA KAZNE U POZITIVNOM SRPSKOM KRIVIČNOM PRAVU

Krivični zakonik Srbije jedan je od retkih krivičnih kodeksa koji reguliše svrhu krivičnih sankcija i svrhu kažnjavanja. Najnovijim novelama Zakonika iz 2019. godine, normi o svrsi kažnjavanja dodata je još jedna odredba. Ostvarenje pravednosti i srazmernosti između krivične sankcije i učinjenog krivičnog dela sada predstavlja novu svrhu kažnjavanja. Do 2019. godine svrha kažnjavanja bila je čisto preventivna, to jest zakonodavac je prihvatao relativnu teoriju o pravnom ciljlju kazne. Generalna i specijalna prevencija bile su jedini pravni cilj kazni u Srbiji. Međutim, stanje stvari je promenjeno uvođenjem nove svrhe i mada je tako novoodređena svrha već određena kao prihvatanje mešovite, eklektičke teorije, o time se ipak još može voditi diskusija. Ovaj rad predstavlja težnju da se predstavi drugačiji pogled na odredbu o pravednosti i srazmernosti. Iako se ovi pojmovi intuitivno vezuju za talionski princip, a samim tim i za retributivnost, pokušaću da temeljno argumentujem svoj stav da se pravednost i srazmernost mogu shvatiti i kao ograničenja represivne prirode kazne. Retributivnost se često pogrešno upotrebljava kao sinonim represivnosti, iako je prvi pojam vezan za svrhu kazne, a drugi predstavlja njenu suštinu. Na putu ostvarenja postavljenog cilja ovog rada, biće razmotrena zaštitna funkcija krivičnog prava i neka opšta načela, poput legitimiteta.

Ključne reči: *svrha kazne, represivnost, retributivnost, prevencija, eklektičke teorije.*

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CHILD TRAFFICKING IN MEDIA REPORTING IN SERBIA *

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Abstract. *This paper explores the correlation between child trafficking and the media discourse on child trafficking. Child trafficking is one of the most widespread forms of organized crime where potential victims are children as a particularly vulnerable category of persons. Media are communication and information tools which play an important role in reporting about different events and phenomena and creating an image about them among the general public. The author of this paper analyzes 100 media reports published in the most widely read printed and electronic media in the Republic of Serbia in order to respond to several questions: a) whether the media in Serbia responsibly and ethically report on this important issue; b) whether they use their power and influence to exert an impact on the suppression, prevention, and raising awareness among the general public; and c) whether they are actively employed as a tool in the fight against child trafficking. The analysis includes quantitative and qualitative analysis of media texts, classified according to media genres, quantitative analysis based on the reported topics and reasons for reporting, and the countries which the media reports refer to, as well as a comparative quantitative analysis of media reports based on official statistical data about the methods of child exploitation, victims' gender, and internal and foreign child trafficking.*

Key words: *organized crime, human trafficking, child trafficking, exploitation, media, media reporting.*

1. INTRODUCTION: THE CONCEPT OF TRAFFICKING IN CHILDREN

As a form of child abuse, the term "trafficking" implies situations of taking control over a child for exploitation purposes by a person who is not a parent or legal guardian, in pursuit of obtaining material resources or satisfying other needs and interests at the expense of the

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needs, interests and personality of the child. Various forms of exploitation, abuse, neglect and endangerment of children's well-being partially overlap with the field of child trafficking. Trafficking includes situations in which a child is separated from his/her immediate environment by various means or circumstances, most often for labor exploitation, disposal of the child as property, abuse'of power or a state of vulnerability with or without the use of means of control and coercion (Žegarac, Baucal, Gvozden, 2005:16).

Pursuant to the United Nations Convention on the Rights of the Child (1989)[2], a child is any person under the age of 18 (Article 1 CRC);[3] thus, any such person may be a victim of human (child) trafficking. After the adoption of the UN Convention against Transnational Organized Crime (UNTOC) and its Protocols (2000)[4], UN General Assembly supplemented the UNTOC by adopting the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol)[5], which offers the most comprehensive definition of trafficking in persons.[6] According to this Protocol, a child is any person under the age of 18 (Article 3 d), and "trafficking in persons" entails recruiting, transporting, transferring, hiding or receiving a child for exploitation, even if it does not include any of the forms of exploitation outlined in the definition of human trafficking in Article 3 a) of the Protocol.[7]

2. MEDIA AND MEDIA "FRAMING" OF CHILD TRAFFICKING

The media represent a set of instruments that act as intermediaries in communication and information exchange. In Serbian law, the concept of media was defined as "a means of public information that transmits editorially shaped information, ideas and opinions and other content intended for public distribution and an unspecified number of users in words, images, or sound" (Article 29 § 1 of the Public Information and Media Act; hereinafter: PIM Act).[8] It refers to daily and periodical newspapers, news agencies, radio and television programs and electronic editions of those media, and independent electronic editions (internet pages or internet portals) registered in the Media Registry (Article 29 § 2 PIM Act).

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[2] The UN Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly resolution 44/25 on 20 November 1989; https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

[3] The Act on Ratification of the UN Convention on the Rights of the Child, *Official Gazette of the SFRY* - International Treaties, no. 15/90, and the *Official Gazette of the SFR*Y- International Agreements, no. 4/96 and 2/97.

[4] The UN Convention against Transnational Organized Crime and its Protocols were adopted by the UN General Assembly resolution 55/25 on 15 Nov. 2000; https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html In the SFRY, they were recognized by the Act on Ratification of the UN Convention against Transnational Organized Crime and Additional Protocols, *Official Gazette of the SFRY* - International Treaties, no. 6/2001.

[5] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women or Children, supplementing the UN Convention against Transnational Organized Crime, Palermo, 12-15. December 2000.

[6] While criticizing the existing definitions, some authors dealing with human trafficking do not provide a comprehensive definition. They believe that the deficiency of the existing definitions lies precisely in the possibility of ambiguous interpretation of the term "exploitation", and they emphasize the connection with prostitution and ask what makes a position vulnerable (Brunovski, *et a*l, 2008: 59).

[7] Article 3 a) states that "trafficking in persons" (human beings) means recruiting, transporting, transferring, harboring and receiving persons, through the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or one's vulnerable position, or t giving or receiving money or benefits to obtain the consent of a person who has control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of other persons or other forms of sexual exploitation, forced labor or service, slavery or a relationship similar to slavery, servitude or organ removal (Article 3a) of the Protocol).

[8] Public Information and Media Act (hereinafter: PIM Act), *Official Gazette of the RS*, no. 83/2014, 58/2015 and 12/2016 - authentic interpretation.

The presentation of some social phenomenon to the general public is done by "cognitive framing", which represents cognitive structures used for interpreting how a person perceives his/her environment and the phenomena that occur in it; thus, “frames” are an instrument which allows us to give meaning to different facts. In the media context, “framing” refers to: a) how politicians and decision-makers in the country communicate their decisions to attract media attention; b) how journalists create messages based on organizational guidelines and professional values, and c) how the audience (general public) interprets, questions and thinks about those media messages (Sanford, Martínez, Weitzer, 2016, in: Đukić, 2021:46-47). When it comes to victims of human trafficking, media frames created the concept of the *ideal victim* (Austin, Farrell, O’Brien, 2016), as an individual or a category of individuals who, when threatened, quickly acquire a full and legitimate victim status (Christie, 1986); this group includes individuals who are perceived as vulnerable, helpless, innocent and deserving sympathy, and thus attract greater media attention, generate collective sadness and can influence changes in social and criminal practice (Greer, 2017, in: Đukić, 2021: 48-49).

3. Significance of Analysis of Media Reporting on Child Trafficking

The analysis of media reporting is a useful tool for all experts dealing with various social phenomena. This kind of analysis provides a "sketch" of the observed phenomenon, on the basis of which it is possible to understand the importance that society attaches to that topic and how a certain topic is presented to the public. On the other hand, such analysis may be a good starting point for cooperation between the media and organizations dealing with a specific problem. Due to the complexity of the phenomenon of child trafficking, the presentation in the media is diverse and there is a great possibility of a diverse approach in the analysis of these contents.

This paper will present a quantitative and qualitative analysis of media reports (published in the most widely read printed and electronic media in the Republic of Serbia)[9] according to media genres, a quantitative analysis according to the reported topics and the reasons for reporting, and a comparative quantitative analysis of media reports, with reference to official statistical data on the following parameters: the method of exploitation, the victims’ gender, and internal and foreign trafficking (the Center for Protection of Human Trafficking Victims)[10]

3.1. Analysis of media reporting on child trafficking according to the media genre

Although some local authors (Tomić, 2012)[11] make a distinction between certain genres, classifying media texts into informative (factographic) texts, interpretive texts, and analytical (research) texts, a generally accepted typology still does not exist (Mršević, 2019:63). Yet, this classification may be applied in the analysis of media reporting on child trafficking.

[9] Gemius Audience (2023). Country: Serbia, Overview (website for traffic tacking system), available at https://rating.gemius.com/rs/overview (accessed on 28.2.2023)

[10] Center for the Protection of Human Trafficking Victims (2024). Statictički podaci (Statistical Reports, 2014-2024); available at https://centarzztlj.rs/statisticki-podaci/

[11] For more on this issue, see: Tomić B. (2012.) Uvod u medije (Introduction to Media), Čigoja, Beograd.

Interpretive texts are most common when reporting on child trafficking. They are usually written after the perpetrators are located and arrested, which sometimes occurs after several decades, especially when it comes to cases of trafficking newborns for adoption. What characterizes all interpretive texts is the use of colloquial vocabulary and sensationalist headlines to attract the general public attention as much as possible (e.g. "mother from hell", "face of evil", "horrific crime", "shocking confession", "bizarre", "horror", "scandal", "choose the child", "baby farms", etc.). It is particularly devastating that child trafficking is often described as an event rather than a crime, with a focus on sensationalist content (information related to the perpetrators' arrests) rather than preventive or educational information. The focus is on a "good story" and a sensation that will be talked about, and not on raising awareness about the real scale of this global problem, possible solutions, prevention and legal action. It is also worth noting that experts' comments on child trafficking, which have a great importance and potential in the media space, are rarely or almost never included in this type of journalistic texts. Information about where child trafficking victims can seek help, as the most important information and a condition *sine qua non* in the fight against child trafficking, can hardly be found in this type of texts.

Short *informative texts* are increasingly common in both printed and electronic media. These texts usually comprise sensationalist headlines and a very short description of the event, possibly including a brief statement of one of the actors as the focal point in the text. This type of texts are most often present when the domestic media reports on child trafficking that takes place abroad, most likely because in such cases there is a lack of relevant information; thus, reporters try to cover the scarce information with sensational headlines and subtitles to attract the readers' attention and create a sensation from a short story. The information provided in such texts is without additional data, either about child trafficking or the participants involved. Yet, the preventive role of such texts is significant because they provide a short and clear message to the public that the police have quickly and effectively arrested the perpetrators or that the competent public prosecutor's offices prosecute such crimes by initiating criminal proceedings.

Analytical (research) texts are characterized above all by expertise, correctness and ethical presentation of the global problem of child trafficking. In terms of content, such texts are aimed at raising awareness about the issue, educating the general public (like a lesson on child trafficking), warning about the prevalence of this phenomenon, and providing a true picture about the serious problem in society. These reports are not characterized by media shortcomings such as sensationalism, superficiality, misunderstanding of the phenomenon of child trafficking, violation of the presumption of innocence, implicit or explicit disclosure of the victim's identity, and violation of journalistic ethics, which is often the case with interpretive and informative texts. The good intentions of editors and journalists are combined with the engagement of expert, competent and professionally respected interlocutors, the use of research data and verified sources, all of which contribute to a higher quality of these texts and encourage critical thinking, socially responsible conduct, further education and preventive action. As a rule, such texts are always signed; editors' encourage visible authorship because they are convinced of the quality and importance of such texts (Mršević, 2019:75).

The differences between informative and interpretive texts (on the one hand) and analytical texts (on the other hand) will be best illustrated in the following subheadings, which include examples of these types of texts. In the research sample of 100 analyzed media texts about child trafficking published in Serbian printed and electronic media in the

last decade, only 25 texts are analytical texts, while the remaining 75 texts are informative and interpretive texts (Chart 1).

3.1.1. A representative example of interpretive media texts

The text titled ***"****They wanted to adopt a boy from an orphanage in Ukraine, now they are at the center of an investigation into child trafficking: The couple's hell* (Telegraf, 2022) ***[12]*** is a story about a married couple from the USA who wanted to adopt a child from a Ukrainian orphanage. The story reflects a "race" to be the first to report on "breaking and sensational news" from the war zone. The sensational impression is reinforced by the word "hell" in the title; in addition to the story about the married couple, the text also refers to the impact of war on inter-country adoptions, and the potential danger of increased exploitation and trafficking of children. From the legal perspective, the positive aspects of this text are the indication that war may be a factor that can contribute to the increase of this form of crime, particularly considering the fact that Ukraine is not a signatory to the Hague Convention on the Protection of Children and Cooperation in the field of International Adoption (1993),[13] and the legal consequences that may arise thereof. Images of children hiding in the basements and children with cardboard guns add a touch of sensation to this text. Yet, neither this text nor any subsequent texts offered the epilogue of this story, nor did they report on the investigation that was launched in this case.

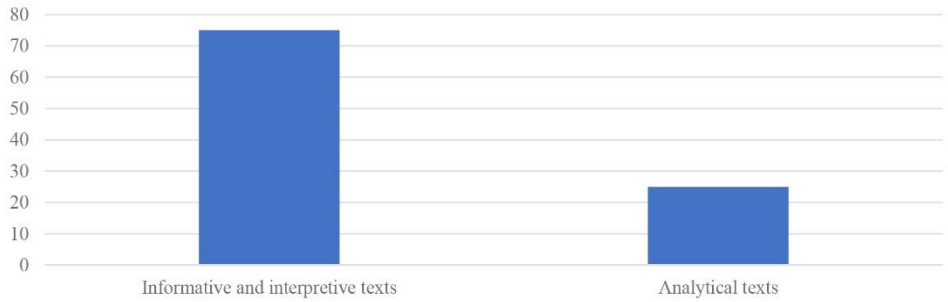

Chart 1. Informative and Interpretive texts, and Analytical texts
Source: Prepared by author (based on research results)

3.1.2. A representative example of informative media texts

The text titled "*MONSTEROUS ATTEMPT TO TRAFFICK CHILDREN! Approached a mother in a store and asked her to sell a baby* (video) (Alo, 2022)[14] is a story about a dramatic event in a supermarket and attempted child trafficking in the US state of Texas. The dramatic headline written in capital letters, including the word "monstrous" and an

[12] Telegraf (2022). Hteli da usvoje dečaka iz sirotišta u Ukrajini, sad su u centru istrage o trgovini decom: Pakao bračnog para, Telegraf (daily newspaper), 26.4.2022; available at https://www.telegraf.rs/vesti/svet/3489570-pokusali-da-usvoje-decaka-iz-sirotis-u-ukrajini-sad-su-u-centru-istrage-o-trgovini-decom-pakao- married couple
[13] Act on Ratification of the Convention on Child Protection and Cooperation in the Field of International Adoption, *Official Gazette of the RS* - International Treaties, No. 12 of October 31, 2013.
[14] Alo (2022). MONSTRUOZAN POKUŠAJ TRGOVINE DECOM! Prišla majci u prodavnici i tražila da joj proda bebu (VIDEO), 29.1.2022: https://www.alo.rs/svet/planeta/591837/monstruozno-trgovina-bebama-otmica-hapsenje/vest

indication about a video recording of the event, was followed by a brief note about haggling and price gouging after the mother refused to sell her child. Then, the journalist describes that a woman (aged 49) approached a young mother in the supermarket, offered her $250,000 for her son and, when the mother refused, "raised" the price to $500,000 explaining that that she liked the boy's blond hair and blue eyes. In this text, the identity of the suspected offender is completely revealed, by stating her full name and surname, which constitutes a violation of the presumption of innocence. The dramatic impression is reinforced by the short statements of the mother about the events in the supermarket and the short statement of the policewoman about the incident during the suspect's arrest. The text reports that the woman was charged with attempted child trafficking, and predicts that she could be sentenced to 10 years of imprisonment.

3.1.3. A representative example of analytical media reports

The text titled *"There are laws but they are not observed"* (Vreme, 2021)[15], including a clear designation of the author's name and surname, begins with statistical data on victims of human trafficking, a warning that more than half of the victims are children, and that more than 85% of cases involve sexual exploitation. The interlocutors and expert consultants in this text are representatives of the two civil sector organizations[16] which jointly provide assistance to victims of human trafficking in Serbia. The author refers to legal provisions to explain the difference between the criminal offence of human trafficking for sexual exploitation (sex trafficking of mainly women and girls) and the offence of soliciting and facilitating prostitution which is envisaged as a misdemeanour.[17] The interlocutors also point to the need to recognize victims of human trafficking as a special user group for supported housing. The author uses subtitles to emphasize specific issues. Thus, the part subtitled "Cybertrafficking" points to the increasingly common form of human trafficking, facilitated by the influx of new technologies and social networks and accelerated by the Covid-19 pandemic. This issue is further illustrated by the results of a survey (conducted by the NGOs "Atina") which indicate that a third of human trafficking victims are children who experience threats, sexual abuse, recruitment or actual exploitation in the digital space. The interlocutors also point to the need for prevention, especially when it comes to children who are most exposed to threats in the digital world, and the need for more intensive work with schools, the training of teachers and all employees to recognize the risks of soliciting and facilitating prostitution. In the part subtitled "Child marriage and trafficking in girls", the author provides definitions of child marriage, early marriage and forced marriage, and clarifies the specifics by referring to the Serbian Family Act.[18] The qualities of this text are indisputable: in addition to the absence of sensationalism, the analytical text based on serious research includes comments by experts, normative support, critical views, the applicable law to address the problem, recommendations for prevention and possible solutions.

[15] Vreme (2021). *Zakoni postoje, ali se ne poštuju* (Trgovina ljudima- Devojčice i žene), 8. decembar 2021, Zora Drčelić, available at https://www.vreme.com/vreme/zakoni-postoje-ali-se-ne-postuju/

[16] the NGO "ASTRA"- Action against human trafficking , and the NGO "ATINA" - Citizens' association for combating against human trafficking and all forms of violence against women.

[17] Article 16 of the Public Order and Peace Act, *Official Gazette of the RS*, no. 6/2016 and 24/2018.

[18] Article 23 § 2 of the Family Act, *Official Gazette of the RS*, no. 18/2005, 72/2011 - other law and 6/2015.

3.2. Analysis of media reporting on child trafficking according to reported cases and topics

When observing the reasons for publication of media texts, two groups of texts can be differentiated: 1) texts reporting on child trafficking as a specific event, regardless of whether it refers to a discovered child trafficking case, the traffickers' arrest, the initiated judicial proceeding or activities undertaken by domestic or international organizations aimed at resolving this global social problem; and 2) texts reporting on child trafficking as a phenomenon, which explain the concept, legal forms, aspects, participants and their roles in child trafficking, forms of prevention, etc. (Chart 2). The second group consists exclusively of analytical media texts, while the first group includes both interpretive and informative as well as analytical media texts.

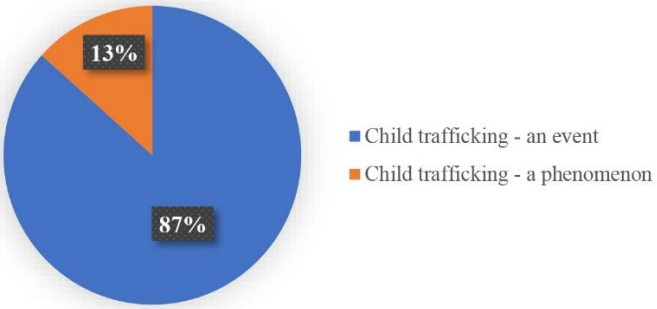

Chart 2 Reporting on child trafficking as an event and as a phenomenon
Source: Prepared by author (based on research results)

Looking at the data presented in Chart 2, it may be concluded that the media coverage in Serbia is dominated by texts reporting on child trafficking as an event. Little is written about the problem itself (13%), while the general public attention is largely focused on specific events and personalities (87%). Such data show that the average reader can rarely find information about what child trafficking is, how to recognize it, how to protect their loved ones from this problem, which institutions, people and organizations deal with this problem and provide assistance, and how an individual can contribute to combating this problem. Apart from the fact that reporting on child trafficking as a phenomenon is a real rarity, it may be concluded that writing about this problem, which is current at all times, is approached only when the event actually occurs.

3.3. Analysis of media reporting according to countries covered by media reports

Looking at the country-specific reports on child trafficking in the indicated period (Chart 3), it may be concluded that the largest number of reports refer to the Republic of Serbia (37%), followed by reports on countries from the region (22%) (Montenegro, Bosnia and Herzegovina, Macedonia, Romania...), while reports related to America are in the third place (12%). In total, more than half of the media reports refer to another country (63%), which creates a prejudice among the general public that the child trafficking victims are mostly foreigners and that child trafficking does not happen "here and now, but somewhere far away, to some other people we do not know". As a matter of fact, in the

largest number of cases, it does happen Serbian citizens, "right now and here" , while the number of foreign citizens identified as victims in Serbia does not exceed 5% of the total number of identified persons (NGO Atina, n.d).[19]

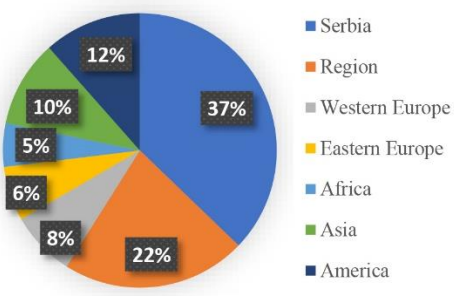

Chart 3 Child trafficking and countries covered by media reports
Source: Prepared by author (based on research results)

The US State Department Report on Trafficking in Persons (2022)[20]points out that Serbia has regressed and that the Serbian authorities have not shown stronger efforts in the fight against human trafficking when compared to the previous report, particularly taking into account the difficulties caused by the Covid-19 pandemic; thus, Serbia remained in tier 2 (in the subcategory designated "Watch list")[21], which entails the need to monitor the situation. Considering such a situation in Serbia, as well as the fact that 37% of media reports on human trafficking refer to Serbia while more than a half refer to some other country (63%), it may be concluded that the focus of media reporting on child trafficking in Serbia is shifting to the bad situation in other countries in order to "justify or cover up and ignore" the bad situation regarding child trafficking in Serbia. It is certainly not a good trend because the general public should be aware of the real situation in Serbia and familiar with the problems because raising awareness can lead to suppression, prevention and potential solutions of this global problem.

3.4. Reporting on child trafficking according to the method of child exploitation

In Serbia, the official statistical data on the form of child trafficking according to the method of exploitation (Chart 4)[22] show that the largest number of children are sexually exploited (43%); multiple exploitation (which most frequently includes sexual exploitation

[19] NGO Atina (n.d) Deset predrasuda o trgovini ljudima, (Ten prejudices about human trafficking), Udruzenje građana za borbu protiv trgovine ljudima; http://www.atina.org.rs/sr/deset-predrasuda-o-trgovini-ljudima
[20] The US State Department's report on human trafficking is one of the most comprehensive sources of information on the fight against human trafficking carried out by governments worldwide; the first document was published in 2001. *See:* US Department of State (2022). Trafficking In Persons Report June 2022;available at ttps://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf
[21] Countries are ranked into three categories: first, second and third tier, while the second tier has a subcategory (*Watch list)* which entails additional monitoring a country's situation in the fight against human trafficking.
[22] The forms of trafficking in children are: child trafficking for sexual exploitation, trafficking for child pornography and pedophilia, trafficking for the exploitation of child labor, trafficking for begging, child trafficking for criminal activities, trafficking in unborn or newly born children for adoption, child trafficking for marriage, child trafficking for participation in armed conflicts, and child trafficking for the sale of body organs.

and some other form of exploitation) is in the second place (18%), while child trafficking for forced marriage is in the third place (14%).

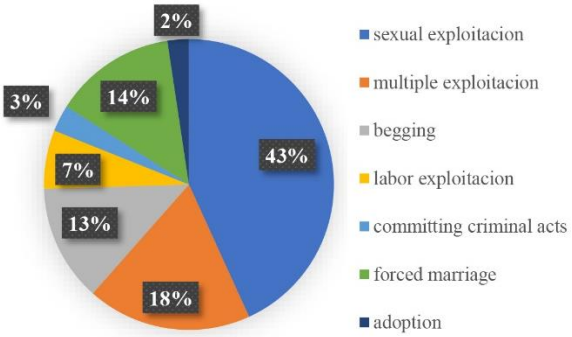

Chart 4 Statistical data on forms of child exploitation during child trafficking
Source: Prepared by author (based on statistical data obtained from the CPHTV website).

On the other hand, the analysis of the observed research sample of media reports on child trafficking in Serbia shows that the largest number of reports refer to the child trafficking for illegal adoption (35%), followed by sexual exploitation (34%) in the second place, and trafficking for forced marriage (10%) in the third place.

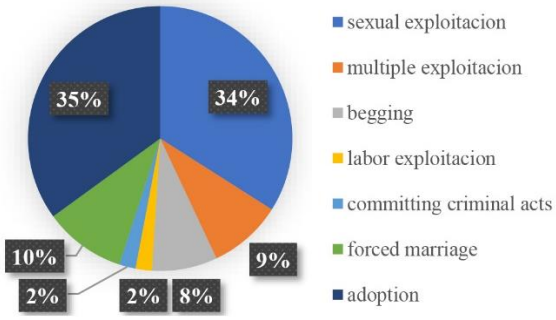

Chart 5 Research data on media reporting on forms of child exploitation during child trafficking
Source: Prepared by author (based on research results)

By comparing Chart 4 and Chart 5, it may be concluded that the media pay most attention to child trafficking for adoption, probably due to the popularity of such stories which often feature very sensational headlines, even though the official statistical data on the number of identified cases is significantly lower than in some other forms of child trafficking. The dark figure of this form of child exploitation is quite high and the media should raise awareness about this form of trafficking; thus, a more extensive media coverage of this issue may have a positive effect. On the other hand, if we observe the media reports on illegal adoption, it may be concluded that the largest number of reports were not written in view of combating, suppressing or preventing this form of child trafficking but for the purpose of "selling" the newspaper or increasing media circulation.

When comparing these two charts, we may observe that child labor exploitation (2%) and multiple exploitation (9%) are unfairly neglected in media reporting. Therefore, it can be concluded that media selectively report on child trafficking, by choosing those forms of child trafficking that will be popular among readers and become a sensation; on the other hand, they do not provide more detailed (analytical) information on the real situation in terms of certain forms of child trafficking, while some forms are grossly ignored.

3.5. Media reports on internal child trafficking and child trafficking abroad

Chart 6 shows statistical data on internal child trafficking[23] and child trafficking abroad.[24] and it can be concluded that internal child trafficking is to the greatest extent represented (83%), while foreign trafficking is represented to a significantly lesser extent (only 17%).

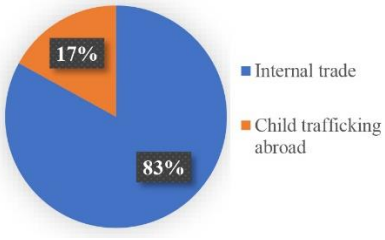

Chart 6 Statistical data on internal child trafficking and child trafficking abroad

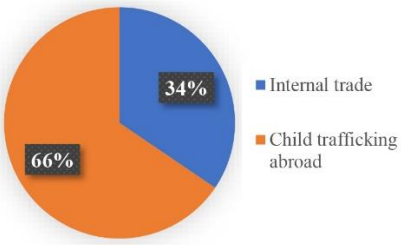

Chart 7 Research data on media reporting on internal child trafficking and child trafficking abroad

Source: Prepared by author (based on statistical data from the CPHTV website and research results).

Chart 7 presents research data on the representation of media reports on internal child trafficking and international child trafficking. The research results show a different trend than the one observed in the statistical data. Namely, child trafficking in foreign countries was covered in 66% of researched media reports, while internal child trafficking was covered in 34% of reports. It certainly does not correspond to the real picture of this phenomenon. When it comes to this parameter of the observed phenomenon, the question arises as to why the official statistical data and the research data on media reporting are inversely proportionate. A possible reply is that adding a foreign element to media reporting generates a greater sensation and interest of the general public. This trend of media coverage is certainly not positive because it misleads the general public, reinforces the misconception that child exploitation rarely happens, and conceals this dark figure of child trafficking in Serbia. Such a trend of media coverage reduces the attention of the general public in terms of recognizing different forms of child exploitation and child trafficking in their environment. Ultimately, it negatively affects the media potential to encourage individuals to recognize such occurrences and report them, and thus contribute to the combating, preventing, reducing and suppressing this global problem.

[23] Internal child trafficking entails situations when domestic citizens are exploited in Serbia.
[24] Child trafficking abroad entails cases where domestic citizens are recruited in Serbia but exploited abroad.

3.6. Media reporting on trafficking according to gender: trafficking in girls and in boys

Chart 8 shows data on the gender of identified victims in the observed period. The statistical data show that girls were victims in the largest number of cases (83%), boys were victims in 15% of cases, while only 2% of cases referred to infant trafficking for adoption.

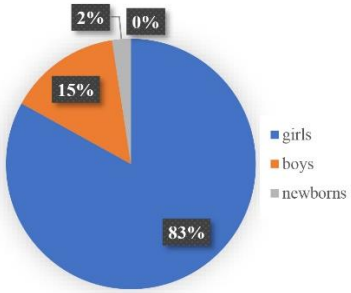

Chart 8 Statistical data on the gender of the identified victim

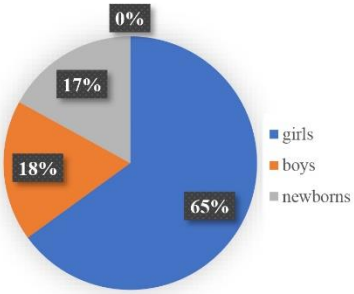

Chart 9 Research data on media coverage by gender of the victim

Source: Prepared by author (based on statistical data from the CPHTV website and research results).

Chart 9 shows research data on media coverage according to the victim's gender. The obtained data are somewhat different. The research data on media reports are consistent with the official statistical data when it comes to boys as identified victims (18%), while a small deviation is noticeable when it comes to girls as identified victims (65%) and a large deviation when it comes to baby victims (17%). This large discrepancy may imply several things. First, such texts attract more attention of the general public and, thus, they are disproportionately represented in the number of identified cases. Second, if the facts from the published media reports are true, there is a huge dark figure when it comes to the child trafficking (in newborns) for adoption. Finally, it is a consequence of the imbalance between statistics and data from media reports.

4. CONCLUSION

Child trafficking is a global problem that may occur in any country. In the 21st century, the media are increasingly strengthening and spreading their influence in "framing" the contemporary discourse by reporting on important issues and problems to the general public. However, their enormous influence also implies a great responsibility. In the Republic of Serbia, the main feature of media reporting on child trafficking is the lack of sufficient professional reporting. A successful model for obtaining a correct and professional text on child trafficking would be an interview with experts in this field. The choice of relevant interlocutors is a prerequisite for a high-quality, responsible and ethical media reporting. The abundance of such high-quality informative and educational media reports will increasingly contribute to shaping demanding readers who are less likely to opt for tabloids and sensationalist versions of events.

On the basis of comparative analysis of the official statistical data on child trafficking in the observed period and the research sample of media reports in the same period, it may

be concluded that the media do not convey a realistic picture about this phenomenon to the general public. Thus, they create numerous prejudices and misconceptions, which are harmful for public awareness. Considering that media frequently report on cases of child trafficking in foreign countries, they create one of the basic misconceptions that the child trafficking victims are not Serbian citizens. They also create a wrong picture about the most common forms of child trafficking because they choose to report on more "attractive" and sensationalist cases; thus, there is a common bias that sexual exploitation is the only or the most common form of child trafficking, while child labor exploitation is either neglected or unduly presented. Apart from these characteristics, there is a visible and widely present trend of reporting on child trafficking as an event, only after it occurs, while reporting on child trafficking as a phenomenon is neglected. Thus, the media fail to use their power and influence in view of preventing, reducing, suppressing and combating different forms of child trafficking.

The fight against child trafficking will be effective only if the general public understands this phenomenon properly. If this phenomenon is not understood and treated in the right way, our ability to react to crime decreases, particularly when it is conditioned by misconceptions and prejudices. Therefore, the media need to report responsibly on this topic and help individuals better understand and recognize this problem. Instead of creating myths and misconceptions through superficial reports and sensationalism, the media have to encourage the general public to become part of the fight against child trafficking. If the media take responsibility and use their communication power and impact for the purposes of ethical and responsible media reporting on child trafficking, the media may be a strong instrument in the fight against this global problem which would urge the society as a whole to join the fight.

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TRGOVINA DECOM U MEDIJSKOM IZVEŠTAVANJU U SRBIJI

Ovaj rad se bavi korelacijom između trgovine decom i medijskog diskursa o trgovini decom. Trgovina decom je jedan od najrasprostranjenijih oblika organizovanog kriminaliteta, gde se u ulozi potencijalne žrtve nalaze deca kao kvalifikovano osetljiva kategorija lica. Mediji su instrument komunikacije ali i izveštavanja i stvaranja slike o pojavama i fenomenima kod široke javnosti. Autorka rada analizira 100 medijskih izveštaja objavljenih u najčitanijim pisanim i elektronskim medijima u Republici Srbiji, radi davanja odgovora na pitanja da li mediji u Srbiji odgovorno i etički izveštavaju o jednom vrlo važnom pitanju, kao i da li svoju moć i uticaj koriste na način da utiču na suzbijanje, prevenciju, podizanje svesti kod široke javnosti, odnosno da li su aktivno oruđe u borbi protiv trgovine decom. Analiza obuhvata kvantitativnu i kvalitativnu analizu medijskih tekstova prema medijskim žanrovima, kvantitativnu analizu prema povodima i temama o kojima se izveštava, zemljama na koje se medijski izveštaji odnose i komparativnu kvantitativnu analizu medijskih izveštaja sa zvaničnim statističkim podacima o načinu eksploatacije, internoj i trgovini u inostranstvu i polu žrtve.

Ključne reči: *organizovani kriminalitet, trgovina ljudima, trgovina decom, eksploatacija, mediji, medijsko izveštavanje.*

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Book Review

THE HANDBOOK ON FEMALE CRIMINALITY IN THE FORMER YUGOSLAV COUNTRIES *

Editors: Angelina Stanojoska, Darko Dimovski and Elena Maksimova
Springer, 2023 (296 pages)

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Apart from the common legal tradition, the countries of the former SFRY also share the challenges they face when studying certain forms of criminality. The criminality of women is rarely analyzed in the criminological and criminal law literature. One of the possible reasons is that, in criminological studies, women are most often analyzed as victims of crime, and very rarely as perpetrators of criminal acts. The editors of the *Handbook on Female Criminality in the Former Yugoslav Countries*, Angelina Stanojoska, Darko Dimovski and Elena Maksimova, tried to eliminate this shortcoming. An important qualitative property of this book is the comparative approach to the study of female criminality in the countries of the former SFRY. Consistently applied in the presented articles, this approach is highly relevant for observing female criminality in specific contexts, taking into account all the historical, legal and social specificities of each individual state created after the disintegration of the former SFRY. In ten unique criminological studies, the authors analyze the criminality of women in Serbia, Montenegro, North Macedonia, Croatia, Bosnia and Herzegovina, and Slovenia, but the comparative approach ensures that the Handbook represents a unique whole rather than a collection of individual studies. The authors of research studies presented in this monograph are university professors with many years of scientific experience in the study of crime in general, and women's crime in particular.

The first chapter, authored by Miomira Kostić, is titled M*apping Women's Role in the History of Wars in the Former Yugoslavia, as Depicted in the Daily Newspaper "Politika"*. The author examines women's role and experiences in times of war in the former Yugoslavia in different 20th century historical periods, with specific reference to the First World War, the Second World War and civil wars in the former SFRY, when the social position of

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* Stanojoska, A., Dimovski, D. and Maksimova, E. (eds.) (2023) The Handbook on Female Criminality in the Former Yugoslav Countries, Springer.

women was seriously aggravated because they were exposed to violent physical, psychological, economic and sexual violence. The author also provides examples of women who actively took part in the war, either as combatants for freedom and medical staff in World War I and World War II or as anti-war activists (in civil wars in the former SFRY). The study is based on numerous texts published in the daily newspaper "*Politika"*, which enable the reader to observe the social position of women over time in different social circumstances. Considering that the first chapter of a monograph commonly indicates a contextual and substantive framework of thematic research, this comprehensive study has established the important historical and criminological frame for presenting the research results in the subsequent chapters.

The second chapter, authored by Darko Dimovski, is titled *Women's Crime in the Republic of Serbia: Research on judicial practice in the City of Niš.* This paper is based on an empirical research on the phenomenological and etiological characteristics of female criminality. The research covered court records on all criminal offences committed by women in the period from 2016 to 2020 in the territory under the jurisdiction of the Basic Court and the High Court in the City of Niš. In order to create a relevant research sample for the analysis of the phenomenological and etiological characteristics of women's criminality in Nis in the observed period, the research included the following case selection criteria: 1) a final court decision was rendered on the criminal offense committed by a woman; and 2) the final decision was issued in the period from 1 January 2016 to 31 December 2020. The research results show that women commit the most serious crimes (murder and serious bodily injury) as a response to years of violence suffered by their partners or other family members. The paper also presents conclusions and recommendations for the prevention and suppression of other forms of crime against women. The author particularly emphasizes the importance of preventive programs that would lead to reducing the scope of women's criminality. On the whole, this chapter presents the results of a significant criminological study on the criminality of women in the territory of the City of Niš.

The third chapter, authored by Ana Marija Getoš and Reana Bezić, is titled *Gender and Crime in Croatia: Female Criminality in Context*. The authors analyze gender-based crime in the Republic of Croatia in the context of female criminality. A special quality of this study is the detailed presentation of criminal legislation in the Republic of Croatia, as well as the analysis of the phenomenological characteristics and the available statistics on the most common types of crime committed by adult female offenders and juvenile female offenders (in the categories of homicide, misdemeanours, and white-collar crimes). The authors also discuss the contexts where women commonly have the role of victims (domestic violence, sex exploitation, etc.), and provide an overview of the criminal justice system response to female criminality. In the end, the authors conclude that, in spite of the gradually decreasing difference in the rate of crime committed by men and women in Croatia, women's crime is still viewed as a lesser social danger. Considering the observed trend of greater participation of women in white-collar crimes, the authors note that it is a very important area for further criminological research.

The fourth chapter, authored by Angelina Stanojoska, is titled *The Feminist Pathways Perspective: The Pathways to Crime of Female Murderers in the Republic of North Macedonia.* Murders are the most serious crimes and, as such, have always attracted public attention. The author analyzes the criminogenesis of murders committed by women in North Macedonia, pointing out that criminality of women should be examined by using the feminist approach. This approach is significant because it looks at criminogenesis from the point of view of numerous factors that contribute to the position of women as victims of criminal acts. In

the Republic of Macedonia, these criminogenic factors are patriarchal environment, economic dependence on abusers, and exposure to various forms of violence within the family. The paper also presents the confessions of women who were convicted of the crime of murder after being subjected to domestic violence for years. Thus, in addition to valuable theoretical considerations, the paper has an empirical significance as it contributes to understanding female criminality in the Macedonian context .

The fifth chapter, authored by Elena Maksimova and Olga Koševaliska, is titled *Battered Woman Syndrome in Female Perpetrators in the Republic of North Macedonia*. In the context of domestic violence, the authors analyze the psychological effects and traumatic experiences sustained by women victims of violence during years-long recurrent abuse, which may trigger the drive for self-defence and eventually lead to the commission of a criminal act of homicide. In addition to the statistical data on female crime committed as a result of the Batterred Woman Syndrome (BWS) in the Republic of North Macedonia, the paper includes several case studies and confessions of women who bravely talked about their experience of violence and all factors of importance for criminogenesis in each specific case. The authors also examine the concept of femicide in the Macedonian context, emphasizing the importance of further qualitative research into complex criminological phenomena of domestic violence, female criminality and femicide.

In chapter six, the authors Aleksandra Jovanović, Velimir Rakočević and Lidija Rakočević examine the issue of *Female Criminality in Montenegro*. After providing a brief overview of the position of women in the Montenegrin society in the historical development of the state of Montenegro, the authors emphasize that female criminality and different forms of punishment were largely conditioned by the patriarchal character of the society itself. Focusing on the current criminal legislation and constitutional provisions, the authors elaborate on the phenomenology and etiology of female criminality, as well as the legal framework foe combating female criminality. The most common crimes committed by women in Montenegro are crimes against property, traffic offences and abuse of official positions. The most common sanctions imposed on female juvenile offenders are warnings and guidance measures, educational measures of increased supervision, and exceptionally institutional measures (referral to an educational institution and correctional facility). The authors conclude that Montenegro lacks a systemic approach to women's crime and better coordination of state authorities in the fight against crime.

In chapter seven, the authors Miodrag Simović and Mile Šikman explore the issue of *Women's Crime in Bosnia and Herzegovina: Scope, Structure, and Psychosocial Status.* The authors explore the share and scope of female criminality in the structure of adult and juvenile crime, as well as the etiological factors of women's criminal conduct. In terms of the scope and structure of female criminality in Bosnia and Herzegovina, the authors report that property crime prevails among adults, while criminal offences against life and limb prevail among juveniles. The authors conclude that commission of criminal acts by women is a consequence of exposure to various forms of victimization and consider that the presented findings can be of great importance when creating different crime policy measures.

In chapter eight, Olivera Ševo Grebenar presents the results of research on the issue of *Female Crime During the Armed Conflict in Bosnia and Herzegovina* in the period 1992-1995. Based on the conducted research, it was determined that during the tragic armed conflict in B&H in this period, the largest number of women were convicted of committing war crimes against the civilian population, while the crimes against international law (crimes against prisoners of war, crimes against humanity, and command responsibility)

perpetrated by women were much less frequent when compared to those perpetrated by men. In the author's opinion, it is a consequence of the prejudice against women's active participation in military operations and the low representation of women in military and political positions during the given period.

The ninth chapter, authored by Miha Šepec and Barbara Balazić, is titled *Female Offenders: Analysis of Female Criminality in the Republic of Slovenia.* The authors analyze the criminality of women in Slovenia in the historical, sociological and feminist context. Statistical data show that women commit relatively few serious crimes, usually in response to long-term victimization and violence, which is perceived as a major criminogenic factor. Slovenian case law shows that women are moss frequently tied for misdemeanours and white-collar crimes. The authors point out that female offenders have long been excluded from major criminological studies, and that it is necessary to pay special attention to the study of women's criminality which gradually approaches male criminality in terms of its characteristics.

The tenth chapter, authored by Irma Deljkić, Marina Malish Sazdovska and Danijela Spasić, is titled *Gender Balance in the Criminal Justice System: Bosnia and Herzegovina, North Macedonia, and Serbia.* Bearing in mind that these three states share a common legal tradition and the problem of factual inequality between men and women, the authors explore gender equality in the distribution of police and judicial functions in these three states created after the disintegration of the SFRY. The results of the conducted research on the criminal justice system show similar patterns of female representation in the police and the judiciary. Women are underrepresented in the police, but they outnumber men in the judiciary. However, women are more represented in the positions of lower court judges, while men are more represented in higher, appellate and supreme courts, and in positions of court presidents. In the prosecutor's offices, the largest number of women is recorded in the rank of deputy prosecutors. The lowest representation of women is recorded in internal affairs bodies, particularly in special units, which is a problem for further consideration. The presented data show that inequality between men and women is still present in the police and the judiciary despite the normative equality of the sexes, and despite the fact that female law students outnumber male students in legal education.

On the whole, it can be concluded that the *Handbook on Female Criminality in the Former Yugoslavia Countries*, edited by Angelina Stanojoska, Darko Dimovski and Elena Maksimova, exceeds the scope of the criminological study on female criminality in many ways. This monograph is an analytical-synthetic work of exceptional importance for criminological thought and science because it opens new perspectives in the research on women's role as criminal offenders, victims of crime, combatants and activist in times of crisis, and legal professionals.

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Report

WINTER ELSA LAW SCHOOL "WELS NIŠ" 2024

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Abstract. *In this report, we present the results achieved in the Winter ELSA Law School (WELS) Niš, organized in the period from 18 - 25 February 2024 by ELSA Niš. The WELS project aims to allow students from various European countries to acquire new knowledge from different spheres of legal life, make new friendships, and connect with other young lawyers across Europe. The local group ELSA Niš organized this event for the first time in February 2024. In addition to the rich academic program on the topic of "Business Law and IT Law" prepared for the WELS Niš participants, the local group ELSA Niš managed to present the City of Niš and the Serbian culture to our friends from all over Europe. During the five-day event, held on the premises of the Science and Technology Park Niš and the Faculty of Law, University of Niš, our lecturers covered a range of topics which included: the legal framework of information technologies in the European Union, the legal regulation of blockchain technology, strategies for the defense of a joint-stock company against a hostile takeover, the phenomenon of mass tort claims, and many more up-to-date topics in the sphere of Business Law and IT Law. The lecturers who generously participated in the WELS Niš are prominent experts in their fields, including well-known lawyers, businessmen, and professors from the Faculty of Law, University of Niš.*

Key words: *ELSA Niš, WELS Niš 2024, commercial law, IT law, intellectual property, data protection, blockchain, digital currency, entrepreneurship*.

1. INTRODUCTION TO THE ELSA ORGANISATION AND THE WELS PROJECT

The European Law Students' Organization (ELSA) is a non-profit, non-governmental organization that connects law students and provides them with opportunities to network, learn, and grow in an uplifting and multicultural environment. Through various ELSA projects, its members can gain practical knowledge not only on law and similar topics but

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also on project management, marketing, etc., and thus expand their horizons beyond the books they read in the course of academic law study. In addition, it enables students not only to meet each other but also to meet prominent legal experts. While the impact on its members is immeasurable, the ELSA also has a considerable impact on other students who are not its members. It aims to build the practical and theoretical knowledge of all law students, and it fulfills this aim by organizing international law schools, lectures, webinars, and much more.

The Winter ELSA Law School (WELS) is a project delivered in many European countries by various local ELSA groups. It is a week filled with lectures on specific subjects, cultural exchange, and networking of law students from all over Europe. It aims to promote multiculturalism and provide young people from different countries with expert knowledge in a field of law they are interested in but which is not extensively covered in their studies.

The local group ELSA Niš had the opportunity to organize this project for the first time in the period from 18th to 25th February 2024, and we hope that it will become an annual event. We were delighted to host a diverse group of 19 participants from 15 different countries: Austria, Azerbaijan, Belgium, Bulgaria, France, Finland, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Switzerland and Spain. The participants differed not only in terms of their cultural background but also in terms of age and personality, which contributed to the ultimate value of this project for all participants. The project was realized in partnership with the Science and Technology Park Niš, the Serbian-Korean Information Access Center, and the Faculty of Law, University of Niš. At the opening ceremony, after the ELSA Niš representatives presented the project, the Vice-Dean of Studies at the Faculty of Law, University of Niš, Prof. Dejan Vučetić (LL.D.), introduced the participants to the Law Faculty Niš and the programs it offers, with particular reference to the Master degree program "Law and IT," as a new Master degree program which has been offered since 2021.

In this report, the authors will briefly present the content of lectures given at the WELS Niš 2024 and the academic value the participants received from the WELS Niš project.

2. LECTURE 1: THE MARKET AND COMPTETITION

Nebojša Miljanović is the founder and the CEO of RPS *Audit & Consulting* company Belgrade, and the CEO/CFO at RIČ company Prokuplje. Mr. Miljanović is also a licensed, authorized auditor at the Serbian Chamber of Authorized Auditors, and a financial/business advisor with over 22 years of experience. He has extensive knowledge of audit, finance, business advisory and operational management, with confirmed market success and positive customer feedback scores. He has significant experience with international clients and investment funds operating in Serbia. The Serbian Commercial Courts hire Mr. Miljanović as an independent consultant for control and overview of the reorganization plan under the Serbian bankruptcy law.

At the beginning of the lecture, the lecturer introduced the WELS Niš participants to the business environment in Serbia. As most participants were from Western European countries, they were fascinated by the transition from a planned economy to a capitalist economy. The participants also had an opportunity to learn more about entrepreneurship in Serbia, and to examine the problems of entrepreneurs developing their businesses in Serbia. Mr. Miljanović also discussed certain specificities in our transition process compared to

other Eastern European countries. After explaining the transition process, the lecture focused on changing the business atmosphere, the new challenges faced by entrepreneurs, and the legal consequences of actions taken by the entrepreneurs.

3. Lecture 2: Legal Framework of Information Technologies in the European Union and the Phenomenon of Mass Tort Claims

Nebojša Stanković (LL.D.) is an attorney-at-law, with a Doctoral degree in International Law, on the topic "The Impact of Normative Regulation of Foreign Direct Investment in the sustainable development of Serbia." Among many professional accomplishments, he is the president of the Supervisory Board of the Bar Association of Serbia, judge of the Court of Honor of the Serbian Chamber of Commerce, ambassador of Serbia at the Global Blockchain Business Council (GBBC), member of the National Alliance for Economic Development (NALED), and an expert on the World Justice Project registered experts list (2014-2024). The World Bank has ranked his law firm in the Serbian experts list.

Mr. Stanković divided his lecture at the WELS Niš into two topics, and thus covered both principal topics: Business Law and IT Law. The first part of the lecture focused on the issue of mass (collective) tort lawsuits in our legal system, which was of great interest to the participants because many of them had not encountered this phenomenon in their legal systems. In the second part of the lecture, Mr. Stanković discussed the legal framework of information technologies in the European Union. The detailed explanations were supported by several examples on the functioning of this system, which enabled the participants to gain both theoretical and practical knowledge on this topic.

4. Lecture 3: Blockchain Legal Regime

Predrag Cvetković (LL.D.) is Full Professor of International Trade Law, Insurance Law, Foreign Trade and Foreign Investment Law, and Transportation Law at the Faculty of Law, University of Niš. His scientific interests include International Commercial Law, Foreign Investments Law, Public-Private Partnership regulation, regulation of international trade (CEFTA, WTO), and settlement of trade and investment disputes. Among many professional accomplishments, he is listed as an arbitrator of the Foreign Trade Arbitration Court at the Serbian Chamber of Commerce and Industry, an arbitrator of the Permanent Court of the Serbian Chamber of Commerce, and a member of the team representing Serbia in investment disputes. In recent years, Prof. Cvetković has focused his professional and academic activity on the relationships, intersections, and synergy between AI and Law. He teaches the course “Legal Framework for Distributed Ledger Technology and Blockchain”, offered at the Master Study Program "Law and IT" at the Faculty of Law, University of Niš.

The regulation of Blockchain systems in law is one of the latest problems faced by lawyers worldwide. The system is still unknown to most of us, even though its regulation has become a priority nowadays. Prof. Cvetković's lecture on “Blockchain Legal Regime” helped us become better acquainted with this technology, its regulation and significant changes in the sphere of law. The participants were delighted to learn more about this topic and all the critical issues which are crucial for regulating this technology today.

5. LECTURE 4: GDPR IN FOCUS: AN OVERVIEW OF THEORY AND PRACTICE

Aleksandra Jovanović is a Data Protection Supervisor at *Better Collective*, an international digital sports media company based in Denmark. After graduating from the Faculty of Law, University of Niš, obtaining an LL.M. degree in civil law in 2020, and completing her legal internship at a law firm, she pursued her international career by acting as a Data Protection Assistant (2020). Considering her longstanding interest in emerging technologies, this field appeared as the ideal intersection of law and IT. In an effort to expand her expertise in this field, she acquired the International Association of Privacy Professionals certification in 2023, and became a Certified Information Privacy Professional for Europe. Her professional development plans involve continued growth in Privacy program management, specifically focusing on digital advertising technologies.

Ms. Jovanović's lecture covered the basics of Data Protection, a vital topic among young lawyers and law students. The lecturer introduced the participants to the main principles and provision of the General Data Protection Regulation (GDPR) and explained how the GDPR compliance works in practice. The participants also had an opportunity to participate in an engaging and interactive case study. Working in groups, they could immediately apply the knowledge acquired in the lecture to real-life situations, which are quite common in many companies nowadays.

6. LECTURE 5: DEFENSE STRATEGY OF A JOINT-STOCK COMPANY AGAINST A HOSTILE TAKEOVER

This lecture was given by Savo Vešković, Teaching Associate at the Chair of Trade Law at the Faculty of Law, University of Niš. The participants had an opportunity to gain new knowledge about defense tactics used by joint-stock companies against hostile takeovers. Mr. Vešković covered the following topics in detail: terminological differences between the basic terms in the process of a hostile takeover of a joint-stock company; the relationship between defense measures and the motives for taking control over the target company; the reasons for taking over the joint stock company; the most relevant classifications of defense measures; exact defense measures employed by the management of the target company. In this lecture, the participants gained new knowledge and tested their prior knowledge of Commercial Law.

7. LECTURE 6: PRESENTATION OF THE JURISTSOFT COMPANY

The IT Company *JuristSoft* is a company which offers software solutions for automating business operations and HR processes. Its major product, "JuristBiro", is a program designed to help companies manage their employees and draft legal documents in accordance with the provisions of the Serbian Labour Act. The company is a member of the Science and Technology Park Niš. The *JuristSoft* legal team, including Aleksandar Janaćijević, Milica Nikolov and Anđela Anđelković, presented the company's products and work ethic. They also illustrated how their software automates processes related to labor law and human resources (HR). In addition to providing practical examples on the functioning of legal rules within the business and IT law, the lecturers offered high-quality theoretical knowledge about the application of

labor law in Serbia. This lecture sparked the participants' interest in how legal and IT experts can cooperate to make a successful product. In addition, it demonstrated that law students should not see themselves only as lawyers and judges, and raised their awareness about the prospects of acting as legal practitioners in the IT sector.

8. Lecture 7: The Central Bank Digital Currency in the Contemporary Monetary Law

Marko Dimitrijević (LL.D.) is Associate Professor at the Faculty of Law, University of Niš, and the Academic Coordinator of the Jean Monnet Module for European Monetary Law (2020-2023). He teaches European and International Monetary Law, Economic Policy for Lawyers, and the EU Law of the Economic System. He is an observer-member at the European Law Institute (ELI), University of Vienna (since 2017), and an international research fellow at the Information Society Law Center (ISLC) at "Cesare Beccaria" Department of Law, University of Milan (for 2022/2023). During his academic career, Prof. Dimitrijević developed scientific research in the field of monetary law at numerous prominent European scientific institutions.

Prof. Dimitrijević's lecture at the WELS Niš was essential as it set the foundation for understanding digital currencies within the framework of the World Bank, a topic which is not commonly covered in law school classes. Prof. Dimitrijević presented his research and reflections on the functioning of digital currencies in the contemporary monetary law. This lecture covered many vital concepts that help students understand the system of this renowned monetary institution.

9. Lecture 8: Basics of Intelectual Property and Licensing Property and Licensing Agreements: Instruments to Unlocking IP Value

Jovana Joksimović is an Attorney-at-law, with an LL.B. in International Relations, obtained at the Faculty of Law, University of Belgrade. She worked as a legal intern in a defense team before the ICTY Hague, a pro bono legal intern and a legal trainee. The areas of her specialization include Intellectual Property, Labor Law, Data Protection and GDPR. After taking a Data Protection Officer (DPO) course, Ms. Joksimović has been working as an IP Officer within the project "Technopark Serbia – boosting exports through technoparks". She is the author of many articles on IP rights and has been an IP lecturer, mentor and consultant on numerous projects.

In her lecture at the WELS Niš, Ms Joksimović provided an essential introduction to Intellectual Property, which was particularly valuable to those participants who have not had the opportunity to study Intellectual Property Law. The theoretical background was supported with relevant case law and practical examples from the industry. At the end of the lecture, the participants had an opportunity to apply the knowledge gained during the lecture by engaging in an IPM and Licensing simulation case.

10. LECTURE 9: INTRODUCTION TO THE SCIENCE AND TECHNOLOGY PARK NIŠ AND WORKSHOP ON PITCHING SKILLS

As a symbolic ending of the WELS Niš lecture week, the participants were addressed by Miloš Grozdanović, Assistant Director for Business Development of the Science and Technology Park in Niš. Given that more than half of the lectures were held at the Science and Technology Park Niš (STP Niš), this presentation was an opportunity to learn more about the history and significance of this institution for the business and IT scene in the City of Niš. After introducing the STP Niš, Mr. Grozdanović held a workshop on pitching in business contexts. Relying on this prior experience, he shared his expertise in the pitching skill in order to teach students how to pitch their ideas to the investors. The interactive workshop enabled the participants to work in groups and demonstrate their creativity while improving their public speaking and pitching skills.

11. CONCLUSION

The Winter ELSA Law School (WELS) Niš, organized by ELSA Niš in February 2024, was very insightful and beneficial both for the participants and the organizers. The participants gained essential knowledge and understanding of different fields of law relevant in the business and IT sector, presented by leading experts in those fields. The organizers and the participants had a unique opportunity to meet people from other cultures, which enhanced their cultural awareness and acceptance of other cultures and human diversity. They also had a chance to socialize, make friendships and enjoy the diverse cultural activities of the City of Niš. This project has contributed to placing the City of Niš on the European map and promoting the Faculty of Law in Niš and its academic study programs.

ZIMSKA ŠKOLA PRAVA "WELS NIŠ" 2024

U ovom izveštaju govorićemo o rezultatima postignutim u okviru WELS Niš projekta. WELS Niš je zimska škola prava u organizaciji Evropskog udruženja studenata prava (ELSA) koja ima za cilj da omogući studentima iz različitih evropskih zemalja da steknu nova znanja iz različitih oblasti prava, sklope nova prijateljstva i povežu se sa drugim mladim pravnicima širom Evrope. Lokalna grupa ELSA Niš je u februaru 2024. godine po prvi put organizovala ovaj događaj. Pored bogatog akademskog programa iz oblasti trgovinskog prava i prava informacionih tehnologija koji smo pripremili za naše učesnike, uspeli smo da na najbolji način predstavimo našu kulturu i lepotu našeg grad našim novim prijateljima. Tokom petodvevnih predavanja, koja su održana u prostorijama Naučno-tehnološkog parka Niš i Pravnog fakulteta Univerziteta u Nišu, naši predavači su obradili niz aktuelnih tema: pravni okvir informacionih *tehnologija u Evropskoj uniji, zakonska regulativa blokčejn tehnologije, strategija odbrane akcionarskog društva od neprijateljskog preuzimanja, fenomen masovnih odštetnih zahteva, itd. Predavači koji su velikodušno učestvovali u WELS Niš projektu su istaknuti stručnjaci u svojim oblastima, istaknuti pravnici, privrednici i profesori Pravnog fakulteta Univerziteta u Nišu.*

Ključne reči: *ELSA Niš, Zimska škola prava WELS Niš 2024, trgovinsko pravo, pravo informacionih tehnologija, intelektualna svojina, zaštita podataka, digitalne valute, blokčejn, preduzetništvo.*

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