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KÉSZÜLT A MAGYAR KORMÁNY TÁMOGATÁSÁVAL
MINISZTERELNÖKSÉG NEMZETPOLITIKAI ÁLLAMTITKÁRSÁG
BETHLEN GÁBOR Alap

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Tactica retorică a lui Cicero în procesul lui Lucius Licinius Murena

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REZUMAT
În noiembrie 63 î.Hr. Cicero și-a susținut discursul în apărarea comandantului de oști, Lucius Licinius Murena, care a candidat în anul următor pentru funcția de consul, Murena fiind acuzat de competitorii săi și de susținătorii acestora de mită electorală, deci de *ambitus*. Condamnarea lui Murena, nu doar că ar fi frânt cariera politică a strategului, dar ar fi împins republica într-un pericol major, căci în urma unei astfel de decizii conducerea statului ar fi fost preluată la începutul anului 62 în loc de doi consuli de doar unul singur, care nu putea să facă față amenințării conspirației demascate, alimentate de Catilina. Cicero era, deci chemat să apere – dincolo de onoarea unui membru al elitei politice romane –însăși stabilitatea statului roman, precum articulează în mod cert în *oratio*. Această situație excepțională l-ar fi determinat pe orator să accepte apărarea lui Murena, în pofida faptului că acuzația fusese formulată de Marcus Porcius Cato, om de stat cu o autoritate morală deosebită, care a respectat consecvent principiile eticii stoice pe tot parcursul activității sale, și de Servius Sulpicius Rufus, cel mai însemnat specialist în drept al epocii, prieten bun cu Cicero. În discursul de apărare oratorul nu se concentrează în primul rând pe contrapunerea meritelor personale ale competitorilor Licinius Murena și Sulpicius Rufus, ci va compara cariera celor doi, activitatea lor de strategi și savanți în științele juridice – respectiv intercalând și evaluarea propriei sale vocații fundamentale – și cea de orator, așezându-le pe cântarul slujirii statului și al binelui public. Cicero oferă o evaluare spirituală, presărată de umor. Sfârșitul procesului e bine cunoscut: tribunalul l-a achitat pe Murena, care și-a putut începe astfel activitatea de consul în anul următor, preluând funcția de la Cicero, apărătorul său. În cele ce urmează vom cerceta mai întâi fundalul istoric al discursului *Pro Murena*, detaliind mai amănunțit evenimentele politice din preajma rostirii discursului, căci acest *oratio* apare chiar în timpul demascării conspirației inițiate de Catilina, astfel că nu poate fi extras din contextul relațiilor politice turbulente din acele luni. Urmează ca – în decursul analizei fundalului juridic al procesului – să trecem în revistă modalitatea alegerii consulilor în ultimul veac al republicii, respectiv expunerea mitelor electorale legate organic de acest proces, precum și eforturile legislative nu neapărat eficiente, care vizau sancționarea comiterii de *ambitus*. În final vom trece la prezentarea tacticii oratorice adoptate în *Pro Murena*, la *contentio dignitatis*, și anume la acea strategie tipică aplicată în procesele care implicau cazurile de *ambitus*, și prin care Cicero a comparat evoluția carierei și personalității candidaților rivali: prin această abordare oratorul dorea nu atât demonstrarea nevinovăției clientului său în legătură cu acuzația de mită electorală, ci a aptitudinilor lui Murena pentru demnitatea funcției de consul, demonstrând în același timp incapacitatea adversarului său, Sulpicius Rufus, pentru ocuparea acestei funcții.
CUVINTE CHEIE
Cicero, Pro Murena, retorică clasică, drept penal roman, contentio dignitatis.

Cicero's Rhetorical Tactics in the Trial of Lucius Licinius Murena

ABSTRACT
In November 63 BC, Cicero delivered his speech in defence of the army commander Lucius Licinius Murena, who was running for the office of *consul* the following year. Murena was accused by his competitors and their supporters of electoral bribery, or *ambitus*. Murena's conviction would not only have ended his political career but would have put the republic in grave danger because following such a decision the leadership of the state would have been taken over at the beginning of 62 BC by a single *consul* instead of two, who would have been unable to cope with the threat of the conspiracy exposed, fuelled by Catiline. Cicero was therefore called upon to defend—beyond the honour of a member of the Roman political elite—the very stability of the Roman state, as he himself clearly articulates in his *oratio*. This exceptional situation would have prompted the orator to accept Murena's defence, despite the fact that the accusation had been made by Marcus Porcius Cato, a statesman of exceptional moral authority who had consistently adhered to the principles of Stoic ethics throughout his career, and by Servius Sulpicius Rufus, the most eminent legal expert of the time and a good friend of Cicero. In his defence speech, the orator does not focus primarily on contrasting the personal merits of his competitors Licinius Murena and Sulpicius Rufus but rather compares their careers, their work as strategists and scholars in the legal sciences—interweaving his own fundamental vocation—and as orators, placing them on the scales of service to the state and the public good. Cicero offers a spiritual assessment, sprinkled with humour. The end of the trial is well known: the court acquitted Murena, who was thus able to begin his term as *consul* the following year, taking over the position from Cicero, his defender. In what follows, we will first examine the historical background of the speech *Pro Murena*, providing more detail on the political events surrounding the delivery of the speech, as this *oratio* appears during the unmasking of the conspiracy initiated by Catiline, so it cannot be extracted from the context of the turbulent political relations of those months. Next, in the course of analysing the legal background of the trial, we will review the method of electing *consuls* in the last century of the republic, namely the presentation of electoral bribes organically linked to this process, and the not necessarily effective legislative efforts aimed at punishing the commission of *ambitus*. Finally, we will move on to presenting the rhetorical tactics adopted in *Pro Murena*, the *contentio dignitatis*, namely the typical strategy applied in trials involving cases of *ambitus*, through which Cicero compared the career development and personalities of rival candidates: through this approach, the orator sought not so much to prove his client's innocence in relation to the accusation of electoral bribery but rather to demonstrate Murena's, the winner of the election, aptitude for the dignity of *consul*, and at the same time his opponent's, Sulpicius Rufus's, inability to hold this office.
KEYWORDS
Cicero, Pro Murena, classical rhetoric, Roman criminal law, contentio dignitatis.

I. FUNDALUL ISTORIC AL DISCURSULUI PRO MURENA

În anul 63 î.Hr. Lucius Licinius Murena și Decimus Iunius Silanus au fost aleși *consuli* pentru anul 62; în afară de aceștia, însă, și-au exprimat dorința de a accede la această funcție Lucius Sergius Catilina și Servius Sulpicius Rufus, cel mai eminent savant de drept al epocii. Înainte de alegeri M. Porcius Cato a jurat în public că va acuza de *ambitus*,

deci de mită electorală, pe oricine va câștiga în afară de Silanus, cumnatul său,[1] iar amenințarea – concretizată ulterior – se îndrepta primordial împotriva lui Catilina, uneltitorul conspirației, dar îl viza și pe Murena, cel ales împreună cu Silanus. Sulpicius, cel învins, a început să strângă dovezi încă în timpul campaniei, înainte de alegeri, dovezi referitoare la faptele ilegale ale rivalilor săi.[2] În Roma se întâmpla frecvent ca un *magistratus* ales să fie acuzat de *ambitus*; în anul 66 P. Cornelius Sulla și P. Antonius Paetus, ambii ocupând funcția de *consul designatus* au fost condamnați, iar în 54 toți cei patru candidați au fost supuși procedurii declanșate de *ambitus*.[3] Condamnarea unui *consul designatus* a atentat într-o bună măsură la stabilitatea *res publicii*.[4] Dar faptul că acuzația formulată de Sulpicius și Cato a depășit cu mult periclitarea *res publicii*, o justifică evenimentele anului 63. Rostirea discursului *Pro Murena* poate fi datată în noiembrie 63, deci într-una din cele mai adânci perioade de criză ale republicii. Anul 63 – an în care consuli sunt Marcus Tullius Cicero și Caius Antonius Hybrida (fiul oratorului din discursul *De oratore* al lui Cicero și unchiul lui Marcus Antonius, celui care urma să devină *triumvir*) – este marcat de cea de-a doua conspirație organizată de Catilina.[5] Principalele evenimente ale acestei conspirații le descriem succint în cele ce urmează.[6]

Cicero va rosti în acest moment, în 8 noiembrie prima *Catilinaria*, în care a demascat uneltirile lui Catilina,[7] și l-a somat pe acesta să părăsească Roma.[8] Catilina și-a dat seama că a rămas total izolat, a părăsit în grabă senatul, iar noaptea a plecat din oraș. Aparent și-a asumat exilul, dar de fapt i s-a alăturat lui Manlius. În ziua următoare, în data de 9 noiembrie, Cicero a comunicat poporului cele întâmplate în cel de-al doilea discurs rostit împotriva lui Catilina. Spre mijlocul lui noiembrie, în Roma s-a aflat că Catilina a preluat conducerea armatei lui Manlius, împreună cu însemnele *imperiului*, gest pentru care a fost declarat *hostis populi Romani*. Catilina și-a lăsat însă numeroși complici în Roma, despre a căror prezență și sarcini Cicero era informat datorită Fulviei, dar în lipsa dovezilor nu putea să acționeze. Aflând de această mișcare, Cicero a propus să se colecteze dovezi scrise despre complotiști, ceea ce s-a și întâmplat.[9] Cicero a ajuns în posesia acestei dovezi în urma unui[10] atac petrecut la Pons Mulvius.

În ședința senatului din templul Concordia, conducătorii complotului rămași la Roma au fost constrânși să mărturisească sub presiunea documentelor; poporul întrunit la Forum a fost informat despre aceste fapte de către Cicero încă în seara zilei respective (3

1 Plutarchus: *Cato minor* 21, 3.
2 Cicero: *Pro L. Murena* 43–46.
3 Joachim Adamietz (1989): *M. T. Cicero, Pro Murena*, Wissenschaftliche Buchgesellschaft, Darmstadt p. 9; Joachim Adamietz: Ciceros Verfahren in den Ambitus-Prozessen gegen Murena und Plancius, *Gymnasium*, 1986, pp. 102–117.
4 Cicero: *Pro L. Murena* 79, 82.
5 Christian Meier (1968): Ciceros Consulat, în Gerhard Radke (ed.): *Cicero, ein Mensch seiner Zeit*, de Gruyter, Berlin, pp. 61–116.
6 Hans Drexler (1976): *Die Catilinarische Verschwörung*, Wissenschaftliche Buchgesellschaft, Darmstadt, p. 124.
7 Cicero: *In Catilinam* 1, 1.
8 Cicero: *In Catilinam* 1, 10.
9 Cicero: *In Catilinam* 3, 6.
10 Sallustius: *De coniuratione Catilinae* 45, 1.

decembrie), acesta e momentul când el va rosti cea de-a treia *Catilinaria*. Cea de-a patra *Catilinaria* a fost rostită în data de 5 decembrie în templul Concordia, unde trebuia să se hotărască asupra sorții complotiștilor arestați. Iunius Silanus a propus cea mai aspră pedeapsă, cea capitală, propunere la care au aderat cei mai mulți, dar Caesar a votat pentru detenția pe viață, opțiune care a avut și ea câțiva adepți. Cicero intervine în acest moment și, însumând în cea de-a patra *Catilinaria* părerile de până atunci, i-a întrebat pe senatori dacă acceptă propunerea lui Silanus sau pe cea înaintată de Caesar, iar balanța părea că va înclina în favoarea lui Caesar. În această clipă însă a luat cuvântul Marcus Porcius Cato, care a cerut pedeapsa cu moartea pentru trădătorii de țară, cerere votată de senat, iar verdictul a fost îndeplinit în seara zilei la Tullianum. Cicero a fost aclamat de popor și de senat ca salvator al Romei.[11] Q. Lutatius Catulus l-a salutat ca *pater patriae,* distincție de care Cicero a fost mândru până la sfârșitul vieții. Catilina a fost înfrânt împreună cu oastea sa în anul 62 la Pistoria, bătălie în care va pieri și comandantul armatei.[12]

Pe baza acestor informații putem încerca plasarea cronologică a discursului *Pro Murena*.[13] Complicii lui Catilina încă nu sunt arestați, și Cato încă nu și-a început activitatea de tribun, fapt la care face trimitere și Cicero.[14] Totodată data de 8 noiembrie poate fi menționată ca *terminus post quem*, adică momentul în care Catilina părăsește Roma, deoarece vorbește de acest fapt ca de un eveniment deja consumat.[15] În același timp, Cicero își exprimă dorința ca Antonius să-l înfrunte cu trupe armate pe Catilina; ordinul în acest sens a fost emis cu câteva zile după plecarea lui Catilina.[16] Luând în considerare aceste aspecte, discursul a fost rostit în ultimele zile ale lui noiembrie 63.[17]

În decursul procesului întâlnim patru acuzatori (Servius Sulpicius Rufus, M. Porcius Cato, Sulpicius Rufus cel tânăr, și un anumit C. Postumius, despre care nu avem prea multe informații) și trei apărători (Q. Hortensius Hortalus, M. Licinius Crassus și Cicero), procedura finalizându-se cu achitarea lui Murena.[18]

II. PROCEDURA ALEGERII CONSULILOR ȘI RECURGEREA LA AMBITUS – ROLUL ASOCIAȚIILOR

În perioada republicii romane existau patru tipuri de adunări populare *(comitia curiata, comitia centuriata, comitia tributa, concilium plebis)*, dar în ultimul secol al republicii doar două au avut o importanță efectivă: *comitia centuriata*, menită să aleagă *magistratus maiores*, deci și pe *consuli*, respectiv *comitia tributa*, întrunită pentru alegerea celor care deveneau *magistratus minores*. Potrivit tradiției, regele Servius Tullius a fost cel care a instituit adunarea *centuriilor,* dar activitatea acestui for poate fi documentată doar

11 Marion Giebel (1977): *Marcus Tullius Cicero*, Rowohlt, Reinbek bei Hamburg, p. 45; Imre Trencsényi-Waldapfel (1959): *Cicero*, Gondolat, Budapest, p. 40.
12 Sallustius: *De coniuratione Catilinae* 57, 5.
13 Drexler (1976): p. 154.
14 Cicero: *Pro L. Murena* 81.
15 Cicero: *Pro L. Murena* 6, 78.
16 Sallustius: *De coniuratione Catilinae* 36, 3.
17 Adamietz (1989): p. 3.
18 Cicero: *De domo sua* 134.

începând cu mijlocul secolului al V-lea. Inițial, această *comitia* funcționa pe baza unei împărțiri pe companii militare *(centuriae),* ulterior însă caracterul militar s-a estompat. Cetățenii formau – pe baza evaluării avuției lor de către *censori* – 193 de *centurii,* împărțite în unități de călăreți și de pedestrași, întruniți în așa-numitele *classisuri.* La început ele arau defalcate astfel: cavalerii, care se aflau deasupra unităților de *classis,* formau 18 *centurii*, averea lor trebuia să depășească potrivit *censusului* suma de o sută de mii de *as.* Populația înregimentată în *classis*uri forma cinci categorii: cei care dispuneau de o avere mai mare de o sută de mii de *as* se întruneau în 80 de *centurii*, cei cu o avuție de peste șaptezeci și cinci de mii formau 20 de *centurii*, la fel ca și cei cu peste cincizeci de mii *as,* cât și cei care dețineau averi de peste douăzeci și cinci de mii, iar cei cu o avere de peste unsprezece mii de *as* formau 30 de *centurii.* Sub *classis*uri se situau cele cinci *centurii* care nu aveau nicio avere: cei din tagma *fabri* și *cornices* aveau câte două *centurii,* respectiv cei aparținând categoriei *proletarii* formau o singură *centuria.* După anul 215, reprezentarea primei clase s-a redus de la optzeci la șaptezeci de *centurii*, împărțite în 35 de unități pentru *iuniores* (cuprinzând populația cu vârsta între optsprezece și patruzeci și șase de ani) și 35 de unități pentru *seniores* (cei cuprinși între patruzeci și șapte și șaizeci de ani). Înainte de alegeri s-a tras la sorți una din *iuniores centuria* care a devenit astfel *centuria praerogativa*, așadar ea a votat prima, prevestind astfel rezultatul final al votului.[19] (Evident, *centuriile* cele mai înstărite nu cuprindeau o sută de persoane, în timp ce acelea care nu aveau nici o avuție, puteau număra chiar mai multe mii de cetățeni).

Votul se desfășura la nivel de *centuria*, mai întâi alegeau cei mai înstăriți, apoi cei cu o situație materială mai modestă, iar la final – în principiu – cei fără avuții, adică majoritatea populației. Votul cetățenilor era egal, dar acesta era însumat pe *centurii,* astfel că în fond fiecare unitate reprezenta un vot *pro* sau *contra* în funcție de majoritatea exprimată prin vot deschis. Trebuie menționat că numărarea voturilor s-a efectuat paralel cu procesul votării, și nu la final – deci printr-un artificiu logic aparent straniu, dar care deservea eficient interesele politice –, votarea se desfășura până în momentul în care *centuriile* care au votat au depășit procentajul de cincizeci la sută. Pentru o victorie electorală era, deci, de ajuns ca mai mult de jumătate din cele 193 de *centurii* să voteze „corespunzător": cele optsprezece voturi ale cavalerilor și optzeci de voturi ale primei clase însumau mai mult decât jumătate din totalitatea *centuriilor.* (Ulterior, când ponderea primei clase a scăzut întrucâtva, era de ajuns ca la cavaleri și la voturile primei clase să se adauge și 20 de *centurii* din cea de-a doua clasă de cetățeni avuți.) Primele 98 de *centurii* reprezentau doar un fragment al cetățenilor, deci alegerile nu reprezentau nici pe departe decizia majorității cetățenilor.[20] La alegeri nu participau nici pe departe toți cetățenii, din moment ce locația votului, câmpul Mars avea o capacitate de șaptezeci de mii, iar numărul total al cetățenilor depășea deja în secolul al II-lea de mai multe ori această cifră. Păturile mai sărace din provincie nu prea veneau la Roma pentru a vota, deoarece data alegerii *consulilor* cădea în a doua jumătate a lunii iulie, perioada secerișului orzului și a culesului fasolei, astfel că alegerile erau decise,

19 György Németh, Tamás Nótári (2006): *Hogyan nyerjük meg a választásokat? (How to Win Elections?)*, Lectum, Szeged.

20 Tamás Nótári (2013): *Római jog*, Lectum, Szeged, p. 54.

pe lângă procedura specifică de vot și datorită acestei suprapuneri, de către voturile celor mai avuți.[21]

Cel care dirija alegerile, deschidea votul printr-un discurs *(contio)*, iar după prezentarea numelor candidaților și o rugăciune adresată zeilor își ocupa locul pe *sella curulis,* așezat lângă un pod de lemn (*pons suffragi*). Alegătorii care se perindau organizați pe *centurii,* primeau tăbliță cerate pe care notau inițialele candidatului preferat și le aruncau în urna *(cista)* așezată la celălalt capăt al podului de lemn. După ce câte o unitate și-a exercitat votul, aceste opțiuni erau însumate într-o încăpere amenajată pentru numărarea voturilor și se nota numele candidaților, însemnând cu puncte deciziile luate de *centurii.* În momentul în care doi candidați obțineau 50% plus un vot din voturile exprimate de *centurii*, votarea se considera validată și se încheia procesul de votare. Instituția restricției propagandei electorale în ziua votului era necunoscută în Roma republicană, astfel că agenții încercau să facă campanie propriilor candidați chiar și la intrarea pe pod. Dacă se contura un rezultat, care nu convenea clasei conducătoare, se încerca influențarea – câteodată destul de energică – a rezultatului final al votului în timpul exprimării, astfel încât podul de votare putea să se năruie „întâmplător", ori *augurii* puteau semnala premoniții sinistre[22] – în ambele cazuri aceste situații puteau invalida, respectiv amâna alegerile, ceea ce asigura un răgaz necesar pentru influențarea atmosferei în sensul dorit.

Mita electorală, respectiv recurgerea la *ambitus* era un pandant „de regulă" al alegerilor. Începând din prima jumătate a celui de-al doilea secol, avem cunoștință de existența a două legi care sancționau cazurile de *ambitus*, acestea sunt *lex Cornelia Baebia* din anul 181,[23] și o lege din 159,[24] dar, din păcate, nu cunoaștem conținutul acestora. În perioada dintre domniile lui C. Gracchus și Sulla, sistemul *quaestiones perpetuae* era deja foarte răspândit, din acești ani ne parvine informația privind primul proces care s-a declanșat efectiv pentru a judeca acuzația de *ambitus*: în anul 116 Marcus Aemilius Scaurus va câștiga o funcție de *consul* pentru anul 115 din postura de *homo novus*, iar concurentul său perdant, P. Rutilius Rufus îl acuză de *ambitus.* Ca răspuns și Saurus va proceda la fel, în final cei doi acuzați și acuzatori în aceeași măsură au fost achitați.[25] Existența *lex Cornelia de ambitu*, inițiată de Sulla este oarecum discutabilă,[26] cunoștințele noastre despre *leges Corneliae* nu sunt nici pe departe complete, deoarece legat de acestea dispunem de două izvoare principale: pe de o parte discursurile lui Cicero, pe de altă parte scrierile juriștilor principatului târziu, pe care le cunoaștem preponderent doar datorită aspectelor reținute în *Digesta*. Cicero se referă la aceste legi doar în măsura în care interesele sale din respectivul discurs, deci situația retorică o necesită, nu se străduiește nicidecum să ofere o prezentare exhaustivă, căci nici nu ține de sarcina sa. Juriștii principatului s-au preocupat doar de acele legi emise de Sulla care au rămas

21 Günter Laser (2001): *Quintus Tullius Cicero – Commentariolum petitionis.* Texte zur Forschung 75, Wissenschaftliche Buchgesellschaft, Darmstadt, p. 16.
22 Plutarchus: *Cato minor* 42.
23 Livius: *Ab urbe condita* 40, 19, 11.
24 Livius: *Ab urbe condita librorum periochae* 47.
25 Erich S. Gruen (1968): *Roman Politics and the Criminal Courts 149–78 BC*, Harvard University Press, Cambridge, pp. 120–122.
26 Wolfgang Kunkel (1974): Quaestio, în *Kleine Schriften*, Böhlau, Weimar, p. 61.

valabile după reformele augustiene. Existența *lex Cornelia de ambitu* pare a fi probabilă datorită următoarei referiri. Potrivit acesteia în vremurile anterioare cei condamnați au fost pedepsiți printr-o interdicție de zece ani de a candida la funcția de *magistratus*.[27] Menționata *lex Cornelia* nu putea fi aceeași cu *lex Cornelia Baebia* adoptată în anul 181, din moment ce între discursul rostit în apărarea lui Publius Cornelius Sulla și apariția *lex Cornelia* a trecut mai mult de un deceniu, și cum în această perioadă au apărut și alte legi care sancționau recurgerea la *ambitus*, nu se poate presupune că ar fi rămas neschimbat cuantumul pedepsei.[28]

În perioada de după Sulla, *quaestio de ambitu* era condus de obicei de un *praetor*, ca de exemplu în anul 66, când C. Aquilius Gallus a fost cel care a îndeplinit funcția de *praetor ambitus*.[29] Despre legile care i-au urmat ne informează discursul ciceronian *Pro Murena*. În urma revendicării lui C. Cornelius, aflat în funcția de *tribunus plebis* în anul 67, va lua naștere *lex Calpurnia*,[30] despre sancțiunile căreia știm următoarele: cuprindea excluderea din senat, interdicția pe viață a candidării pentru funcții publice (față de o restricție de zece ani stipulată în *lex Cornelia*) și o anumită amendă în bani.[31] Un *senatus consultum* din anul 63 sancționa în mod expres o parte a reglementărilor cuprinse în *lex Calpurnia*, cum ar fi recrutarea pe bani a unor adepți, distribuirea masivă a biletelor și a locurilor gratuite la jocurile cu gladiatori și ospățurile exagerate.[32] Este de presupus ca acest *senatus consultum* a interpretat și a concretizat legea menționată.[33] Evenimentele anului 64 – în primul rând mitele tot mai dese comise de Antonius și Catilina –au impus adoptarea unei legi noi. Aceasta a fost *lex Tullia de ambitu*,[34] adoptată în 63, și susținută de toți cei care au candidat pentru *consulatus*ul din anul 62: ea stipula ca o nouă pedeapsă și o perioadă de zece ani de exil, respectiv se impunea într-o manieră mai hotărâtă împotriva celor care împărțeau foloase bănești și sancționa absența în fața instanțelor – motivată prin pretinse cazuri de boală. În afară de aceste restricții legea a interzis organizarea de jocuri cu gladiatori în cei doi ani de dinaintea candidaturii, excepție făcând doar cazurile în care aceste jocuri erau obligatorii prin testament. Legea dorea să împiedice astfel distribuirea de sume direct către alegători, și a vrut să limiteze numărul suitei candidaților (umflarea numerică a cortegiilor echivala aproape cu un marș triumfal, prin care se sugera alegătorilor ideea victoriei sigure). Fapt este că – precum menționează Adamietz într-o remarcă spirituală – proporțiile efective ale unui *ambitus* erau determinate doar de limitele posibilităților financiare ale candidaților.[35]

27 Scholia Bobiensia: *ad Cicero pro Sulla* 5, 17.
28 Theodor Mommsen (1899): *Romisches Strafrecht*, Duncker & Humblot, Leipzig, p. 867.
29 Cicero: *Pro Cluentio* 147.
30 Cicero: *Pro L. Murena* 46; Dio Cassius 36, 38, 39.
31 Cicero: *Pro L. Murena* 47; Martin Jehne (1995): Die Beeinflußung von Entscheidungen durch „Bestechung": Zur Funktion des ambitus in der römischen Republik, în Martin Jehne (ed.): *Demokratie in Rom? Die Rolle des Volkes in der Politik der römischen Republik*, F. Steiner, Stuttgart, pp. 51–76, p. 66. f.
32 Cicero: *Pro L. Murena* 67; Laser (2001): pp. 14, 22.
33 Adamietz (1989): p. 25.
34 Cicero: *Pro L. Murena* 5.
35 Adamietz (1989): p. 27.

În legătură cu campania electorală nu putem omite *Commentariolum petitionis*, cel mai vechi document de strategie electorală care ni s-a păstrat – datând din anul 64 – în care Quintus Tullius Cicero, fratele mai mic al lui Marcus îl sfătuia pe acesta în legătură cu metodele câștigării alegerilor pentru a deveni *consul*, deci cum poate accede la funcția cea mai înaltă a republicii romane.

Este prea puțin probabil, ca după ce Marcus ar fi prelucrat-o, Quintus a publicat, ori ar fi putut publica această lucrare, în care schițează organizarea și derularea campaniei electorale, din moment ce dezvăluie cu o sinceritate necruțătoare detaliile luptei pentru obținerea voturilor. Günter Laser însumează esența scrierii lui Quintus astfel: pentru a obține funcția de *consul*, candidatul trebuie să apeleze la orice truc, promisiune falsă, minciună, simulare și la aproprierea-lingușirea grupului adecvat scopului.[36] Devoalarea unui astfel de oportunism și mod de manevrare deșănțat nu putea fi sub nici un chip în interesul păturii conducătoare perioadei republicii târzii, și l-ar fi plasat în special într-o situație extrem de neplăcută pe Marcus Tullius Cicero, căci nu putea să se sustragă suspiciunii potrivit căreia a câștigat funcția de *consulatus* – mai ales ca *homo novus* – doar pentru că a aplicat în practică toate aceste instrumente.[37]

Evident, și Marcus deținea cunoștințele referitoare la candidatura pentru funcție, dar însumarea experiențelor de către Quintus poate fi motivată de faptul că și el a candidat la funcții mai mici *(magistratus minores)*, completând astfel cu observații personale strategia fratelui său mai mare.[38] Pluralul folosit în enunțurile cu o tonalitate mai personală[39] denotă faptul că autorul scrisorii era într-o relație nemijlocită cu adresantul. Textul *Commentariolum*ului nu a fost publicat, evident, de Marcus nici în anul 64, nici ulterior, căci astfel își devoala propriile intenții politice și oportunismul, dar acuzațiile împotriva lui Antonius și Catilina, adunate în această însemnare, puteau fi folosite fără rețineri și într-o manieră confortabilă în discursul său ulterior intitulat *In toga candida*.[40] Quintus descrie cu toată deschiderea situația deloc prielnică a fratelui său în legătură cu candidatura acestuia la funcția de *consul*. Cicero e considerat de ordinul nobililor ca fiind *homo novus*,[41] care nu e susținut nici de o tabără suficientă de *cliens*, nici de un sprijin material potrivit, pe când adversarii Antonius și Catilina beneficiază din plin de toate acestea.[42] Deși expresia de *homo novus* nu a fost niciodată definită exact, era uzitată în două sensuri: într-o accepțiune restrânsă îi definea pe aceia care nu aveau *consuli* printre ascendenți; într-un sens mai larg erau denumiți astfel aceia care aveau înaintași ce dețineau anumite funcții, chiar dacă nu pe cea mai înaltă, respectiv erau membri ai senatului. Optimații foloseau expresia cu dispreț, pentru ei având doar semnificația de parvenit, Cicero însă afirma cu destulă mândrie că a obținut orice funcție

36 Laser (2001): p. 5.
37 Laser (2001): p. 5.
38 Laser (2001): p. 7.
39 Cf. *Commentariolum petitionis* 56.
40 Rudolf Till: Ciceros Bewerbung ums Konsulat. (Ein Beitrag zum commentariolum petitionis.), *Historia: Zeitschrift für Alte Geschichte*, 1962, pp. 315–338, p. 317; Laser (2001): p. 6.
41 *Commentariolum petitionis* 2, 13.
42 *Commentariolum petitionis* 55.

la limita inferioară de vârstă permisă de lege, deși nu provenea din rândul aristocrației senatoriale. O asemenea idee apare și în *Pro Murena*.[43]

Marcus era dezavantajat de propriul caracter, respectiv de viziunea despre viață, căci fiind platonian îi erau străine prefăcătoria *(simulatio)*, indispensabilă pentru candidatură,[44] și abilitatea de a lega prietenii, conformându-se cu alegătorii.[45] Principala sa armă este talentul oratoric prin care putea deveni preferat în rândul poporului *(popularis)*,[46] însă, în același timp, trebuia să se ferească să nu pară un politician populist, din moment ce rezultatul alegerii nu era decis de masele orășenilor *(urbana multitudo)*.[47]

III. CONTENTIO DIGNITATIS CA STRATEGIE ORATORICĂ ÎN PRO MURENA

Structura discursului *Pro Murena* poate fi schițată astfel:[48] Cicero mai întâi răspunde reproșurilor primite pentru că și-a asumat rolul apărării.[49] În retorica antică se recurge frecvent la strategia prin care apărătorul vrea să se dezvinovățească într-o primă fază. Stilul său e solemn, începând deja cu prima frază, atât prin lexic, cât și prin ritm, prin recurgerea la *creticus*.[50] În partea principală[51] urmărește dispoziția dezvoltată de acuzare în trei eșantioane.[52] În prima parte extrem de succintă respinge acuzele aduse lui Murena pentru stilul său de viață *(reprehensio vitae)*. În cea de-a doua parte se axează pe șansele celor doi competitori de a fi aleși.[53] Se impunea această comparație deoarece acuzarea dorea să demonstreze ulterior că Murena, fiind fără șanse, a recurs la mijloace necinstite pentru a-și dobândi victoria; Cicero dorea să formuleze o replică la acest atac. Oratorul accentuează faptul că originea și funcția, care pot fi astfel dobândite, sunt aceleași în cazul ambelor părți,[54] deci nici una dintre părți nu putea să obțină vreun avantaj referindu-se doar la acest drept. Cariera lui Murena a fost cea care a cucerit stima generală, și astfel i-a adus victoria.[55] Va contrapune gloria carierei oratorice și a celei militare cu activitatea de jurist,[56] competiție din care *(studiorum atque artium contentio)* – așa cum o impunea situația retorică – evident că au ieșit învingătoare *eloquentia* și *res militaris*. După acest pasaj, Cicero înșiră motive și mai solide în favoarea lui

43 Cicero: *Pro L. Murena* 17.
44 *Commentariolum petitionis* 1, 45.
45 *Commentariolum petitionis* 42, 45, 54.
46 *Commentariolum petitionis* 2, 55.
47 *Commentariolum petitionis* 52.
48 Carl Joachim Classen (1985): *Recht, Rhetorik und Politik. Untersuchungen zu Ciceros rhetorischer Strategie*, Wissenschaftliche Buchgesellschaft, Darmstadt, p. 124; Adamietz (1989): p. 83.
49 Cicero: *Pro L. Murena* 1–10.
50 Quintilianus: *Institutio oratoria* 9, 4, 107.
51 Cicero: *Pro L. Murena* 11–83.
52 Manfred Fuhrmann (1970): Interpretatio – Notizen zur Wortgeschichte, în Detlef Liebs (ed.): *Sympotica F. Wieacker*, Vandenhoeck & Ruprecht, Göttingen, p. 293.
53 Cicero: *Pro L. Murena* 15–53.
54 Cicero: *Pro L. Murena* 15–17.
55 Cicero: *Pro L. Murena* 18–21.
56 Cicero: *Pro L. Murena* 22–30.

Murena:[57] cum ar fi jocurile festive organizate în calitatea sa de *praetor*.[58] Faptul că, în contrast cu Sulpicius Rufus,[59] și-a asumat administrarea unei *provincii*,[60] și în fine că alegerea sa e susținută de strategul Lucullus și trupele sale, întoarse la Roma din cel de-al treilea război purtat împotriva lui Mithriades. Urmează atacul împotriva lui Servius:[61] aduce o critică tacticii urmate de acesta, și anume dezaprobă faptul că Sulpicius, în loc să depună eforturi pentru a-și apropia victoria, s-a ocupat mai ales de colectarea dovezilor menite să susțină acuzația de *ambitus* împotriva adversarilor săi, și astfel i-a alungat involuntar în tabăra lui Murena pe cei care se temeau de victoria lui Catilina.[62] În partea a treia va trece la prezentarea capetelor de acuzare propriu-zise.[63] Într-o primă fază oferă replica la acuzațiile aduse lui Cato și la motivele acestei acuzații,[64] și anume la faptul că acesta a fost determinat doar de caracterul său ultra energic să susțină acuzarea.[65] Așa cum a ironizat anterior meschinăriile și anumite instituții desuete, ținând de *iurisprudentia*,[66] în acest moment va ridiculiza intransigența uneori exagerată a eticii stoice.[67] Această acuză e urmată de o dezmințire la obiect, dar destul de succintă, și nu prea convingătoare.[68] Nu a pus accent pe demonstrație, ci pe faptul – subliniat în mod deosebit – că însuși procesul e o mutare mai mult decât greșită, și dacă cineva urmărește prin asta ca în ianuarie anul următor să-și preia funcția doar un *consul*, acela va arunca *res publica* în mâinile lui Catilina și a acoliților săi.[69] Scopul său e, deci apărarea statului și a cetățenilor săi.[70] În partea de *peroratio*[71] atrage atenția judecătorilor să aibă în vedere în deciziile lor interesul general.[72]

Succesul obținut de Cicero cu *Pro Murena,* și anume, achitarea lui Murena, se datorează – pe lângă accentuarea dimensiunii politice a procesului – comparației carierei celor doi candidați (*studiorum atque artium contentio*, respectiv *contentio dignitatis*), iar în acest demers i-au fost de ajutor aplicarea cu măsură a umorului și ironiei. În lucrarea sa teoretică, intitulată *Orator,* Cicero oferă fundamentarea teoretică a celor trei genuri de stil, dar evidențiază faptul că stilul simplu, pe lângă celelalte caracteristici (ritmul prozodiei, evitarea frazei, omiterea *hiatusului*, *munditia* și *elegantia*, moderația în recurgerea atât în privința epitetelor, cât și a ornamentelor, tropilor și figurilor de stil)[73] spiritul și ironia sunt cele mai specifice trăsături. Pe parcursul aplicării lor oratorul

57 Cicero: *Pro L. Murena* 37–42.
58 Cicero: *Pro L. Murena* 38.
59 Cicero: *Pro L. Murena* 42.
60 Cicero: *Pro L. Murena* 42.
61 Cicero: *Pro L. Murena* 43–52.
62 Cicero: *Pro L. Murena* 52.
63 Cicero: *Pro L. Murena* 54–83.
64 Cicero: *Pro L. Murena* 61–66.
65 Cicero: *Pro L. Murena* 64.
66 Cicero: *Pro L. Murena* 22–30.
67 Classen (1985): p. 163; Adamietz (1989): p. 203.
68 Cicero: *Pro L. Murena* 66–77.
69 Cicero: *Pro L. Murena* 78.
70 Cicero: *Pro L. Murena* 78.
71 Cicero: *Pro L. Murena* 83–90.
72 Cicero: *Pro L. Murena* 86.
73 Tamás Adamik (1998): *Antik stíluselméletek Gorgiastól Augustinusig*, Seneca, Budapest, p. 130.

trebuie să aibă în vedere să nu provoace vătămări incurabile, respectiv să aibă grijă să-și înfigă acul doar în adversari, dar și acest lucru să se producă cu moderație, și nu în permanență, să nu-i jignească pe toți și nu oricum. Quintilian, vorbind de moderația cuvenită oratorului – respectată de altfel de Ciero în *Pro Murena* –, menționa necesitatea ca oratorul să nu dorească să jignească pe nimeni, să se ferească mai cu seamă de intenția de a renunța la un prieten de dragul unei remarci pline de spirit.[74] E demn de reținut cum a procedat Cicero cu Sulpicius în acest spirit: el afirmă *expressis verbis* despre Sulpicius, că pe lângă celelalte virtuți ale sale, cum ar fi cumpătarea, demnitatea, justețea, fidelitatea și toate celelalte merite, l-a considerat din cale afară de merituos pentru demnitatea de *consul,* dar și pentru orice altă funcție,[75] respectiv consideră foarte lăudabil că și-a asigurat o experiență în domeniul dreptului civil, și-a jertfit multe nopți, a lucrat mult, pe mulți i-a ajutat.[76] Remarcile ironice se adresează de fiecare dată doar *iurisprudentiei*.[77] În lumina celor prezentate să trecem în revistă cariera celor doi competitori, cea a lui Murena, apărat de Cicero din considerente politice, și cea a lui Sulpicius Rufus, care de altfel e în relații cordiale, prietenești cu oratorul, respectiv relația oratorului cu domeniile reprezentate de aceștia: *res militaris* și *iurisprudentia*!

Lucius Licinius Murena s-a născut în anul 105, și-a efectuat stagiul militar în Asia Mică între 83 și 81, sub comanda comandantului suprem care era totodată și tatăl său, participând și la *triumphus*urile acestuia. În anul 75 își îndeplinea funcția în *quaestura* împreună cu Sulpicius,[78] ca mai apoi să se întoarcă în 74 cu *consul*ul L. Lucullus în războiul contra lui Mithridates, care a reizbucnit între timp.[79] În anul 65 este din nou *collega* lui Sulpicius, și în postura de *praetor urbanus* are ocazia din plin să-și adjudece o popularitate semnificativă datorită *Ludi Apollinares* organizate cu mult fast;[80] în funcția de *propraetor* i se atribuie în anul 64 administrarea provinciei Gallia Narbonensis. Acuzatorii i-au reproșat că provine dintr-o gintă nouă,[81] Murena însă nu era un *homo novus* în sensul tradițional al cuvântului, căci în decursul generațiilor era al patrulea care a acces până la funcția de *praetor*, iar denumirea de *homo novus* se folosea de regulă doar în cazul în care membrii familiei nu au obținut nici o demnitate din cele care țin de *curulis*, ceea ce le revenea prin *ius imaginum*.[82] Una din bazele succesului său îl constituia fundalul său material solid, fapt dovedit și de jocurile organizate de el din postura de *praetor*, iar obținerea funcției de *propraetor* în Gallia i-a consolidat și mai mult statutul; totodată i-a priit și situația politică existentă, din moment ce era nevoie de o armată bine organizată, eficientă pentru a contracara pericolul care amenința din partea lui Catilina, iar dintre candidați doar Murena dispunea de o asemenea oaste.[83] Servius Sulpicius nu s-a remarcat prin fapte mai importante după ce a îndeplinit funcția de *consul*, dar

74 Quintilianus: *Institutio oratoria* 6, 3, 28.
75 Cicero: *Pro L. Murena* 23.
76 Cicero: *Pro L. Murena* 19.
77 Alfons Bürge (1974): *Die Juristenkomik in Ciceros Rede Pro Murena*, Juris, Zürich, p. 80.
78 Cicero: *Pro L. Murena* 18.
79 Cicero: *Pro L. Murena* 20, 89.
80 Cicero: *Pro L. Murena* 38.
81 Cicero: *Pro L. Murena* 17.
82 Adamietz (1989): p. 15.
83 Adamietz (1989): p. 18.

făcând abstracție de situația politică dată și de rezultatul alegerilor, cele 180 de volume care ni s-au păstrat demonstrează o operă care-i conferă o superioritate intelectuală față de personalitatea mai degrabă ștearsă a lui Lucius Licinius Murena.[84]

Romanii considerau că războiul este o parte organică a vieții și erau conștienți pe deplin de faptul că acel *imperium* de care dispuneau, se datora virtuților militare, adică *virtus militaris*; astfel în conștiința lor meseria-arta războiului, acel *res militaris* a devansat orice altă activitate, care putea fi derulată doar în condițiile unei păci dobândite-impuse cu ajutorul *res militaris*. *Corpus Ciceronianum* însă nu abundă deloc de pasaje în care s-ar regăsi această opinie: cu toate că Cicero recunoaște că gloria lăsată de strămoși poporului roman e confirmată în mai multe ipostaze, chiar poate fi omniprezentă, mai ales în chestiunea războiului,[85] totodată elogiind caracterul vizionar ca om de stat și excelentele abilități oratorice ale lui Cn. Pompeius, evidențiază faptul că tocmai aceste însușiri constituie esența demnității unui strateg.[86] Opinia tradițională romană despre primatul *res militaris* e nuanțată și mai mult în *De officiis*: e drept că cea mai bună recomandare pentru glorie a unui tânăr e cea obținută prin meritele militare,[87] cu toate acestea însă e de revizuit și de contestat acea opinie reprezentată de mulți, potrivit căreia faptele războinice ar fi mai mari și mai măreațe decât faptele păcii – ne atenționează Cicero,[88] și concluzionează, formulând acest punct de vedere –, dacă dorim să judecăm corect, trebuie să recunoaștem că multe din faptele vieții civile tihnite s-au dovedit a fi mai mari și mai ilustre decât cele din război.[89] Citează cu convingere și concludent sentința, pe care cei răi și invidioși nu se sfiesc s-o atace,[90] atestând că faptele curajoase ale vieții civile pe timp de pace nu sunt cu nimic mai prejos și mai puțin importante decât faptele de arme, mai mult, necesită mai multă silință și trudă decât cele din timpul războiului.[91]

Deși familia lui Servius Sulpicius Rufus provenea dintr-o gintă patriciană, nu a avut un rol important în viața publică romană.[92] Bunicul său nu a ajuns într-un post important în *cursus honorum*, iar tatăl său era din ordinul cavalerilor.[93] În tinerețe a urmat studii asemănătoare cu cele efectuate de Cicero, a învățat retorica în Rhodos, și, întorcându-se de acolo, s-a îndreptat dinspre elocință spre *iurisprudentia*.[94] A îndeplinit funcția de *quaestor* în Ostia, cel mai probabil în anul 75,[95] după care în 65 a devenit *praetor* și președinte în fruntea *quaestio peculatus*.[96] Ambele funcții erau îndeplinite în aceiași ani

84 Adamietz (1989): p. 19.
85 Cicero: *De imperio Cnaei Pompeii* 6.
86 Cicero: *De imperio Cnaei Pompeii* 42.
87 Cicero: *De officiis* 2, 45.
88 Cicero: *De officiis* 1, 74.
89 Cicero: *De officiis* 1, 74.
90 Cicero: *De officiis* 1, 77.
91 Cicero: *De officiis* 1, 78.
92 Cicero: *Pro L. Murena* 16.
93 Cicero: *Pro L. Murena* 16.
94 Cicero: *Brutus* 151.
95 Cicero: *Pro L. Murena* 18.
96 Cicero: *Pro L. Murena* 35, 42.

în care și Murena avea aceleași demnități.[97] După ce a fost *praetor,* nu a acceptat administrarea unei *provincii,* a rămas la Roma și a activat în continuare ca *iuris consultus*.[98]

Așa cum bine știm, a fost înfrânt în alegerile din 63. Care ar fi cauzele acestui eșec? Servius Sulpicius nu dispunea de un fundal social adecvat și de relații; în legătură cu activitatea oratorică Cicero menționează că datorită acestei abilități, bărbații care nu aveau sorginte nobilă adesea și-au dobândit demnitatea de *consul*, căci au făcut rost de o influență considerabilă, de legături de prietenie extrem de puternice și de susținere amplă.[99] Prin enunțul *homines non nobiles* Cicero se referă și la propria sa carieră, care, deși nu era unică, putea fi considerată din cale afară de rară, din moment ce în ultimele trei secole ale republicii între cei 600 de *consuli* vom găsi doar 15 care erau *homo novus*.[100]

Gratia era considerată un element *sine qua non* al vieții publice romane, de care politicianul trebuia să dispună neapărat printre adepții săi și în rândul poporului,[101] respectiv era indispensabilă pentru obținerea unei funcții.[102] Deși astăzi am considera mijloacele dobândirii *gratiei* ca ținând uneori de zona corupției,[103] Cicero însuși făcea deosebire între *gratia* și fraudă/mituire.[104] Fără acest liant social puternic, multe dintre instituțiile dreptului roman – cum ar fi de exemplu *mandatum*, *negotiorum gestio*, *commodatum* – ar fi devenit inoperabile,[105] iar dacă *gratia* și *amicitia* nu ar fi cimentat cercurile romane conducătoare, cârmuirea imperiului ar fi necesitat un aparat administrativ mult mai vast.[106] Cicero menționează că nimic nu se regăsește în *iurisprudentia* din toate acestea *(gratia*, *amicitia*, *studium)*.[107] Evident, e problematic să decidem, în ce măsură poate fi considerată această afirmație a lui Cicero drept o opinie proprie, și în ce măsură este o necesitate născută din situația politică concretă. *Beneficentia* și *liberalitas* (precum *gratia*, *amicitia* și *studium*, menționate în *Pro Murena*)[108] nu sunt doar categorii etice, ci și mijloacele afirmării în viața publică.[109] Pe vremuri, cultivarea *iurisprudentiei* era instrumentul adecvat pentru a accede în acest sens, îndeletnicirea aflată în posesia primilor oameni în stat, și-a pierdut însă din sclipire în prezentul învolburat. Prin denumirea de marele savant al științelor juridice al epocii, trebuie să înțelegem persoana lui Servius Sulpicius Rufus. Cu el va începe intrarea ordinului cavalerilor în zona *iurisprudentiei.* Afirmația potrivit căreia *iurisprudentia* nu oferă un fundal adecvat pentru îndeplinirea unui rol în viața publică, era dictată doar de situația politică dată și nu denotă convingerea personală a lui Cicero. La fel, constatarea că dinspre

97 Cicero: *Pro L. Murena* 18.
98 Cicero: *Pro L. Murena* 42.
99 Cicero: *Pro L. Murena* 24.
100 Bürge (1974): p. 100.
101 Cicero: *De inventione* 2, 161; Cicero: *De officiis* 1, 48; Bürge (1974): p. 101.
102 Cicero: *Pro Plancio* 9.
103 Bürge (1974): p. 103.
104 Cicero: *Epistulae ad Atticum* 1, 16, 12.
105 Fritz Schulz (1961): *Geschichte der romischen Rechtswissenschaft*, Böhlau, Weimar, p. 106.
106 Bürge (1974): p. 103.
107 Cicero: *Pro L. Murena* 24.
108 Cicero: *Pro L. Murena* 24.
109 Wolfgang Kunkel (1967): *Herkunft und soziale Stellung der romischen Juristen*, Böhlau, Graz–Wien–Köln, p. 38.

știința dreptului nu se poate croi în nici un caz un drum sigur către *consulatus*,[110] este doar parțial validă. *Res publica* anului 63 nu mai trăia într-adevăr acele vremuri când savanții în drept ar fi ajuns frecvent la vârful *cursus honorum,* totodată până în anul 95 optsprezece juriști au ocupat funcția de *consul* (Appius Claudius Caecus și Cornelius Scipio Nasica având chiar două mandate), cele douăzeci de mandate de *consulatus* s-au derulat în perioada 201–95.[111] După anul 95, următorul an în care demnitatea de *consul* va fi ocupată de un savant în științele juridice este anul 51, iar acesta nu este altcineva, decât însuși Servius Sulpicius Rufus.

Eșecul lui Sulpicius din anul 63 a avut însă și un motiv personal, din moment ce, nefiind o personalitate destul de hotărâtă, a observat succesele inițiale ale adversarilor săi, a renunțat prematur la luptă, și în loc să contribuie la propria victorie, efortul său s-a îndreptat spre făurirea acuzării împotriva viitorilor câștigători.[112] Această tactică – având în vedere popularitatea lui Murena, bazată pe perioade când avea funcția de *praetor*, și teama generală provocată de Catilina – parcă l-a predestinat pe Sulpicius să înregistreze înfrângerea.

Iar când, într-un final, în anul 51 a obținut funcția de *consulatus*, repurtând o victorie chiar împotriva lui Cato, aflat de partea sa în 63,[113] nu a reușit să se afirme cu forța și determinarea cuvenită în acele vremuri destul de furtunoase.[114] A murit în 43 ca mediator pentru pace în războiul civil care reizbucnise. Cicero s-a raportat cu mare recunoștință la Servius Sulpicius atât în timpul vieții sale,[115] cât și după moartea acestuia[116] – calitățile sale personale extraordinare nu au fost contestate nici în *Pro Murena;*[117] a pretins prietenului său o înmormântare publică și înălțarea unei statui în fața *rostrei*, ambele gesturi de onoare derulându-se potrivit dorinței lui Cicero.[118]

Cicero lăuda activitatea de savant în drept, depusă de Servius Sulpicius nu fără motiv, pentru că acesta a lăsat în urmă o moștenire intelectuală diversificată, o colecție de *responsum* de 180 de volume,[119] publicată de discipolii săi, Aufidius Namusa[120] și Alfenus Varus,[121] de numele său se leagă crearea a trei genuri noi. Dintre juriștii perioadei republicii, în cazul său poate fi surprinsă cel mai marcant influența filosofiei grecești.[122] Faptul că era întemeietor de școală e confirmat și de informațiile despre cei zece discipoli ai săi.[123] Cicero însuși se exprimă laudativ cu privire la metoda prin care

110 Cicero: *Pro L. Murena* 23.
111 Kunkel (1967): p. 41.
112 Cicero: *Pro L. Murena* 43.
113 Plutarchus: *Cato minor* 49, 2; Dio Cassius 40, 53.
114 Cicero: *Epistulae ad familiares* 8, 10, 3.
115 Cicero: *Brutus* 150–157; Cicero: *De officiis* 2, 65.
116 Cicero: *Philippicae in Marcum Antonium* 9, 10.
117 Cicero: *Pro L. Murena* 23.
118 Sex. Pomponius: *Digesta Iustiniani* 1, 2, 2, 43.
119 Sex. Pomponius: *Digesta Iustiniani* 1, 2, 2, 43.
120 Sex. Pomponius: *Digesta Iustiniani* 1, 2, 2, 44.
121 Schulz (1961): p. 254.
122 Iulius Paulus: *Digesta Iustiniani* 26, 1, 1 pr.=*Inst*. 1, 13, 1; Domitius Ulpianus: *Digesta Iustiniani* 15, 1, 9, 2–3; Domitius Ulpianus: *Digesta Iustiniani* 34, 2, 27, 3; Gaius: *Digesta Iustiniani* 50, 16, 30 pr.
123 Sex. Pomponius: *Digesta Iustiniani* 1, 2, 2, 44.

Servius, depășindu-și predecesorii, a pășit pe noi căi în domeniul *iurisprudentiei*[124] și evidențiază faptul că, datorită pregătirii sale filosofice, era capabil să creeze un sistem coerent, revendicat în mod frecvent drept o lipsă a științelor juridice de până atunci; Servius Sulpicius s-a detașat net de tradiția pontificală a trecutului, a cultivat pe lângă *ius civile* și *ius praetorium* cu o exigență științifică, și a aplicat în mod plenar metoda dialecticii.

Toate acestea însă nu justifică tratarea lui Cicero ca un corp străin în științele juridice, ori să considerăm *iurisprudentia* ca un domeniu fundamental detașat de Cicero, căci opinia „*nihil hoc ad ius; ad Ciceronem*" era într-adevăr doar punctul de vedere împărtășit de *iuris consultus*, și accentua doar faptul că Cicero era străin de cultivarea tehnică, aplicată a dreptului. Practica judiciară însă este doar o ramură a *iurisprudentiei*, a cărei utilitate cotidiană nu asigură motive pentru a-i conferi un *primatus* în sens absolut. Totodată e un fapt că Cicero era în relații foarte strânse cu cei care practicau *iurisprudentia*: îi considera printre maeștrii săi pe cei doi Scaevola, pe *augur* și pe *pontifex*, și în *Laelius de amicitia* el însuși relatează momentul în care, după ce a îmbrăcat *toga virilis*, tatăl său l-a dus la Mucius Scaevola, iar din acea clipă oratorul a rămas alături de *augur*, după moartea acestuia s-a dus la Scaevola *pontifex*, pe care îl numește ca fiind unul din cei mai talentați și mai sârguincioși bărbați ai statului roman.[125]

Merită trecut în revistă de asemenea și rolul, respectiv importanța atribuită de Cicero cunoștințelor juridice în contextul pregătirii oratorice. În sistemul de valori asumat de Cicero, *eloquentia* este fără îndoială în fața *iurisprudentiei*, opinie reflectată cât se poate de caracteristic, prin constatarea referitoare la Sulpicius Rufus, respectiv că acesta a dorit mai curând să fie primul în știința numărul doi, decât al doilea clasat în știința primordială,[126] din acest motiv a ales *iurisprudentia* în loc de *eloquentia*. Spațiul științei juridice e mai strâmt decât cel al elocinței, iar aceasta prin natura ei e mult mai complexă, căci în timp ce un *iuris consultus* poate funcționa foarte eficace fără a cunoaște *ars oratoria*, *orator*ul nu se poate lipsi de anumite cunoștințe juridice. Pregătirea oratorică nu poate, deci să ignore studiul juridic,[127] precum *orator*ul – și mai cu seamă *perfectus orator*, definit în *De oratore* – nu poate disprețui nici o știință, căci ele toate sunt tovarășii discursului oratoric și se află în slujba acestuia.[128]

O astfel de formulare a concluziei îi este atribuită în *De oratore* lui Crassus, maestrul său, unul din personajele principale ale dialogului.[129] Utilitatea cunoștințelor juridice e accentuată în mod hotărât și în continuarea discuției, mai exact spunând că oamenii ar trebui să-și asume oboseala cauzată de învățătură, chiar dacă pătrunderea și cunoașterea universului juridic e o sarcină majoră și grea, și anume pentru dimensiunea folosului care derivă din însușirea acestor cunoștințe, dar – și nu ar îndrăzni să enunțe acest lucru în prezența lui Scaevola, dacă maestrul însuși n-ar fi obișnuit să afirme – în opinia sa nu există știință mai lesne de pătruns, decât *iurisprudentia*.[130] În *Brutus,* în

124 Cicero: *Brutus* 152.
125 Cicero: *Laelius de amicitia* l.
126 Cicero: *Brutus* 151.
127 Cicero: *De oratore* 1, 18. 159.
128 Cicero: *Orator* 120.
129 Cicero: *De oratore* 1, 75.
130 Cicero: *De oratore* l, 185.

decursul elogierii postume a lui Hortensius – poate singurul adversar și coleg de carieră demn de dimensiunile lui Cicero –, acesta îi evidențiază cunoștințele juridice,[131] iar în *Pro L. Valerio Flacco* adversarul său neîndemânatic în domeniul juridic devine ținta unui atac sarcastic.[132] Menționează de asemenea că – față de cei mai mulți oratori – pentru el a fost deosebit de importantă cunoașterea *ius civile*.[133]

Ca o însumare a *studiorum atque artium contentio* putem să ne referim la o apreciere a lui *Quintilian* despre întregul discurs *Pro Murena,* în care vorbește cu recunoaștere despre procedeul lui Cicero, prin care a recunoscut toate virtuțile lui Sulpicius, chiar l-a elogiat, totuși l-a sfătuit să nu candideze pentru funcția de *consulatus*.[134] Prin umor și ironie Cicero reușește să estompeze tăișul acuzațiilor formulate de Sulpicius și Cato. În decursul acestei acțiuni, pentru a potența impactul comicului îndreptat împotriva juriștilor, recurge de mai multe ori la grecisme, *proverbium*uri și expresii proverbiale. Expresii împrumutate din jargonul juridic, citate din diferite proceduri civile, la care adaugă comentarii din limba vorbită, într-o tonalitate de taifas/șuetă. În schimb, când aduce vorba de *res militaris,* respectiv de *eloquentia*, stilul său devine elevat, festiv.

Devine însă evident că o parte însemnată a afirmațiilor sale rămâne doar la nivel de topos retoric, nu e decât reluarea unor opinii critice arhicunoscute, vizând un anumit grup ocupațional (în cazul de față pe cel al juriștilor) – dintre care însă câteva remarci sunt exprimate pe tonul unei critici reale. Lauda e adresată în permanență unei persoane anume, lui Sulpicius, dar obstrucțiile ating doar ocupația acestuia. În *Pro Murena* Cicero nu neagă importanța generală a științelor juridice și a dreptului ca sistem normativ, nu se îndoiește de importanța rolului lor în treburile publice și în viața statului. Se ferește în permanență să zguduie temeliile ordinii juridice, critica sa rămâne la suprafață; o critică – precum elogiul *res militaris* – nu izvorăște din convingerea proprie a lui Cicero, este doar o necesitate dictată de situația oratorică.

131 Cicero: *Brutus* 322.
132 Cicero: *Pro Flacco* 35.
133 Cicero: *Partitiones ortoriae* 100.
134 Quintilianus: *Institutio oratoria* 11, 1, 68. *Quam decenter tamen Sulpicio, cum omnes concessisset virtutes, scientiam petendi consulatus ademit! quam molli autem articulo tractavit Catonem!*

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Historical Aspects of Employer's Liability for Damage Caused by an Employee to a Third Party at Work or in Work-Related Situations under Serbian Law

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ABSTRACT
In this article, the author analyses the evolution of an employer's liability for damages caused by an employee to a third party at work and in work-related situations under Serbian law. As a starting legal source, she considers the Serbian Civil Code of 1844, which is a shortened version of the Austrian Civil Code of 1811, and analyses its rules on this subject. However, during the translation of the Austrian Civil Code, an omission occurred, which made it difficult for the author to determine whether it establishes fault as a condition of liability in a general way and to draw a conclusion on whether the liability of the employer is fault-based or a form of strict liability. After the Serbian Civil Code had ceased to be in effect, with the adoption of the Law on the Invalidity of Legal Regulations enacted before 6 April 1941, the employer's liability for damage caused by an employee and suffered by third parties was regulated by the Basic Law on Labour Relations on 24 October 1966. Similarly, the Draft of a Code on Obligations and Contracts of 1969, published by Professor Mihailo Konstantinović ("Sketch"), also regulates this issue but differentiates between two categories of employers: state and private employers. In relation to the liability of public employers, it referred back to labour law regulations. Finally, the 1978 Obligations Act regulated this subject matter in relation to all employers. It prescribes that the employer shall be liable for damage caused by an employee to a third party at work and in work-related situations, with the condition that the employee acts at fault. The 1978 Obligation Act does not determine the legal nature of this liability. However, contemporary legal scholarship is of the opinion that it should be construed as strict liability, since the employer cannot exempt himself/herself from liability by proving that there is no fault on his/her side. Only employees' faults are legally relevant.
KEYWORDS
Serbian Civil Code of 1844, fault-based liability and strict liability, Basic Law on Labour Relations, "Sketch" (Draft) for a Code of Obligations and Contracts, 1978 Obligations Act.

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Aspecte istorice ale răspunderii angajatorului pentru prejudiciile cauzate de un angajat unui terț la locul de muncă sau în situații legate de muncă, potrivit dreptului sârb

REZUMAT
În acest articol, autoarea analizează evoluția răspunderii angajatorului pentru prejudiciile cauzate de un angajat unui terț, la locul de muncă și în situații legate de muncă, în dreptul sârb. Ca punct de plecare, ea examinează Codul civil sârb din 1844, care reprezintă o versiune abreviată a Codului civil austriac din 1811, și analizează dispozițiile acestuia referitoare la această materie. Totuși, în cursul traducerii Codului civil austriac a intervenit o omisiune, care a îngreunat stabilirea de către autoare a faptului dacă acesta instituie vinoața ca o condiție generală a răspunderii și formularea unei concluzii privind caracterul răspunderii angajatorului, respectiv dacă aceasta este una întemeiată pe vinoățiesau o formă de răspundere obiectivă. După ieșirea din vigoare a Codului civil sârb, ca urmare a adoptării Legii privind nulitatea actelor normative adoptate înainte de 6 aprilie 1941, răspunderea angajatorului pentru prejudiciile cauzate de un angajat și suferite de terți a fost reglementată prin Legea fundamentală privind relațiile de muncă din 24 octombrie 1966. În mod similar, Proiectul Codului obligațiilor și contractelor din 1969, publicat de profesorul Mihailo Konstantinović („Schița"), reglementează, de asemenea, această problemă, dar face distincția între două categorii de angajatori: angajatori de stat și angajatori privați. În ceea ce privește răspunderea angajatorilor publici, acesta trimite la reglementările din dreptul muncii. În final, Legea obligațiilor din 1978 a reglementat această materie în privința tuturor angajatorilor. Ea prevede că angajatorul răspunde pentru prejudiciile cauzate de un angajat unui terț, la locul de muncă și în situații legate de muncă, cu condiția ca angajatul să fi acționat cu vinovăție. Legea obligațiilor din 1978 nu stabilește natura juridică a acestei răspunderi. Cu toate acestea, doctrina juridică contemporană consideră că ea trebuie calificată drept răspundere obiectivă, întrucât angajatorul nu se poate exonera de răspundere prin dovedirea lipsei vinoației sale. Singura vinoație relevantă din punct de vedere juridic este cea a angajatului.
CUVINTE CHEIE
Codul civil sârb din 1844, răspundere bazată pe vinoație și răspundere obiectivă, Legea fundamentală privind relațiile de muncă, „Schița" (Proiectul) Codului obligațiilor și contractelor, Legea obligațiilor din 1978.

I. THE SERBIAN CIVIL CODE OF 1844 – THE EMERGENCE OF THE LEGAL INSTITUTE

From a historical perspective, to determine the emergence of an employer's liability for damages[2] caused by an employee to a third party at work and in work-related situations under Serbian law, one should refer to Art. 810, Sec. 2 of the Serbian Civil Code of 1844,

2 The Serbian Civil Code does not contain a definition of damage. According to D. Janković, damage is any detriment caused to someone's property, rights, or person, which consists of two elements, namely, positive or simple damage and negative damage (lost profit), D. Janković (1936): *Izvodi iz specijalnog dela obligacionog prava*, Grupa Futur Beograd, Beograd, p. 62.

which prescribed an exception to fault-based liability.[3] Sec. 1 of this article explicitly states that no one is to be held liable for damage caused by others. However, Sec. 2 lays out an important exception. It refers to someone who keeps persons in his/her service (in today's time, service would mean an employment relationship), with the condition that these persons are "vagrants, rogues, and known criminals"[4] without any identity documents. If such persons cause any damage, the person they serve will be liable. Therefore, it prescribes a form of liability for the actions of other people. As the Serbian Civil Code was drafted based on the Austrian Civil Code in 1811, Art. 810, Sec. 2 corresponds to Art. 1314 of the Austrian Civil Code,[5] with some deviations. However, Art. 810, Sec. 2 only gives us the impression that the laird (master) will be liable for other people's actions because the laird (master) himself/herself is imputable for accepting persons known for their misconduct, since they would have had to be aware of that.

It is important to note that the Civil Code of 1844 regulated the contract of service but did not distinguish between labour and work contracts. Another important point is that the Serbian Civil Code did not contain a general provision on the employer's liability for workers and employees.[6] The aforementioned studies referred only to specific situations that resemble employment relationships.

1. Analysis of Art. 810 of the Serbian Civil Code of 1844

Art. 810 of the Serbian Civil Code designates persons in the service of a citizen who has given them the opportunity to enter into relations with the public. If they cause damage to a third party, the named person would have to compensate because these persons acted under his/her instructions to carry out different tasks on his/her behalf. The third party relied on his/her trust in the master who instructed the servants, because those servants knew the master and, based on that personal relationship, they undertook the tasks in relation to which the damage was caused.[7]

At that time, there were servant documents from which the master could see the kind of behaviour the servant had previously demonstrated. Certain servant categories are mandatory to possess such documents. However, even if they had records of proper conduct in the servants' documents, but the master knew them as

3 The fault-based liability has prevailed everywhere in legal life since its origin in Roman law, and through the civil codes of the 19th century, because everyone was liable for "evil intent or negligence". However, at that time, modern codes (19th century) provided that even if there was no "evil intention or negligence", exceptionally the tortfeasor will be held liable even though he/she did not act with fault. Dragoljub Aranđelović (1924): *O odgovornosti za naknadu štete (Objašnjenje glave XXX Građanskog zakonika)*, Izdavačka knjižarnica Napredak, Beograd, p. 26.

4 Aranđelović (1924): p. 33.

5 Art. 1314 of the Austrian Civil Code stipulates that whoever accepts a person into his/her service, and that person does not have any documents about him/her, is dangerous because of his/her physical and mental characteristics, and keeps him/her with him/her despite knowing about this, will be liable for the damage caused by that person. Aranđelović (1924): p. 33.

6 Mihailo Konstantinović (1952): *Obligaciono pravo (prema beleškama sa predavanja profesora M. Konstantinovića)*, Savez studenata Pravnog fakulteta u Beogradu, Beograd, p. 120.

7 Aranđelović (1924): p. 33.

those demonstrating misconduct previously, the master would be liable for them. Conversely, in a situation where the servant had a document from which his/her honesty could be determined, but the servant was not personally known to the master, the master would not be liable for his/her servant. This distinction is important because of the burden of proof: the master was considered *bona fide* in relation to the honesty of his/her servants, so the injured party had to prove that the improper behaviour of the master's servants was known. Although Provision 810 of the Code prescribes that the master is liable for all the damage that the servant causes to someone in real life, this was not quite like that. It would also not be logical because, for example, if the servant went somewhere for his/her personal needs and caused damage to someone, it would not even be fair for the master to be liable for the damage because it had nothing to do with him/her. Only in the case when the master is privately related to third parties does he/she need to fulfil some obligation towards them, and then, instead of personally fulfilling his/her obligation, he/she uses his/her servant, and the servant does not fulfil the obligation properly, resulting in damage to the third party, then the master would be held liable for the damage.[8]

2. Analysis of Art. 811 of the Serbian Civil Code of 1844

Art. 811 prescribes that the master shall be held liable if he/she hires a person without qualifications for a specific job—that is, an incompetent and unskilled person who causes harm to another person—while he/she knew of these inabilities. In this case, his/her fault is choosing the wrong person for a given task (*culpa in eligendo*). This study also creates the impression that deviations have arisen from fault-based liabilities.

Damage can be caused either to persons with whom the employer has a contractual relationship or to third parties with whom there is no contractual relationship. In the first case, the principal will be liable for the damage that is considered to have been caused by his/her action and not by someone else's action. The plaintiff must prove that the damage was caused by poor performance. The principal, however, to be released from liability, would have to prove that the damage was a result of *casus* (a fortuitous event), but only if it was agreed that he/she would be liable for the results of the *casus*.[9]

Thus, there is an example from case-law, from the period when the Civil Code of 1844 was still in application, in which the plaintiff took his mare to a horseshoe shop whose owner was not present at the time, and the shoeing was performed by a person at the shop who had been prohibited from working due to incompetence. Before the shoeing, the person noticed that the hoof was injured and warned the plaintiff about it, but the mare's owner ignored that fact and approved the shoeing. Subsequently, the mare died of tetanus, and the plaintiff sued the owner of the shop and the person who performed the shoeing, demanding compensation for the damages. The District Court rejected this claim, which was subsequently confirmed by a higher District

8 These are the situations specified in Chapter 22 of the Serbian Civil Code, which regulates mandate, as well as Art. 616.

9 Aranđelović (1924): p. 37.

Court. The reasoning behind the decision was that the person was not in a working relationship with the owner of the horseshoe shop and did not have permission from the owner to perform the task. Owing to his lack of qualifications, he was prohibited from performing the given tasks, and the plaintiff was warned about the mare's physical defects beforehand. The public prosecutor filed an extraordinary legal remedy for this judgment. The Supreme Court of the People's Republic of Serbia annulled both the decisions and granted claims. It stated that the damage was caused during an illegal activity, and the owner was liable because he accepted an unqualified person at the store who did not have a work permit.[10]

3. Analysis of Art. 812 of the Serbian Civil Code of 1844

This article[11] is an exception to the set of rules according to which an innkeeper is liable for other people's actions only when he/she is at fault in choosing people who will work for him/her. Therefore, it is not required as a condition for the principal to know about the earlier life of his/her younger counterparts; however, he/she will nonetheless be liable if damage occurs.

This brings us back to the beginning of Chapter 30, Art. 800, which stipulates that whoever causes damage to another person, be it on someone else's property or rights and persons, must compensate for it. Subsequently, Art. 801 prescribes that from the obligation to compensate for the damage, one can only be exonerated if one proves that the damage is not attributable to one's fault but happened by accident. Therefore, the Code did not define faults in any of the articles. It appears that this omission occurred during the translation of the Austrian Civil Code. This led to the conclusion that the principle of causation was adopted because Art. 801, as a condition for exemption from liability for damage, states that the tortfeasor should prove that the damage happened accidentally and that they were not at fault. Furthermore, proving that damage accrued accidentally is even more difficult than proving the absence of a fault. This further leads to the conclusion that the Serbian Civil Code of 1844 adopted the principle of proven fault.[12]

However, it is important to return to the interpretation of Art. 812 of the Serbian Civil Code, because, according to Professor M. Konstatinović, there is a presumption of the employer's fault in that article, which is absolute.[13]

In his analysis, Dragoljub Aranđelović exhaustively tackled the innkeeper's liability for the damage that guests/passengers would suffer from the things brought in. Although it may seem confusing (since Art. 812 does not contain the word "thing" anywhere but generally prescribes the liability of innkeepers), at the same time, it

10 Liability of Employers and Workers – Assuming Risk, *Anali Pravnog fakulteta u Beogradu*, 4/1955, pp. 456–457.

11 Art. 812 of the Serbian Civil Code of 1844 reads as follows: "[i]nnkeepers, taverners, boatmen and drivers (carriers) are also liable for the damage that their people would cause to passengers".

12 Dragan Kostić (1975): *Pojam opasne stvari*, Institut za uporedno pravo, Savremena administracija, Beograd, p. 70.

13 Konstantinović (1952): p. 121.

refers to Art. 580 of the Code, which is included in Chapter 19 of the Code under the title *Deposit or Trust* and which corresponds to Art. 970 of the Austrian Civil Code but is slightly modified. Art. 970 governs the liability of innkeepers, boatmen, etc., such that they are liable for their servants who are in their service or other persons in their house who cause damage to passengers in respect of the things received. He further referred to Art. 677, which governs the lease agreement. Although it is not applicable to the liability of the innkeeper, it departs from the assumption that the passengers and the innkeeper conclude a contract for the reception of the passengers to live in the inn, and the passenger pays a certain price in money for it.[14] Art. 678 governs rent or housing contracts; hence, it is necessary to analyse Chapter 25 of the Code pertaining to lease contracts. However, regardless of these regulations, the innkeeper will be liable for damage, irrespective of whether he/she concludes a housing contract with the passenger. The same applies to the deposit contract regulated in Chapter 19 because the liability of the custodian arises from the deposit contract, parallel to the liability of innkeepers, because they are also obliged to keep things entrusted and are handed over things in trust and to compensate for damage due to omissions during storage, if any.[15] This leads to the conclusion that innkeepers are liable in the same way as for breaches of contract. However, there is one important and mitigating circumstance: he/she will not be liable for *casus*. The conditions for the innkeeper's liability are as follows: 1) he/she took away or damaged the thing from the passenger with malicious intent; 2) he/she was careless when storing things, left the door open and unsupervised, so thieves could easily get in and steal things; and 3) due to general negligence.[16]

If none of the aforementioned conditions could be attributed to the fault of the innkeeper, he/she would not be liable for the damage accrued to the things brought in. The same applies to natural events and catastrophes causing the destruction of things, but also to theft, which could not be prevented even by the increased attention of the innkeeper, or if things are perishable by their very nature. At the time, the older school of thought in the theory of private law prevailed, according to which there was no liability in private law if there was no fault due to the occurrence of the event.[17]

However, it may often happen that passengers do not have the opportunity to enter into a binding relationship with the innkeeper and arrange lodging directly because he/she does so with his/her servants (porters, maids, waiters), so the liability of the innkeeper also includes the liability for damages caused by the fault of his/her servants. Servants also include persons who temporarily perform work for the innkeeper, such as laundresses, day labourers, craftsmen who perform work on behalf of the innkeeper, as well as persons who live with the innkeeper if they work for him/her.

14 Dragoljub Aranđelović (1906): *Odgovornost gostioničara prema putnicima zbog pretrpljene štete u gostionicama na unesenim stvarima*, Štampano u državnoj štampariji Republike Srbije, Beograd, pp. 5–7.
15 Aranđelović (1906): p. 8.
16 Aranđelović (1906): pp. 9–11.
17 Aranđelović (1906): pp. 12–13.

Therefore, analogous to the conditions enumerated above for the innkeeper's liability due to his/her fault, it also applies to the servant, and this is covered by Art. 812.[18]

The innkeeper would not be able to exempt himself/herself from liability for the mentioned persons, even if he/she could prove that they have a history of proper conduct, since he/she has to pay more attention when choosing his/her servants, because the passengers are entrusted to them.[19]

To be entitled to compensation, a passenger must prove that the items had been handed over undamaged. The time of the emergence of the liability is important, since it can also be the moment when the innkeeper or servant receives things outside the inn, because it is not necessary that things are actually brought inside the inn. The evidence can be receipts, witnesses who were present when the item was handed over, or mutual oaths. The amount of damage was determined by expert opinions. If the passenger proved that the damage was caused by bad intent or gross negligence, he/she could claim, in addition to the actual damage, the profit he/she lost due to the destruction of the object or even compensation at the extraordinary value of the object.[20]

4. Social changes and special laws

Regarding labour relations, in addition to the Serbian Civil Code of 11 March 1844, the following acts were applied in Serbia: the Guild Decrees of 14 August 1847 and its amendments on 29 January 1849 and 30 April 1853; the Mining Code of 15 April 1866 which was amended on 21 July 1877, 6 February 1896, and 27 January 1900; the Rules on Relations between Servants and Their Masters on 12 September 1904; and the Act on Shopkeepers on 28 June 1910.[21]

As society developed, so did labour laws. In the second half of the 19th century, trade unions were formed in most European countries, which also had an impact on Serbia. First associations for mutual assistance were formed, followed by the establishment of the first trade union named *Opančarsko-radničko društvo* in Belgrade.[22] Forty-nine years had to pass until its establishment (although it was short-lived), because in London in 1847, the Founding Congress of the "Union of Communists" (the first workers' party) was held, in which Yugoslavs took part together with workers and free intellectuals from various European countries that followed a communist ideology.[23] Prior to that, there were no conditions for the introduction of labour law

18 Aranđelović (1906): p. 14.
19 Aranđelović (1906): p. 15.
20 Aranđelović (1906): p. 16.
21 Nikola Tintić (1969): *Radno i socijalno pravo, Knjiga prva: Radni odnosi (I)*, Narodne novine, Zagreb, p. 132.
22 Boško Perić (1949): *Radno pravo, Beleške predavanja docenta Dr Boška K. Perića, na Pravnom fakultetu u Sarajevu u školskoj 1948/49 godini, Sveska 1, Uvod i istorija radnog prava (Radnički pokreti i istorija radnog prava u inostranstvu)*, Odbor za izdavanje udžbenika, skripata i učila za studente fakulteta i visokih škola NR BiH, Sarajevo, p. 117.
23 Perić (1949): pp. 54–55.

institutes, like those in Western Europe, bearing in mind the long-term Turkish influence that left a deep mark on both the Serbian economy and society as a whole.[24]

II. THE EVOLUTION OF THE INSTITUTE AFTER THE SECOND WORLD WAR UNTIL THE ENACTMENT OF THE 1978 ACT ON OBLIGATIONS

1. The new social environment and the adoption of the Law on the Invalidity of Legal Regulations enacted before 6 April 1941 and during the enemy occupation

After gaining liberty from the Turkish rule, Serbia faced the First World War at the beginning of the 20th century, after which it was united with other South Slavic nations in the Kingdom of Serbs, Croats, and Slovenes in 1918, which in 1929 changed its name to the Kingdom of Yugoslavia. Shortly after the Second World War, a period of an unstable legal environment emerged, during which the Act on the Invalidity of Legal Regulations—enacted before 6 April 1941—applied for the period of enemy occupation (briefly known as the Act on Invalidation). It set aside the Civil Code of 1844, among others.

This also affected the law of obligations, which was not regulated by statutes until 1978.[25] However, in 1969, Mihajlo Konstantinović, a professor at the Faculty of Law in Belgrade, wrote and published a large project for the codification of law in the field of obligations. He modestly named it a *Sketch for the Code of Obligations and Contracts*, but it was in fact a full-fledged normative proposal for an act on obligations. The 1978 Obligations Act mostly relied on the 1969 "Sketch". The "Sketch" was an unofficial draft for which Professor Konstantinović was personally responsible and which left a deep mark on judicial practice.

2. Basic Act on Labour Relations of 1966

As new social conditions emerged, the rules on the principal's liability for his/her servants who caused damage to third parties from the Civil Code of 1844 were no longer sustainable. The spirit of socialism spread, and new rules had to be adopted for the needs of life in a socialist society.

This happened with the adoption of the Basic Act on Labour Relations of 24 October 1966. The Act stipulates in Art. 97, Sec. 1 that the labour organisation where the worker was working at the time the damage was caused is liable for the damage caused to third parties (individual or legal entity) by the worker at work and in work-related

24 Perić (1949): p. 1.

25 Mihailo Konstantinović (1969): *Obligacije i ugovori, Skica za Zakonik o obligacijama i ugovorima* as reprinted in the series *Klasici jugoslovenskog prava* (1996), Novinsko-izdavačka ustanova Službeni list SRJ, foreword by Slobodan Perović, p. 7.

situations. Sec. 2 specifies that for damage caused to a third party by an employee of a state body or organisation performing activities of public interest, in connection with the performance of a service or other activity of a state body, or an organisation performing activities of public interest, the socio-political community, or an organisation in which a service or other activity is performed, shall be held liable. In addition, in Sec. 3, the Act specified that the injured party had the right to demand compensation directly from employees if the injury was caused by a criminal act.[26]

For a proper understanding of the terms used in the 1966 Basic Act on Labour Relations, one should consider the specificities of post-Second World War Yugoslavia, in which a special, milder form of socialism, so-called self-managing socialism, was developed, with its specific legal concepts and terminology. Instead of employer, for instance, the term labour organisation was used; instead of the state, social-political community; and later, instead of employment relationship, joined work was used.

It seems that the principle of strict liability prevailed in the rules of the 1966 Act, because the labour organisation was liable to third natural and legal persons for damage, regardless of whether the employee was at fault. However, whether the labour organisation is entitled to recourse depended on the employee's faults. If the employee acted with simple negligence, he/she was not obliged to compensate the organisation for the damage caused to the third party and was paid by the labour organisation, but if the damage was caused intentionally or by gross negligence, the employee was obliged to compensate the amount that the organisation paid to a third party. The labour organisation had a deadline of six months to request recourse, which was calculated from the moment it paid compensation to the injured third party. The reason for this legal solution was that the same deadline was prescribed for filing a lawsuit. There was, however, one exception: when the worker caused damage by a criminal act (for example, while transporting goods for a third party, the driver stole part of the goods). In such cases, the injured party could demand payment for the damage directly from the worker. The place of occurrence of the damage did not affect the liability of the labour organisation for damage. This place could be both within the labour organisation itself or outside of it (for example, during the transportation of goods, damage occurred on the road or in the business premises of a third party).[27] The 1966 Act prescribed special grounds for the exemption from or limitation of employees' liability in the recourse procedure. According to Art. 99, Sec. 2 of the 1966 Act, the labour organisation itself, by its internal acts, prescribes the conditions, bodies, and procedures to decide on the release of the worker for payment of damages. In addition, it specified that employees could have been released from liability if they had acted with gross negligence. The rules also specified that the labour organisation should especially consider, when deciding on the employee's liability in the recourse procedure, the economic position of the worker, his/her conduct, and previous work. When the amount to be compensated by the labour organisation was so high that the

26 Osnovni zakon o radnim odnosima (prečišćen tekst) sa objašnjenjima i drugim propisima iz te oblasti, *Službeni list Socijalističke Federativne Republike Jugoslavije*, 1966, p. 54–55.

27 Teofilo Popović, Aleksandar Nikolić (1969): *Propisi o radnim odnosima, Komentar osnovnog Zakona o radnim odnosima*, Prosveta, Beograd, p. 169.

worker could not pay it without major consequences to himself/herself and his/her family, the labour organisation could decide to exempt him/her from the payment obligation.[28]

Special rules applied to individuals employed by private employers. In such cases, the private employer was also liable for damage caused by the employee to a third person, but only under specific conditions. First, the damage had to be caused by an employee who was permanently employed by the employer, as employers could not be held liable without a permanent employment relationship; for example, in the case of a work contract, an employer was not obliged to compensate for damage caused by the employee. Second, the employee had to have caused the damage while performing tasks entrusted to him/her, since damage occurring outside the employee's duties did not give rise to employer liability. If an employee caused damage while acting in accordance with the employer's specific orders, the employer was solely liable on the basis of their own fault; however, if the employee caused damage due to their own fault, both the employee and the employer were jointly liable, and the injured party could choose from whom to seek compensation. After paying damages, the employer had the right to seek recourse from the employee who was at fault, although if the employer was also at fault, the amount of reimbursement was proportionately reduced. The employer could be released from liability if it was proven that the damage was caused by force majeure or that the injured party or a third party was responsible; however, if there was an increased risk of damage, which was a condition for strict liability, the employer remained liable in accordance with the rules of strict liability.[29]

3. State liability for civil servants – The 1948 Act on Civil Servants

When a civil servant caused damage while performing his/her duties, the injured party could be another person or the state itself. Only the former shall be analysed in this study because the rules applicable to these cases differed.

The Act on Civil Servants of 7 May 1948[30] prescribed the rules that a civil servant would be personally liable for the damage he/she causes to others (citizens or the state) while performing his/her duties in the service, and that the state is the guarantor for this. The condition for liability was the fault of the official, which the injured party would have to prove. The Act also contained a rule that the superior liable for appointing the official, according to the consent of the Ministry of Finance, would pass a decision on the release of the civil servant from liability if he/she caused damage that resulted from the action undertaken for the sake of the general public interest.[31]

If the judgment was passed against the civil servant and compensation could not be recovered from him/her, it could be demanded from the state because it was in the

28 Popović, Nikolić (1969): p. 169.
29 Popović, Nikolić (1969): p. 173.
30 Zakon o državnim službenicima od 07.05.1948. god. (Act on Civil Servants of 7 May 1948) Art. 40.
31 Konstantinović (1952): p. 124.

role of a guarantor, and the judgment had an effect against it as well, but only on the condition that it also participated in the proceedings. Otherwise, if the state was not included in the lawsuit, the injured party could file a new lawsuit against the state to collect damages within one year from the date of the damage or within nine months from the date of learning about the damage, after which their right was extinguished. The court at the venue at which the damage occurred was competent to hear the case. The state had the right to recourse against civil servants for the amount paid to the injured party.[32]

The same rules were applied to members of the national militia according to the Act on the National Militia of 12 December 1946.[33]

The Constitutional Act of 13 January 1953[34] changed this liability by making the state liable to pay the amount of damage caused by its officials to citizens through illegal actions. The new Act on Public Servants from 1957 defined and implemented this principle in more detail.[35] The basis of this was the old moral rule according to which anyone who caused harm to another must be held liable. This rule provided fertile grounds for various explanations based on liability. According to one understanding, damage caused by the fault of officials or competent collegial bodies was considered to be caused by the fault of the state itself because its activity takes place through them. This liability could be based either on the presumption of a fault by the employer due to poor supervision or due to poor selection of the staff. Some support the idea that the guarantee of the work of the staff was the basis of the state's liability.[36] The state could not supervise itself, but it did so through officials who were hierarchically subordinated to one another. Professor Đorđe Tasić made a distinction between the liability of the state for actions that were illegal from the liability that violated the equality of citizens when it came to public burdens, because the state was liable according to the principle of risk and pays for damage according to the principle of equality of citizens for public burdens.[37]

4. Special cases

There were a range of special cases of employee liability. For instance, if an inspector caused damage to companies or individuals who worked with foodstuffs during supervision, the state was directly liable. These were situations in which the inspector seized foodstuffs suspected of being dangerous to life and health. He/she could also order them to be destroyed or prohibit their use until they were examined by an expert. If the tests showed that the foodstuffs were not dangerous, the inspector had to withdraw the ban

32 Konstantinović (1952): p. 124.
33 Konstantinović (1952): p. 126.
34 The Constitutional Act of 13 January 1953, Art. 99.
35 Dragaš Denković: Osnov odgovornosti za štetu koju građanima prouzrokuju javni službenici, *Anali Pravnog fakulteta u Beogradu*, 1–2/1962, p. 58.
36 Denković (1962): p. 61.
37 Đođe Tasić: Odgovornost države za protivpravna akta njenih organa, *Društveni život*, 1921, pp. 280–281; Đođe Tasić (1924): *Odgovornost države po principu jednakosti tereta*, p. 198 as cited in Denković (1962): p. 61.

on their use and return them to the companies or persons from whom they had been confiscated. However, if the food was destroyed, they had the right to demand compensation directly from the state or from the body whose inspector had ordered the confiscation, all based on the Regulation on Health Control of Food of 21 June 1948. The injured party could also demand damages from the inspector who acted in fault. In this case, the state also had the right to recourse from the inspector. This rule was heavily criticised because the liability of the inspector deprived him/her of his/her freedom in the performance of his/her duties, because his/her duty was to protect public health, and he/she should not suffer consequences if he/she did not cause the damage intentionally or because of gross negligence.[38]

The General Act on People's Committees[39] was enacted on 1 April 1952. This foresaw that municipalities, counties, or cities would be liable for the damage caused by a committee member or employee of the People's Committee to citizens in the performance of their duties due to their illegal acts. The injured party was entitled to request compensation from the People's Committee; if it refused to comply within 30 days, it had the right to file a lawsuit in court.[40]

5. Strict liability for the damage caused by dangerous things

Parallel to employee liability, the rules of strict liability evolved. This was necessitated by the fact that there were cases in which liability was based on an increased risk of damage. If the employer controls the source of the increased risk and damage that occurred, he/she could not be released from liability by proving that he/she was not at fault and that he/she paid due attention. For example, damage can occur from an accident involving a car owned by an employer and driven by a chauffeur employed by the employer. The employer would not be able to absolve himself/herself of liability by proving that the chauffeur acted contrary to his/her instructions, because the employer's liability was not based on fault but on the increased danger created by a vehicle qualifying as dangerous.[41]

Until the enactment of the 1978 Obligations Act, there was a lack of general rules on dangerous things. Moreover, special acts that regulated strict liabilities for certain dangerous objects were rare. In the pre-war Yugoslav state, that is, between the two world wars, several acts were enacted in which the strict liability of the owner was regulated, applicable to a specifically defined situation. The most important act in this regard was the Railway Act, enacted on 23 June 1930, which envisaged rules on compensation for damages caused by railway construction. Furthermore, the Act on Aviation of 18 February 1913 and the Act on Companies for Regular and Occasional Transportation of Passengers and Goods by Motor Vehicles on 2 December 1930 should also be mentioned. However, strict liability for dangerous things was not

38 Konstantinović (1952): pp. 126–127.
39 Opšti zakon o narodnim odborima od 01.04.1952. god. (General Act on People's Committees of 1 April 1952) Art. 29.
40 Konstantinović (1952): p. 127.
41 Kostić (1975): p. 70.

regulated in a general way, so post-war jurisprudence had to create a new solution for this area.[42]

The first attempt to provide a general rule on strict liability may be identified in Art. 136 of the "Sketch", specifying which things are considered dangerous, stating that: they are movable or immovable things, whose position, use, or characteristics, or their very existence, represent an increased risk of damage to their surroundings.[43] However, today, there is no definition of dangerous things or activities in the Obligations Act, so it is up to courts to assess which things are dangerous and which are not.[44]

III. THE 1978 OBLIGATIONS ACT

The "Sketch" had explicit rules on the liability of the employer for the damage caused by an employee to a third party in relation to work or work-related situations. However, these regulations addressed this subject matter less *in meritum* than the 1978 Obligations Act did. It seems that Professor Konstantinović was well aware of the rules contained in the 1966 Basic Act on Labour Relations. For this reason, in Art. 135, the "Sketch" simply refers back to the labour law regulations. It states that for compensation for damage caused to the labour organisation or third parties by an employee at work and in work-related situations, the rules of labour law regulation should apply.[45] This rule aimed to cover almost all situations, since the majority of workers were employed in "labour organisations". However, there was also some space for private employers, although very narrow. This seems clear from the second section of the same Art. 135 of the "Sketch" stipulating that for the damage caused at work and in work-related situations by persons employed by individual employers, their employer is liable in addition to them. Finally, the third section stipulates the employer's right to recourse. It envisages that the employer, who compensated for the damage attributable to the person employed, has the right to demand compensation of the paid amount from him/her, unless, in a given case, fairness requires that he/she bears the damage in full or in part.[46]

Finally, we reach the present era, in which the 1978 Obligations Act is in force. However, the rules of the Obligation Act have changed over time. At the time of its enactment, it bore the hallmarks of the society in which it was created; Art. 170, Sec. 1 spoke not of the employer but of the organisation of associated labour, which would be liable for the damage caused by the worker (employee) unless it proves that the worker acted as he/she should. After amendments to the 1993 Obligations Act, Art. 170, Sec. 1 stipulates that the company in which the employee worked at the time of causing the damage is liable for the damage caused by the employee in the course

42 Kostić (1975): pp. 71–72.
43 Konstantinović (1969): p. 29.
44 Marija Karanikić Mirić (2016): *Objektivna odgovornost za štetu*, Službeni glasnik, Beograd, p. 82.
45 Vrleta Krulj: Opšta pravila o građanskoj odgovornosti i posebna pravila o odgovornosti radnika i radnih organizacija (Osvrt na rešenja usvojena u „Skici za Zakonik o obligacijama i ugovorima"), *Zbornik radova Pravnog fakulteta u Nišu*, 1970, p. 65.
46 Konstantinović (1969): p. 51.

of work or work-related situations unless it proves that the employee acted as he/she should in the given circumstances. In the subsequent section, the Obligations Act stipulates that the injured party has the right to demand compensation directly from the employee if he/she causes the damage intentionally. Finally, Sec. 3 excludes the application of this rule from Sec. 1 if the damage is caused by a dangerous thing or dangerous activities when the liability is strict.

The existence of a presumed fault, based on the employee, is required to establish employer liability. In this case, the employer's fault is not important for the employer to be strictly liable. The right of the employer to recourse against the employee was regulated in a subsequent article. First, Art. 171, Sec. 1 expands the application of liability rules to all employers (Art. 170, Sec. 1 only names companies). However, in Sec. 2, any person who indemnifies the injured party for damage has a recourse claim against the employee if he/she caused the damage intentionally or by gross negligence. If the damage was caused by ordinary negligence of the employee, the employer had no right to recourse for the damages paid.[47]

It is important to note that although the employee's fault is prescribed as a condition, it is not considered a fault-based liability according to the recent Serbian doctrine of civil law. A leading contemporary Serbian scholar, Professor Karanikić Mirić, provides a strong argument for this. She claims that the employer is liable for damages, regardless of whether he/she himself/herself is at fault. The employer's liability is fault-based and is not a type of subsidiary liability. Only if they prove that there is no professional fault by the employee can the employer be released from liability.[48]

Art. 172 stipulates the liability of a legal person for any damage caused to their organs or bodies. Sec. 1 states that a legal entity is liable for damages caused by its bodies to a third party in terms of the performance of or in connection with the performance of its functions. Sec. 2 further states that, if nothing else is prescribed for the given case, the legal person has the right to compensation from the person for whom the damage is attributable to his/her intentional or gross negligent conduct. Finally, Sec. 3 specifies that the right to recourse expires within six months of the date of payment of compensation for damages. To establish the liability of a legal person according to judicial practice, it is necessary for the acts of the organ to be illegal and irregular.[49]

In addition, there are special rules regarding whether the damage is caused by a civil servant when the rules of the Act on State (Civil) Servants apply.[50] Art. 124 of this Act stipulates that when a civil servant causes damage at work or in a work-related situation to a third party through the illegal or irregular performance of his/her labour obligations, the state shall be held liable. If the damage was intentionally caused, the injured party could claim compensation directly from the civil servant,

47 Marija Karanikić Mirić (2020): Granice odgovornosti poslodavca za zaposlenog, in Vuk Radović (ed.): *Kaznena reakcija u Srbiji*, Pravni fakultet Univerziteta u Beogradu, Beograd, pp. 168–169.
48 Karanikić Mirić (2016): p. 11.
49 Karanikić Mirić (2016): pp. 65–66.
50 Zakon o državnim službenicima 2022 (Act on Civil Servants 2022), Art 124.

and if the state had already paid compensation for the damage, it would have had the right to recourse from the civil servant within six months.

Finally, there is a special situation that brings us back to Art. 170, Sec. 3 of the Obligations Act, which refers to a dangerous thing used by a person employed by the owner of the dangerous thing. In such a case, the employer shall be held liable as if he/she himself/herself had used the dangerous thing according to strict liability, and such a circumstance only resembles liability for another person, that is, the employer's liability for the acts of his/her employee.[51]

IV. CONCLUSIONS

Looking back at the historical evolution of the institution of employers' liability for the damage caused by their employees to third parties during work or in work-related situations, one thing is certain: throughout this time, the employer's fault-based liability and strict liability became intertwined. In the Serbian Civil Code of 1844, there were situations where the employer was liable because he/she acted with fault since he/she knew of the earlier improper conduct of his/her servants and took them into his/her service anyway. He/she was also liable, again, based on his/her own fault, when he/she made the wrong choice of his/her servants because he/she knew they were not qualified for the given task (*culpa in eligendo*). However, when the employer played the role of an innkeeper, he/she could have been liable in both fault-based and strict liability regimes.

As society was developing but at the same time collapsing under the gusts of wars in the 20th century, the provisions of the Serbian Civil Code proved to be unsustainable, so a new solution had to be adopted. A major milestone was the 1966 Basic Act on Labour Relations, which explicitly regulated this subject matter. In his "Sketch", Professor Konstantinović initiated in 1969 a wave of changes that was also reflected in the rules of the 1978 Obligations Act, which is still effective even today. However, it does not explicitly specify whether employer liability is fault-based or strict. The contemporary civil law scholarship, led by Professor Marija Karanikić Mirić, supports the interpretation that the employer's liability under the 1978 Obligations Act is strict, because he/she cannot be relieved from the liability by proving that he/she himself/herself was not at fault. However, when the damage is caused by a dangerous thing that the employee used while performing work tasks, the employer, as the owner of such a thing, would be liable as if he/she himself/herself caused the damage, which is a different legal solution compared to all previous ones. This is, for that matter, the result of all social changes and the consequences of the development of society, which would never have occurred if there were no risks in every business. However, for someone to take on a risk, they must accept responsibility for both their own actions and those of their associates, since this responsibility is tied to the pursuit of economic profit, which ultimately drives social activity.

51 Karanikić Mirić (2016): p. 110.

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Development of the Role of National Parliaments in the European Union

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ABSTRACT
This study focuses on the historical development of the role of national parliaments in the European Union (EU). The study first deals with questions such as what the parliament is, how parliaments are structured, what the functions of a parliament are, and how, over time, national parliaments have lost their power, while the European Parliament has strengthened its own. The main part of the work refers to the influence and role of national parliaments through different periods of the development of the EU, starting with the foundation of the organisation with the Lisbon Treaty. National parliaments have always been part of the EU political system, although hidden behind their governments, and are called upon to play a direct role on extraordinary and limited occasions such as the ratification of treaty reforms.
KEYWORDS
Parliament, national parliaments, role of national parliaments, European Parliament, European Union, treaties.

Dezvoltarea rolului parlamentelor naționale în Uniunea Europeană

REZUMAT
Acest studiu se concentrează asupra dezvoltării istorice a rolului parlamentelor naționale în Uniunea Europeană (UE). Studiul abordează mai întâi aspecte precum: ce este parlamentul; cum sunt structurate parlamentele; care sunt funcțiile unui parlament; precum și modul în care, de-a lungul timpului, parlamentele naționale și-au pierdut o parte din putere, în timp ce Parlamentul European și-a consolidat atribuțiile. Partea principală a lucrării se referă la influența și rolul parlamentelor naționale în diferite etape ale dezvoltării UE, începând cu fondarea organizației prin Tratatul de la Lisabona. Parlamentele naționale au făcut întotdeauna parte din sistemul politic al UE, deși adesea rămase în umbra guvernelor lor, fiind chemate să joace un rol direct în situații excepționale și limitate, precum ratificarea reformelor tratatelor.
CUVINTE CHEIE
Parlament, parlamente naționale, rolul parlamentelor naționale, Parlamentul European, Uniunea Europeană, tratate.

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I. INTRODUCTION

The role of national parliaments is very important because of the norms that the European Union has established regarding the involvement of national parliaments and how these norms have evolved over time, as well as the question of how the domestic legal systems of Member States have shaped the position of their national parliaments in EU affairs. National parliaments were actively involved during the creation of the EU in a way that each founding treaty of the three original communities (European Coal and Steel Community, Euroatom, and European Economic Community) required the approval of national parliaments of all six founding members. Further, the treaty reforms of the Single European Act, the Maastricht Treaty, the Amsterdam Treaty, and the Treaty of Nice marked significant efforts to strengthen parliamentary democracy in the EU and thus contributed in parallel to the development of the role of national parliaments in the EU decision-making process. This was still a limited method of participation, but greater participation of national parliaments in the activities of the EU was made possible with the adoption of the Treaty of Lisbon, which finally provided more significant opportunities for direct contact with EU institutions. The relationship between national parliaments and the EU is actually the relationship between a set of institutions within the national constitutional orders of the Member States on the one hand and an international organisation of which these Member States form part on the other.

II. GENERAL INFORMATION ABOUT THE PARLIAMENT (GENESIS)

Parliament comes under different appellations in different countries, but in generic terms, it is a representative body of the political system, represented by individuals to whom the people have entrusted the responsibility of representing them by laying down the legal framework within which society shall be governed. Parliaments also ensure that these legal conditions are implemented in a responsible manner by the executive.

The form of a democratic socio-political organisation called a parliamentary system or parliamentarianism is named after parliament. This system is also called the Westminster system, after London's Westminster, where the British Parliament is located.[2] The name parliament comes from the French *parlement*, which is the action of *parler* (to speak), so *parlement* is a discussion, and the term came to mean a meeting where discussions take place.

In the modern sense, it refers to a body of people (in the institutional sense) who meet to discuss matters of state. Initially, the parliamentary system was the first form

2 For an overview of the Westminster system, see the website of the Legislative Assembly for the Australian Capital Territory. Available at: https://www.parliament.act.gov.au/visit-and-learn/resources/factsheets/the-westminster-system (accessed on 4.12.2025).

of representative government to include commoners in the decision-making forum (but not the nobility). Legislatures, also called parliaments, operate under a parliamentary system in which the executive is constitutionally accountable to the parliament. This can be contrasted with a presidential system based on the model of the United States congressional system that operates under a stricter separation of powers, where the executive does not form part of, nor is it appointed by, the parliamentary or legislative body. Usually, congresses do not select or dismiss the heads of government, and governments cannot request early dissolution, as may be the case for parliaments. Some states have a semi-presidential system that combines a powerful president with an executive that is responsible to parliament.

The development of the modern parliamentary system dates back to the late thirteenth century in England and was formalised by King Edward I of England at a meeting in 1295, when representatives of rural landowners and townsmen were invited to participate in the King's Council (known as *Curia Regis*) as members of the commons. In the beginning, the English Parliament was unicameral, and a few years later, in the 14th century, it acquired a bicameral structure.

However, according to many authors, the ancient Greek and Roman parliaments were considered the oldest bicameral parliaments when the basic idea of the entire bicameral system developed. One of the rationales behind the bicameral nature of parliaments is that power should not be concentrated in the hands of any individual, any institution, or any class, while another is that wisdom is needed to rule.[3]

1. Parliament and separation of powers – (Genesis)

The division of power in a state is exercised by three separate institutions, which are independent of one another to avoid possible conflicts when all powers are concentrated in the hands of a single individual or institution. The division of powers is necessary because history has often shown that unlimited power in the hands of one person or group, in most cases, means that others are suppressed or their powers are curtailed. The separation of powers, typically for democracy, is intended to prevent the abuse of power and safeguard freedom for all. In a democratic system where there is separation of powers, the state's tasks are divided into three branches: legislative, executive, and judicial. First, legislative power is exercised by a parliament which debates and adopts laws, provides resources to the executive power for the implementation of this legislation, and monitors the implementation thereof. Second, executive power is exercised by the Head of State, assisted by the government responsible for formulating and implementing policies for the common good of society. Finally, judicial power is exercised by the courts responsible for ensuring that laws are implemented properly and that any misconduct is punished appropriately.[4]

3 Petar Bačić: Drugi dom – stanje, poslanje, perspektive, *Zbornik radova Pravnog fakulteta u Splitu*, 1/2007, pp. 87–104, p. 88.

4 Inter-Parliamentary Union, UNESCO (2004): *A Guide to Parliamentary Practice: A Handbook*, UNESCO–IPU, pp. 4–7. Available at: https://www.ipu.org/resources/publications/handbooks/2016-07/handbook-guide-parliamentary-practice (accessed on 4.12.2025).

2. Structure and functions of parliaments

Regarding the structure of parliaments, some are unicameral, which means they are composed of a single chamber/house, such as Sweden (*the Rigstag*) or Denmark (*the Folketing*), while others are bicameral, composed of two chambers/houses such as the United Kingdom (*House of Commons* and *House of Lords*) and France (*National Assembly* and *the Senate*). Most modern countries have adopted unicameral systems. In some countries with a federal structure, there are national and regional parliaments; although they perform basically the same functions as the national parliament, they are given decentralised authority to legislate in areas of local or regional significance.

Most parliaments are elected in the context of elections held at regular intervals based on universal suffrage.

Generally, parliaments have a two-tier management structure, one being the political structure responsible for making decisions regarding political issues before the parliament, and there is the administrative structure, which supports the political decision-making process. Parliaments also perform their work through various types of committees (*standing, select, portfolio, specialised, or ad hoc*) entrusted with responsibility for a specific sector of the state business.[5]

Parliaments are responsible for protecting and promoting human rights and are the principal representative institutions in each state. They are responsible for representing the interests of all sectors and societies, particularly in articulating these interests in relevant policies and ensuring that these policies are implemented efficiently.

Parliaments perform three main functions. The first is the legislative role by which they adopt laws that govern society in a structured manner. The second role is to oversee the executive, which means monitoring performance by the executive to ensure that the latter performs in a responsible and accountable manner, and the third function of parliament is to allocate financial resources to the executive (including monitoring government spending).[6]

III. THE EUROPEAN UNION AND ITS RELATIONSHIP WITH THE NATIONAL PARLIAMENTS – DEVELOPMENT OF THE ROLE OF NATIONAL PARLIAMENTS

Before discussing the main topic, it is important to answer some preliminary questions. The first question is as follows: what kind of organisation is the EU? Is it a federation, confederation, or something else? These questions lead to the next one: what is the nature of the EU, and provided that the EU is a union of democratic states, is the Union itself organised in a democratic way? Finally, what is the main role of national parliaments in the EU?

5 Inter-Parliamentary Union, UNESCO (2004): p. 6.
6 Inter-Parliamentary Union, UNESCO (2004): p. 6.

To answer these questions, it is necessary to look into the history of European integration and the genesis of the European Parliament, all of which are necessary to get to the final answer to the main topic: the role of national parliaments in the EU.

Regarding the legal nature of the EU, it is important to emphasise that the EU is not a state, but it also has features that distinguish it from an ordinary intergovernmental association. These features include the complex structure of institutions, which ultimately indicate that it is not an ordinary international agreement among sovereign states. It is considered that the EU is more than a confederation, but it is not a federal state either because this would imply that it is a group of modern states with unlimited veto power.[7]

In view of the above, many authors believe that the most appropriate description of the legal nature of the EU would be the term *supranational organisation*, which would indicate that it is something more than an international organisation, but it has not yet reached the level of integration among Member States necessary to achieve statehood. Thus, in Case 26/62, *Van Gen den Loos v the Netherlands* (1963), the European Court of Justice considered that the original community was *unique*, that is, *sui generis*, which is justified considering there is no other similar entity. The uniqueness of the aforementioned features of the Union stems from its relationships with its members and its external relationships.

From the Union's relationship with the Member States, it can be concluded that the Community or Union was established by the creation of permanent institutions that were assigned legislative, executive, and judicial powers, which were transferred from the Member States. Thus, the legal existence of the EU is based on the transfer of sovereign power, wherein the sovereign rights of each state are limited. In countries that are not members of the EU, it acts as a *legal entity*, given that this is determined by customary international law.[8]

1. National Parliaments under the Treaties establishing the European committees

The situation after the Second World War is closely related to the development of the EU because society and the economy had to be restored after the ruins, and many states had to be re-established. Europe had to look for more modest instruments of independent integration that would bring peace, but also to find instruments that would restore the economy. The first step towards achieving this goal was the establishment of the European Coal and Steel Community (ECSC), which initially aimed to prevent further war between France and Germany. This community was founded on international cooperation based on the principle of supranationalism and was first proposed by French Foreign Minister Robert Schuman on the 9th of May 1950. Based on the Schuman Plan, six countries (Germany, France, Italy, the Netherlands, Belgium, and Luxembourg) signed an agreement in Paris on 18 April 1951, which established a common framework

7 For more details, see: Arsen Bačić, Petar Bačić (2017): *Europsko pravo, studijski izvori 1.*, Pravni fakultet Sveučilišta u Splitu, Split, p. 132.

8 Bačić, Bačić (2017): p. 132.

for agreements on the production and distribution of coal and steel and an autonomous system of institutions that would manage it for the next 50 years.[9]

Based on the success of the Coal and Steel Community Agreement, the six founding countries expanded their cooperation into other economic areas. The next step was the signing of two treaties, the European Economic Community and the European Atomic Energy Community (Euratom); these communities came into existence on 1 January 1958.

The next important event occurred on 19 March 1958, which was also considered the day the European Parliament was born. It was the day the first session of the European Parliamentary Assembly, the predecessor of today's European Parliament, took place in Strasbourg, France, electing Robert Schuman as its president. On 30 March 1962, the Assembly replaced the Joint Assembly of the ECSC and changed its name to European Parliament.

On 1 July 1967, the three aforementioned communities merged into one European Community (EC), with common institutions representing the forerunners of the EU.

Most national parliaments were not involved in early agreements; for this reason, they have no information on and cannot control the drafts of EU decision-making taking place in this accelerated form. This also calls for early involvement and accelerated national scrutiny.[10]

National parliaments are central actors in the scrutiny and implementation of EU legislation.[11] Thus, Raunio maintained that national parliaments participate in the EU in three ways. The first is the national parliaments' participation in the formulation of national policy based on Union legislation; the second is to monitor the behaviour of Member State representatives in the Council of Ministers and the European Council; and the third is to have functions that are specifically regulated by treaties such as the ratification of amendments to treaties and the implementation of directives. The last function of participation differs from the first two, as treaties impose rights and duties on national parliaments. During the time of development, the EU expanded its competencies, resulting in a significant change in the institutions and political environment of national parliaments.

European integration refers to the transfer of responsibilities previously held by Member States to common decision-making institutions. As a result of this transfer of responsibility, there has been a reduction in the roles of national parliaments as legislators, budget authorities, and executive oversight bodies. Several competencies that were transferred from the national level to the EU initially belonged to the Council, but the European Parliament gradually assumed a full parliamentary role.

National parliaments have seen that more effective oversight of their governments' activities at the EU level and closer ties with the European Parliament are good ways

9 Mads Dagnis Jensen, Dorte Martinsen (2015): *Out of Time? National Parliaments and Early Decision-Making in the European Union*, Cambridge University Press, Cambridge, p. 250.
10 Jensen, Martinsen (2015): p. 250.
11 Tapio Raunio (1999): *Always One Step Behind? National Legislatures and the European Union*, Cambridge University Press, Cambridge, p. 180.

to increase their influence on EU policymaking, while ensuring that the EU is based on democratic principles.

The European Parliament also benefits from a close relationship with national parliaments because their participation helps strengthen the legitimacy of the European Parliament and brings the EU closer to citizens.

Historically, national parliaments have undergone different stages of adaptation to European integration. Some authors (T. Raunio and John O'Brennan) identify a three-stage process through which legislatures become increasingly involved in the governance of the Union.[12] At the very beginning of the first stage, between the 1950s to the mid-1980s, national parliament involvement was very limited because of the lack of interest in integration and the nature of the EC. It was also characterised by intergovernmental decision-making; public opinion in the original six countries, Benelux countries, France, Italy, and West Germany, was supportive of integration, and there were hardly any procedural changes within the national legislatures. This period also had a low interest in European affairs among member parliamentarians.

In 1973, when Denmark and the UK (and Ireland) entered the community, the situation began to change such that the membership issue produced a notable cleavage in both countries. This was influenced by public opinion, and party elites were much more hesitant about integration than other Member States were. The parliament traditionally occupied a central place in the Danish and British political systems, so it was not surprising that the legislatures of both countries decided to establish European Affairs Committees to have more control over the work of the Council.

2. The period before successive treaty amendments

National parliaments neither had nor were they in search of a formally subscribed function in EU affairs under the treaties establishing the EC. Until 1979, members of the European Parliament were not directly elected by the people of Europe but were instead members of national parliaments who had been designated as members of the European Parliament.

In accordance with the previously mentioned authors, the second stage of adaptation is between the 1980s Maastricht Treaty—which is characterised by responding to the challenge where community decision-making acquired supranational elements—and the initiation of the internal market project, being the real spur of change. In 1985, the Commission launched its White Paper on a single market, and the Single European Act (SEA) was signed a year later.[13]

The question of the role of national parliaments emerged after the SEA (1987) came into force, which reinforced the idea of integration. The SEA extended the scope of qualified majority voting. Thus, there were two profound changes brought about by

12 John O'Brennann, Tapio Raunio (2007): Introduction: Deparliamentarization and European Integration, in John O'Brennann, Tapio Raunio (eds.): *National Parliaments within Enlarged European Union, From 'Victims' of Integration to Competitive Actors,* Routledge, London–New York, pp. 1–26, p. 9.

13 O'Brennann, Raunio (2007): p. 9.

SEA. First, the community's jurisdiction was extended to new areas, and then qualified majority voting was introduced in the Council. Therefore, along with the assent and cooperation procedures that strengthened the legislative powers of the European Parliament and Commission, there is no possibility that national governments will block Council decisions. However, the SEA strengthened supranationalism in EC decision-making.

The main characteristic of the erosion of national sovereignty was connected to the scrutiny and implementation of internal market directives that increased the workload of legislatures, as laws that were previously under the jurisdiction of national parliaments were now decided in Brussels. This was the moment when national parliaments realised that they had underestimated the impact of the EC's evolution on their own political functions. Given that the Community needed to expand its power, MPs in the majority of the legislatures recognised the need to keep pace with community politics. The realisation of the above was possible mainly by strengthening the competence of the existing or establishing special EU committees. At this point, it was widely felt that specific permanent committees, which were supposed to follow EC activities within their field of competence, were unable to do so more slowly. Consequently, specific bodies have been established for European affairs. At times, these bodies have the status of a committee when they present reports directly to the plenary and ask for a vote. In other cases, they have a lesser status that bars them from direct access to the plenary. In such cases, there could be findings that require parliamentary action to be passed to the competent committee so that they can be introduced to the plenary.[14]

Through these committees, national parliaments have sought to act collectively, and in 1989, they created the Conference of Community and European Affairs Committees, which is more commonly known as the French abbreviation for Conference: *COSAC*.[15] The Conference meets twice a year in the Member States holding the Presidency of the Council (of Ministers) of the EU and brings together members of European Affairs Committees and a delegation of the European Parliament. At these meetings, which also include the Chairman of the Institutional Committee, COSAC provides a great forum for the exchange of information, as well as the exchange of best practices on parliamentary involvement in the EU. This kind of exchange of information and analysis at this forum helps parliaments less effective in scrutinising their own governments' policy benefit from the experience of others more effectively and prepare the ground for more influential COSAC actions.[16]

There is also the Conference of Speakers of the EU, which is considered the oldest vehicle for formalised contact between national parliaments, as they have held regular annual meetings since 1975. The guidelines of the Conference state that its members include the speakers of national parliaments in EU Member States , as well

14 Karlheinz Neunreither (1994): *The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Parliaments*, Cambridge University Press, Cambridge, p. 303.

15 Neunreither (1994): p. 303.

16 Theo Jans, Sonia Piedrafita: The Role of National Parliaments in European Decision-Making, *EIPAScope*, 1/2009, pp. 19–26, p. 20.

as the President of the European Parliament. Together with COSAC, this Conference is a forum for the exchange of information, opinions, and experiences, and it promotes research activities and common actions.

Finally, the third stage of the national parliament's adaptations to the EU, in accordance with the previously mentioned authors, is between addressing the democratic deficit and the Maastricht Treaty.[17] This stage was characterised by further extensions of the EU's powers thanks to the Maastricht Treaty, which moved the balance of power further in favour of the EU. In the Council, majority voting increased, while the co-decision procedure gave the EP equal status in certain issue fields. Public opinion surveys have shown that citizens have become increasingly sceptical of integration, while national parties are struggling to maintain unity in European matters. The debates that followed Maastricht were more focused on the democratic deficit, which was defended as the weak role of directly elected institutions in EU governance. Therefore, national parliaments were seen as some of the best solutions for correcting the deficit. Addressing the democratic deficit began during the ratification of the Maastricht Treaty, while most legislatures sought a chance to play a more active role. It was obvious to national legislatures that the successful implementation of the Maastricht Treaty would change Europe's political landscape. The result of the above was that some parliaments made their ratification conditional on receiving more powers *vis-à-vis* the government in European matters, and this was seen also as a guarantee for better access to information on EU matters.[18]

The next development was made with specialised standing committees that gradually became more involved in European questions. Recognising the huge workload of the European Affairs Committees was part of the delegation of authority from the EU committees to the standing committees, which was also motivated by the need to utilise the policy expertise of the standing committees. This situation of sectoral specialisation had influenced a very uneven pace in that in some parliaments (the Danish and the Finnish) the role of the standing committees had become institutionalised, while in some southern Member States, these standing committees remain marginal actors. It is important to note that while establishing a system of specialised committees for scrutinising the participation of their governments in EU affairs, national parliaments act strictly within the limits of their competence. Even if the Maastricht gives some more roles to national parliaments, all modifications or amendments of the existing treaties must be submitted for their agreement according to the constitutional rules of each Member State, which is also a lesson to national parliaments that in the future they should not accept to be confronted with a new treaty or major treaty amendments that have already been negotiated, but they should insist on increased participation in the preparatory process.

17 The contract was signed on 7 February 1992 and entered into force on 1 November 1993. The Maastricht Treaty created the European Union, and it is officially known as the Treaty on European Union. It marked the beginning of "a new phase in the process of creating an ever more closely connected community of peoples in Europe", giving the previous community a political dimension.

18 O'Brennann, Raunio (2007): pp. 11–12.

It is interesting to mention that some authors (such as K. Neunreither) have proposed criteria for evaluating the efficiency of parliamentary influence on executive action in EC matters. For the first criterion, they proposed early information about the conversations within various EU Council committees, or at least at the stage of deliberation, and also information on whether the Council itself had commented on a given issue. The second criterion would consist of the obligation of a national government to consult its own parliament on major issues to be decided upon within the Community framework, while the last criterion would be whether parliamentary opinions should bind the national government or whether it should be considered as just an informal outline.[19]

3. The period after successive treaty amendments

Over time, as competencies shifted from the national to the EU level with successive treaty amendments, the proper role of national parliaments became a more pressing issue in the European integration process. Because of the Council's role as the most important EU decision-making institution, the decision-making process of the EU is heavily influenced by national governments, as more powers were transferred to the European level, which deprived the national parliament of direct powers over the adoption of legislative acts in those fields in which powers had been transferred.

The EU Treaties came to recognise the role of national parliaments, first through a *Declaration on the Role of National Parliaments in the European Union* (annexed to the final act of the Maastricht Treaty), *Intergovernmental Conference* (IGC), and then in *Protocols that were annexed to the Treaties by the Amsterdam* (Torino, 1996, in force from 1999) and *Nice Treaties* (26.02.2001, in force from 01.02.2003).

It is also interesting to mention that the final text of the Treaty Establishing a Constitution for Europe, which ultimately failed to become law on account of Dutch and French vetoes, explicitly mentioned the role of national parliaments in the body of the treaty text itself for the first time.[20]

Declaration number 13 annexed to the Maastricht Treaty was the first, albeit timid, step forward recognising the role of national parliaments, which was followed by a *Protocol on the Role of National Parliaments in the European Union annexed to the Treaty of Amsterdam* (1996, in force from 1999), all of which eventually culminated in the direct role of national parliaments under the form of an *early warning system* provided in the Lisbon Treaty. It focused on improving the scrutiny process at the national level (individual roles).

The Maastricht Treaty, in *annexed Declaration 13*, stated,

> *[t]he Conference considers that it is important to encourage greater involvement of national parliaments in the activities of the EU and that this was to be done through improved access to information. The governments of Member States will ensure that national parliaments receive commission proposals for legislation in a good time for information, which would be enough time for possible examination. Similarly, the Conference considers it important for contact between the national parliaments and the European Parliament to be stepped up, in particular through the granting of appropriate reciprocal facilities and regular meetings between members of parliament interested in the same issues.*

19 Neunreither (1994): p. 304.
20 O'Brennann, Raunio (2007): p. 13.

Therefore, it was emphasised that there would be extended cooperation with the European Parliament.[21]

Besides *Declaration 13*, *annexed Declaration number 14* is also important for the role of national parliaments, and it was focused on the collective role of the parliaments (national plus European Parliament) and tried to get started the Assises or, better said, to move forward the joint conference of the European Parliament and national parliaments that had convened in 1990. It states,

> *[t]he Conference invites the European Parliament and national Parliaments to meet as necessary as a Conference of the Parliaments (or 'Assizes'). The Conference of the Parliaments will consult on the main features of the EU without prejudice to the powers of the European Parliament and the rights of the national parliaments. The President of the European Council and President of the Commission will report on each session of the Conference of the Parliaments on the State of the Union.*[22]

Although declarations are not legally binding, their inclusion in the treaty was part of a political breakthrough while recognising the right of national parliaments to monitor EU legislation *ex ante*.

Both the above-mentioned issues of annexed declarations of Maastricht were on the agenda during 1996–1997, the work of the *Intergovernmental Conference* (IGC '96). The role of the national parliament was a minor or, better, marginal issue in the IGC, with limited interest. In the EP Task Force on the IGC, some countries were, at the start of 1996, not in favour of reinforcing the role of national parliaments (Germany, Italy, Luxembourg, Spain, Belgium, Ireland, and the Netherlands). All countries supported the idea of systematically forwarding commission proposals to national parliaments, but all Member States wanted commissioners to be heard by national parliaments according to the control exercised by the EP.

Next, the role of national parliaments emerged with the Protocol attached to the Amsterdam Treaty, the *Protocol on the Role of the National Parliaments in the European Union*. Protocols are legally binding instructions for the relevant individuals and institutions, an improvement over the Maastricht Declaration. The Protocol's provisions contain some steps forward; for example, setting an exact time limit that the national parliaments and EU institutions must respect, and another provision contains details documenting that the national legislatures have the right to receive.[23]

The importance of *Declaration No. 23 of the Treaty of Nice* lies in the four key questions it lists, which the next IGC should address, with one of them being "the role of national parliaments in the European architecture". It is also important to mention *the Laeken Declaration* (December 2001), which provided more detailed questions about the contribution of national parliaments. Questions that this declaration had to deal with were,

21 O'Brennann, Raunio (2007): pp. 12–13.
22 O'Brennann, Raunio (2007): p. 12.
23 Philipp Kiiver (2007): European Scrutiny in National Parliaments: Individual Efforts in a Collective Interest, in John O'Brennann, Tapio Raunio (eds.): *National Parliaments within Enlarged European Union, From 'Victims' of Integration to Competitive Actors,* Routledge, London–New York, p. 71.

for instance, represented in a new institution, alongside the Council and the European Parliament, or whether they should have a role in areas of European action in which the European Parliament had no competence, but it would also focus on the division of competence between the Union and Member States, for example, through preliminary checking of compliance with the principle of subsidiarity. The Treaty of Nice (signed on 26 February 2001) was intended to make legal preparations for the future enlargement of the EU, while the rejection of the first referendum on the Treaty contributed to the greater emphasis on the scrutiny of European issues.[24]

Furthermore, the role of national legislatures featured prominently in the debates on the Convention. The national legislatures met from February 2002 to July 2003 to draft a constitution for the Union. This Convention established a separate Working Group (WG IV) on *the role of national parliaments* for debating the position of domestic legislatures. The first time national parliaments were mentioned in the main text of the Constitution came with the Constitutional Treaty signed in October 2004. Article I-46, which is connected to the principle of representative democracy, contains the following provisions: 1) The functioning of the Union shall be founded on representative democracy. 2) Citizens are directly represented at the Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments or to their citizens. 3) Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen. 4) Political parties at the European level contribute to forming European political awareness and expressing the will of citizens of the Union.[25]

The *Protocol on the Role of National Parliaments in the European Union* and the *Protocol on the Application of the Principles of Subsidiarity and Proportionality* are the main sections of the Constitutional Treaty. The former is designed to make national legislators better informed about EU decisions, whereas the latter focuses specifically on monitoring subsidiarity principles. In the Protocol on the Role of National Parliaments in the European Union, it is prescribed that the draft of European legislative acts sent to the European Parliament and the Council shall be forwarded to national parliaments, which means proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank, and requests from the European Investment Bank for the adoption of a European legislative act. This is a significant improvement on the Protocol in the Amsterdam Treaty because legislative initiatives shall now be sent directly to national parliaments by the respective institutions. At the same time, under the present rules (in the Amsterdam Treaty), the "government of each Member State may ensure that its own national parliament receives them as appropriate". One improvement is that national MPs also gain better access to non-legislative documents. In addition to the Commission consultation documents (communication and green and white papers, which were mentioned earlier in the Amsterdam Treaty's Protocol), the

24 O'Brennann, Raunio (2007): p. 13.
25 O'Brennann, Raunio (2007): p. 14.

national parliaments will in the future also receive the Commission's annual legislative programme, the annual reports of the Court of Auditors, "as well as any other instrument of legislative planning or policy to national Parliaments". Inclusively, the Protocol states that the agendas for and the outcomes of meetings of the Council, including the minutes of meetings where the Council is deliberating on draft European legislative acts, shall be forwarded directly to national parliaments at the same time as to Member States' governments.[26]

The Treaty of the European Union (TEU, 2007) and the Treaty on the Functioning of the European Union (TFEU, signed on 25 March 1957) provided important changes in direct relevance to national parliaments. National parliaments were mentioned for the first time and assigned specific roles in the body of the treaty text. National parliaments ensure compliance with subsidiarity (Article 5 TEU) and contribute to the good functioning of the EU (Article 12 TEU). According to Art. 12, national parliaments contribute actively to the good functioning of the Union: 1) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the Role of National Parliaments in the European Union; 2) by seeing to it that the principle of subsidiarity and proportionality is respected; 3) by taking part, within the framework of the area of freedom, security, and justice, in the evaluation mechanisms for the implementation of the Union policies in that area and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities; 4) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty; 5) by being notified of applications for accession to the Union; 6) by taking part in the inter-parliamentary cooperation between national parliaments and with the European Parliament, in accordance with the Protocol on the Role of National Parliaments in the European Union.[27]

They were also given prerogatives, especially the *early warning system* for monitoring possible breaches of subsidiarity and checks carried out by COSAC. This so-called early warning system is a mechanism that enables national parliaments to conduct surveillance with respect to the principles of subsidiarity and proportionality, which means that it empowers them to ensure compliance with the principle of subsidiarity (Art. 5.3 TEU).

IV. REBALANCING AND REASONS FOR GAINING THE POWER OF THE EUROPEAN PARLIAMENT VS WEAKENING THE POWER OF NATIONAL PARLIAMENTS

European integration has been the most successful political project in Europe's history, yet it is also marked by growing scepticism. Political leaders have become more cautious and hesitant, increasingly questioning the legitimacy and future direction of European

26 O'Brennann, Raunio (2007): p. 15.
27 Consolidated version of the Treaty of the European Union, *Official Journal of the European Union* (C 326/15).

integration. European citizens, on the other hand, became more outspoken than ever, and they began to claim ownership of European integration projects. The sustainable success of the EU depends on the continuous deepening of integration efforts that were already underway at the beginning of its creation.

The national parliament in the EU and their involvement have evolved rapidly, especially since the ratification of the Maastricht Treaty. Even national parliaments have complained about their insufficient role in EC development and their continuing loss of competence. To have a meaningful influence on European legislation, parliamentarians must involve themselves in the pre-initiative stage.

Thus, most ideas on what constitutes appropriate involvement at the European level for national parliaments may have to be developed beyond the scrutiny of executive activities, considering that national parliaments are to legitimise European legislation in a meaningful way. The draft treaty significantly improved the visibility of national parliaments in the EU, but at the same time it has done little to clarify the position and role of national parliaments within the EU because, in some way, it denies them a direct voice at the European level and also does not lay down rules or minimum requirements for procedures at the national level.[28]

National parliaments are almost without exception portrayed in the literature as reactive institutions because they have a modest influence on policy initiatives from the executive. When we discuss the so-called *deparliamentarisation* thesis, the development of European integration has led to the erosion of parliamentary control over executive holders. Therefore, powers previously under the jurisdiction of national legislatures have shifted upwards to the European level, which was done by national governments and legislatures, signalling that the benefits accruing to Member States from integration outweigh losses to national parliamentary sovereignty. In a political sense, neither domestic nor European parliaments are sovereign bodies under the control of European-level executive powers in the adoption of legislative acts at the EU level. Despite its increased role in the EU political system, the powers and legitimacy of the EP fall far short of full compensation for the loss of power in national parliaments.[29]

Research on the impact of the EU on national politics has shown strong support in favour of the *deparliamentarisation* thesis. While some authors try to define which lessons can be learned from the transfer of powers from national states to the EU, citizens of Member States fear the loss of democratic control over the most important political issues.[30]

Finally, with regard to parliamentary control in the EU, European integration is commonly understood to have two negative effects on legislative oversight. First, it

28 O'Brennann, Raunio (2007): p. 20.

29 Adam Cygan: National Parliaments within the EU Polity – No Longer Losers but Hardly Victorious, *ERA Forum*, 2012, pp. 517–533, pp. 518–519. Available online: https://link.springer.com/article/10.1007/s12027-011-0233-9 (accessed on 4.12.2025).

30 Marta Zalewska, Oskar Josef Gstrein: National Parliaments and Their Role in European Integration: The EU's Democratic Deficit in Times of Economic Hardship and Political Insecurity, *Brugler Political Research Papers*, February 2013, p. 5. Available at: https://www.coleurope.eu/sites/default/files/research-paper/wp28_zalewskagstrein.pdf (accessed on 4.12.2025).

alters the constitutional basis of the policy-making process by transferring rule-making authority to a higher level of governance. As a result, national parliaments lose one of their most powerful instruments of executive control: legislative sovereignty. Second, European integration changes several features of how the policy-making process operates in practice, thereby weakening the recognition of national parliaments as actors in EU-level politics.[31]

National parliaments operate most efficiently at the national level; because of the emphasis on activity at the national level, it would be inappropriate for the European level to impose rules and standards on national parliaments. This leaves national parliaments with the problem of how they can individually place their mark on European legislation through their governments.[32]

V. CONCLUSIONS

National parliaments have usually been described as latecomers to European integration, but there is little doubt that they have developed institutional means to become more involved over the last few years, especially since the *Lisbon Treaty* (2009). For the first time, this treaty introduced a separate article, rather than a protocol, covering the role of national parliaments in the EU, which emphasised the importance of their role and addressed the question of democratic legitimacy through further enhancement of the EP. The greater involvement of national parliaments in the activities of the EU is secured in different ways, and with Lisbon, they obtained the right to information, since EU institutions are obligated to forward all drafts of legislative acts of the Union and applications for accession to the EU.

The Lisbon Treaty also ensures the active participation of national parliaments within certain fields of decision-making processes at the EU level, for example, through involvement in the political monitoring of Europol, by adopting measures concerning the cross-border implications of family law (Art. 12 TEU, Art. 81 TFEU), or by taking part in the revision procedures of the Treaties (Art. 12, 48 TEU). The national parliament, thanks to the Lisbon Treaty, also obtained the right to express objections to policy proposals concerning treaty changes that are proposed under simplified procedures instead of normal ones. They also obtained the right to express objections to measures of judicial cooperation in civil law matters with cross-border implications. In such cases, their proposals must be forwarded to the national parliaments. The proposals are not adopted if national parliaments make their opposition known within six months of the date of such notification; this also means that objections can be voiced over the principle of subsidiarity. National parliaments play a formal role in the scrutiny of EU legislation, allowing them to issue reasoned opinions if they consider that a proposal breaches the

31 Thomas Winzen: Political Integration and National Parliaments in Europe, *Living Reviews in Democracy*, December 2010, pp. 1–14, p. 3. Available at: https://ethz.ch/content/dam/ethz/special-interest/gess/cis/cis-dam/CIS_DAM_2015/WorkingPapers/Living_Reviews_Democracy/Winzen.pdf (accessed on 4.12.2025).

32 Winzen (2010): p. 3.

principle of subsidiarity. If such violations have been detected, national parliaments may trigger two different procedures, widely known as *yellow card* (can be triggered if over one-third of national chambers or parliaments issue reasoned opinions) and *orange card* (apply to the ordinary legislative procedure and are drawn when at least a simple majority—more than half of the national parliaments—conclude that a legislative proposal does not comply with the principle of subsidiarity). These procedures have not been as effective as expected, and there are various proposals on how to improve the work of reasoned opinion procedures.

In summary, regarding the role of national parliaments in relation to the EU, there are four key activities of national parliaments: first, to scrutinise, influence, and hold their own governments accountable; second, to engage in dialogue with the EU institutions (especially the European Commission and the European Parliament); third, to conduct a subsidiarity check on EU legislative proposals (the reasoned opinion procedure); and fourth, to engage in inter-parliamentary cooperation.

In the end, looking to the future and better cooperation between national parliaments and the EU, some improvements could be made. First, further democratisation of the EU through stronger parliamentarisation, and second, an improvement could be achieved through the autonomous action of national parliaments as well as through actions collectively agreed between national parliaments, the Commission, the Council, and the European Parliament.

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Political Shifts and Worker Representation: Trade Union Effectiveness in Interwar and Post-war Romania

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ABSTRACT
Little has been written about the contribution of trade unions to the formation of modern Romanian society or about Romanian trade union history in general. Despite their potential as instruments of social peace and justice, the interaction between political regimes, labour rights, and trade union effectiveness in Romania has been understudied. By stripping the history of trade unions from the distortions imposed during the Soviet-type dictatorship and focusing on key strikes and labour movements in the Jiu Valley—Romania's major coal basin and important labour centre during the interwar and post-war period—this study aims to examine Romanian political systems and historical conjunctures through the lens of trade union effectiveness. It investigates if trade unions fulfilled their intended role under different regimes and whether legal frameworks, such as provisions for freedom of association, were genuinely implemented or remained legal fictions. This perspective is insightful for understanding the marginalised role and diminished importance of trade unions today, illustrating how the legacy of fictitious workers' representation has had long-lasting repercussions.
KEYWORDS
Trade unions in Romania, interwar period, Soviet-type dictatorship, legal framework, representation, strikes.

Schimbări politice și reprezentarea muncitorilor: eficiența sindicatelor în România interbelică și postbelică

REZUMAT
S-au scris puține lucruri despre contribuția sindicatelor la formarea societății moderne românești sau despre istoria sindicatelor din România în general. În ciuda potențialului lor de a servi drept instrumente ale păcii și justiției sociale, interacțiunea dintre regimurile politice, drepturile lucrătorilor și eficiența sindicatelor în România a rămas insuficient >>

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>> studiată. Analizând istoria sindicatelor dincolo de distorsiunile impuse în timpul dictaturii de tip sovietic și concentrându-se asupra grevelor și mișcărilor muncitorești din Valea Jiului – cel mai important bazin carbonifer al României și un centru esențial al muncii în perioada interbelică și postbelică – acest studiu își propune să examineze sistemele politice și conjuncturile istorice din România prin prisma eficienței sindicatelor. Se investighează în ce măsură sindicatele și-au îndeplinit rolul preconizat sub diferite regimuri și dacă legislația, incluzând prevederile privind libertatea de asociere, a fost implementată în mod autentic sau a rămas o simplă ficțiune juridică. Această abordare oferă o înțelegere profundă asupra rolului marginalizat și a importanței diminuate a sindicatelor în prezent, evidențiind cum moștenirea reprezentării fictive a lucrătorilor a avut repercusiuni de lungă durată.
CUVINTE CHEIE
Sindicate în România, perioada interbelică, dictatură de tip sovietic, cadru legal, reprezentare, greve.

I. INTRODUCTION

Originally, trade unionism emerged as a mechanism to restore the balance disrupted by legal individualism, a facet of economic liberalism that favoured the accumulation of capital. By cultivating solidarity rooted in the similarity of needs and enabling collective negotiation, trade unions became instruments of social peace and justice. Despite this, little has been written about the contribution of trade unions to the formation of modern Romanian society or about Romanian trade union history in general. This gap can be attributed to two main factors. Firstly, Romania was predominantly agrarian prior to the forced industrialisation and organisation policies of the Soviet-type totalitarian regime. As Lucian Boia notes in *Why Is Romania Different?*, the country's social structure consisted of a small urban population, an even smaller industrial workforce, and a vast majority of peasants, with over 80% of the population living in villages.[2] This lack of a massive urban working class influenced the development and role of trade unionism. Secondly, much of the literature on trade unions produced during the Soviet-type dictatorship primarily served as a tool for legitimising the regime, distorting their historical narrative. These are the circumstances under which the analysis of trade union history gains relevance and is brought into focus.

This research follows two primary tracks. The first focuses predominantly on the interwar period, while the second addresses the post-war era under the influence of the Soviet-type totalitarian regime. Furthermore, the study considers the establishment of potential cause-and-effect relationships between the historical periods examined and the effectiveness of trade unions today. The analysis of trade union history is approached from the perspective of effectiveness. How can the effectiveness of trade unions be assessed? The answer to this question shapes the areas of investigation.

The efficacy of trade unions can be measured through the relationship between their legal framework, the practical enforcement of legal norms, and the unions' ability to fulfil their intended roles. To structure this evaluation, the following groups of questions serve as a guide: 1. Where did trade union authority or empowerment stem from? Did it originate from the workers themselves, or was it imposed by the state?

2 Lucian Boia (2012): *De ce este România altfel?*, Humanitas, București, p. 64.

2. How challenging was the process of establishing trade unions? What obstacles did they face in terms of organisation? 3. What outcomes did trade unions achieve? Did they secure significant accomplishments such as collective labour contracts or the protection of certain rights? Based on these questions, the criteria for analysis include authority/empowerment, the establishment in practice and organisational strength, and the achievements of trade unions. Particular attention is devoted to collective agreements—"a central institution of collective labour law, whose existence or inexistence [and] the regulation of its conclusion and possible content [...] are of paramount importance for the enforcement of workers' interests"[3]—as the right to conclude such agreements, and their practical implementation serves as a central thread weaving through the history of trade union during the periods examined.

II. ROMANIAN TRADE UNIONISM AT THE END OF THE 19TH CENTURY AND IN THE INTERWAR PERIOD

1. Trade unions according to the law

The origins of Romania's trade union movement date back to the late 19th and early 20th centuries, a period that holds significance also from a legal perspective. This era marked the introduction of Romania's first wave of industrial labour legislation. Though often partial and fragmented, these regulations played an important role in advancing the recognition of the right to association and organisation in the field of labour.

The 1866 Constitution already recognised the right to associate (Article 27) at a declarative level, entrusting lawmakers with defining the limits and conditions for its exercise. However, it was not until 55 years later that specific legislation detailing the content of this fundamental right in the context of labour law emerged. Before addressing this, it is worth highlighting the Resolution of the National Assembly in Alba Iulia (*Rezoluția Adunării Naționale de la Alba Iulia*). Adopted on the 1st of December 1918, this resolution proclaimed the unification of Transylvania, Banat, Crișana, and Maramureș with the Kingdom of Romania, finalising what is known as the Great Union (*Marea Unire*)[4] and contributing to the establishment of Greater Romania (*România Mare*).[5] Widely regarded

3 Magdolna Vallasek: A kollektív munkaszerződés szabályozásának problémái Romániában, *Erdélyi Jogélet*, 4/2020, pp. 217–227, p. 218.

4 By the term Great Union, Romanian historiography refers to the unification of Romanian-inhabited territories with the Kingdom of Romania, beginning with Bessarabia, followed by Bukovina, and culminating with the unification of Transylvania, Banat, Crișana, and Maramureș with Romania.

5 The term Greater Romania refers to the borders of the Kingdom of Romania during the interwar period, established as a geopolitical reality after the First World War, as a consequence of the Great Union and its ratification by the Treaty of Versailles (1919), the Treaty of Saint-Germain (1919), and the Treaty of Trianon (1920). Collectively, these treaties confirmed the territorial configuration of Greater Romania, encompassing Transylvania, Bukovina, Bessarabia, and parts of Banat, Crișana, and Maramureș.

as one of the most significant moments in Romanian history and historiography, this date holds a central place in the nation's collective memory and is celebrated today as a national holiday. Among the provisions of the Resolution was a commitment to grant industrial workers the same rights and privileges as those enjoyed in the most advanced Western industrial states.[6] However, this progressive provision was never enshrined in law. Of the resolution's measures, only its point I—the unification of Transylvania and Eastern Hungarian territories with Romania—was incorporated into Romanian legislation.[7]

Following the First World War and in the wake of the 1920 general strike,[8] which led to the government's suspension of trade union activities, Romania adopted Act No. 41 of 26 May 1921[9] on trade unions. This legislation, partly influenced by the establishment of the International Labour Organisation (ILO),[10] of which Romania was a founding member, for the first time solidified the existence of professional unions (*sindicate profesionale*) as a legislative reality in Romania.[11] Such a pioneering regulatory framework established the principle of trade union freedom (Article 2), allowing for the formation of unions for employers, employees, and self-employed professionals practising the same, similar, or related professions, without requiring prior authorisation. According to this act, the objectives of professional unions were "the study, defence, and development of professional interests, limited to those of an industrial, commercial, agricultural, technical, and cultural nature, without pursuing benefit sharing" (Article 1). It was the first Romanian legislation to grant unions that have been recognised as legal persons the right to conclude collective agreements (Article 32)[12]—while also establishing the

6 "III. În legătură cu aceasta, ca principii fundamentale la alcătuirea noului Stat Român, Adunarea Națională proclamă următoarele: [...] 6. Muncitorimei industriale i se asigură aceleași drepturi și avantagii, care sunt legiferate în cele mai avansate state industriale din Apus." Rezoluțiunea Adunării Naționale de la Alba Iulia din 18 Noiembrie/1 Decembrie 1918.

7 Zoltán József Fazakas (2024): *A Vastörvény*, Forum Iuris, Kolozsvár, pp. 67–68.

8 The 1920 Romanian general strike, which took place from 20 to 28 October, was the largest proletarian uprising in the country up to that point, involving over 400,000 workers from various sectors. In response to intensified exploitation and deteriorating economic conditions following the First World War, among the demands of the workers participating was the recognition of trade unions.

9 Published in the *Official Gazette* no. 41, 20 December 1921.

10 The creation of the ILO in 1919 as part of the Treaty of Versailles reflects the belief that universal peace can be achieved only if it is grounded in social justice. Promoting social justice and humane labour conditions—central to the ILO's founding mission, as outlined in the Preamble of its first Constitution—requires the protection of workers through labour standards and principles, including the recognition of the principle of freedom of association. The establishment of these founding principles by the ILO positively influenced the legislative focus on labour relations in Romania.

11 Alexandru Țiclea: Evoluția legislației muncii în spațiul românesc, *Dreptul*, 4/2021, pp. 50–71, p. 55.

12 However, it still lacked detailed provisions regarding the procedure, the essential content elements, and the representativeness of the social partners required to conclude such agreements. In contrast, the 1929 Act on labour contracts—published in the *Official Gazette* no. 74 on 5 April 1929—not only provided a definition of the collective agreement—describing it as a written accord concluded between employers, their representative groups, and workers' professional organisations or groups, containing provisions on working conditions and

employer's obligation to implement them—and to represent their members in court on matters related to their professional and collective interests. Many of these provisions set a precedent for subsequent legislation.[13]

The 1923 Constitution of Greater Romania (Article 29) and even the 1938 authoritarian Constitution (Article 26) of King Carol II—including a provision mandating the obligation to work—granted the right to association. However, with the enactment of the 1938 legislative decree on the recognition and functioning of corporations of workers (*bresle de lucrători*),[14] particular servants (*funcționari particulari*), and craftsmen (*meseriași*)[15]—and the subsequent repeal of the 1921 trade union act—trade unions were replaced with corporations of workers—professional corporate bodies modelled after the corporatist political system of fascist Italy at the time—resulting in a severe restriction of the right to association. With this, King Carol II declared that he had accomplished the "royal revolution".[16] Article 40 of this act stipulated that only a single union per country could be recognised for each professional category or related professions. Contrary to the previous *status quo* of non-political trade unions, the organisation, functioning, and dissolution of guilds were placed under the authority of the Ministry of Labour. Furthermore, guilds could only be established, and syndicate leaders appointed, through royal decree.[17] Thus, the monistic structure of syndicate life and the establishment of guilds became instruments for centralisation and control[18] under the new dictatorial regime. Another legislative decree from November 1940 led to the abolition of these organisations. Subsequently, a series of regulations introduced a restrictive labour regime during wartime.[19]

2. Trade union effectiveness in practice

With the role and legal background of interwar trade unions outlined, attention now shifts to assessing their effectiveness. This section will follow the criteria outlined in the introductory part of the research, with one exception: the analysis of trade union authority or empowerment will be omitted, as examining the origins of interwar trade

remuneration—but also established detailed regulations governing the circumstances for concluding such contracts. Vallasek (2020): p. 219.

13 National Archives of Romania, Inventory no. 3406: *Uniunea Generală a Sindicatelor din România 1944–1989*, pp. 3–4. Available at: https://arhivelenationale.ro/site/download/inventare/Uniunea-Generala-a-Sindicatelor-din-Romania.-1944-1989.-Inv.-3406.pdf (accessed on 05.11.2024).

14 The Romanian word *breaslă* translates as 'guild', showing that the legislator chose to revive this traditional term even though, in the legal context of the time, it referred to fascist-type corporation. For the sake of historical accuracy, this paper uses the term in this latter meaning.

15 Published in the *Official Gazette* no. 237, 12 October 1938.

16 Lavinia Betea, Cristina Diac, Florin-Răzvan Mihai, Ilarion Țiu (2012): *Viața lui Ceaușescu. Ucenicul Partidului*, Adevărul, București, p. 189.

17 Țiclea (2021): p. 61; Ștefănescu (2018): pp. 97–98.

18 The police were also closely monitoring the workers by infiltrating the celebrations, gatherings, and outdoor festivities organised by the guilds. Agents "eavesdropped on what was being discussed, sung, or chanted. In doing so, they were assessing the 'mood' of the proletariat." Betea, Diac, Mihai, Țiu (2012): p. 195.

19 Țiclea (2021): p. 61.

union authority holds less significance given that legitimacy during this era was not state-imposed—except in the aforementioned case of guilds/corporations.

2.1. Establishment and organisational strength

The drive for economic modernisation pursued by successive governments between 1918 and 1938 created tensions between state policy, industrial workers, and the peasantry. Within this context, labour organisation—usually happening under the advocacy of the Social Democrats—manifested itself.[20] As previously seen, the legal framework also recognised trade unions. However, acknowledgement alone leaves open questions: did this recognition translate into genuine support or efforts to develop the trade union movement? Did it reflect a sincere intention to meet the demands of the working class?

The Central Leadership of the National Federation of Trade Unions describes the early interwar period as an intense struggle for the survival of unions, requiring enormous efforts merely to safeguard their existence. In one of its reports, it offered the following critique:

> *although there is an act in Romania recognising the right of the working class to organise, workers were nevertheless frequently obstructed—often with extreme brutality—from organising and defending their rights and interests. From the lowest-ranking detective or gendarme to the highest administrative officials, efforts were made to hinder union organising and other union actions.*[21]

Sándor Szenkovics, a trade union member who witnessed the 1929 Jiu Valley strike, echoed this sentiment, observing, "[s]ome believe that trade unions should follow a policy of begging and submission."[22]

Employers dismissed thousands of workers for attempting to organise, but persecution and unlawful measures were not enough. The formalities imposed by Act No. 21 of 6 February 1924 concerning legal persons[23]—applicable to trade unions, as it sought to unify the procedure for recognising the legal personality of all associations that did not pursue profit or patrimonial purposes[24]—even after its amendment,[25] further restricted the freedom to organise.

20 Anca Glont: Reframing the Lupeni Strike of 1929: State Intervention and Organized Labor in Romania's Jiu Valley, *Plural*, 1/2023, pp. 37–59, p. 39; A romániai szakszervezetek az 1921-22-ik évben, *Erdélyi Munkásnaptár*, 1923, pp. 92–96, p. 95.

21 A Romániai Szakszervezetek Országos Szövetsége (1932): *A romániai szakszervezeti mozgalom 1926–1930. A Romániai Szakszervezetek Országos Szövetsége központi vezetőségének jelentése 1926–1930 évekről és az 1931. jan. hó 4.–7. tartott szakszervezeti kongresszus jegyzőkönyve*, Gutenberg, Kolozsvár, p. 20.

22 Sándor Szenkovics: A szakszervezetek és a politika, *Szabad Szó*, 8 November 1944, no. 7, p. 1. The translations of originally non-English quotations belong to the author of the article unless stated otherwise.

23 Published in the *Official Gazette* no. 27, 6 February 1924.

24 Nicolae Ghiulia (1929): Chestiunea muncitorească în Ardeal și Banat, in *Transilvania, Banatul, Crişana şi Maramureşul: 1918–1928*, Cvltvra Națională, București, pp. 707–738, pp. 713–714.

25 The modification was intended to facilitate the establishment and functioning of professional organisations. Ghiulia (1929): pp. 713–714.

2.2. Achievements

When it comes to the prevailing social realities, the newspaper *Maros*, under the title *What Trade Unions Do? – On the Activities of Trade Unions*, provides an overall picture of the role and achievements of trade unions:

> *[c]onsidering that industry in Romania is at a very rudimentary level, as Romania is not an industrial but an agrarian state, trade unions here have a much greater role and mission than in any other industrial or more industrialised country. The unions fought and continue to fight against the exploitation of labour and for improving the standard of living of workers. The goal of trade unions, therefore, is to serve the economic and cultural interests of their members, foster a sense of solidarity among them, and support all efforts aimed at improving working conditions. To achieve this, they enter into collective agreements that regulate working hours, wages, and working conditions. They intervene, make proposals, and, if necessary, protest to ensure that favourable acts for workers are passed in parliament. They ensure the observance of existing acts. [...] They offer legal protection to their members, establish libraries, publish professional journals, issue notices and pamphlets, organise scientific lectures, courses, balls, and celebrations, convene meetings, lead wage movements and strikes, and support workers imprisoned for their involvement in labour movements.*[26]

One should take a closer and clearer look at some of the achievements enumerated above. Between 1926 and 1930, "the lion's share of the work of the National Trade Union Council was devoted to organising and rebuilding efforts".[27] During this period, efforts were made to organise railway workers, tobacco and match factory employees, and a significant number of private officials. This era also saw the reorganisation of unions for workers in the clothing, leather, textile, and woodworking industries.[28] Additionally, the enactment of the 1929 Act on labour contracts,[29] along with the legislation created on women's and children's labour and the establishment of the eight-hour workday,[30] were key achievements of the trade union movement between 1926 and 1930.[31] However, due to the lack of implementation instructions or records of which companies could be granted exemptions, the latter act was not properly applied.[32] Article 44 granted the Council of Ministers the authority to suspend its provisions only in the event of war or other threats to national security. Despite this, and despite the protests from the workers' representatives, the committee operating alongside the Ministry of Labour granted numerous exceptional permits for extending working hours, some of which contradicted legal provisions.[33] The fact that not even the Ministry of Labour took the act seriously was further evidenced by the absence of any data collected regarding the results achieved through its practical application.[34] As previously mentioned, the 1921 Trade Union Act granted the right to conclude

26 *Maros*, 16 November 1929, no. 262, p. 4.
27 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 4.
28 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 4.
29 Published in the *Official Gazette* no. 74, 5 April 1929.
30 Published in the *Official Gazette* no. 85, 13 April 1928.
31 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 4.
32 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 76.
33 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 5.
34 A Romániai Szakszervezetek Országos Szövetsége (1932): p. 76.

collective agreements. From 1926 to 1929, a total of 374 collective agreements were signed.[35] However, according to the chief labour inspector of Bucharest, union delegates were merely tolerated individuals in negotiations of collective agreements.[36]

All these aspects illustrate that the rights enshrined formally in law and practical reality were not aligned. The complete lack or ineffectiveness of enforcement instructions for these acts—stemming from the absence of comprehensive, detailed explanations—further widened the gap between the law and its implementation.[37] The labour protection legislation held merely promotional value. The Central Leadership of the National Federation of Trade Unions itself noted,

> *[o]ur acts were not created to advance the country's people on the path of progress; rather, the primary goal has always been to use these to obscure reality from foreign observers. More than once, the very legislators themselves were the first to trample upon their own acts.*[38]

3. A closer look: The 1929 Lupeni strike from a trade union perspective

Although examples of labour movements, particularly miners' strikes in Romania, can be traced back to the 19th century, this section will primarily focus on the 1929 Lupeni strike, a notable event in the Jiu Valley in the interwar period. Situated in southwestern Romania, between the Retezat and Parâng Mountains—both part of the Southern Carpathians—the Jiu Valley was home to miners renowned for their combative spirit. Research on European social history from the 19th to 20th centuries shows that workers in hazardous environments and demanding industries—such as mining, oil, and heavy industry—developed a robust sense of human and professional solidarity. This solidarity, combined with an increased ability for self-organisation, significantly enhanced their capacity to engage in protest movements and coordinate more effectively during such actions.[39] The following event illustrates how Romanian labour movements aligned with this pattern.

Driven by the Great Depression, social and economic problems in interwar Romania had escalated to the point of near insolvency. To tackle this issue, the state was forced to increase taxes while simultaneously cutting incomes and salaries. The so-induced deterioration of economic conditions fuelled the growth of the trade union movement, culminating in 313 strikes involving over 65,000 workers between 1926 and 1929.[40]

By the end of 1929, the miners in Lupeni, too, had already staged numerous strikes.[41] However, the 1929 strike—often referred to as the first demonstration of the "highly

35 A României Szakszervezetek Országos Szövetsége (1932): p. 46.
36 A României Szakszervezetek Országos Szövetsége (1932): p. 21.
37 A României Szakszervezetek Országos Szövetsége (1932): pp. 76–79.
38 A României Szakszervezetek Országos Szövetsége (1932): p. 30.
39 Tismăneanu (2006): p. 344.
40 A României Szakszervezetek Országos Szövetsége (1932): p. 44.
41 Ghiță Ionescu (1994): *Comunismul în România*, Litera, București, p. 64.

developed workers' stratum consciousness" that characterised the Jiu Valley[42]—was somewhat atypical. It did not (only) reflect the miners' anger over wages and living standards, as might have been expected. Instead of the local traditions of labour activism and solidarity, this strike revealed a reality of disunion among the workers.[43]

Shifts in the market and coal production from 1925—particularly the mechanisation of coal extraction and processing—along with reduced purchases by the Romanian Railways in 1927, which had previously bought over two-thirds of production, diminished the need for skilled underground miners and led to widespread personnel dismissals.[44] The leadership of the Union of Mining Industry Workers in Romania (UMIMR)—whose legal authority stemmed from the Social Democratic Party—urged miners to aid each other financially and negotiated with the coal mine directors to reduce working hours for everyone rather than implement layoffs. In response, the state suppressed trade union activity.[45]

In 1928, the National Peasants Party (PNȚ), backed by a broad base of popular support in that year's parliamentary elections, came to power. The installation of the new Maniu government, which promised democratisation and civil rights while advocating a platform of social justice, gave hope to the miners that the political climate would provide a fertile ground for negotiating a new collective contract between the Jiu coal miners and the coal companies. Discussions had already occurred as early as January 1929, and the contract was finalised in July the same year. However, the seemingly hostile PNȚ did not intervene in the negotiations, and the conditions proposed by the mining companies were disappointingly unsatisfactory.[46] The destabilisation and growing discontent ruling the Jiu Valley paved the way for the creation of a new, highly radical labour group—the Independent Union (*Sindicat Independent*)—at Lupeni. By this, the unified front of mining unions had been divided between Independent and UMIMR chapters.[47] Ongoing negotiations and heated debates among miners from different unions escalated into a refusal to work, accompanied by a campaign of violence and the shutdown of the power plant, trapping hundreds of miners below ground, with a limited supply of breathable air.[48] This unrest was brutally suppressed by the gendarmerie, who resorted to live fire, leaving behind a tragic toll of deaths and injuries.

Just as the communist affiliation of the Independent Union's membership remains uncertain, it is unclear whether the strike was led by and representative of Communist agitators. According to Ghiță Ionescu, the party's organisations in the most significant industrial areas were reportedly weak. Unprepared for mass action, the Romanian Communist Party (RCP) was unable to take the lead in the spontaneously triggered struggles at Lupeni.[49] The 1932 Congress of the party openly acknowledged that workers'

42 Adrian Mica: Discussion on the 1977 Jiu Valley Strike as Scandal in Romania, *Sfera Politicii*, 129–130/2008, pp. 31–42, p. 32.
43 Glont (2023): p. 40.
44 Glont (2023): pp. 45, 47.
45 Glont (2023): p. 47.
46 *Erdélyi Hirlap*, 9 August 1929, no. 3331, p. 5.
47 Glont (2023): p. 52.
48 Glont (2023): p. 53.
49 Ionescu (1994): p. 69.

actions had developed spontaneously, without Communist support or leadership. The Lupeni miners' demonstration was even described as a police provocation. Nevertheless, at the RCP's 30th anniversary, weaving the event into the party's mythology, Gheorghe Gheorghiu-Dej[50] claimed that the Communist Party had been the one to call the proletarian masses to action and urge workers to organise a broad mass movement.[51] Despite these ambiguities, it is clear that the strike was neither an exclusively Communist action[52]—a significant number of Social Democratic and non-affiliated workers also participated—nor a manifestation of revolutionary communism.[53]

What is more important to conclude is that the 1929 Lupeni action cannot be considered emblematic of labour organisation during the interwar period. It reflected the increasing internal divisions within the labour movement and the largely unmet expectations trade unions had of the government. Unions in the Jiu Valley operated in a context where both the political system and employers played dominant roles in shaping labour conditions and restricting workers' autonomy. With the coal industry in crisis, miners lost faith in the ruling government, which failed to fulfil promises and support the workers,[54] giving rise to labour militancy.

From the perspective of trade union effectiveness, the 1929 Lupeni strike highlighted both the strengths and limitations of the labour movement. On the one hand, it demonstrated the miners' capacity for collective action and the unions' potential to organise and advocate for workers. On the other hand, it also revealed the structural constraints unions faced, as they could not fundamentally alter the power dynamics between workers, employers, and the state. Instead, their role became more about mediating immediate grievances and less about challenging systemic inequalities. This dynamic also demonstrates how the state's pursuit of modernisation repeatedly suspended or undermined civil rights.[55]

III. ROMANIAN TRADE UNIONISM IN THE POST-WAR PERIOD: REALITIES OF THE SOVIET-TYPE DICTATORSHIP

After examining the emergence of trade unionism at the end of the 19th century and its subsequent erosion and prohibition during the interwar period, it is now important to take a closer look at the legal framework and political regime that shaped and governed trade unionism during the historical conjuncture referred to as the "post-war" period.

50 Gheorghe Gheorghiu-Dej was the leader of communist Romania between 1947 and his death in 1965.
51 Ionescu (1994): p. 70.
52 Zoltán Serfőző: A világgazdasági válság hatása Romániában. A romániai kommunista párt 1928–1931 között, *Acta Universitatis Szegediensis de Attila József nominatae: Acta Historica*, 1987, pp. 19–34, p. 22.
53 Glont (2023): p. 56.
54 Glont (2023): p. 56.
55 Glont (2023): p. 59.

1. Context of the role of trade unions – Why were they so important?

In the aftermath of the Second World War, Romania remained an overwhelmingly agrarian country,[56] with its urban population (approximately 24%) being only one-third the size of its rural population (approximately 76%).[57] In this context—but also stemming from the forced adoption of Soviet ideology—it is hardly surprising that, following the Communist takeover, the newly installed regime, led by the Romanian Communist Party, prioritised the establishment of an industrial and urban working class. Ruling in the name of these workers and claiming to represent their interests became central to the regime's strategy for legitimising its authority.[58]

To overcome the social consequences of the war and implement Soviet-style production techniques in labour relations, the regime adopted a so-called politics of productivity.[59] However, while the state created the *façade* of the existence of an urban working class, its forced industrialisation and urbanisation policies failed to improve living standards in the long run. Instead, conditions eroded: factory wages were insufficient to ensure a minimal standard of living, and widespread hardship—including food shortages and restrictions on gas and electricity consumption—replaced the utopia of a prosperous workers' society with their exploitation in the interest of the state.

Amid this life of economic deprivation, fear, and a profound disconnection from the proletarian ideology officially proclaimed by the RCP,[60] trade unions representing the industrial working class could have played a determining role. Their potential to act as the voice for workers, engaging in open dialogue and addressing these pressing concerns, was especially required in such circumstances. Why, then, was this role not realised?

1.1. Legal landscape

Beginning with the constitutional foundation of both trade unionism and labour law, it is evident that the right to association—including union association in most instances—in Romania is consistently recognised. This was reflected in the three Romanian constitutions of the Soviet-style totalitarian dictatorship: the 1948 (Article 32), 1952 (Article

56 Boia (2012): p. 64.

57 Romania's population in 1948 was approximately 15.87 million, of which 12.1 million lived in rural areas, while 3.7 million constituted the urban population. By 1966, the urban population had increased to 38% and by 1977 to 43% of the total, eventually surpassing the rural population with 54% in 1992. Institutul Național de Statistică: *Populația la recensămintele din anii 1948, 1956, 1966, 1977, 1992 și 2002 – județe și medii*. Available at: https://insse.ro/cms/files/RPL2002INS/vol1/tabele/t01.pdf (accessed on 21.01.2025).

58 Monica Ciobanu: Reconstructing the Role of the Working Class in Communist and Post-communist Romania, *International Journal of Politics, Culture, and Society*, 3/2009, pp. 315–335, p. 319.

59 Adrian Grama (2019): *Laboring Along: Industrial Workers and the Making of Postwar Romania*, Walter de Gruyter, Berlin–Boston, p. 11.

60 Ciobanu (2009): p. 316.

86), and 1965 (Article 27) constitutions.[61] Grounded in the socialist principle, famously phrased as "he who does not work, neither shall he eat"—originally rooted in the New Testament,[62] later adopted by Lenin—the obligation to work was also a permanent provision of the 1948, 1952, and 1965 constitutions.

On 21 January 1945, Act No. 52 on Professional Trade Unions[63] entered into force. Like its predecessor from 1921, this act—which remained in effect until August 1991—established that the primary objective of professional trade unions was the study, defence, and development of professional interests, with the prohibition of benefit-sharing remaining an essential condition. Article 17 of this act stipulates that the manner of establishment, organisation, and operation of the professional trade union is determined by the free will of its members through statutes, for all matters not otherwise regulated by the present law.

The 1950 Labour Code[64] bore all the hallmarks of the Soviet Union's approach to labour legislation. Though incomplete, it regulated collective labour contracts.[65] Similarly, the 1972 Labour Code[66] also included provisions on collective labour agreements.[67] Regarding international legal sources, Romania ratified several key conventions of the ILO. These included The Freedom of Association and Protection of the Right to Organise Convention (No. 87) ratified in 1957, followed by the ratification of The Right to Organise and Collective Bargaining Convention (No. 98) in 1958. Article 4 of this Convention calls for measures to encourage and promote voluntary negotiation mechanisms between employers or their organisations and workers' organisations, intending to regulate employment terms and conditions through collective agreements. However, the agreements of this era primarily aimed to fulfil the goals of centralised economic planning, with the improvement of working and living conditions for workers remaining a secondary goal. This clearly reflected the ideology of the ruling political regime.[68]

Moreover, the right to strike was excluded—tacitly outlawed—from both codes on the rationale that workers, as collective owners of the means of production, were theoretically in control of these resources through the state. Thus, any hypothetical conflict between workers and management was considered an internal contradiction—a protest against themselves within a system that claimed to have abolished class divisions. The same logic extended to negotiations over wages or working conditions. In both

61 Ion Traian Ștefănescu: Momente esențiale ale reglementării raporturilor de muncă în secolul după Marea Unire. Concluzii, *Dreptul*, 12/2018, pp. 93–108, p. 105.
62 2 Thessalonians 3:10–13.
63 Published in the *Official Gazette* no. 17, 21 January 1945.
64 Introduced through Act No. 3/1950, published in the *Official Bulletin* no. 50, 8 June 1950.
65 Article 3 of the Code, in fact, defined the enterprise-level collective agreement as an agreement concluded between the Trade Union Committee in an enterprise or institution, as the representative of employees, workers, and civil servants on one side and the employers on the other. Magdolna Vallasek (2020): *Román munkajog. 2. Bővített és aktualizált kiadás*, Forum Iuris, Kolozsvár, p. 124.
66 Introduced through Act No. 10/1972, published in the *Official Bulletin* no. 140, 1 December 1972.
67 This code also addressed the regulation of the enterprise-level collective agreement, without introducing significant changes compared to the previous provisions. Vallasek (2020): p. 124.
68 Vallasek (2020): p. 124.

instances, the absence of explicit regulations was interpreted as a prohibition.[69] This reality-distorting approach did nothing but directly embed ideology into legislation, transforming the provisions of labour law—or the lack thereof—into arms of the principal employer, the true owner of all means of production, and the effective beneficiary of industrial labour: the state. By framing rebellion and dissent as illegitimate and contradictory, the state's exclusivity in power was—at least in theory and by law—peacefully preserved and protected.

Examining this legal framework reveals that in most cases the law itself did not pose an explicit, fundamental barrier to the development of a union association. However, given the state's control over the law, a purely textual legal analysis offers little insight into the practical realities of Romania under the Soviet-type dictatorship. Its characteristics are better and more deeply understood through factual analysis within a sociological framework.

1.2. Trade unions as "transmission belts"

In Soviet-type political systems—following a broader regional pattern—the re-emerged official trade unions operated under the Marxist–Leninist principle of "transmission belts". Romanian trade unions were no exceptions in this regard. This suggestive concept defined their bidirectional function: through top-down transmissions, unions mobilised workers to contribute to labour production for the collective welfare of the society, while they were also meant to safeguard workers' rights and interests through bottom-up mediation.[70] Trade union membership was mandatory,[71] and the General Union of Romanian Trade Unions (UGSR – *Uniunea Generală a Sindicatelor din România*), a confederation encompassing all existing unions, was established in 1966, automatically incorporating all workers.[72] Much like cooperatives, press organs, cultural-educational organisations, and youth unions, the UGSR functioned as a mass organisation[73] of the Soviet-style socio-economic system. However, did the concept of "transmission belts" align with how the industrial working class generally perceived the position and influence of trade unions? Not in the least.

2. Trade union effectiveness

When assessing post-war trade union effectiveness—which is both the next task after outlining the required role and legal background of post-war trade unions and the main focus of this article—the same questions regarding the establishment, authority/

69 Ștefănescu (2018): pp. 99–100.
70 Anita Chan: Revolution or Corporatism? Workers and Trade Unions in Post-Mao China, *The Australian Journal of Chinese Affairs*, 29/1993, pp. 31–61, p. 36.
71 In contrast to Article 2 of the 1945 Act on professional trade unions, which declared that no one shall be compelled to join, refrain from joining, or cease being a member of a professional trade union against their will.
72 Vladimir Tismăneanu et al./Comisia prezidențială pentru analiza dictaturii comuniste din România (2006): *Raport final*, București, p. 155.
73 Tismăneanu (2006): p. 137.

empowerment, and accomplishments of trade unions from the interwar period should be revisited.

2.1. Authority/empowerment – Worker-driven or state-imposed?

Given the organisational autonomy and potential strength of trade unions, their subordination represented a persistent concern for Romania during the Soviet-type dictatorship that inherently sought to maintain a monopoly on power.[74] In practice, the Romanian state's top-down control often overshadowed any efforts by the trade unions—bound by predefined roles—to represent the subordinated interests of workers. Thus, instead of fulfilling the doctrine of workers' empowerment and promoting their autonomy, trade unions paradoxically co-opted them into a paternalistic system that deprived them of political power.[75] Unlike in democratic settings, the authority of trade unions did not originate from their members but was instead imposed through state control. Due to their primary loyalty to the Party, they could only play a diminished, if not entirely fictive, role as social actors, as the state consistently suppressed attempts at prioritising workers' advocacy. For example, despite being a highly trained communist, Tudor Anton, the President of the Labour Union at "23rd August", formerly Malaxa Works, Bucharest's largest metal factory, was dismissed in the summer of 1951 for befriending workers. Confronted with the intensification of labour unrest, and instead of freeing himself of his class bindings and being accused of "vanity", "Tudor was the 'anarcho-syndicalist' delegate of the locomotive section who [...] completely identified with their demands."[76]

According to a party report—retrieved from the National Archives of Romania by Adrian Grama—on the situation in the southern Transylvanian town of Mediaș, workers viewed trade unions as watchdogs for the state. For this reason, from a delegate's perspective, the "fear of the masses" often outweighed the allure of holding prestigious positions—such as those in the factory committees—within the trade union hierarchy.[77] However, in certain instances, such as the 1987 Brașov rebellion—sparked by widespread discontent with Ceaușescu's economic policies[78]—it was the state itself that shifted responsibility to local officials and the factory management. This strategy aimed

74 Gheorghe Socol: Sindicate și sindicaliști. O analiză sociologică a reconstrucției sindicalismului în România, *Calitatea Vieții*, 1–4/2001, pp. 147–154, pp. 147–148.

75 Paul J. Kubicek (2004): *Organized Labour in Postcommunist States: From Solidarity to Infirmity*, University of Pittsburgh, Pittsburgh, p. 24.

76 Adrian Grama (2018): Practices of Distance and Perceptions of Proximity: Trade-Union Delegates and Everyday Politics in Post-Second World War Romania, in Muriel Blaive (ed.): *Perceptions of Society in Communist Europe. Regime Archives and Popular Opinion*, Bloomsbury Academic, London, p. 36.

77 Grama (2018): p. 38.

78 Following the death of Gheorghe Gheorghiu-Dej in 1965, Nicolae Ceaușescu became the leader of the Romanian Communist Party, serving as General Secretary until 1989. He also held the position of President of the State Council from 1967 and in 1974 became Romania's first President of the Republic. His policies of forced industrialisation—and the debt repayment it necessitated—led to severe economic decline and widespread poverty during the 1980s, fueling dissent and culminating in the 1989 revolution, which brought an end to the Soviet-type dictatorship in Romania.

at obscuring and denying the political nature of the uprising.[79] At the same time, party delegates frequently acted as though the party itself were to blame for the prevailing economic hardship.[80] Nevertheless, union advocacy for workers' interests against the state or management was the exception rather than the rule.[81]

2.2. Establishment in practice and organisational strength

Before assessing the establishment of trade unions, it is worth first addressing the situation of workers' councils. The creation of workers' councils in 1971 could be considered innovative, not only compared to the Soviet-style labour relations but also because they were intended to empower workers by enabling self-management (*autoconducerea*) and participation in workplace governance at the enterprise level.[82] Paul J. Kubicek argues in his book that the establishment of these councils can be seen as an implicit acknowledgement by the regime of the unions' ineffectiveness in representing workers.[83] This interpretation, however, calls for scrutiny. It is highly unlikely that the party would willingly abandon its rigid ideology and undermine the propaganda by admitting such a weakness in a regime built on and centred around the power of the ruling working class. To the exact contrary, their establishment just further strengthened the existing hierarchical structures that already characterised union operations. Kubicek himself states that council members were not elected but nominated by party or trade union leadership, and they were often part of the management.[84] The discourse centred on workers' rule bore no resemblance to the simulated power and autonomy infused into the meetings of workers' councils.

In 1979, an attempt was made to create a free trade union in Romania, with its declared purpose being the protection of human rights, particularly those arising from labour relations.[85] Despite receiving support from the workers[86]—proving the existence of a substantial group of dissatisfied people, eager to be represented by an organisation independent of the communist regime—the Party and the Department of State Security

79 Ciobanu (2009): p. 327.
80 Grama (2018): p. 38.
81 David Mandel (2004): *Labour after Communism*, Black Rose Books, Montreal, pp. 5–6.
82 Ciobanu (2009): p. 320; Kubicek (2004): p. 24.
83 Kubicek (2004): p. 25.
84 Kubicek (2004): pp. 24–25.
85 Ana-Maria Cătănuș (2014): *Vocația libertății. Forme de disidență în România anilor 1970–1980*, Institutul National pentru Studiul Totalitarismului, p. 113.
86 Contrary to the communiqué of the SLOMR from 6 March 1979, which stated that 1,478 people joined the founding core of the SLOMR, the actual number of members could not realistically exceed a few hundred people, although it is difficult to estimate. Oana Ionel, Dragoș Marcu (2005): Vasile Paraschiv şi „Securitatea lui", in Vasile Paraschiv: *Lupta mea pentru sindicate libere în România: terorismul politic organizat de statul comunist*, Polirom, Iași–București, p. 368. The fact that SLOMR was not born out of a strike or a prolonged labour conflict meant that solidarity with this union was somewhat limited in both numbers and geographical spread. In any case, it is worth mentioning that after the radio announcement about the creation of the SLOMR, dozens of individuals expressed their desire to be part of the new structure, with some even sending letters of affiliation to the union to Radio Free Europe. Cătănuș (2014): p. 118.

(*Securitate*)[87] rapidly suppressed the initiative before it could evolve into a movement. As a result, though legally established,[88] the Free Trade Union of the Working People of Romania (*Sindicatul Liber al Oamenilor Muncii din România* – SLOMR) existed solely in a six-month-long formative phase, never advancing beyond that point.[89] The broadcast of its founding declaration by Radio Free Europe on 4 March 1979 was followed by the immediate imprisonment of its three leaders.[90] What became evident was a virtually paralysed civil society. All workers' organisations had to operate exclusively through party-approved channels.[91] "[W]orkers who gave thought to non-party union organisation felt the heavy hand of Ceaușescu's Securitate."[92] The regime systematically responded to any gesture of independence by silencing its initiators.[93] Those who dared to call for free trade unions faced ruthless persecution.[94]

2.3. Achievements

As the point of reference for evaluating trade union accomplishments, the attention now shifts to collective agreements. While collective labour contracts were reintroduced, they prioritised output figures and productivity targets over collective bargaining, making these metrics the criteria for accessing benefits.[95] The overlapping of union leader and membership and Communist Party membership further emphasised the functioning of trade unions—adjuncts[96] to the RCP—as a relay for spreading the message coming from the party's forums.[97] Thus, trade unions were not only deprived of the ability to express the real interests of those they represented but, on the contrary,

87 The Department of State Security (*Departamentul Securității Statului*), commonly known as the *Securitate*, was the secret police agency of the Socialist Republic of Romania and the primary instrument of repression of dissent. "Paradoxically—and not by coincidence—the term securitate, which typically conveys a sense of comfort and the absence of interference in private life, was used to name an institution that systematically restricted, and often nullified, human rights. This was done to enforce the demands of the party-state in the name of the dictatorship of the proletariat and the construction of socialism." Tismăneanu (2006): p. 172. For details, see Tismăneanu (2006): pp. 167–186.

88 The legality of the SLOMR was stated right in the preamble of its founding declaration, indicating that the union was established in accordance with Article 22 of the International Covenant on Civil and Political Rights and Article 8 of the International Covenant on Economic, Social, and Cultural Rights, both ratified by Romania in 1974. Additionally, the union's affiliation with the International Confederation of Free Trade Unions was announced. Cătănuş (2014): p. 113.

89 Ciobanu (2009): p. 323.

90 Ionel, Marcu: (2005): pp. 367–371.

91 Kubicek (2004): p. 22.

92 Daniel N. Nelson (2019): *Romania after Tyranny*, Routledge, p. 7.

93 Ciobanu (2009): p. 321.

94 Tismăneanu (2006): p. 19.

95 Grama (2019): p. 12.

96 Victoria Stoiciu (2023): *Romania – Trade Union Monitor*, Friedrich Eber Stiftung, Bucharest, p. 2.

97 Socol (2001): p. 148.

they became a supplementary means of control of the party and state authorities over the employees.[98]

The re-emergence of trade unionism and the promising—preferential—provisions of collective labour contracts instilled faith in the industrial working class regarding their rights; however, their hoped-for power could not materialise. As a result, the dynamics of party-making, even at the factory level, led to "a winter of inertia and resignation"[99] punctuated by "cyclical episodes of workers' explosions and suppression",[100] a pattern seen throughout Eastern European socialist states.

3. The 1977 Lupeni strike

Labour unrest during communism should not be classified as part of the structured, politically conscious, disciplined activism typically associated with legitimate leadership and trade unions in democratic settings. Instead, the absence of effective representation, driven by the indifference and powerlessness of the unions, usually led to protests marked by more or less spontaneous outbursts and sometimes localised violence, with workers resorting to direct action.[101] Nevertheless, this period can be divided into three major phases—1945–1958, 1958–1977, and 1977–1989—reflecting somewhat distinct characteristics of workers' protests.[102]

The strikes of the 1945–1958 period were mostly spontaneous, non-violent, small-scale, and defensive, typically provoked by harsh working conditions, increased labour quotas, or unpaid wages. These protests frequently arose in sectors with pre-communist labour traditions, such as the oil, mining, machinery, and steel industries. Testimonies suggest that at this stage workers still had some faith in communist leaders from labour backgrounds, and the divide between the people and the communist elite had not yet fully formed. Despite these efforts, the protests did not lead to any significant outcomes.[103]

Following the withdrawal of Soviet troops in 1958, a new era emerged, marked by forced industrialisation and "nationalising" the Soviet model. The accelerated pace of industrialisation required a larger workforce, leading to an influx of rural workers into the industrial sector. This social hybridisation eroded established traditions within workers' social universe in and outside of the factory, weakening labour solidarity. A tacit acceptance developed between the working class and the communist regime, contributing to a lower incidence of protests. The protests that did occur were either small-scale, defensive actions or individual initiatives by courageous workers such as

98 Socol (2001): p. 148. Interestingly, in contrast to the extensive archives of the Communist Party, the records of Romanian trade unions after 1945 are either lost or nonexistent, making them virtually untraceable. However, in terms of content, the former cannot be regarded as a substitute or repository for the latter. Grama (2019): p. 22. This reality further reinforces the omnipotence of the party and state control.

99 Tony Judt (2005): *Postwar. A History of Europe since 1945*, The Penguin, New York, pp. 170–171.

100 Chan (1993): p. 37.

101 Grama (2019): pp. 122–123.

102 Tismăneanu (2006): p. 345.

103 Tismăneanu (2006): pp. 345–346.

Vasile Paraschiv, who openly opposed the regime with his proposals for democratising workers' unions, addressed to the General Association of Romanian Trade Unions (UGSR).[104]

On 4 March 1977, a powerful earthquake (7.2 on the Richter scale) struck Romania. Under its unexpected impact, the Romanian society reacted with solidarity in the face of death and destruction. However, this unity was soon followed by what writer Paul Goma referred to as "the earthquake of people".[105] Later that year, the large-scale miners' strike in the Jiu Valley marked the end of the era of tacit acceptance of the communist regime by workers. Underlining the discrepancy between the goals proclaimed by the party and the reality of everyday life, this became the first significant labour movement under Nicolae Ceaușescu's rule[106] and posed a greater threat to the communist regime than any other form of protest in the 1970s.[107]

Provoked by newly introduced legislation—Act No. 3 of 30 June 1977[108]—bringing salary cuts and the prolongation of the age of retirement, the mature, non-violent, defensive strike began on the morning of 1 August at the Lupeni mine, with miners occupying their workplaces indefinitely. Bypassing the official trade union—which was not even aware of the salary cuts[109]—the workers elected their own representative body.[110] Their key demands included better wages, improved working conditions, a reduction in the retirement age, better healthcare, and an end to the increased work quotas. Ceaușescu himself was compelled to visit the miners and address their concerns personally. Faced with a group of 35,000 miners,[111] he ultimately agreed to all their demands, including the assurance that no one would be punished for participating in the strike. This convinced the miners to return to work the same day. The majority of the miners' demands were indeed satisfied for a short period.

The existence of strong miners' movement traditions in the area fostered a unique sense of cohesion among the miners. This solidarity, combined with the dangerous nature of their work, enabled miners to organise and execute a large-scale protest, often referred to as the best-conducted workers' protest in Romania during the Soviet-type dictatorial regime.[112] Nevertheless, the communist authorities did not use direct force to suppress the strike; they gradually took measures to prevent future solidarity among the miners, such as forced relocations, demotions, arrests, interrogations, trials,

104 Tismăneanu (2006): pp. 346–347. For further insight into the story of Vasile Paraschiv, whose struggle with Securitate lasted for more than two decades, see Ciobanu (2009): p. 321.
105 Florin Constantiniu (1997): O istorie sinceră a poporului român. Capitolul "Vraja se destramă", in Barbu Mihai, Alexandru Bogdan, Gheorghe Chirvasă (eds.): *După 20 de ani sau Lupeni '77–'97*, Matinal & Cameleonul, Petroșani, p. 120.
106 Cătălin Docea (1997): Lupeni '77, in Barbu Mihai, Alexandru Bogdan, Gheorghe Chirvasă (eds.): *După 20 de ani sau Lupeni '77–'97*, Matinal & Cameleonul, Petroșani, p. 78; Cătănuș (2014): p. 18.
107 Ciobanu (2009): p. 322.
108 Published in the *Official Bulletin* no. 82, 6 August 1977.
109 Mica (2008): p. 35.
110 *Chicago és Környéke*, 31 December 1977, no. 53, p. 1.
111 Mica (2008): p. 33.
112 Cristina Petrescu, Dragos Petrescu (2007): Resistance and Dissent under Communism: The Case of Romania. *Totalitarismus und Demokratie*, 2/2007, pp. 323–346, p. 332.

and convictions. In some cases, even physical liquidation occurred.[113] Ten years later, in November 1987, the protesters of the Brașov strike faced similarly harsh treatment and an even grimmer fate.[114]

IV. CONCLUDING THOUGHTS

Using factors such as authority or empowerment, establishment, and accomplishments of trade unions as key points of reference, alongside an examination of the legal framework and social realities, this paper aimed to assess the effectiveness of trade unions in Romania during the interwar and post-war periods.

Regarding the legal framework, recognition of the right to association and the right to conclude collective agreements—despite interruptions—was a defining feature of trade union history during the examined periods. The protection of these rights, through legal milestones such as the 1921 trade union law and the 1929 law on labour contracts, shaped the collective labour law of the interwar period, a time when labour law institutions were undergoing significant development. The first fault line in this continuity emerged during the dictatorship of King Carol II when the 1921 trade union law was repealed and trade unions were replaced by corporatist guilds. Within this framework, authority shifted to the Ministry of Labour, and the establishment of unions became dependent on royal decrees. The restriction of trade union freedom was further intensified by the prohibitive wartime labour regime. After the Second World War, Romanian labour law was shaped in the spirit of Soviet-type labour regulation, subordinating unions to the state. Alongside this, their original goal—to improve the working and living conditions for workers—became overshadowed by the need to fulfil the objectives of centralised economic planning.

When it comes to the authority/empowerment of post-war trade unions—criteria interpreted solely in the context of guilds in the analysis of the interwar period—the following excerpt from a 1977 newspaper encapsulates the functional formalism that defined trade unions in the Soviet-type dictatorship, emphasising their supervision by and subordination to the Communist Party:

> *[Workers], unlike their Western counterparts, lack effective representation. [A]s in other communist regimes, the "official trade unions" are aligned with the government, representing its interests rather than those of the workers.*[115]

Reduced to mere puppets of the regime, these unions, bound by predefined roles, were stripped of genuine power or authority, straying far from their original mission

113 Tismăneanu (2006): pp. 347–350.

114 For a detailed account of the Brașov workers' anticommunist uprising of 1987—a precursor to the December 1989 revolution—and the fate of its initiator, Iosif Farcas, see Ciobanu (2009): pp. 316–317, pp. 325–326.

115 *Chicago és Környéke*, 31 December 1977, no. 53, p. 1.

of promoting workers' rights and welfare. Their bottom-up empowerment and role in representing workers became illusory,[116] leaving them incapable of addressing social and economic grievances.

When considering establishment in practice and organisational strength—the second criterion for evaluating the effectiveness of trade unions—interwar trade unions, although legally recognised, struggled to gain the genuine support necessary to meet the demands of workers. On the contrary, efforts to hinder union organising through dismissal, persecution, or other unlawful measures were widespread.

Post-war trade union establishment was not legally obstructed either, as evidenced by the creation of the SLOMR free trade union in accordance with the law. However, all workers' organisations were required to operate exclusively through party-approved channels. The regime systematically responded to any gesture of independence by silencing its initiators. As for the organisational strength of trade unions under the Soviet-type dictatorship, the rhetoric of workers' rule bore little resemblance to the simulated power infused into these organisations. Labour movements faced continued resistance and suppression, with the affirmation of certain rights being merely declarative and in stark contrast to reality. Framing rebellion and dissent as contradictory and legally prohibited was nothing but the reality-distorting reflection of ideology in the law. Despite facing resistance and suppression, the Jiu Valley protests demonstrated the miners' solidarity and ability to self-organise. In the early years after the fall of the totalitarian regime, they once again became the "protagonists"[117] of the so-called mineriads (*mineriade*), during which armed miners from the Jiu Valley brutally suppressed opposition movements challenging the new government in Bucharest. These unique Romanian phenomena illustrate how the organisational power exhibited by miners, when mobilised and supplied at the request of the government, could transform into a dangerous and militant force—potentially shaping the trajectory of Romania's fledgling democracy.

In terms of achievements—the third criterion in evaluating the effectiveness of trade unions—there were notable accomplishments in the interwar period. The collective enforcement of rights through labour struggles during this time significantly shaped the development of the entire labour law framework. Trade unions played an indisputable role in the enactment of the 1929 Act on labour contracts, as well as in legislation addressing women's and children's labour and the establishment of the eight-hour workday. These provisions set precedents for subsequent legislation. However, the rights acquired by unions and enshrined in law did not fully align with practical reality. Labour protection legislation often held merely promotional value, while trade unions had to endure a series of abuses of authority in a country where substantive and effective social policy could not be discussed.

Although post-war trade union movements demonstrated the solidarity of workers, unlike the strikes that contributed to the democratisation of the working class in

116 Socol (2001): p. 148.
117 Mica (2008): p. 32.

Poland[118]—despite facing similar repression by the Polish Communist Party—no labour movement in Romania achieved significant results. This can be attributed, on the one hand, to the agrarian nature of the society and the top-down enforced industrialisation, which lacked organic, bottom-up development. On the other hand, other social groups, particularly intellectuals, remained detached from the events, choosing not to express solidarity with the workers.[119] As a result, the labour movement remained numerically weak. Workers lost their confidence in the similarly weak unions, which demonstrated their inability to influence policies. Ultimately, when considering long-term consequences, the absence of strong collective worker representation in Romania today—characterised by dramatically low trade union density and collective agreement coverage—can, to some extent, be traced back to forty-five years of fictitious syndicalism.

118 For details, see: Alain Touraine, François Dubet, Michel Wieviorka, Jan Strzelecki (1983): *Solidarity. The Analysis of a Social Movement. Poland 1980–1981*, Cambridge University, Cambridge.
119 Cătănuș (2014): p. 18.

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The Evolution of Personal Scope in Polish Individual Labour Law – A 20th-Century Historical Analysis

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ABSTRACT
This paper examines the historical development of Polish labour law, focusing on the expansion of its personal scope and its adaptation to broader socio-economic changes. In Poland, labour law began to take shape after the country had regained independence in 1918, driven by industrialisation and the need to regulate the relationship between employers and employees. The study examines key milestones, including early regulations covering both workers and knowledge workers, attempts at codification in 1949, and the introduction of the Labour Code in 1974, which, despite numerous amendments, remains the core of the Polish labour law system. Particular attention is paid to the gradual inclusion of different categories of workers, extending beyond traditional employment to the service sector and non-standard working arrangements. By analysing these developments, the article highlights the historical foundations that have shaped the Polish labour law and offers insights into how these principles can influence future legislative reforms to strengthen labour protection.
KEYWORDS
Personal scope, labour law, employee, employer, employment relationship, Poland.

Evoluția competenței personale a dreptului individual al muncii din Polonia – o analiză istorică a secolului al XX-lea

REZUMAT
Acest articol examinează dezvoltarea istorică a dreptului muncii din Polonia, concentrându-se asupra extinderii sferei sale personale și a adaptării acesteia la schimbările socio-economice mai ample. În Polonia, dreptul muncii a început să se contureze după recâștigarea independenței în anul 1918, fiind determinat de industrializare și de necesitatea reglementării raporturilor dintre angajatori și angajați. Studiul analizează etape esențiale, inclusiv reglementările timpurii care acopereau atât muncitorii, cât și lucrătorii al cunoașterii (knowledge workers), încercările de codificare din 1949 și introducerea Codului muncii din 1974, care, în pofida numeroaselor modificări, rămâne nucleul sistemului polonez de drept al muncii. O atenție deosebită este acordată includerii treptate a diferitelor categorii de lucrători, depășind cadrul tradițional al raporturilor de muncă pentru a cuprinde sectorul >>

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>> serviciilor și formele atipice de muncă. Prin analiza acestor evoluții, articolul evidențiază fundamentele istorice care au modelat dreptul muncii polonez și oferă perspective asupra modului în care aceste principii pot influența viitoarele reforme legislative menite să consolideze protecția muncii.
CUVINTE CHEIE
Sferă personală, dreptul muncii, angajat, angajator, raport de muncă, Polonia.

I. INTRODUCTION

The origins of modern labour law can be traced back to the economic changes that began in England in the 18th century. The shift from the intensification of labour to that of capital and the development of capitalism in the 19th century created the conditions for the birth of the modern labour market.[2] On the European continent, the key event in this regard was the French Revolution of 1789. The collapse of state society and feudal structures made possible the establishment of a liberal state in which Napoleonic codifications enshrined the principles of freedom of contract and the inviolability of private property.[3] In this context, wage labour was born, fuelled by the development of the Industrial Revolution. Urban workshops and rural cottage industries were replaced by factories powered by steam and wind.[4] Despite technological advances, working conditions remained difficult, especially for women, children, and unskilled workers. These problems led to the introduction of regulations on job security, working hours, wages, and the minimum age of workers.[5] Moreover, the employment contract gradually ceased to be seen as a mere lease of services based on the principle of equality of parties and freedom of contract. Legislation began to stress the introduction of minimum standards for the protection of workers, which formed the basis of modern labour law.[6]

An analysis of early labour legislation indicates that its focus was on improving the working conditions of those workers who were associated with heavy or large-scale industry, requiring close co-operation and subordination to the instructions of a supervisor or manager overseeing the work process. Over time, labour laws began to expand their scope to absorb more and more new categories of workers, not only those strictly associated with factory work but increasingly those associated with the service sector. These changes did not omit Poland either, which, after regaining its independence in 1918, became actively involved in the process of industrialisation and, consequently, the legal regulation of the relationship between employees and employers.

The following article aims to provide a historical analysis of the tendencies of Polish labour law, focusing on changes in the coverage of the given groups of employees within

2 Jan Lucassen (2023): *Historia pracy: nowe dzieje ludzkości*, Znak Horyzont, Kraków, p. 395.
3 Andrzej Dziadzio (2020): *Powszechna historia prawa*, Warszawa, p. 197–199.
4 Lucassen (2023): p. 403.
5 Tadeusz Zieliński (1979): *Zarys wykładu prawa pracy*, Katowice, p. 84.
6 Ludwik Florek (1990): *Ochrona praw i interesów pracownika*, Państwowe Wydawnictwo Naukowe, Warszawa, pp. 11–14.

the scope of labour law regulation. This is even more important considering the current regulation, which draws its legitimacy from the Labour Code[7] (hereinafter LC), introduced into the Polish legal order in 1974, although repeatedly amended and reinterpreted. An analysis of the development of the personal scope of individual labour law throughout the 20th century will enable the broadest possible understanding of the foundations that have shaped labour relations in Poland. It may also prove helpful in creating the premises of a new regulation that realises more extensively the principle of labour protection provided for in the 1997 Constitution of the Republic of Poland. The first part focuses on the early development of Polish labour law after the restoration of independence, with particular emphasis on two regulations governing the conditions of work under an employment contract for workers and knowledge workers. The second part analyses the times before the adoption of the Labour Code and the attempted codification of labour law in 1949. The third part takes a closer look at the regulation of the scope of subjects formed under the regime of the Labour Code. The last part, serving as a conclusion, will consider the current form of the regulation in the context of the situation of persons performing work on a basis other than employment (for example, the situation of self-employed persons or those employed under civil law contracts).

II. PERSONAL SCOPE OF LABOUR LAW IN THE SECOND REPUBLIC OF POLAND

With the rebirth of the statehood of the Second Republic of Poland, labour legislation faced the challenge of uniformising the regulations governing employee relations inherited from the three separate legal systems of the partitioned states and adopting new and unique labour law solutions. Besides the challenge of unifying the disparate provisions of labour law,[8] the Polish legislator was also tasked with ensuring the protection of workers in accordance with the nature of the newly-established state and the constitutional position of labour, as set forth in the Constitution of the Republic of Poland of 17 March 1921.[9] Initially, labour law was referred to as "factory legislation" due to the limited scope of the subject matter at that time. The first regulations of working time, safe and hygienic working conditions, or wage protection concerned the legal situation of factory workers in industrial establishments, where working conditions were the most severe. Subsequently, as labour legislation evolved, one began to speak of "industrial legislation"[10] or "workers' law".

7 Act of 26 June 1974 Labour Code (Journal of Laws of 2023, item 1465).

8 Cf. Sebastian Kwiecień: Umowa o pracę robotników – polskie regulacje prawne okresu międzywojennego, *Roczniki Nauk Prawnych*, 4/2018, pp. 87–110 , pp. 90–92; Monika Tomaszewska (2021): Umowa o pracę, in Krzysztof Wojciech Baran (ed.): *System Prawa Pracy. Historia polskiego prawa pracy*, Warszawa, pp. 234–240.

9 Journal of Laws 1921 no 44, item 267.

10 As J. Licki or Z. Salwa points out, this term was both too narrow and too broad; cf. Zbigniew Salwa (1989): *Prawo pracy w PRL w zarysie*, Warszawa , pp. 13–14; Jerzy Licki (1961): *Prawo pracy PRL. Zarys wykładu. Część I – ogólna*, Państwowe Wydawnictwo Naukowe, Łódź–Warszawa, p. 6.

The first act within the framework of labour legislation was the Decree of the Head of State on the 8-hour working day,[11] which was adopted in November 1918 and was subsequently replaced by the Act on Working Time in Industry and Commerce.[12] The personal scope of the Act extended to all workers employed on a contractual basis in industrial, mining, metallurgical, artisanal, communication and transport, commercial enterprises, as well as other workplaces that were run in an industrial manner, regardless of their ownership status. Other categories of workers related to, for example, outworking, agriculture and gardening, sailors, appointed and contract workers employed in state offices and institutions, scientific and school employees or domestic servants, remained outside the scope of many regulations, such as factory law,[13] children and women work act,[14] working time regulation.[15] Such shaping of the personal scope of the regulation clearly shows that in the early period of the second Republic of Poland, labour legislation focused on employees in heavy industry and trade, excluding from regulation other subjects whose work equally involved more or less subordination to the employing establishment.

The first attempt at regulating the personal scope of workers[16] was made through two regulations issued by the President of Poland in 1928: *Regulation of Employment Contract of Workers*[17] and *Regulation of Employment Contract for Knowledge Workers*.[18] The regulations were *lex specialis* in relation to provisions introduced in the 1933 Regulation of the President of the Republic of 27 October 1933 Obligation Code (hereinafter Obligation Code),[19] and the provisions of the Obligation Code could only be in force if the matter was not regulated therein. Both regulations, of course, concretised the personal scope of their application to different types of workers. However, as can be observed in other European countries,[20] lawmakers use different methods to achieve this goal. Article 2 of the *Regulation of Employment Contract for Knowledge Workers* provides an exhaustive list of employees covered by the Regulation, taking into account, in particular, the position held by the employee and the nature of the work

11 Pol. of 1918 no. 17, item 42.
12 Journal of Laws 1920 no. 2, item 7.
13 Journal of Laws 1927 no. 53, item 468.
14 Journal of Laws 1924 no. 65, item 636.
15 Beata Bury (2007): *Praca w godzinach nadliczbowych jako obowiązek pracownika*, Warszawa, pp. 15–16. For more on the material scope of labour law in the interwar period, cf. Antoni Dral (2015): Rys historyczny rozwoju prawa pracy i ubezpieczeń społecznych w Polsce w okresie dwudziestolecia międzywojennego, in Karol Dąbrowski Sebastian Kwiecień (eds.): *Ochrona pracy w okresie międzywojennym w Polsce. Studium historyczno-prawne*, Lublin.
16 It should be added that the inter-war legislation also considered civil servants—for whom the basis of the employment relationship was not a contract but administrative acts—to be employees. This was, therefore, an example of the establishment of the employment relationship of employees on a non-contractual basis. Tomaszewska (2021): p. 244.
17 Journal of Laws no. 35, item 324.
18 Journal of Laws no. 35, item 323.
19 Journal of Laws no. 82, item 598.
20 Division to "standard" workers and knowledge workers was applied in the legislation of e.g. Belgium, Italy, or Austria. In Denmark, France, and Russia, there was no such distinction of workers. Aleksander Raczyński (1930): *Polskie prawo pracy*, Warszawa, p. 41.

performed.[21] The catalogue of knowledge workers was based on an enumerative method, generally adopting the catalogue provided in the Decree of 24 November 1927 on the insurance of knowledge workers,[22] with the exception of teachers, educators and captains, as well as officers of sea or river vessels.[23] According to Art. 3, the Minister of Labour and Social Welfare, in consultation with other Ministers, granted the possibility of adding to knowledge workers further groups of workers not listed in Article 2 through legislation.[24] Article 4, on the other hand, excluded three groups from the notion of knowledge workers, who, unlike the groups not included in Article 2, could not be drawn in by regulation under Article 3. These were schoolchildren and apprentices (whose status fell under the provisions of the traineeship contract in the Obligation Code), persons employed on seagoing vessels and persons employed in state or local government offices and institutions.[25] The definition of "standard" worker in the second regulation was created through negation. First and foremost, provisions regulating the employment contract for workers did not apply to knowledge workers, nor did they apply to agricultural workers, persons employed in state and municipal offices and state schools, or to those performing activities analogous to those of lower state officials, domestic servants, and house caretakers. Outworkers, who were not employed under a contract of employment, apprentices and dockworkers were also not considered workers.[26] In disputed situations, it was to be decided by the court whether a worker was a knowledge worker or a "standard" worker.[27]

Due to its subsidiary nature in relation to the two regulations mentioned above, the Obligation Code shaped the legal situation of only a few groups of subjects, i.e. agricultural workers, domestic caretakers, domestic teachers, and domestic servants. As M. Święcicki points out, the labour relations of the first two groups were regulated by collective labour agreements and arbitration rulings, while different provisions for teachers were introduced by Article VIII of the provisions introducing the Obligation

21 Łukasz Baszak: Regulacje prawne umowy o pracę pracowników umysłowych w latach 1928–1939, *Folia Iuridica Universitatis Wratislaviensis*, 1/2016, p. 13.

22 Journal of Laws no. 106, item 911.

23 Stefan M. Grzybowski (1947): *Wstęp do nauki prawa pracy*, Księgarnia Powszechna, Kraków, pp. 119–120.

24 In the interwar period, this opportunity was taken up once in the Regulation of 21 August 1934 on the classification of navigators and pilots of aircraft in the category of knowledge workers (Journal of Laws, no. 78, item 729).

25 Baszak (2016): p. 13.

26 Dockworkers were protected based on the Regulation of the President of the Republic of Poland of 27 October 1933 (Journal of Laws, no. 85, item 646). Within the meaning of this regulation, a dockworker was a worker employed in port handling, recognised as a dockworker by the Qualification Commission and registered with the Intermediary Office for Dockworkers in Gdynia; cf. Ignacy Rosenblüth (1937): *Pracy prawo, Encyklopedia podręczna prawa prywatnego*, Warszawa , p. 1690.

27 What had a huge importance due to different protection provisions to different categories of workers; for more details, cf. Baszak (2016): p. 14; Łukasz Baszak: Regulacje prawne umowy o pracę robotników w latach 1928–1939, *Folia Iuridica Universitatis Wratislaviensis*, 2/2017, p. 14 and the case-law mentioned therein.

Code.[28] As regards domestic servants, it should be noted that the Code only had a subsidiary effect on their situation due to the normative acts of the partitioned states that were still in force.[29]

The scope of subjects who could employ workers under the regulation of employment contract for workers was broad, extending to anyone who hired a worker to perform work for remuneration. The employer could be a legal entity under either private or public law, or even a natural person. Surprisingly, the regulation of the employment contract for knowledge workers did not specify who an employer can be. Thus, the general provisions of the Obligation Code should apply. In this regard, it can be briefly stated that an employer could be anyone who had the capacity to enter into an employment contract with an employee in his/her own name, and the law did not establish any special characteristics for an employer. In the Second Republic of Poland, the employer was considered solely as a debtor to the employee, to whom the general civil law provisions on the performance of obligations applied. The employer's primary obligation was the payment of wages.[30]

To conclude this part of the research, the goal of the regulations was to unify labour legislation across the territory of the Republic of Poland[31] and to increase the uniformity of its coverage, while also removing many provisions that reflected economic and social underdevelopment.[32] Thus, it was neither the form nor name of the contract but the nature and type of work performed that was decisive in the employment classification process governed by the provisions of the regulation on the contract of knowledge workers and the contract of workers. Nevertheless, none of the regulations eliminates the general provisions of employment contracts of partitioned states.[33] Moreover, we can observe in both regulations a high level of "randomness"; for instance, many of the general norms found in one decree are not found in the other, and vice versa.[34] The wording of provisions found in both texts is not identical, although it would be difficult to determine the reasons for these differences.[35] Additionally, it should be emphasised that the distinction between "standard" and "knowledge" workers was, in fact, artificial. Indeed, it was difficult to identify types of work that did not require any degree of mental engagement. The distinction between manual and non-manual workers, therefore, remained ambiguous, as a non-manual worker

28 Maciej Święcicki (1960): *Instytucje polskiego prawa pracy w latach 1918–1939*, Państwowe Wydawnictwo Naukowe, Warszawa, p. 148.
29 Święcicki (1960): pp. 139, 148.
30 Raczyński (1930): p. 126 ff.
31 In the end, the regulation did not apply to the Silesian Voivodeship; for more details, cf. Jerzy Wengierow: Postępy unifikacji prawa pracy w Polsce, *Przegląd Prawa Pracy*, 5/1939, p. 260.
32 Święcicki (1960): pp. 141–142. On the material scope of both regulations, cf. Maria Bosak-Sojka: Status prawny robotników na podstawie rozporządzenia o umowie o pracę robotników z 1928 roku, *Roczniki Administracji i Prawa*, 2/2021, pp. 151–162; Baszak (2016): p. 13–24.
33 Święcicki (1960): p. 150.
34 For instance, the definition of employer in the regulation on employment relationship for workers and the lack of such a definition in the second regulation.
35 Święcicki (1960): p. 139.

was still fundamentally a worker, and a manual worker was often expected to exert a mental effort. This distinction between the regulations of the employment contract of workers and knowledge workers had both theoretical and practical importance, particularly concerning notice periods and holiday entitlements that were different for these categories of workers.[36]

As an aside, it is worth mentioning that there were drafts in progress for laws on the employment contract for domestic workers, domestic teachers, homeworkers, and agricultural workers, but these were never adopted.[37]

III. PERSONAL SCOPE OF LABOUR LAW IN THE FIRST YEARS OF THE POLISH PEOPLE'S REPUBLIC

After the end of the Second World War, labour legislation underwent significant changes due to the necessity of unification and adjustment to the new, state-socialist system. Nevertheless, the Polish People's Republic maintained the legislation from the interwar period. Firstly, the new state extended the legislation to the territory of the "Regained Territories" that were in force in the Upper Silesian part of the Silesian Voivodeship.[38] It also adopted the Decree of 8 January 1946 on extending the validity of certain provisions of labour legislation to the entire territory of the Polish State.[39] The former decree incorporated around 35 degrees and regulations from the interwar period to the new socio-economic system, which formed the core of labour law in post-war Poland.[40] At the same time, the decree repealed legal acts dating back to feudal-state relations, such as the Regulation for Servants, from the former Kingdom of Poland.[41] Another major change brought about in the post-war period was the state takeover of the means of production, also known as "nationalisation". This change had profound consequences for the employer–employee relationship. The State became the main employer and exercised its powers in various forms. The economy was managed according to a centralised planning system. Gradually, labour relations and autonomous acts were incorporated into this system. The degree of autonomy granted to economic structures and units

36 Cf. Zygmunt Fenichel (1930): *Zarys polskiego prawa robotniczego*, Kraków, pp. 38–43.
37 Święcicki (1960): pp. 116–117, p. 140.
38 Decree of 13 November 1945 on the Administration of the Regained Territories, Journal of Laws 1945, No. 51, item 295.
39 Journal of Laws 1946, no. 4, item 30.
40 Aneta Giedrewicz-Niewińska (2021): Wybór, in Krzysztof Wojciech Baran (ed.): *System Prawa Pracy*. Historia polskiego prawa pracy, Warszawa, pp. 331–332. It is noteworthy that the "problematic succession" of interwar legislation was brought to a resolution at the General Assembly of the Supreme Court of 25 November 1948 on the importance of the jurisprudence of the decisions of the two chambers of the Supreme Court in the interwar period: 1918–1939. The Supreme Court decided, *inter alia*, that in view of the fundamental differences between the pre-war and post-war legal orders, part of the case-law based on the principles of the previous system has lost its relevance and that the continued reliance in current case-law of the ordinary courts on rulings and legal principles established in the interwar period should be differentiated. Licki (1961): p. 52.
41 Święcicki (1960): p. 150.

fluctuated over time. Private activity was limited, and the larger organisational structures in the economy were state-owned.[42] Additionally, the term "labour law" began to be used, aligning with the terminology commonly found in the legislation of other countries (*droit du travail, Arbeitsrecht, derecho del trabajo*). It can be said that it represented the strict sense of the term, as its scope was limited to work in its most common form, subordinate work.[43] Civil law relationships such as the project contract, the contract of mandate, the agency contract, the contract of services, etc., which also involve the performance of work but do not have the characteristics of subordination found in employment relationships, fell outside the scope of labour law.

The formation of Polish labour law encompassed the codification of labour law. During this period, the Labour Law Codification Commission was established with a dual objective: systematising and technically improving the existing law and creating new regulations. The principal codification work was conducted between 1948 and 1949.[44] Unfortunately, due to "serious difficulties of both a political and a technical-legislative nature" in the 50s Poland, the Codification Commission decided to suspend its work on the codification of labour law, which delayed codification for the next 20 years.[45] It is noteworthy that in the first editions of the labour code the concept of "employment contract" was replaced by "employment relationship". Art. 2 stated, "[i]n an employment relationship, an employee performs work for remuneration under the direction of the employer or his representative". This definition created space to include within its scope not only relations arising from the employment contract but also civil service and administrative relations, related to the establishment of the employment relationship by appointment, election, and nomination. Eventually, the separate definition of the employment relationship was removed, and its content was largely repeated when defining the employment contract itself. Consequently, in the drafting of the labour code, the term "employment contract" began to be treated as synonymous with the term "employment relationship", which was also the result of the removal of non-contractual forms of employment from the draft.[46]

Due to the continued application of the interwar legislation, both regulations on the employment contract for workers and knowledge workers dictated the scope of labour law regulation. It was considered that an employee could only be an individual, based on the wording of Article 447 of the Code of Obligations, which reserved the obligation to provide work in person. Moreover, according to Art. 52 of the Act of

42 Łukasz Pisarczyk (2021): Specyficzne źródła prawa pracy, in Krzysztof Wojciech Baran (ed.): *System Prawa Pracy. Historia polskiego prawa pracy*, Warszawa, pp. 176–177.

43 Salwa (1989): pp. 14–15.

44 For a comprehensive analysis of the draft labour code from 1949, cf. Aneta Giedrewicz-Niewińska (2015): *Projekt kodeksu pracy z 1949 r.*, Napoleon V, Oświęcim.

45 Aneta Giedrewicz-Niewińska (2010): Podstawy nawiązania stosunku pracy w projekcie kodeksu pracy z 1949 roku, in Marian Mikołajczyk, Józef Ciąga, Piotr Fiedorczyk, Anna Stawarska-Rippel, Tomasz Adamczyk Andrzej Drogoń, Wojciech Organiściak, Karol Kuźmicz (eds.): *O prawie i jego dziejach księgi dwie. Studia ofiarowane profesorowi Adamowi Lityńskiemu w czterdziestopięciolecie pracy naukowej i siedemdziesięciolecie urodzin*. Księga II., Białystok, pp. 495–496.

46 Giedrewicz-Niewińska (2010): pp. 488–490.

18 July 1950 on general provisions of civil law,[47] a person with limited capacity to act could, without the consent of a legal representative, undertake to provide services for remuneration and perform legal acts concerning the relationship arising from such a contract. However, if the contract opposed the well-being of that person, the legal representative could terminate the contract with the authorisation of the guardianship authority. Additionally, it should be emphasised that the employing entity could exist in two legal forms, i.e. as a legal person (enterprise, farm, office, institution, or cooperative) or as an individual. However, they could only be employers in the "non-collective sphere" of the economy. With the entry into force of the Civil Code in 1965, Article 36 was introduced, which specifically defined the so-called special legal capacity of a legal person. According to this provision, the legal capacity of a legal person was determined by law or by statutes based on the law and the scope of the person's functions. Based on this, the capacity to enter into an employment contract was determined.[48]

At this point, it is worth mentioning the definition of employee in point 2 of Article 1 of the Decree of 12 October 1950 on the inventiveness of employees,[49] which states that an employee is a person employed in a "collaborative workplace" not only on the basis of a public-law relationship or an employment contract but also on the basis of a project contract or a mandate contract. This might be considered more as an attempt to create uniformity in the concept of employee by broadening the coverage of legal relationships rather than a consistent effort to recognise other types of work providing.[50]

IV. PERSONAL SCOPE OF LABOUR LAW AFTER INTRODUCING THE LABOUR CODE

Significant progress in regulating the personal scope of labour law is connected to the introduction of the Labour Code in 1974. The Code aimed to regulate labour relations in a universal, uniform, and comprehensive manner,[51] establishing labour law as a distinct branch of law.[52] As a basis, "the LC defines the rights and obligations of employees and seeks to strengthen the socialist employment relationships". The socialist employment relationship was grounded in characteristics identical to the previous understanding

47 Journal of Laws 1950 no. 34, item 311.
48 Tomaszewska (2021): p. 263.
49 Journal of Laws 1950 no. 47, item 428.
50 Anna Musiała: Zatrudnienie niepracownicze – uwarunkowania prawnohistoryczne, Czasopismo Prawno-Historyczne, 2/2010, pp. 418–419.
51 Maciej Święcicki: Zakres przyszłego kodeksu pracy oraz niektóre problemy jego treści, *Państwo i Prawo*, 11/1969, pp. 753–754, which, however, was not fully reflected in the final form of the Code; cf. Tadeusz Zieliński (1986): *Prawo pracy. Zarys systemu*, Warszawa–Kraków, pp. 104, 132–134.
52 Cf. Wacław Szubert: Zagadnienie kodyfikacji prawa pracy, *Państwo i Prawo*, 8–9/1962, pp. 227–228; Święcicki (1969): p. 753.

of labour relations. Employees who voluntarily entered an employment relationship[53] were fundamentally obliged to personally perform a specified type of work in a specified position and to participate in workplace activities. Conversely, employers, understood as establishments, had the obligation to pay remuneration according to the quantity and quality of the work performed and to ensure "normal" working conditions.[54] Thus, the socialist employment relationship did not negate the civil law roots of the relationship between employees and employers, or establishments, but rather affirmed the obligatory nature of the employment relationship.

The new code established comprehensive regulations on the rights and obligations of employees engaged on various bases such as employment contracts, appointments, elections, nominations, or cooperative employment contracts. Non-contractual employment relationships began to be recognised as part of labour law due to W. Jaśkiewicz's analysis and subsequent argumentation regarding the legal provisions, along with the lawmakers' tendency to equalise the legal status of public servants and regular employees.[55] These relations have a mixed character, blending elements of both administrative and labour law. Consequently, for instance, a nomination act not only initiates a public servant relationship but can also serve as the basis for an employment relationship.[56] At the same time, the LC abolished the distinction between workers and knowledge workers, while retaining some differentiation in labour relations based on the place or type of work performed.[57] However, Art. 5[58] and Art. 303 of the LC allowed the Council of Ministers to establish different working conditions for a specific group of employees compared to the standard LC regulation. An employee could be a person who had reached a certain age, generally 18 years. The Labour Code permitted the employment of adolescents aged 15 to 18 years, with restrictions on the type of work they could perform. Adolescents were allowed to engage only in light seasonal and casual work or be employed for vocational training purposes. The employee's capacity to act regulated in Art. 22 (2) was virtually a repetition of Art. 52 of the Act on general provisions of civil law.

As previously mentioned, certain legal relationships, such as those involving outworkers, partially fell outside the regulation of labour law due to their dual nature. The contract for outwork was characterised with wage-earning and occupational

53 However, temporarily in 1950, the Act of 7 March 1950 was introduced on planned employment of secondary vocational and higher education graduates that implemented an administrative work order, which limited freedom of work in the context of concluding an employment contract and to freely choose place, time, and working conditions; cf. Licki (1961): p. 116.

54 Licki (1961): pp. 115–116.

55 Wiktor Jaśkiewicz: Pozaumowne stosunki pracy, *Ruch Prawniczy i Ekonomiczny*, 1/1958, p. 7 ff.

56 Wiktor Jaśkiewicz: Stosunek służbowy a stosunek pracy, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2/1960, pp. 23–26, p. 32.

57 Zieliński (1986): p. 242.

58 For instance, the Council of Ministers issued a Regulation on 20 November 1974 regarding employment relationships in which the employer is a natural person (Journal of Laws no. 45, issue 272). That regulation excluded the application of certain provisions of the LC to these relationships; cf. Kamila Naumowicz (2021): Ustawowe i podustawowe źródła prawa pracy, in Renata Babińska-Górecka (ed.): *System Prawa Pracy. Tom XIV. Historia polskiego prawa pracy*, Warszawa, pp. 135–137.

employment of natural persons, typically performed in the worker's home. The work was carried out either individually or with the assistance of others, on the order and for the account of the supervisor, using materials supplied by the supervisor.[59] Consequently, a certain degree of similarity between persons performing contracts for outwork and employees could be observed, which justified extending labour law protections to these individuals, while taking into account the specificities of homeworking. With regard to Art. 303 of the LC, the Council of Ministers issued a regulation[60] specifying the scope of application of labour law provisions to individuals performing contracts for outwork, incorporating modifications to account for the different conditions of such work.[61] The regulation of the legal protection of outworkers, on the one hand, demonstrates that lawmakers acknowledged the need to provide protection nearly similar to that granted to employees for other categories of workers, who, due to the specific depiction of their employment relationship as strictly subordinated work, did not have employee status. On the other hand, the general provision in the LC, which delegated to the Council of Ministers the right to regulate the situation of non-employee workers distinctively, could have been seen as unconstitutional in a democratic state governed by the rule of law.[62]

Due to nationalisation and the fact that the state owned most of the means of production, it not only organised the labour system but also, treating employment as a basic social obligation, enforced citizens to engage in and pursue gainful employment. As a result, it became necessary to redefine the status of the employer, which was inextricably linked to the company ownership, a *sine qua non* for an entrepreneur to hire employees.[63] Art. 3 of the LC defined an establishment as an organisational unit employing employees, even if it lacked legal personality. The status of an employing unit was granted, in particular to state enterprises, offices or other state organisational units, cooperatives, and social organisations. The LC also introduced the principle of single management, requiring the establishment manager to represent the establishment to the workforce and act on its behalf. In the socialist legal system, the concept of "work establishment" referred both to the subjective side of the employment relationship and to the technical and organisational unit where work was performed.[64] This distinction, although important in theory, often led to ambiguities

59 Teresa Wyka: Społeczno-ekonomiczne przesłanki rozwoju nakładztwa w Polsce, *Prawo Pracy i Polityka Społeczna*, 3/1980, p. 162.

60 Regulation of the Council of Ministers of 31 December 1975 on employment rights of persons performing outwork (Journal of Laws of 1976, No. 3, item 19, as amended).

61 For a broader commentary on the material scope of the contract for homeworking, cf. Piotr Prusinowski (2022): Komentarz do art. 303, in Krzysztof Wojciech Baran (ed.): *Kodeks pracy. Komentarz. Art. 94–304(5)*, Warszawa.

62 For instance, in the judgment of Constitutional Tribunal P 23/07, the Tribunal has drawn attention to the ambiguities related to the regulations implementing the Labour Code, in particular the lack of guidelines on the content of these legal acts, and emphasised the unconstitutionality of provisions contained in the regulation.

63 Andrzej Marian Świątkowski: O kontrowersjach wokół pojęcia „autentyczny" pracodawca, *Państwo i Prawo*, 4/2018, pp. 32, 35.

64 Zieliński (1986): pp. 239–240.

in legal and administrative practice. In the subjective sense, an establishment was defined as a legal entity with a defined organisational structure, property-separated resources, and legal capacity. The Supreme Court, especially in its jurisprudence in the years prior to the adoption of the LC, emphasised that a work establishment was a specific place where an employee actually performed his or her work in accordance with the contract. Thus, the workplace was not equated with an organisational unit located within the premises of a multi-unit enterprise, further emphasising the distinction between the term's subjective and objective meanings. These characteristics allowed the workplace to act in its own name in legal matters and bear liability for its obligations. In this view, the workplace fulfilled the role of an employer, functioning as an independent entity in its relations with employees.[65]

V. CONCLUSIONS

With the changes brought by the transformation in 1989, it was expected that labour law and the Labour Code would also resemble the form that could be observed in Western countries. This shift was particularly evident in the huge amendment of the LC in 1996,[66] which aimed to eradicate the remnants of the socialist employment relationship.

One of the most significant changes introduced to the code was replacing the term "establishment" with the term "employer". This change was dictated, on the one hand, by the privatisation of the means of production and the abolition of the state's monopoly on commercial activity, and, on the other hand, by the development of free market capitalism, where private entrepreneurs predominantly act as employers rather than establishments. However, this shift has not dispelled doubts about the status of the employing entity and has, in some cases, even highlighted them. The management-based concept of employer still holds primacy, recognising an internal employer as a separate organisational unit with legal, organisational, property, and technical independence and the right to employ workers. Just as in the previous socio-economic system, numerous issues still arise today concerning the identification of the genuine employer.[67]

On the other hand, the scope of the term "employee" has not changed, but Article 22 clarified the criteria for an employment relationship by specifying the employee's subordination to the employer in terms of place and time. Subsequent amendments, resulting from the growing practice of substituting employment contracts with civil law contracts, introduced a prohibition on such a substitution when the conditions of an employment relationship are met. Although this amendment to Article 22 appears

65 Zbigniew Hajn (2017): Podmioty stosunku pracy, in Krzysztof Wojciech Baran, Grzegorz Goździewicz (eds.): *System Prawa Pracy. Tom II. Indywidualne prawo pracy. Część ogólna*, Warszawa, pp. 144–148.

66 Act of 2 February 1996 amending the Act – Labour Code and amending certain acts (Journal of Law no. 24, item 110 as amended).

67 Świątkowski (2018): pp. 36–38.

to be a necessary correction, it did not effectively address the issue of substituting employment contracts with, for example, mandate contracts.

To conclude, it is symptomatic and, at the same time, worthy of deep reflection that in the course of the evolution of labour law as a separate branch of law, there has been a simplification of the concept of employee and a growing complexity in the organisational structures on the employer's side. The scope of the employer has evolved in parallel with changes in the employment relationship, but even more so with shifts in the economic system and the organisation of work. From the very beginning of labour law regulation in Poland, the scope of entities legally authorised to employ workers was defined. According to the civil law concept of the employment contract, the employer was primarily a debtor, obliged to pay the employee for the work performed. With the change in the socio-economic system, the concept of the employer underwent a metamorphosis, coming to reflect the status of the establishment, which encompassed both the objective (as a place where work is performed) and subjective (as an employing entity) dimensions of the employer. As a result of the nationalisation and collectivisation of the means of production, workplaces became mere organisational units with their own assets and the power to employ workers, with the state acting as the *de facto* sole employer in the socialist system. After the shift to capitalism following the 1989 transition, the problem of identifying the *de facto* employer escalated, driven by globalisation, the establishment of branches by foreign companies, and the outsourcing and leasing of workers as forms of temporary work. The factual situation and the legal regulation of the status of the employer perpetuated the challenge of determining the genuine employer, an issue of particular importance in contexts such as collective bargaining. This negligence or failure to address these issues has its visible consequences in terms of, for example, the erosion of trade unions, the reduced effectiveness of collective bargaining, but also the segmentation of the labour market through the use of civil law contracts and, often, bogus self-employment.

In the subsequent decades of the 20th century, the notion of employee expanded the subjective scope of labour law to include more and more groups of employees. Initially, only a small number of industrial and commercial employees, often enumerated, were covered by the newly developing labour relations. Over time, the circle of subjects broadened to include knowledge workers or, during the People's Republic era, service relationships and non-contractual employment relationships. The legal situation of contractors performing work on the basis of civil law agreements—such as project contracts, contracts of mandate, or agency contracts—as self-employed individuals, was also a subject of growing concern. The situation of these workers, often required to perform work personally, with a limited range of clients and on a continuous basis, was difficult to distinguish from a subordinated employment relationship. In fact, due to the rise of labour legislation, the legal situation and protection of self-employed workers was often weaker than that of, for example, knowledge workers, who enjoyed better and additional protective measures.[68] Despite the similarities between the factual situations of employees and the self-employed in the form of dependent

68 Grzybowski (1947): p. 100.

self-employment, the legislator never decided to extend the labour law regulation to these subjects.[69] As A. Musiała rightly points out, the collectivist approach effectively excluded from labour law regulation, and indeed from the category of "working people", those who did not fit into the strictly subordinated socialist employment relationship, leaving them outside the scientific discussions of labour law doctrine in the long term.[70] In the doctrine of the interwar period and the era of actually existing socialism, the subject of work performed outside the employment relationship was not widely commented upon, though it is worth noting that the thoughts of these authors remain relevant today.[71] This is particularly important in the context of the two unsuccessful attempts to create a new Labour Code from scratch, in 2006–2008 and 2016–2018, during which codification committees sought to address the issue of extending labour law to non-employment work by including dependent self-employed individuals, i.e. those who provide work continuously and repeatedly, often for a single employing entity, while maintaining a civil law relationship, with the salary being their main source of income. Thus, given that self-employment in Poland oscillates around 19% of the workforce (about 3.2 million people),[72] with over 75% of these individuals not employing workers, rights such as the minimum hourly rate, the obligation to ensure safe and hygienic working conditions, or the coverage of social contributions to commissioned contracts appear to be insufficiently guarded by the state in terms of labour protection. In order to avoid further deregulation of labour law and to strengthen the legal protection of not only the employees but of all the workers, an in-depth analysis of the personal scope of labour law and a clear definition of the circle of persons entitled to labour rights is necessary. The same applies to providing a clear definition of the entities that employ workers, to eliminate doubts about their legal status in labour relations.

69 Although such a possibility was provided for by the legislator in Article 303 § 2 LC, indicating that the Council of Ministers may define, by way of a regulation, the scope of application of the provisions of labour law to persons who perform work permanently on a basis other than an employment relationship or a contract for outwork, with amendments resulting from the different conditions of the performance of that type of work. Despite the application, this provision has so far been reflected in only one regulation. This is a vivid example that the legislator, within the labour law system, took into account the possibility of extending the scope of particular labour law regulations to subjects who are not employees within the meaning of labour law.

70 Musiała (2010): pp. 414–415.

71 Cf. Grzybowski (1947): p. 100; Tadeusz Zieliński (1988): *Podstawy rozwoju prawa pracy*, Państwowe Wydawnictwo Naukowe, Warszawa–Kraków, pp. 50–56; Witalis Ludwiczak (1955): *Umowa zlecenia*, Państwowe Wydawnictwo Naukowe, Poznań, p. 33.

72 Statistics Poland (2024): *Statistical Yearbook of the Republic of Poland 2024*. Available at: https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rzeczypospolitej-polskiej-2024,2,24.html (accessed on 25.12.2025).

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Rape as a Crime Against Humanity and as a War Crime in the Context of the International Criminal Tribunal for the Former Yugoslavia

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ABSTRACT
The main goal of this article is to analyse the crime of rape in the context of law and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as the legal impact that the operation of this tribunal has had on the law and practice of the International Criminal Court (ICC) in this matter. Therefore, the first part of this paper is dedicated to the research of the definitions of the crime of rape given in the practice of the ICTY, namely the ones that stemmed from the Furundžija and Kunarac et al. cases before that tribunal. The author argues that such a situation, in which one criminal tribunal does not have the definition of a crime for which it has jurisdiction in advance but rather has to create it in its practice, is a serious violation of some of the most important principles of criminal law, most importantly the principle of legality. The second part of the article focuses on the definition of rape adopted in the law of the ICC, i.e. by its Elements of Crimes act and the influence that the definitions of rape created by the ICTY have had on it. The author opines that, although the creators of the ICC's definition of the crime of rape surely had in their minds the definitions created by the ICTY, the definition contained in the Elements of Crimes is nevertheless different from those previous definitions. Having that in mind, the author argues that the ICC should rarely refer to the ICTY practice regarding the crime of rape in its future jurisprudence, and that it could do so only when such practice is completely in line with the definition of rape contained in the Elements of Crimes.
KEYWORDS
Rape, International Criminal Tribunal for the Former Yugoslavia, International Criminal Court, crimes against humanity, war crimes, sexual violence.

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Violul ca crimă împotriva umanității și ca crimă de război în contextul Tribunalului Penal Internațional pentru fosta Iugoslavie

REZUMAT
Scopul principal al acestui articol este de a analiza infracțiunea de viol în contextul dreptului și al jurisprudenței Tribunalului Penal Internațional pentru fosta Iugoslavie (TPII), precum și impactul juridic pe care funcționarea acestui tribunal l-a avut asupra dreptului și practicii Curții Penale Internaționale (CPI) în această materie. Prin urmare, prima parte a lucrării este dedicată cercetării definițiilor infracțiunii de viol consacrate în practica TPII, respectiv cele rezultate din cauzele Furundžija și Kunarac et al. în fața acestui tribunal. Autorul susține că o asemenea situație, în care un tribunal penal nu dispune în prealabil de o definiție a infracțiunii asupra căreia are competență, ci este nevoit să o creeze prin propria practică, constituie o încălcare gravă a unora dintre cele mai importante principii ale dreptului penal, în special a principiului legalității. A doua parte a articolului se concentrează asupra definiției violului adoptate în dreptul Curții Penale Internaționale, respectiv cea prevăzută în actul intitulat Elementele infracțiunilor, precum și asupra influenței pe care definițiile violului elaborate de TPII au avut-o asupra acesteia. Autorul este de părere că, deși autorii definiției infracțiunii de viol din cadrul CPI au avut, fără îndoială, în vedere definițiile create de TPII, definiția cuprinsă în Elementele infracțiunilor este totuși diferită de definițiile anterioare. Având în vedere acest aspect, autorul susține că CPI ar trebui să facă rareori trimitere la practica TPII privind infracțiunea de viol în jurisprudența sa viitoare și că ar putea face acest lucru doar atunci când această practică este pe deplin conformă cu definiția violului prevăzută în Elementele infracțiunilor.
CUVINTE CHEIE
Viol, Tribunalul Penal Internațional pentru fosta Iugoslavie, Curtea Penală Internațională, crime împotriva umanității, crime de război, violență sexuală.

I. INTRODUCTION

Sexual violence, and consequently rape as its most serious form, has almost always accompanied every war and armed conflict in human history[2]—namely, "the widespread occurrence of sexual violence in armed conflicts and other macro-criminal contexts is undisputed".[3] In other words, "rape during wars has probably existed since the dawn of humanity".[4]

2 See: Miloš Babić (2011): *Međunarodno krivično pravo*, Pravni fakultet u Banjoj Luci, Banja Luka, p. 152.
3 Tanja Altunjan: The International Criminal Court and Sexual Violence: Between Aspirations and Reality, *German Law Journal*, 5/2021, pp. 878–893, p. 878. For a wide list of examples of wars and armed conflicts during which the commission of rape was documented, see: Christine Chinkin: Rape and Sexual Abuse of Women in International Law, *European Journal of International Law*, 3/1994, pp. 326–341, pp. 327–329; Kathleen M. Pratt, Laurel E. Fletcher: Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, *Berkeley Women's Law Journal*, 1994, pp. 77–102, p. 80; Malaika Rajandran: Sexual Violence and International Law, *Refugee Survey Quarterly*, 4/2004, pp. 58–73, pp. 59–61.
4 Anne-Marie Roucayrol: Du viol comme arme de guerre, *La Pensée*, 4/2020, pp. 80–92, p. 80.

However, until relatively recently, International Law has rarely dealt with rape committed in such and similar contexts.[5] As Haddad points out, "[w]hile the history of conflict rape is brutal and extensive, conflict rape has historically been an invisible crime largely absent from international and domestic criminal prosecution".[6] Rape was a "natural part of war".[7] This situation started to change gradually during the 20th

5 "The concept of rape as an international crime is relatively new." Mark Ellis: Breaking the Silence: Rape as an International Crime, *Case Western Reserve Journal of International Law*, 2/2007, pp. 225–247, p. 227. Even though there have been some sporadic cases of criminal trials for rape committed during war (e.g. the earliest documented criminal prosecution for acts of sexual violence before some sort of international court was the trial of Peter von Hagenbach in Breisach in 1474, even though the emphasis in this trial was that the war during which those rapes were committed was deemed illegal/unjust, and not on rape *per se*; see more in: Diane Lupig: Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court, *Journal of Gender, Social Policy & the Law*, 2/2009, pp. 431–496, p. 436; Miranda Das, Sukhdev Singh: Crimes of Sexual Violence within International Criminal Law: A Historical Outline, *Journal of Politics and Law*, 1/2021, pp. 1–11, p. 2), it has largely passed unnoticed through the most part of human history. Perhaps the most notable example of the complete absence of the prosecution for rape committed during the war is the trial of major German war criminals in Nuremberg in the aftermath of the Second World War (see more: Kelly Askin: Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, *Berkeley Journal of International Law*, 2/2003, pp. 288–349, p. 301; Mark Ellis: Breaking the Silence: Rape as an International Crime, *Case Western Reserve Journal of International Law*, 2/2007, pp. 225–247, pp. 227–228; Lupig (2009): pp. 439–442; Das, Singh (2021): p. 3). The situation was only slightly different before the International Military Tribunal for the Far East (IMTFE; Tokyo Tribunal), where rape was addressed in some cases, but not as a separate category of war crimes/crimes against humanity but subsumed under other crimes, e.g. as a war crime of "inhuman treatment" (see more: Jennifer Green, Rhonda Copelon, Patrick Cotter, Beth Stephens: Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, *Hastings Women's Law Journal*, 2/1994, pp. 171–241, p. 173, fn. 5; Peggy Kuo: Prosecuting Crimes of Sexual Violence in an International Tribunal, *Case Western Reserve Journal of International Law*, 3/2002, pp. 305–321, p. 307; Askin (2003): p. 302; Ellis (2007): p. 228; Lupig (2009): pp. 436–439; Das, Singh (2021): pp. 3–4; Никола Пауновић [Nikola Paunović] (2024): Кривичноправни и доказни аспекти злочина силовања у међународном кривичном праву[Krivičnopravni i dokazni aspekti zločina silovanja u međunarodnom krivičnom pravu, in Milan Škulić], in Милан Шкулић, Родољуб Етински, Ивана Миљуш, Алекса Шкундрић [Milan Škulić, Rodoljub Etinski, Ivana Miljuš, Aleksa Škundrić] (eds.): *Однос међународног кривичног и националног кривичног права* [*Odnos međunarodnog krivičnog i nacionalnog krivičnog prava*], Vol. I, Удружење за међународно кривично право, Универзитет у Београду – Правни факултет [Udruženje za međunarodno krivično pravo, Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 637–656, pp. 638–639).

6 Heidi Nicholas Haddad: Mobilizing the Will to Prosecute: Crimes of Rape at the Yugoslav and Rwandan Tribunals, *Human Rights Review*, 1/2011, pp. 109–132, p. 111.

7 The main reason why sexual violence, and most importantly rape, committed in times of war or armed conflict was rarely prosecuted is that it was simply deemed as a "natural part of war". However, some other reasons also contributed to this "under-prosecution", which are also common to sexual crimes in general, and not only when they are committed in contexts required for war crimes or crimes against humanity. Namely, "one of the specific issues

century, as a prohibition of rape in armed conflicts began to be included in various sources of International Law. Finally, with the creation and operation of the *ad hoc* International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR), there came a revolution in this field.[8]

The goal of this article is to examine how the ICTY dealt with rape as a war crime and as a crime against humanity. More specifically, our focus shall be on the definition(s) of rape as a specific and individual form of war crimes and crimes against humanity. Also, we will research the relation between the definitions of rape used by the ICTY and the definition of said crime adopted for the International Criminal Court (ICC).

II. RAPE IN THE ICTY STATUTE

ICTY, the first form of international criminal judiciary since the post–Second World War international military tribunals, was formally established by the UN Security Council Resolution 827 of 25 May 1993.[9] One of the most publicly expressed reasons for the creation of this tribunal was the worldwide reaction to the alleged crimes of sexual violence, most notably rape, committed by various warring parties during the still ongoing armed conflicts in the former Socialist Federal Republic of Yugoslavia (SFRY), most notably in Bosnia and Herzegovina.[10]

related to sexual violence is that it remains an 'invisible' crime because feelings of guilt or shame, fear of retaliation or taboos may prevent victims from coming forward and talking about it", and "material barriers such as security risks, physical distance and transportation costs may also prevent victims from seeking help". Gloria Gaggioli: Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law, *International Review of the Red Cross*, 2014, pp. 503–538, p. 504.

8 "[T]he ad hoc Tribunals dedicated, in particular, great attention to one crime: the crime of rape". Alexandra Adams: The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape, *European Journal of International Law*, 3/2018, pp. 749–769, p. 750. Former ICTY Chief Prosecutor, Richard Goldstone, highlighted, "men had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war", and "the two UN Tribunals truly represent a distinct shift in mindset". Richard Goldstone: Prosecuting Rape as a War Crime, *Case Western Reserve Journal of International Law*, 3/2002, pp. 277–285, p. 279.

9 The UN Security Council claimed that, by establishing the ICTY, it acted under Chapter VII of the UN Charter, and that thus the creation of the ICTY as a subsidiary organ of the Security Council has the nature of the enforcement measure under said chapter, aimed at maintaining or restoring international peace and security. However, this method of creation of a body of international criminal justice, regardless of its *ad hoc* character *in concreto*, is often regarded as a very contentious one; see e.g. Babić (2011): pp. 184–186; Zoran Stojanović (2012): *Međunarodno krivično pravo*, Pravna knjiga, Beograd, pp. 119–121; Милан Шкулић [Milan Škulić] (2020): *Међународно кривично право* [*Međunarodno krivično pravo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 120–135.

10 See more: Goldstone (2002): pp. 278–279. Bedont and Martinez note, "the recent conflicts in the former Yugoslavia and Rwanda and the publicized mass rapes during those conflicts shocked the conscience of the world and spurred the creation of the two Ad Hoc Tribunals". Barbara

During the process of establishing the ICTY, "many women's groups turned to the task of ensuring that rape and related crimes against women would be recognised within the jurisdiction of the future Tribunal".[11] Nevertheless, the ICTY Statute explicitly mentioned rape in its normative part only once. Namely, it was included in the list of crimes against humanity that fall within the jurisdiction of the Tribunal.[12] On the other hand, rape is *expressis verbis* not stipulated as a war crime.[13] However, the ICTY Statute did not contain any definition of the crime of rape, even as a crime against humanity, but has barely stated that rape can constitute a crime against humanity, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[14]

This situation would not be so appalling if, in the International Law of the time, there had been a universally adopted definition of the crime of rape. But this was not the case. Namely, up to 1993, there was a substantial number of international legal documents that prohibited rape during armed conflicts.[15] However, none of them

Bedont, Katerine Hall Martinez: Ending Impunity for Gender Crimes under the International Criminal Law, *The Brown Journal of World Affairs*, 1/1999, pp. 65–85, p. 67. For example, Haddad points out that, in an 18-month period between April 1992 and September 1993, "139 media stories ran in major world publications with 'rape' in Bosnia in the headline of the story". Haddad (2011): p. 125. However, one should bear in mind that the "notion of rape and sexual violence in general, as a 'weapon of war', has been also widely used for propaganda actions, which often were not based on facts". Шкулић [Škulić] (2020): p. 265.

11 J. Green et al. (1994): p. 176.

12 See Art. 5 (1) (g) of the ICTY Statute.

13 See Articles 2 and 3 of the ICTY Statute.

14 Art. (1) of the ICTY Statute.

15 Rape was not mentioned in the Charters of IMTN and IMTFE, either as a war crime or as a crime against humanity. Even so, some authors claim, "[r]ape has always been considered a war crime, although it was not mentioned as such in either the Nuremberg Charter or the Geneva Conventions, which probably reflects the fact that it was not always prosecuted with great diligence." William A. Schabas (2001): *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, p. 43. Similarly: Marco Sassòli (2019): *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing Limited, Cheltenham, p. 555 (para. 10.160). For example, Meron reminds, "[r]ape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)." Theodor Meron: Rape as a Crime under International Humanitarian Law, *The American Journal of International Law*, 3/1993, pp. 424–428, p. 425. Nevertheless, it was for the first time explicitly stipulated as a crime against humanity in Article 2 (1) (c) of Law number 10 issued by the Allied Control Council for Germany in the aftermath of the Second World War. After that, there has been a series of international legal documents that have prohibited rape in the armed conflicts (e.g. Article 27 (2) of the Fourth Geneva Convention of 1949; Article 76 of the First Additional Protocol (1977) to the Geneva Conventions of 1949; Article 4 (2) (e) of the Second Additional Protocol (1977) to the Geneva Conventions of 1949). See more about the (declarative) prohibition of rape in wars and armed conflicts in the instruments of International Humanitarian Law: Askin (2003): pp. 290–300, pp. 303–305; Gaggioli (2014): pp. 511–513; Das, Singh (2021): p. 4; Пауновић [Paunović] (2024): pp. 638–639. However, neither the relevant provisions of the 1949 Geneva Conventions nor those of the 1977 Additional Protocols listed rape amongst their grave breaches provisions: Ilias Bantekas,

contained a definition of what, *in concreto*, the crime of rape under international law *is*. This could be acceptable from the point of view of the International Public Law in general, and, for instance, International Humanitarian Law as its integral part. However, such a situation is *per se* not acceptable in the context of International Criminal Law, which is part of International Law that contains rules that stipulate the conditions for individual criminal responsibility. In other words, how can we prosecute a person for the commission of a crime if we do not know what that crime is?[16] By what means could the prosecutor know what the elements of the crime are that he needs to include in the indictment and that he needs to prove during the trial? Also, how can the court know when the commission of the crime has been proved if it does not know what the elements are that have to be proven? And, finally, how can we speak of fair trial at all if the defence does not know the elements of the crime for which the accused is being accused?[17]

In lack of any definition in its Statute and general International Law,[18] the ICTY had to *create* its own definition(s) of the crime of rape.[19]

Susan Nash (2003): *International Criminal Law*, Cavendish Publishing Limited, London, Sydney, Portland, Oregon, p. 365. Sellers interestingly points out that the contemporary International Humanitarian Law, which has developed mainly out of European legal tradition, and which currently and openly prohibits rape during armed conflicts, "was preceded by humanitarian law precepts from the Middle East and Japan, dating from the seventh century, and from China, dating from the second century", and that "these precedents, now 'earlier modern' humanitarian law precepts, mainly military codes, regulated armed conflict and included prohibitions of sexual violence". Patricia Viseur Sellers: Sexual Violence and Peremptory Norms: The Legal Value of Rape, *Case Western Reserve Journal of International Law*, 3/2002, pp. 287–303, p. 290.

16 The former ICTY Chief Prosecutor, Richard Goldstone, has quite plainly admitted, "[s]ubstantively, one of the problems we faced in charging rape as a war crime was the absence of any definition of that crime" (Goldstone (2002): p. 283).

17 Having this in mind, we could not completely agree with the following statement. "Although in the past rape had been explicitly or implicitly prohibited under international humanitarian law, until the establishment of the ICTY it has never been defined in any of the instruments in which it was contained. Bantekas, Nash (2003): pp. 364–365. As we have seen, rape was only mentioned but not defined in the ICTY Statute. Maybe the cited authors were thinking of the definition(s) of rape given by the ICTY in its jurisprudence—however, as they have referred to international "instruments", it should be concluded that they were primarily aiming at the ICTY Statute, and not at the definitions of rape contained in the decisions of that tribunal.

18 The fact that there was no generally accepted definition of the crime of rape in the International Law at the time was upheld in the decisions of international criminal tribunals. For instance, the ICTR Trial Chamber stated in *Akayesu* that it "must define rape, as there is no commonly accepted definition of this term in international law". *The Prosecutor versus Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 596.

19 This situation was not a unique one for the crime of rape as a crime against humanity within the context of ICTY but more a general one regarding most of the criminal offences prescribed by the ICTY (as well as ICTR) Statute. For example, Croatian authors Degan and Pavišić point out, "the practice showed that the Statutes of the Tribunals are deficient" and that their judges have "awarded themselves the role of the legislators", concluding, "such legislative procedure, which is completely inappropriate for any criminal judicial body, bears a permanent risk to punish the accused for a conduct which was not, at the time of the commission, a crime under

III. DEFINITION(S) OF RAPE IN THE JURISPRUDENCE OF THE ICTY

However, the first international criminal judicial body to come up with a definition of the crime of rape in International Criminal Law was not the ICTY—it was the ICTR. In its seminal *Akayesu* case, the ICTR defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive".[20] This definition, which has been described as a "very broad and generic definition of rape",[21] has been accepted in some of the early cases before the ICTY.[22]

Nevertheless, ICTY has very soon chosen to create its own definition(s) of the crime, essentially departing from the one adopted by ICTR in Akayesu.[23] Firstly, in the *Furundžija* case, the ICTY Trial Chamber gave the following definition of the *actus reus* of rape:

> *(i) The sexual penetration, however slight:*
> *(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or*
> *(b) of the mouth of the victim by the penis of the perpetrator;*
> *(ii) by the coercion or force or threat of force against the victim or a third person.*[24]

It is interesting to see how the Trial Chamber in *Furundžija* came up with this definition.[25] Firstly, it stated, "[n]o definition of rape can be found in international law."[26] It further noted that neither "is resort to general principles of international criminal law

positive law". Vladimir Đuro Degan, Berislav Pavišić (2005): *Međunarodno kazneno pravo*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, pp. 54–55.

20 *Akayesu*, para. 598.

21 Gaggioli (2014): p. 507.

22 See e.g. *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, IT-96-21-T, Trial Judgment, 16 November 1998, paras. 478–479.

23 "Whereas the chamber initially referred to the Akayesu definition, it later ignored it when constructing its own definition". Philip Weiner: The Evolving Jurisprudence of the Crime of Rape in International Criminal Law, *Boston College Review*, 3/2013, pp. 1207–1237, p. 1211.

24 *Prosecutor v Anto Furundžija*, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 185.

25 The ICTY Trial Chamber in *Furundžija* changed the law-finding method in relation to the one applied by the ICTR in *Akayesu*. Namely, in *Akayesu* (para. 597), ICTR came to its definition of rape through analogy with the way in which torture is addressed to in the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. However, the ICTY in *Furundžija* chose to apply Article 38 (1) (c) of the Statute of the International Court of Justice (ICJ), which prescribes "the general principles of law recognized by civilized nations" as one of the sources of International Law (see more on these principles in: Миленко Крећа [Milenko Kreća] (2019): *Међународно јавно право* [*Međunarodno javno pravo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 95–100). See more in Adams (2018): pp. 755–756.

26 *Furundžija*, para. 175.

or to general principles of international law of any avail",[27] and that in order "to arrive at an accurate definition of rape [...] it is necessary to look for principles of criminal law common to the major legal systems of the world",[28] which "may be derived, with all due caution, from national laws".[29] The Trial Chamber then proceeds with a brief comparative legal analysis of the definitions of rape in various national legal systems[30] and comes up with its own definition of the crime of rape.

The said definition makes a distinction between two major types of sexual penetration that could be relevant. Firstly, the penetration of the vagina or the anus of the victim—in this constellation, the perpetrator can be either a man (who is penetrating the victim by his own penis or by any other object), or a woman, in which case only the penetration of the victim by some other objects (and not by the penis of the perpetrator) is viable. Secondly, the penetration of the mouth of the victim—here the object of the penetration could only be the penis of the perpetrator and not some other objects; therefore, in this situation, a perpetrator can only be male.[31] However, in both major constellations of relevant penetration, a victim could be both female and male.

In order to constitute rape, the relevant penetration needs to be committed by coercion or force or threat of force, which can be directed against the victim or against some other person. In other words, coercion/use or threat of force is a constituent element of the crime of rape according to the *Furundžija* definition, and therefore it must be proven in court. This approach can still be regarded as a traditional one,[32] even though some elements of the definition (e.g. the fact that a victim could be either female or male) do not fall within the classical, i.e. traditional legal notion of rape.[33]

It is pointed out in legal theory that "although the Furundžija approach purports to be specifically oriented, in reality it does not seem to differ much from the conceptual position adopted in Akayesu".[34] However, it seems to be beyond any doubt that, from

27 *Furundžija,* para. 177.
28 *Furundžija,* para. 177.
29 *Furundžija,* para. 177.
30 *Furundžija,* paras. 180–184.
31 One of the main problems encountered by the ICTY Trial Chamber while defining the crime of rape in *Furundžija* was the one if forcible sexual oral penetration constitutes rape or some other, milder criminal offence (e.g. sexual assault), given the fact that national legislations were divided on the matter. Finally, it concluded in favour of including the said penetration within the scope of the definition of the crime of rape (see *Furundžija* paras. 182–184).
32 In that sense: Тијана Шурлан [Tijana Šurlan] (2011): *Злочин против човечности у међународном кривичном праву* [*Zločin protiv čovečnosti u međunarodnom krivičnom pravu*], Службени гласник [Službeni glasnik], Београд [Beograd], p. 324.
33 The "pure" traditional normative approach considers the crime of rape to be "coercive sexual penetration of a woman by a man". Милан Шкулић [Milan Škulić] (2019): *Кривична дела против полне слободе* [*Krivična dela protiv polne slobode*], Службени гласник [Službeni glasnik], Београд [Beograd], p. 28.
34 Bantekas, Nash (2003): p. 366. However, it is also noted that the *Furundžija* definition "followed more closely the traditional common law understanding of rape than did the ICTR's definition of rape in Akayesu". Weiner (2013): p. 1211.

the criminal law point of view, the *Furundžija* definition is the more advantageous one given the fact that it is much more precise.[35]

The definition given in *Furundžija* was substantially changed in the *Kunarac et al*. case, which is considered ICTY's "seminal case relating to the crime of rape".[36] According to the *Kunarac* definition, the crime of rape is:

> *[s]exual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.*[37]

The first part of the *Kunarac* definition, regarding the forms of sexual penetration, is the same as the relevant part of the *Furundžija* definition. Nevertheless, the crucial difference between the two definitions is that the *Furundžija* definition contains *coercion/use or threat of force* as an element of rape, whereas the *Kunarac* definition does not—it instead prescribes the *lack of consent* to the sexual act on the part of the victim as an element.[38] Moreover, the Appeal Chamber in *Kunarac* explicitly stated, "[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape."[39] The attempt of the Appeal Chamber in *Kunarac* to show that the definition of rape newly created by the Trial Chamber in the same case does not substantively depart from the definition given in *Furundžija* is unconvincing[40]—as Weiner correctly underlines, "the elements of the *actus reus* identified in the two cases are clearly different".[41]

35 Other authors also undoubtedly deem the Furundžija definition as a "more precise" one. Gaggioli (2014): p. 507. In this regard, Paunović argues that the Akayesu definition is "unacceptable because it loses the difference between rape and other sexual acts which are illegal, but which do not constitute rape". Пауновић [Paunović] (2024): p. 641. Similarly, Goldstone, who indeed regards the Akayesu definition as the "crucial step forward", admits, "it goes too far to the extent that it does not require any act of penetration of or by a sexual organ to constitute rape". Goldstone (2002): p. 283.

36 Weiner (2013): p. 1212.

37 *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 460.

38 In this sense, Dixon underlines, "[i]n Kunarac, the Trial Chamber also expanded the definition of rape adopted in Akayesu and Furundžija, to encompass all situations in which consent is not 'freely' and 'voluntarily' given." Rosalind Dixon: Rape as a Crime in International Humanitarian Law: Where to from Here?, *European Journal of International Law*, 3/2002, pp. 697–719, p. 700.

39 *Prosecutor v Dragoljub Kunarac, Radomir Kovač, Zoran Vuković*, IT-96-23 & IT-96-23/1-A, Appeal Judgment, 12 June 2002, para. 129.

40 The Appeal Chamber stated, "[h]owever, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent." *Kunarac et al.,* Appeal Judgment, para. 129.

41 Weiner (2013): p. 1214.

What was the reason for this change? Firstly, the Trial Chamber in *Kunarac* argued that the *Furundžija* definition is "in one respect more narrowly stated than is required by international law",[42] namely, "[i]n stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim."[43] Then the Kunarac Trial Chamber further stated that the basic underlying principle common to the national legal systems examined by the Trial Chamber in *Furundžija* is that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim",[44] and that the "full range of provisions referred to in that judgment suggests that the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual autonomy".[45] In other words, "[t]he basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalised."[46]

In fact, the differences in the approaches applied in *Furundžija* and *Kunarac* highlight two main comparative approaches in defining the crime of rape in general. The first one puts an emphasis on coercion/use or threat of force, whilst the other emphasises the lack of consent on the part of the victim.[47] These differences are not just theoretical, but they have practical repercussions as well. Namely, if coercion/use or threat of force is an element of rape, then the existence of it must be proven, i.e. it is not enough for the existence of the crime of rape that the victim claims not to have consented to the relevant sexual penetration, but it is necessary to prove that coercion/force or threat of force have been used towards her/him to materialize the said penetration. On the contrary, if the lack of consent is stipulated as an element of the crime, then it is enough to prove that sexual penetration occurred contrary to the will of the victim—it is not necessary to prove that force had been applied, nor that threats of use of force have been made.

The main problem with the "lack of consent" approach, which was implemented in the *Kunarac* definition, is that, in a practical sense, it makes the definition of rape too extensive. In other words, how is the ICC prosecutor, or any other prosecutor who operates in the system which adopts the lack of consent concept of rape, going to prove that there was no consent to the relevant sexual act on the victim's behalf? Of course, in situations in which some kind of coercion (force, threat of force, or other) was applied, this can be proven by e.g. injuries on the victim's body. However, when

42 *Kunarac et al.*, Trial Judgment, para. 438.
43 *Kunarac et al.*, Trial Judgment, para. 438.
44 *Kunarac et al.*, Trial Judgment, para. 440.
45 *Kunarac et al.*, Trial Judgment, para. 440.
46 *Kunarac et al.*, Trial Judgment, para. 457.
47 Some authors regard the first possible approach (rape is either committed through force or threat of force) as the "civil law" approach and the second one (rape is a relevant act of sexual nature committed without the consent of the victim) as the "common law" approach: Adams (2018): p. 750. Others avoid labelling those approaches as "civil law" or "common law" ones, rather referring to them as the "traditional" and "relatively new(er)" approaches: Милан Шкулић [Milan Škulić] (2019): pp. 28–32.

no force, nor threat nor any other form of coercion was applied, what will be the proof that will generate the conviction in the mind of the judges that the crime of rape has indeed been committed?[48] Here, the main proof most certainly is the testimony of the victim—but what if, as it is expected to happen in most of the cases, the accused simply denies any involvement in the alleged crime, or if he/she denies that the sexual act in question was conducted without the consent of the victim? As Stojanović correctly points out, it is "erroneous to equalise the participation in an unwanted sexual act with a coercive sexual act".[49] In any case, "it is necessary that from the conduct of the victim one could conclude that she/he does not consent to the sexual act".[50] If the relevant sexual act were being conducted only contrary to the will of the "victim", without any manifestation of an objection to such an act from the victim, then such a lack of consent would be very hard to prove.

Without entering into further argument about the advantages and disadvantages of the possible approaches in defining rape as a crime, we must, however, conclude that the ICTY, i.e. the same international criminal judicial body, has applied two essentially different definitions of the crime of rape in its jurisprudence, in relation to events that took place during the same period (Yugoslav wars) and in the same territory (Former SFRY). From a criminal law point of view, this situation is inherently dubious. The conclusions that have been put forward by some authors that "it seems that both definitions are the same, because 'coercion or force or threat of force' essentially mean 'the lack of consent'",[51] as well as the remarks of the ICTY itself that the solution given in *Kunarac* "does not differ substantially from the Furundžija definition"[52] are not convincing. As we have seen, these two definitions are substantively different, given the fact that they adopt distinctive approaches in the normative construction of the crime of rape, which, on the other hand, can have different practical impacts. Even though the *Kunarac* definition was generally universally accepted in the subsequent jurisprudence of the ICTY,[53]

48 In this context, Stojanović poses an interesting question: if in a certain case no coercion has been applied, but at the same time in the same case the consent of the victim to the sexual act does not exist, then what enabled the perpetrator to conduct the relevant sexual act? See: Zoran Stojanović: Silovanje bez prinude – usaglašavanje KZ Srbije sa članom 36 Istanbulske konvencije, *NBP – Nauka, bezbednost, policija*, 1/2016, pp. 1–23, p. 16.

49 Stojanović (2016): p. 9.

50 Stojanović (2016): p. 13.

51 Antonio Kaseze (2005): *Međunarodno krivično pravo*, Beogradski centar za ljudska prava, Beograd [Original: Antonio Cassese (2003): *International Criminal Law*, Oxford University Press, Oxford, translated by Obrad Račić in cooperation with Vidan Hadži Vidanović and Marko Milanović], p. 91 fn. 94.

52 *Kunarac et al.*, Trial Judgment, para. 459.

53 See: *Prosecutor v Milomir Stakić*, IT-97-24-T, Trial Judgment, 31 July 2003, paras. 755–756; *Prosecutor v Radoslav Brđanin*, IT-99-36-T, Trial Judgment, 1 September 2004, para. 1008; *Prosecutor v Miroslav Kvočka, Mlađo Radić, Zoran Žigić, Dragoljub Prcać*, IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 395; *Prosecutor v Dragan Zelenović*, IT-96-23/2-S, Trial Judgment, 4 April 2007, para. 36; *Prosecutor v Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, IT-04-84-T, Trial Judgment, 3 April 2008; *Prosecutor v Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, IT-05-87-T, Trial Judgment, vol. 1, 26 February 2009, para. 203; *Prosecutor v Vlastimir Đorđević*, IT-05-87/1-T, Trial Judgment,

this does not alleviate the inconsistency that existed in its overall practice—until the creation of the *Kunarac* definition, the ICTY applied a different one, the *Furundžija* definition (and even in some cases the *Akayesu* definition) of rape.

Finally, as Weiner correctly points out, the *Kunarac* definition also added "a two-part *mens rea* requirement",[54] which requires "not only proof of a general intent to effect the sexual act but also proof that the accused knew the sexual act was taking place without the victim's consent".[55]

IV. DEFINITION OF RAPE IN THE LAW OF THE INTERNATIONAL CRIMINAL COURT

Although the "adoption of the ICC Statute was heavily influenced by the creation and practice of the ICTY and the ICTR",[56] the creators of the ICC applied a different method in relation to the one applied by those who created the ICTY and the ICTR. Namely, the very norms of the Rome Statute of the ICC contain provisions which stipulate the principle of legality (*nullum crimen, nulla poena sine lege*), and, most importantly for our topic, its *nullum crimen, nulla poena sine lege scripta and nullum crimen, nulla poena sine lege certa* elements. Conversely, the Rome Statute stipulates, "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[57] In this way, the Rome Statute "clearly accepts the *lex scripta* segment of the principle of legality, given the fact that the crimes within its jurisdiction are solely contained within the Rome Statute as a written source of international law",[58] and it also "implies the significance of the *lex certa* element of the principle of legality, having in mind that most of the crimes within the jurisdiction *ratione materiae* of the ICC are precisely described in the Rome Statute".[59]

In accordance with such an approach, the legal framework of the ICC contains precise definitions of the crimes that fall within its jurisdiction. Namely, rape is

23 February 2011, para. 1766; *Prosecutor v Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić*, IT-04-74-T, Trial Judgment, vol. 1, 29 May 2013, para. 69; *Prosecutor v Radovan Karadžić*, IT-95-5/18-T, Trial Judgement, vol. 1, 24 March 2016, para. 511.

54 Weiner (2013): p. 1213.

55 Weiner (2013): pp. 1213–1214.

56 Altunjan (2021): p. 879.

57 Art. 22 (1).

58 Алекса Шкундрић [Aleksa Škundrić] (2024): Начело законитости у међународном кривичном праву [Načelo zakonitosti u međunarodnom krivičnom pravu], in Милан Шкулић, Родољуб Етински, Ивана Миљуш, Алекса Шкундрић [Milan Škulić, Rodoljub Etinski, Ivana Miljuš, Aleksa Škundrić] (eds.): *Однос међународног кривичног и националног кривичног права* [*Odnos međunarodnog krivičnog i nacionalnog krivičnog prava*], Vol. I, Удружење за међународно кривично право, Универзитет у Београду – Правни факултет [Udruženje za međunarodno krivično pravo, Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], pp. 589–614, p. 607.

59 Милан Шкулић [Milan Škulić]: Начело законитости у кривичном праву [Načelo zakonitosti u krivičnom pravu], *Анали Правног факултета у Београду* [*Anali Pravnog fakulteta u Beogradu*], 1/2010, pp. 66–107, p. 95.

prescribed in the Rome Statute as one of the acts of sexual violence that can constitute crimes against humanity,[60] as well as war crimes, committed both within international[61] and non-international armed conflicts.[62] However, the exact definition of what rape *is* for the purposes of the ICC is not given in the Rome Statute but in the Elements of Crimes, an act that represents "some kind of addendum of the Statute".[63]

It is noted that, *inter alia*, in the field of crimes of sexual violence, the "jurisprudence of ICTY and ICTR had a significant impact on the Preparatory Commission of the ICC in the preparation of the Elements of crimes for the Rome Statute".[64] According to this act,[65] rape is

> *the invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body,*[66]

where such an invasion was committed by

> *force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.*[67]

60 Art. 7 (1) (g).
61 Art. 8 (2) (b) (xxii).
62 Art. 8 (2) (e) (vi).
63 Шкулић [Škulić] (2020): p. 73.
64 Adams (2018): p. 763. Some authors similarly underline, "[t]he definition of rape found in the Elements of Crimes is heavily influenced by the legal reasoning in cases regarding rape of the ICTY and the ICTR." Maria Sjöholm (2017): Article 7 (1) (g): Crimes against Humanity – Rape, in Mark Klamberg (ed.): *Commentary on the Law of the International Criminal Court*, TOAEP, Brussels, p. 50 fn. 52. This fact was also acknowledged during the time of drafting the Rome Statute. Namely, Zimmermann noted, "[t]aking into account the recent experiences of both the conflict in the former Yugoslavia as well as those of the conflict in Rwanda, it is not surprising that the current draft for the statute of the ICC now contains a provision which no longer considers rape and similar forms of sexual violence as constituting outrages upon personal dignity, but that it created a specific provision." Andreas Zimmermann: The Creation of the Permanent International Criminal Court, *Max Planck Yearbook of United Nations*, 1998, pp. 169–237, p. 194. Finally, besides the undoubtful influence of the *ad hoc* tribunals' law and practice on the creation of the legal framework of the ICC, great impact in the field of crimes of sexual violence, including rape, and their normative construction in the law of the ICC was made by the so-called *Women's Caucus for Gender Justice*; see more: Bedont and Martinez (1999): pp. 66–69.
65 It should be noted that the same elements constitute rape in all three situations in which it appears in the Rome Statute, aside from the different contextual elements that are required for crimes against humanity / war crimes.
66 Element 1 of Art. 7 (1) (g)-1, Element 1 of Article 8 (2) (b) (xxii)-1 and Element 1 of Article 8 (2) (e) (vi)-1.
67 Element 2 of Art. 7 (1) (g)-1, Element 2 of Article 8 (2) (b) (xxii)-1 and Element 2 of Article 8 (2) (e) (vi)-1. In its jurisprudence, the ICC has correctly underlined, "the second constituent element

It is generally true to say that the "ICC Statute contains the essential definition of rape that came out of the ICTR and ICTY cases and retains much of the language first used by these Tribunals".[68] Nevertheless, generally speaking, the ICC definition of rape is closer to the *Furundžija* definition than to the *Kunarac* one.[69] It prescribes force / threat of force / coercion as alternative elements of the crime, although it gives further elaboration on those circumstances, most notably the notion of coercion, than the *Furundžija* definition does. Namely, "[c]oercion may arise through fear of violence, duress, detention, psychological oppression or abuse of power. These situations are provided as examples, apparent through the use of the term 'such as'."[70] Besides the situations when the perpetrator himself used force, threat, or coercion, the crime of rape may also arise if the perpetrator "took advantage of a coercive environment".[71]

Generally speaking, lack of consent is not an element of the crime of rape in the law of the ICC.[72] However, the ICC definition also contains the alternative possibility for the crime of rape to arise even when there has been no force, nor threat of force nor coercion, namely if the victim was "incapable of giving genuine consent" to the relevant invasion, which reflects the fact that the *Kunarac* definition also had some influence on its creation.[73] Nevertheless, this equalisation of the situations of relevant sexual penetration committed through force / threat of force / coercion

enumerates the circumstances and conditions of invasion of the body of the victim which give it a criminal character". *The Prosecutor v Germain Katanga*, Trial Judgment, ICC-01/04-01/07, 7 March 2014, para. 964.

68 Ellis (2007): p. 240. Weiner similarly states, "[t]he ICC derived this definition from the Akayesu, Furundžija and Kunarac judgments" (Weiner (2013): p. 1217).

69 Adams points out, "[a]lready, the Preparatory Commission to the International Criminal Court (ICC) has opted for the 'civil law' approach (coercion) in devising its elements of crime (EOC) but added one aspect of the 'common law' approach (incapacity to give genuine consent) to the element of coercion" (Adams (2018): p. 750).

70 Sjöholm (2017): p. 50. According to the ICC's practice, "coercive circumstances need not be evidenced by a show of physical force – threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion". *The Prosecutor v Dominic Ongwen*, Trial Judgment, ICC-02 / 04-01 / 15, 4 February 2021, para. 2710

71 Namely, "coercion may be inherent in certain circumstances, such as armed conflict or the military presence of hostile forces amongst the civilian population". *The Prosecutor v Ongwen*, Trial Judgment para. 2710; *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Judgment, ICC-01 / 12-01 / 18, 26 June 2024, para. 1198.

72 This was affirmed in the jurisprudence of the ICC, according to which "[i]t is not necessary to prove the victim's lack of consent, and there is no requirement of resistance on the part of the victim." *The Prosecutor v Ongwen*, Trial Judgment, para. 2709. 1 in: *The Prosecutor v Al Hassan*, para. 1197. In the *Bemba* case, the Trial chamber noted, "[t]he preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice." *The Prosecutor v Jean-Pierre Bemba Gombo*, Trial Judgment, ICC-01 / 05-01 / 08, 21 March 2016, para. 105.

73 According to the Elements of Crimes (see footnotes 16, 51, and 64 of Elements of Crimes), "[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."

with the penetration committed when the victim was incapable of giving genuine consent, i.e. when there was no force, nor threat of force nor coercion, is sometimes criticised in legal theory. In this regard, Adams argues, "the combination of coercion with one aspect of the lack-of-consent doctrine protects two different legal wrongs in one offence (violent rape and sexual abuse), which reflect different degrees of guilt in the perpetrator's mind",[74] and "[i]f one summarizes different criminal acts under the same offence with the same penalties, one would violate the prohibition of equal treatment of unequal facts."[75] Although from the dogmatic point of few these arguments are somewhat convincing, it seems that this is not too important an issue given the fact that, even in some national criminal legal systems that recognise two distinctive criminal offences in similar situations, there is no difference in the prescribed penalties.[76]

It is also worth noting that the *actus reus* of the crime of rape in the ICC definition is somewhat broader than in the *Furundžija* and *Kunarac* definitions, which, as we have seen, share the same ac*tus reus*. Firstly, according to the ICC definition, rape will also exist when the male victim is penetrating the body of a female perpetrator by his penis—it is now correct to state that the Elements of Crimes define the crime of rape in a completely "gender-neutral way".[77] On the contrary, in ICTY definitions, a woman could be a perpetrator of this crime only if she has penetrated the victim's vagina or anus (in this second situation, the victim could also be male) by some other object, but not also in the situation if she, e.g. coerced the male victim to penetrate her vagina with his penis. In general, this normative development in the law of ICC should be welcomed given the fact that it is indeed possible, however unlikely, that such cases of so-called "reversed rape" also appear in its practice. Namely, it is "biologically possible that a woman might force a man to penetrate her body, which calls for a recognition in the definition of the crime".[78]

Secondly, the penetration of *any part of the body*, either of a victim or of a perpetrator, by the sexual organ,[79] conversely, belonging to either the perpetrator or the victim,

74 Adams (2018): p. 750. The cited author further elaborates this idea elsewhere: Adams (2018): p. 766.

75 Adams (2018): p. 766.

76 For example, Criminal Code of the Republic of Serbia (*Sl. glasnik RS,* br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 i 94/2024) contains two distinctive criminal offences – rape (Art. 178) and "sexual intercourse with a helpless person" (Art. 179), for which it prescribes the same penalties.

77 Шкулић [Škulić] (2020): p. 266. The ICC has affirmed this in its jurisprudence, stating that "invasion", in the Court's legal framework, "includes same-sex penetration, and encompasses both male and/or female perpetrators and victims". *The Prosecutor v Bemba*, Trial Judgment, para. 100; *The Prosecutor v Bosco Ntaganda*, Trial Judgment, ICC-01/04-02/06, 8 July 2019, para. 933.

78 Adams (2018): p. 764. The cited author then correctly recognizes that "[s]ince women are now being admitted into the military and are also appearing in high-level political positions, it is to be expected that women will take on the role of the perpetrator in the future and will not only be the victims of rape" (Adams (2018): p. 764).

79 Although the Elements of Crimes here also use a gender-neutral language, speaking of "sexual organ", and not of "penis", it is understood that only a male sexual organ, i.e. a penis,

is sufficient to constitute rape according to the ICC definition. It is understood that in the vast majority of cases, the object of such sexual penetration would be the *vagina*, *anus*, or the *mouth* of the victim, or, much more rarely, of the perpetrator. However, the ICC definition allows for determining the existence of rape even in situations in which the penis of the perpetrator or, in some cases, the penis of the victim, penetrated any other part of the body of the victim or, in some cases, of the perpetrator. These other parts of the body could be, for example, the ears, nose, or eyes of the victim.[80] On the contrary, according to the *Furundžija* and *Kunarac* definitions, the relevant object of penetration could only have been the vagina, anus, and the mouth of the victim.

Thirdly, the ICC definition stipulates that the relevant penetration of the anal or genital opening of the victim could be done with any object or any part of the body of the perpetrator. In this segment, the ICC definition is also broader than the *Kunarac* (and *Furundžija*) definition. Namely, according to *Kunarac*, the relevant sexual penetration of the vagina or anus of the victim could be done *only* by the penis of the perpetrator or by any other object used by the perpetrator, but not by some other parts of the body of the perpetrator (e.g. hand, foot, etc.). The inclusion of the penetration of the vagina or anus of the victim by other parts of the perpetrator's body could be regarded as a positive progressive development regarding the ICC definition of rape, having in mind that such acts can humiliate the victim in the same serious manner as the other recognised sexual penetrations.[81]

Nevertheless, even a broad definition such as the ICC one can be subjected to certain critiques given the fact that, echoing the old Roman law maxim *omnis definitio in iure periculosa est*, no legal definition can be completely perfect. For example, the situation when a female perpetrator coerces a male or a female victim to perform oral sex on her (the perpetrator's) vagina or anus could sometimes not be subsumed under the ICC definition because, in some variants of such oral sex, no penetration might occur. This is so because, following the conception adopted by the creators of the Elements of Crimes, "[t]he key element that separates rape from other acts is penetration."[82] However, in our opinion, there is no essential difference in the level of attack on the victim's sexual autonomy, which is considered to be the main "object of protection" when it comes to sexual crimes,[83] if the victim (male or female) is coerced to perform oral sex on the male or on the female perpetrator, even if in this second situation penetration does not occur but only the stimulation of the female sexual organ, e.g. clitoris, "from the outside" of the woman's body.[84] Therefore, we can argue that the Elements of Crimes provision regarding the crime of rape could be revised to also cover the explained situations.

Regarding the mental elements (*mens rea*) of the crime of rape in the law of the ICC, in the absence of specifically stipulated elements, the general provisions of Article 30

can physically conduct a penetration.

80 Sjöholm (2017): p. 50.

81 Adams (2018): p. 764.

82 Sjöholm (2017): p. 49.

83 See more: Шкулић [Škulić] (2019): p. 257; Наташа Делић [Nataša Delić] (2021): *Кривично право: посебни део* [*Krivično pravo: posebni deo*], Универзитет у Београду – Правни факултет [Univerzitet u Beogradu – Pravni fakultet], Београд [Beograd], p. 95.

84 In this sense, see also: Adams (2018): p. 764.

of the Rome Statute, requiring intent and knowledge on the part of the perpetrator, apply.[85] Given so, besides the mental requirements oriented towards the contextual elements of the crimes against humanity or war crimes under which the crime of rape is being subsumed *in concreto*, the perpetrator "must also have intended to penetrate the victim's body and be aware that the penetration was by force or threat of force".[86] According to the ICC jurisprudence, "[i]ntent will be established where it is proven that the perpetrator meant to engage in the conduct in order for the penetration to take place.",[87] while in relation to the requirement of "knowledge", "it must be proven that the perpetrator was aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent".[88] In determining whether the mental element is fulfilled in the given case, the ICC has examined the "nature of acts" performed by the perpetrator, as well as the "sustained character of the acts over a long period of time".[89] In one particular case, the ICC adjudicated the existence of the mental element upon the circumstances that the "attackers themselves, physically and psychologically, committed acts of violence against the victim and humiliated her" and that, "in addition, they could not have been unaware of her verbal objections".[90]

V. RAPE IN THE PRACTICE OF THE INTERNATIONAL CRIMINAL COURT

Having in mind that the ICC started its operation in 2002, its practice regarding the crime of rape has not been too extensive. The first trial before this court, which, *inter alia*, dealt with the charges of rape, was in the *Katanga* case in 2014, in which the accused was declared not guilty of rape, both as a crime against humanity and as a war crime.[91] The first trial judgment in which the accused was condemned for rape, both as a crime against humanity and as a war crime by the ICC, albeit under the provision of command responsibility, was issued in 2016 in the *Bemba* case.[92] However, by the decision of the Appeals Chamber in 2018, the accused in the *Bemba* case was acquitted of all charges, including the ones for rape.[93] The first case in which the Appeals Chamber upheld the conviction by the Trial Chamber for rape,[94] both as a crime against humanity and as a war crime, was the *Ntaganda* case.[95] This was followed by the Trial Chamber

85 See in this sense: *The Prosecutor v Bemba*, Trial Judgment, para. 110.
86 Sjöholm (2017): p. 50.
87 *The Prosecutor v Bemba*, Trial Judgment, para. 111.
88 *The Prosecutor v Bemba*, Trial Judgment, para. 112.
89 *The Prosecutor v Ongwen*, Trial Judgment, para. 3042.
90 *The Prosecutor v Katanga*, para. 996.
91 See *The Prosecutor v Katanga*, XII. Disposition.
92 *The Prosecutor v Bemba*, Trial Judgment, para. 752.
93 See *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Appeal Judgment, 8 June 2018.
94 See *The Prosecutor v Ntaganda*, Trial Judgment, VII. Disposition.
95 See *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeal Judgment, 30 March 2021.

conviction in the *Ongwen* case,[96] which was upheld by the Appeals Chamber.[97] The newest decision of the ICC in relation to rape was rendered in 2024, when the accused in *Al Hassan* was declared innocent by the Trial Chamber on the charges of rape, both as a crime against humanity and as a war crime.[98]

In its up-to-date jurisprudence regarding the crime of rape, the ICC did not refer too much to the existing practice of the ICTY, although it did do so in several places. For instance, in the mentioned *Bemba* case, the ICC Trial Chamber explicitly referred to the practice of the ICTY as a support to the fact that "[o]ral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration."[99] Also, in its more recent judgment in the *Ongwen* case, the ICC cited some of the ICTY decisions.[100] However, these references to the ICTY practice, which could be regarded as sporadic, were mainly aimed at reinforcing legal reasoning, which already unequivocally stems from the law applied by the ICC, in this case, most importantly, from the Elements of Crimes. We consider this level of influence of the ICTY practice on the contemporary (and future) jurisprudence of the ICC to be an appropriate one. Namely, the *ad hoc* international criminal tribunals in general, and with them the ICTY, have operated in "completely different normative frameworks"[101] in relation to the ICC. The ICC has its codified law, which predominantly fulfils the conditions set by the *nullum crimen, nulla poena sine lege* principle. This could not be said for the law applied by the ICTY. Therefore, in our opinion, the ICC should use the ICTY jurisprudence regarding the crime of rape, as well as in all other situations, only when such practice is in line with the normative solutions contained in the Rome Statute and attached acts, in this case, most importantly, the Elements of Crimes.

VI. CONCLUSIONS

During the past three decades, sexual crimes, and among them most importantly the crime of rape, finally started to be prosecuted by the international criminal judicial bodies. Such a development *in abstracto* deserves to be appreciated. Nevertheless, the way in which these prosecutions took place was not always perfect.

96 *The Prosecutor v Ongwen*, Trial Judgment, para. 3116.
97 *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15 A2, Appeal Judgment, 15 December 2022.
98 See *The Prosecutor v Al Hassan*, para. 1785.
99 *The Prosecutor v Bemba*, Trial Judgment, para. 101. It seems that, for example in the *Bemba* case, the ICC paid much more attention to the ICTR practice, e.g. when it was, in its own words, guided in determination of the notion of "coercive circumstances" contained by the Elements of Crimes by the *Akayesu* Trial Judgment's discussion of "coercive circumstances"; see: *The Prosecutor v Bemba*, Trial Judgment, para. 103.
100 E.g. when underlying the fact that there is no need to prove the resistance on the behalf on the victim, the ICC Trial chamber referred, *inter alia*, to the *Kunarac et al.* appeal judgment; see *The Prosecutor v Ongwen*, Trial Judgment, para. 2709, fn. 7147.
101 Шкулић [Škulić] (2020): p. 142.

Firstly, speaking of the ICTY, it is generally a positive step forward that this *ad hoc* international criminal tribunal has dedicated much of its attention towards the prosecution of the crime of rape as one of the most heinous of all crimes. However, speaking in legal terms, the method used by the ICTY in addressing this matter could be subjected to criticism. Firstly, this *ad hoc* international criminal tribunal did not have even the minimum of a normative framework regarding the crimes for which it nominally had jurisdiction, in our case, regarding the crime of rape. Its Statute did not contain the slightest clue as to what the definition and what the elements of the crime of rape were, for a commission of which it had the authority to condemn. And in the absence of these elements, the ICTY, i.e. the court itself, had to create its own definition of the crime of rape, which it was then going to apply retroactively. Such a situation could be considered a blasphemous one by any criminal lawyer, practitioner, or theoretician.

Secondly, even in the creation of its own definition of rape, the ICTY did not maintain a completely consistent approach. On the contrary, it created two definitions, stemming from the *Furundžija* and the *Kunarac et al*. cases. These definitions were opposed to each other because they adopted two completely different normative approaches to legally defining the crime of rape—the first one focused on the use of force/threat/coercion, while the second one adopted the lack-of-consent approach. Although these definitions surely had a significant impact on the further development of the International Criminal Law and, most importantly, on the definition and the elements of the crime of rape in the context of law of the ICC, it remains to be said that it is legally dubious that the same tribunal, regarding the same crime, committed during the same time and on the same territory, applied completely different definitions of the said crime.

Finally, we can conclude that the situation regarding the crime of rape in the context of the ICC is, legally speaking, a far better one than the one we had in the case of the ICTY. Namely, the Rome Statute and the Elements of Crimes contain precise provisions regarding rape, both as a crime against humanity and as a war crime. Having that in mind, we can argue that the ICC in its future legal practice regarding this crime, which is indeed still in its juvenile phase, should not pay much attention to the jurisprudence of the ICTY, and that it could only do so in situations when the decisions of the ICTY to which the ICC wishes to refer to are completely in accordance with the legal reasoning which arises from the legal sources applicable before the ICC.

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Protection of Crime Victims in Poland: An Analysis of Key Stages of Its Evolution

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ABSTRACT
The article presents the development of crime victims' rights in Poland over the past decades, focusing on the key stages of this process. After the political transformation in 1989, the protection of victims gained importance, leading to the gradual introduction of new support mechanisms. Some of the most important changes included mediation, restitution, and the expansion of victims' procedural rights, allowing them greater participation in criminal proceedings and better opportunities to pursue their claims. International law, particularly regulations from the European Union and other international organisations, played a crucial role in this development by requiring Poland to adapt its system to global standards of victim protection. Despite progress, challenges remain in the practical implementation of these rights. The main difficulties include the effectiveness of the compensation system, protection against secondary victimisation, and access to professional support. The article examines these changes in the context of the growing importance of victims' rights and emphasises the need for further improvements to the protection system, especially in response to emerging threats such as cybercrime and online violence.
KEYWORDS
Victims, rights, protection, justice, mediation.

Protecția victimelor infracțiunilor în Polonia: o analiză a etapelor-cheie ale evoluției sale

REZUMAT
Articolul prezintă evoluția drepturilor victimelor infracțiunilor în Polonia în ultimele decenii, concentrându-se asupra etapelor-cheie ale acestui proces. După transformarea politică din 1989, protecția victimelor a căpătat o importanță deosebită, ceea ce a condus la introducerea treptată a unor noi mecanisme de sprijin. Unele dintre cele mai importante schimbări au inclus medierea, restituirea prejudiciului și extinderea drepturilor procedurale ale victimelor, oferindu-le o participare mai activă în procedurile penale și oportunități >>

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>> mai bune de a-și valorifica revendicările. Dreptul internațional, în special reglementările Uniunii Europene și ale altor organizații internaționale, a jucat un rol crucial în acest proces, cerând Poloniei să-și adapteze sistemul la standardele internaționale privind protecția victimelor. În ciuda progreselor realizate, persistă provocări în aplicarea practică a acestor drepturi. Principalele dificultăți includ eficiența sistemului de compensare, protecția împotriva victimizării secundare și accesul la sprijin profesional. Articolul examinează aceste schimbări în contextul creșterii importanței drepturilor victimelor și subliniază necesitatea unor îmbunătățiri suplimentare ale sistemului de protecție, în special ca răspuns la amenințări emergente precum criminalitatea cibernetică și violența online.
CUVINTE CHEIE
Victime, drepturi, protecție, justiție, mediere.

I. INTRODUCTION

The political transformation that began in Poland in 1989 was a turning point for the system of individual rights protection. The democratisation process required not only a reorganisation of the fundamental principles of the state but also a modernisation of institutions and legal mechanisms to align them with the needs of a civic society. One of the key areas of these changes was the protection of crime victims' rights—a group whose position in the Polish legal system had long been marginalised. Legislative and institutional reforms introduced after 1989 established new standards for safeguarding victims, making their rights an essential part of criminal and social policy. The implementation of these reforms was driven not only by internal needs but also by the necessity to comply with international and European human rights standards. In particular, international legal instruments played a major role in shaping the development of Polish laws concerning crime victims.

The United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power from 1985[2] was one of the first comprehensive international approaches to protecting victims' rights. It emphasised the need for redress, security, and both psychological and material support for victims. Similarly, the Council of Europe Recommendations No. R(85)11 on the position of victims in criminal law and procedure,[3] as well as Recommendation No. R(87)21 on preventing victimisation and assisting victims[4] set standards that influenced legislative changes in many countries, including Poland. Poland's political transformation created conditions for introducing legal and institutional mechanisms that incorporated these international protection

2 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse (accessed on 9.12.2024).

3 Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted on 28 June 1985. Available at: https://rm.coe.int/16804dccae (accessed on 9.12.2024).

4 Recommendation No. R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimisation, adopted on 17 September 1987. Available at: https://rm.coe.int/16805afa5c (accessed on 9.12.2024).

standards. The United Nations Convention against Transnational Organised Crime, adopted in 2000,[5] highlighted the need to protect victims in the context of cross-border organised crime by introducing, among other measures, witness protection programmes and compensation mechanisms. At the same time, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention of 2011,[6] set out detailed victim protection standards, significantly impacting the development of Polish law in this area. At the European Union level, the 2012/29/EU Directive of the European Parliament and the Council,[7] which established minimum standards for the rights, support, and protection of crime victims, played a key role in harmonising legislation across Member States, including Poland. It also strengthened the victims' position in criminal proceedings.

Changes in Polish legislation included reforms to both the Penal Code of 6 June 1997[8] and the Code of Criminal Procedure of 6 June 1997.[9] Measures were introduced to prevent secondary victimisation, ensure compensation for damages, and promote mediation between victims and offenders. Additionally, the role of victims in criminal proceedings was strengthened by allowing them to act as auxiliary prosecutors. The importance of institutions supporting victims also grew, including the Ombudsman and specialised victim assistance centres. However, a breakthrough in promoting victims' rights came with the adoption of the Polish Charter of Crime Victims' Rights in 1999, which consolidated the rights of victims into a single document, based on both national regulations and international standards. Although the Polish Charter of Crime Victims' Rights is not a legally binding act, it plays an important role as an educational and informational document, raising awareness of victims' rights among both the public and professionals within the justice system. Its creation reflected a growing recognition of crime victims' needs and the necessity of ensuring proper support within a democratic rule of law system.

The study of the evolution of crime victims' rights protection is an important aspect of academic reflection on the development of the legal system. Historical analysis not only helps to understand the origins and directions of legal changes but also provides

5 United Nations Convention against Transnational Organised Crime and the Protocols Thereto, 2000. Available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (accessed on December 9, 2024).

6 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011. Available at: https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence (accessed on 9.12.2024).

7 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029 (accessed on December 9, 2024).

8 Act of 6 June 1997, Penal Code, Journal of Laws 2024, item 17 (consolidated text). Available at: https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-karny-16798683 (accessed on 16.12.2024).

9 Act of 6 June 1997, Code of Criminal Procedure, Journal of Laws 2024, item 37. Available at: https://lexlege.pl/kodeks-postepowania-karnego/ (accessed on 16.12.2024).

valuable insights for those involved in assessing and improving existing regulations. This approach allows us to avoid repeating past mistakes and respond more effectively to contemporary challenges, which is the fundamental goal of the historical-legal perspective.

II. RIGHTS OF VICTIMS AFTER THE SYSTEMIC TRANSFORMATION

The political transformation that began in 1989 in Central and Eastern Europe was a turning point in the region's history. These changes affected all aspects of political, economic, and social life, marking the end of the bipolar world order, the dissolution of the USSR, and the restoration of sovereignty for over 20 countries. In each country, the transformation involved a fundamental restructuring of the political system and socio-economic framework, shaping the foundations of modern governance and market economies.[10]

In Poland, the decisive stage of the transformation was the Round Table Talks, which symbolised the peaceful nature of the political transition. As a result of these negotiations, "Solidarity" was legalised and partially free elections were held, paving the way for the formation of the first democratic government in Poland's post-war history. The collapse of the Polish United Workers' Party, driven by a prolonged economic crisis, workers' strikes, and growing social resistance against Soviet-type dictatorship, became a symbol of the end of the Polish People's Republic era. With the Act of 29 December 1989, the country's name was officially changed to the Republic of Poland, and it was defined as a democratic state governed by the rule of law, committed to social justice principles.[11]

No less important in shaping the new legal order was the adoption of the Constitution of the Republic of Poland in the referendum on 25 May 1997.[12] This document became the foundation of a democratic state governed by the rule of law, introducing a catalogue of human rights along with mechanisms for their protection. This was particularly significant for the rights of victims of various abuses during the Polish People's Republic era and throughout the transformation process.[13] For those who had suffered human rights violations under the Soviet-type dictatorship, the adoption of the Constitution was a major milestone, as it opened the door to seeking justice within a new, democratic legal system.

10 Leszek Moczulski (1999): Geopolityczne uwarunkowania rewolucji 1989 r, in Andrzej Kojder (ed.): *Rok 1989. Nowa Polska. Odmieniona Europa*, Instytut Lecha Wałęsy, Warszawa, p. 195.

11 Laura Koba (2020): *Prawa człowieka w polskiej transformacji systemowej*, Kraków. Available at: https://isp.uj.edu.pl/documents/2103800/139368467/Prawa+cz%C5%82owieka+w+polskiej+transformacji+systemowej/b5064bf6-0283-434c-9767-2118ed5bb5a9 (accessed on 9.12.2024).

12 Constitution of the Republic of Poland of 2 April 1997. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/O/D19970483.pdf (accessed on 9.12.2024).

13 Jerzy Kuciński, Waldemar Jan Wołpiuk (2012): *Zasady ustroju politycznego państwa w Konstytucji Rzeczypospolitej Polskiej z 1997 roku*, Wolters Kluwer, Warszawa.

The fundamental principle established in the Constitution was the inviolable dignity of the individual, which became the foundation of civil rights and freedoms, detailed in Chapter II.[14] This catalogue of rights was based on international legal instruments such as the UN Universal Declaration of Human Rights,[15] the International Covenants on Human Rights,[16] and the European Convention on Human Rights.[17] The adoption of the Constitution also created the legal framework for the establishment of institutions responsible for protecting citizens' rights. In the context of victims' rights, it is important to highlight the adaptation of Polish law to international standards, which included ensuring the right to a fair trial, compensation for harm suffered, and protection against discrimination. The political transformation not only introduced a new legal order but also enabled victims to seek justice more effectively.[18]

The principle of a democratic state governed by the rule of law, defined in Article 2 of the Constitution, serves as the foundation of the state's functioning, requiring authorities to act in accordance with the law and principles of justice. For victims of violations, this principle is particularly important, as it protects against government arbitrariness and ensures equal access to legal remedies, allowing them to pursue justice effectively.[19]

The principle of legality, outlined in Article 7 of the Constitution, requires that every decision made by public authorities must have a legal basis, preventing abuses of power and protecting victims. This principle enhances transparency in public administration, ensuring that citizens clearly understand the legal grounds for decisions and have the ability to effectively challenge violations, safeguarding them from government arbitrariness.[20]

Article 10 of the Constitution, which establishes the principle of separation and balance of powers, guarantees the independence of the judiciary, ensuring impartial adjudication in cases involving rights violations. This principle reduces the risk of arbitrary decisions by the executive and legislative authorities, effectively protecting victims from abuses. It ensures that those affected have access to independent courts and the ability to effectively pursue their rights, forming the foundation of justice and

14 Dorota Fleszer: Godność i prywatność osoby w świetle Konstytucji Rzeczypospolitej Polskiej, *Roczniki Administracji i Prawa*, 1/2015, pp. 19–30.

15 The Universal Declaration of Human Rights, 1948. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed on 9.12.2024).

16 International Covenant on Civil and Political Rights, 1966. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (accessed on 9.12.2024).

17 European Convention on Human Rights, 4 November 1950. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (accessed on December 9, 2024).

18 Maciej Pach (2017): Specyfika wykładni konstytucji w konstytucyjnym państwie prawa na przykładzie Konstytucji RP z 2 kwietnia 1997 r, in *Prawo i polityka w sferze publicznej. Perspektywa wewnętrzna*, Wrocław. Available at: https://www.repozytorium.uni.wroc.pl/Content/89891/PDF/01_01_M_Pach_Specyfika_wykladni_konstytucji.pdf (accessed on 9.12.2024).

19 Jarosław Sozański: Zasada demokratycznego państwa prawnego w polskiej praktyce prawnej, *Kwartalnik Naukowy Uczelni Vistula*, 4/2014, pp. 28–40.

20 Przemysław Krzykowski: Znaczenie zasady praworządności przy wydawaniu decyzji administracyjnych przez organy administracji publicznej, *Studia Prawnoustrojowe*, 2009, pp. 215–230.

preventing the concentration of power, which is often a source of systemic human rights violations.[21]

The inviolability and inherent dignity of the individual, defined in Article 30 of the Constitution along with personal freedom, regulated in Article 31, are recognised as the foundation of all rights and freedoms. Human dignity is the source of these rights, emphasising that every person, regardless of their experiences, remains a subject of law, deserving respect and protection by the state. The protection of personal freedom ensures that any restriction can only be introduced by law and solely in justified cases in accordance with the principles of a democratic state governed by the rule of law. These regulations protect citizens from abuses of power while ensuring that any state intervention is proportional and necessary, maintaining a balance between public interest and individual rights.[22]

Article 45 of the Constitution safeguards individual interests in cases of legal disputes or violations of civil rights. For crime victims, this provision is particularly important, as it ensures that they can pursue their rights in a transparent and lawful manner. The requirement for cases to be resolved within a reasonable timeframe prevents excessive delays in proceedings, which could hinder the pursuit of justice and exacerbate the suffering of victims. This regulation strengthens the effectiveness of legal protection and helps restore public trust in the justice system.[23]

Article 79 of the Constitution of the Republic of Poland introduces a mechanism for reviewing the conformity of laws with the Constitution, which is a key element of human rights protection in the Polish legal system. This provision allows crime victims to seek constitutional-level legal protection when their rights are violated due to legal provisions that formed the basis for decisions made by public authorities. By eliminating unconstitutional laws, the Constitutional Tribunal helps prevent similar violations in the future. Through the constitutional complaint mechanism, victims can effectively challenge laws that have caused them harm, providing an additional safeguard against abuses by state authorities.[24]

An integral element of human rights protection is the work of the Ombudsman, an institution that ensures equal treatment of all citizens, regardless of their social, political, or economic status. Established on 15 July 1987,[25] the Ombudsman became the second institution of its kind in the socialist bloc. It was granted the status of a constitutional body through the 1997 Constitution of Poland. Articles 208–212 of the Constitution guarantee its independence and impartiality, enabling it to effectively protect civil rights. The combination of the constitutional complaint mechanism with the Ombudsman's activities creates a coherent system of human rights protection, which

21 Grzegorz Kuca (2014): *Zasada podziału władzy w Konstytucji RP z 1997 roku*, Wydawnictwo Sejmowe, Warszawa.

22 Marek Chmaj (2019): *Komentarz do Konstytucji RP: Art. 30, 31, 32, 33*, Difin, Warszawa.

23 Mariusz Śladkowski: Zasada prawa do sądu w Konstytucji RP, *Roczniki Administracji i Prawa*, 1/2024, pp. 15–31.

24 Marcin Dąbrowski: Zakres podmiotowy skargi konstytucyjnej, *Studia Prawnicze*, 4/2004, pp. 21–32.

25 The Act on the Ombudsman was adopted on 15 July 1987. Available at: https://bip.brpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich (accessed on 9.12. 2024).

is a cornerstone of a democratic state governed by the rule of law.[26] It is worth emphasising that the Ombudsman operates as a non-political institution, ensuring equal protection of rights for all citizens.[27]

Particular attention in this system should be given to the protection of children's rights, as they are the most vulnerable social group and often fall victim to crimes. Established under the Act of 6 January 2000,[28] the Office of the Ombudsman for Children supports children in crisis situations, represents their interests, and works to prevent violence, neglect, and abuse. Acting independently and impartially, the Ombudsman has the authority to intervene in cases of children's rights violations, initiate court proceedings, and submit applications to the Constitutional Tribunal in cases where legal provisions fail to comply with children's rights. Collaboration with institutions such as the Ombudsman for Civil Rights and non-governmental organisations strengthens the support and protection system for the youngest members of society.[29]

The introduction of the new Penal Code in 1997 significantly improved the situation of victims, particularly through the obligation to compensate for damages (Article 46 of the Penal Code).[30] This provision allows victims to obtain compensation or redress without the need to file a civil lawsuit. Regulations concerning conditional discontinuation of proceedings (Article 67 § 3 of the Penal Code) further strengthen the protection of victims' interests. These mechanisms not only help victims recover financial losses but also support conflict resolution and foster offender accountability within society.[31]

The Code of Criminal Procedure, amended in 1997,[32] introduced measures strengthening the position of victims in criminal proceedings. According to Article 49 of the Code of Criminal Procedure, a victim may be a natural person, a legal entity, or an institution without legal personality whose rights have been violated or threatened by a crime. During the pre-trial proceedings, the victim holds the status of a party, which allows them to actively participate in clarifying the case. After the indictment is filed, the victim may act as an auxiliary prosecutor (articles 53–55 of the Code of Criminal Procedure), increasing their involvement in the trial. The institution of mediation (Article 23a of the

26 Kazimierz Działocha (1998): Zasada bezpośredniego stosowania Konstytucji w dziedzinie wolności i praw człowieka, in Barbara Oliwa-Radzikowska (ed.): *Zbiór studiów przygotowanych z okazji 10-lecia Urzędu Rzecznika Praw Obywatelskich, Biuro Rzecznika Praw Obywatelskich*, Biuro RPO, Warszawa.

27 Andrzej Jackiewicz (2014): *Rzecznik Praw Obywatelskich i Rzecznik Praw Dziecka*, Rozbudowa otwartych zasobów naukowych Repozytorium Uniwersytetu w Białymstoku. Available at: https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/12848/1/A_Jackiewicz_Rzecznik_Praw_Obywatelskich_Rzecznik_Praw_Dziecka.pdf (accessed on 9.12.2024).

28 Act of 6 January 2000 on the Ombudsman for Children. Available at: https://brpd.gov.pl/ustawa/ (accessed on 9.12.2024).

29 Agnieszka Krawczak-Chmielecka: O rozwoju praw dziecka w Polsce i na świecie, *Dziecko krzywdzone. Teoria, badania, praktyka*, 2/2017, pp. 11–23.

30 Act of 6 June 1997, Penal Code. Available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970880553 (accessed on 9.122024).

31 Tadeusz Bojarski (ed.) (2006): *Zmiany w polskim prawie karnym: po wejściu w życie kodeksu karnego z 1997 roku*, Uniwersytetu Marii Curie-Skłodowskiej.

32 Act of 6 June 1997, Code of Criminal Procedure. Available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970890555 (accessed on 9.12.2024).

Code of Criminal Procedure) enables reaching a settlement or seeking compensation within the criminal process. Additionally, regulations on the protection of victims and witnesses (articles 184–189 of the Code of Criminal Procedure), such as data confidentiality, remote hearings, or physical protection, ensure safety and trust in the justice system. Modern procedural solutions support victims in asserting their rights while implementing the principles of restorative justice.[33]

The political transformation in Poland was a turning point that brought significant changes to the political and legal system. The principles of a democratic state governed by the rule of law, enshrined in the Constitution of the Republic of Poland, established a legal framework ensuring the protection of individual rights and strengthened the position of victims in criminal proceedings. Amendments to the Penal Code and the Code of Criminal Procedure created new opportunities for effectively asserting one's rights, including obtaining compensation for harm suffered. Institutions such as the auxiliary prosecutor and mediation have significantly reinforced the procedural standing of victims. The introduced regulations not only restored public trust in the justice system but also emphasised the fundamental importance of human rights protection.

III. THE IMPACT OF INTERNATIONAL LAW ON THE RIGHTS OF VICTIMS

The evolution of the protection of victims' rights in Poland has been significantly shaped by recommendations and standards developed on the international stage. These frameworks have contributed to the development of the Polish legal system, strengthening the recognition and enforcement of victims' rights while introducing comprehensive support mechanisms and ensuring their participation in legal proceedings. One of the first groundbreaking documents in this field was the European Convention on the Compensation of Victims of Violent Crimes, adopted in 1983 (although Poland has not ratified it).[34] This Convention influenced the recognition of state responsibility for supporting victims of violent crimes. It imposes an obligation to provide compensation not only to victims but also to dependents who have suffered losses due to the victim's death. It places particular emphasis on situations where the perpetrator is unable to remedy the harm, ensuring that victims are not left to bear the financial consequences of the crime alone. Based on the principles of solidarity and social responsibility, the Convention highlights that the consequences of crimes affect not only individuals but also the entire community. The document requires the widespread dissemination of information about available compensation mechanisms and the provision of compensation covering, among other things, loss of livelihood and medical expenses. At the same time, it excludes the possibility of double compensation to ensure fairness and

33 Kazimierz Zgryzek: Pozycja procesowa podejrzanego i pokrzywdzonego w postępowaniu w przedmiocie zastosowania środków zabezpieczających w kodyfikacji postępowania karnego z 1928, 1969 i 1997 r, *Problemy Prawa Karnego*, 3/2019, pp. 67–87.

34 European Convention on the Compensation of Victims of Violent Crimes, adopted in 1983. Available at: https://rm.coe.int/1680079751 (accessed on 9.12.2024).

the efficiency of the system. The European Convention became not only a milestone in victim protection but also a foundation for the idea of society's shared responsibility for the consequences of crimes.[35]

The shift in the traditional approach of criminal law, which had primarily focused on the relationship between the state and the offender, began in 1985 with the adoption of Recommendation No. R(85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure. This document highlights the stages of criminal proceedings that are particularly significant for the victim from the moment law enforcement authorities receive information about a suspected crime, through the victim's interrogation, to the court proceedings. Each of these stages can be a source of secondary victimisation, emphasising the need for effective protection mechanisms. The recommendation stresses the importance of ensuring adequate protection and safeguarding the interests of the victim at every stage of the process, including compensation, privacy protection, and the minimisation of unnecessary psychological burdens associated with participation in criminal procedures. Particular attention is given to cases where the victim is a minor. In such situations, the recommendation underscores the necessity of providing specialised support from both parents or guardians and qualified professionals capable of offering the child professional psychological and legal assistance.[36]

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted in 1985, introduced an innovative approach to the protection of victims' rights. It provided a broad definition of a victim, encompassing individuals who suffer physical, psychological, emotional, or material harm, as well as violations of their rights. The definition also extended to their relatives and those who support victims. The Declaration emphasised the importance of social solidarity, recognising that the consequences of crimes affect entire communities. A key focus of the document is on respect, compassion, and ensuring victims' access to justice, as well as the protection of their interests at every stage of legal proceedings. It underscores the importance of informing victims about their rights and role in the criminal process, enabling them to actively participate in legal procedures. The Declaration also places particular emphasis on privacy protection, victim safety, and minimising emotional burdens arising from involvement in judicial proceedings. In terms of financial support, the document calls for fair restitution, primarily by offenders, and, if that is not possible, by the state through, for example, victim support funds. Restitution includes the return of property, coverage of medical and rehabilitation costs, and other forms of compensation. A fundamental principle of the Declaration is the provision of comprehensive support, including material, medical, psychological, and social assistance. It also calls for training public officials, such as law enforcement and judicial authorities, to sensitise them

35 Nicholas Katsoris: The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration, *Fordham International Law Journal*, 1/1990, pp. 186–215, Available at: https://heinonline.org/HOL/P?h=hein.journals/frdint14&i=204 (accessed on 9.12.2024).

36 Matti Joutsen: Listening to the Victim: The Victim's Role in European Criminal Justice Systems, *Wayne Law Review*, 1987, p. 95.

to victims' needs. The UN Declaration became a cornerstone of international standards for victim protection, though its full implementation required adaptation to local conditions and the specific legal frameworks of individual countries.[37]

In response to the challenges related to victim protection, the Council of Europe adopted Recommendation No. R(87)21 in 1987, introducing a more individualised approach to victim support and tools aimed at helping them regain social and emotional stability. The document emphasised that crimes such as domestic violence and sexual abuse require long-term and multidimensional assistance, often extending beyond the traditional criminal justice system. One of the key proposals was the integration of support efforts at the local level to better respond to victims' needs, as well as the active involvement of local communities in providing psychological, social, and material assistance. The Recommendation not only stressed the importance of protecting victims' rights but also focused on helping them return to normal life. The document highlighted the need for public education to combat stereotypes and reduce the risk of violence. It also recommended training for law enforcement officers and healthcare professionals to improve their ability to identify and respond to cases of victimisation. Another significant aspect was the promotion of cooperation between the public and private sectors, aiming to create a more effective victim support system. The Recommendation established standards for coordinated actions, emphasising that their effectiveness depended on regular monitoring and adaptation to emerging needs. It provided a framework for Member States to develop empathetic and comprehensive victim protection systems, addressing the challenges of modern societies.[38]

Similar to Recommendation No. R(87)21, the United Nations Convention against Transnational Organised Crime (2000) focuses on victim protection, adapting its measures to the specifics of transnational crime. Article 25 of the Convention establishes assistance standards, obligating states to provide support to victims, particularly in cases where they face threats of retaliation or intimidation from organised criminal groups. The document mandates the implementation of measures to ensure the physical and psychological safety of victims and their families. Additionally, the Convention requires states to introduce procedures that grant victims access to compensation and restitution, which play a crucial role in addressing both material and non-material damages and in helping victims rebuild their lives. Victims should also have the right to express their views and concerns during criminal proceedings, while ensuring fair trial principles and the right of the accused to defence are respected.[39]

37 Ezzat Fattah (1992): The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: A Constructive Critique, in Ezzat Fattah (ed.): *Towards a Critical Victimology*, Palgrave Macmillan UK, London, pp. 401–424.

38 Council of Europe. Committee of Ministers, & Council of Europe. Directorate of Legal Affairs, Assistance to Victims and Prevention of Victimisation: Recommendation No. R (87) 21 Adopted by the Committee of Ministers of the Council of Europe on 17 September 1987 and Explanatory Memorandum (Vol. 21), Council of Europe, 1988.

39 Cecily Rose: The Creation of a Review Mechanism for the UN Convention against Transnational Organized Crime and Its Protocols, *American Journal of International Law*, 1/2020, pp. 51–67.

While the United Nations Convention focuses on the challenges of organised crime, the Council of Europe Convention addresses violence against women and domestic violence, developing an integrated approach to victim protection and support in this area. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in 2011 in Istanbul, sets legal and operational standards aimed at ensuring comprehensive protection for victims and effectively combating all forms of violence. The Convention introduces a systemic approach, requiring cooperation between various institutions, including the judiciary, law enforcement, healthcare services, and non-governmental organisations, to create a coherent support system for victims (Article 18). It mandates the provision of a wide range of services such as legal, psychological, financial, and housing assistance (Article 20), as well as the operation of shelters (Article 23), which offer a safe space and support for victims to rebuild their lives. Special attention is given to children who are either victims or witnesses of violence. Article 26 obliges states to implement protective mechanisms and tailored support based on the child's age and best interests. Poland's ratification of the Istanbul Convention led to legislative changes, including an expanded definition of domestic violence, the introduction of restraining orders for perpetrators, and the development of specialised support centres.[40]

The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support, and protection of victims of crime, serves as a key complement to international victim protection standards, including the provisions of the Istanbul Convention. This document underscores the need for harmonising victim treatment principles across the European Union, ensuring that every victim is treated with respect, professionalism, and without discrimination, regardless of their personal situation or legal status. The Directive clearly defines victims' rights, covering aspects such as access to information, support, and protection against secondary victimisation. A novel element introduced by the Directive is the obligation to conduct an individual assessment of each victim's needs, allowing for tailored protection measures, including privacy safeguards, avoiding contact with the perpetrator, and psychological support. Special attention is given to children and particularly vulnerable individuals, who require additional protective mechanisms. The implementation of Directive 2012/29/EU in Poland has significantly strengthened victims' positions in criminal proceedings. Victims' rights have been expanded, including access to legal assistance and translation services, and procedures have been introduced to minimise the risk of re-victimisation, such as training for justice system personnel. Like the Istanbul Convention, the Directive emphasises the importance of comprehensive victim support and cross-sectoral cooperation to ensure effective protection and assistance.[41]

40 Lourdes Peroni (2016): Violence against Migrant Women: The Istanbul Convention Through a Postcolonial Feminist Lens, in *Feminist Legal Studies*, Springer, United Kingdom, pp. 49–67.

41 Sławomir Buczma: An Overview of the Law Concerning Protection of Victims of Crime in the View of the Adoption of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union, *ERA Forum*, 2/2013, pp. 235–250.

An essential component of these efforts is the Justice Fund, which operates under Article 43 § 19 of the Executive Penal Code[42] and the Regulation of the Minister of Justice of 13 September 2017.[43] The key priorities of the Fund include assisting victims of crime and their relatives, supporting witnesses, and developing the institutional system of victim protection. The Fund's activities also contribute to the implementation of Directive 2012/29/EU, ensuring comprehensive support for victims and their families while reinforcing a systemic approach to safeguarding their rights.[44]

IV. THE POLISH CHARTER OF CRIME VICTIMS' RIGHTS

The protection of crime victims in Poland has evolved over the decades in response to changing social needs and the requirements set by the development of international legal standards. As early as 1976, the Supreme Court, in its guidelines on judicial proceedings, highlighted the need to improve the situation of victims, emphasising the importance of restitution and the active participation of victims in criminal proceedings. These guidelines set a foundation for future reforms, aimed at ensuring more effective protection of victims' interests and strengthening their role within the justice system.[45]

Victimological research indicated that, despite having formal rights, victims rarely exercised them. The main reasons were a lack of sufficient information about their rights and limited access to support mechanisms. These challenges made it necessary to introduce more integrated and systemic solutions. A response to these needs was the development of the Polish Victims' Rights Charter in 1999.[46] Although this document did not introduce new legal norms, its primary goal was to compile all victims' rights in one place and promote their awareness. The Charter aligns with international protection standards such as the 1985 UN Declaration, the 1983 European Convention on the Compensation of Victims of Crime, and various Council of Europe Recommendations. The development of the Polish Victims' Rights Charter was accompanied by broad initiatives, including the establishment of the National Forum for Crime Victims. This forum

42 Act of 6 June 1997, Executive Penal Code. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970900557/U/D19970557Lj.pdf (accessed on 9.12.2024).

43 Regulation of the Minister of Justice of 13 September 2017 on the Fund for Victim Assistance and Post-Penitentiary Assistance – Justice Fund. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20170001760/O/D20171760.pdf (accessed on 9.12.2024).

44 Programme I for the implementation of Justice Fund tasks. Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.gov.pl/attachment/0622a2aa-9307-4f0d-ab53-385829f987d0&ved=2ahUKEwiw3ZSS3OWKAxXq8LsIHb4_N3YQFnoECBwQAw&usg=AOvVaw39OZVRu1dwcVNFkCtBndAO (accessed 9.12.2024).

45 Ewa Bieńkowska (2000): Wiktymologia w Polsce – dzisiaj i jutro, in *Ofiary przestępstw: Materiały z I Międzynarodowej Konferencji na rzecz Ofiar Przestępstw*, Ministerstwo Sprawiedliwości, Warszawa.

46 Polish Victims' Rights Charter. Available at: https://www.gov.pl/attachment/ed6621df-be74-4963-9370-8d5c786093f2 (accessed on 9.12.2024).

played a key role in proposing legislative projects, launching educational programmes, and supporting the development of institutional forms of assistance for victims.

The Victims' Rights Charter refers to constitutional principles such as the protection of private and family life (Article 47) and equality in access to legal protection (articles 31 and 32). It emphasises the need to prevent secondary victimisation by limiting repeated interrogations, protecting personal data, and providing psychological support. The Charter highlights the obligation of public institutions to inform victims about their rights and provide assistance, while also recognising the role of non-governmental organisations. NGOs often fill gaps where state institutions fall short, offering legal, psychological, and material support. The primary goal of the Charter is to ensure effective access to procedures that allow victims to exercise their rights, including compensation, privacy protection, and the ability to pursue claims in both civil and criminal cases.[47]

The right to dignity, respect, and compassion is a natural extension of the guarantees provided by the broadly defined concept of a victim in the Polish Victims' Rights Charter. This right is deeply rooted in the constitutional principle of human dignity protection (Article 30 of the Polish Constitution). Its implementation is the responsibility of public institutions, including the police, the judiciary, healthcare services, and public administration, which are obliged not only to comply with the law but also to foster an atmosphere of trust and respect in their interactions with victims. Examples of these legal standards include Article 14(3) of the Police Act,[48] which requires officers to respect human dignity, as well as provisions in the Law on the Medical Profession and the Code of Medical Ethics,[49] which impose a duty to protect patient privacy and respect their decisions. Similar principles apply to public administration: Article 8 of the Administrative Procedure Code[50] highlights the obligation to build public trust in administrative authorities and to promote legal awareness within society. International standards, such as the Code of Conduct for Law Enforcement Officials[51] and the Council of Europe Declaration on the Police,[52] also emphasise the duty to protect the dignity of crime victims. The Polish Victims' Rights Charter additionally underscores the need to counteract stereotypes that may lead to shifting blame onto the victim, thereby minimising the offender's responsibility. It highlights the importance of educational

47 Monika Sajkowska, Jolanta Szymańczak: Międzynarodowe standardy ochrony ofiar przestępstw, *Dziecko Krzywdzone. Teoria, badania, praktyka*, 1/2004, pp. 6–13.

48 Act of 6 April 1990 on the Police. Available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19900300179 (accessed on 9.12.2024).

49 Code of Medical Ethics, adopted on 14 December 1991. Available at: https://nil.org.pl/uploaded_images/1576053297_kodeks-etyki-lekarskiej.pdf (accessed on 9.12.2024).

50 Code of Administrative Procedure, adopted on 14 June 1960. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19600300168/U/D19600168Lj.pdf (accessed on 9.12.2024).

51 Resolution 34/169 of the United Nations General Assembly: Code of Conduct for Law Enforcement Officials. Available at: https://opolska.policja.gov.pl/download/81/18112/kodeksposteapowaniafunkcjonariuszyporzb9dkuprawnego.pdf (accessed on 9.12.2024).

52 Declaration on the Police: Resolution 690 of the Parliamentary Assembly of the Council of Europe. Available at: https://opolska.policja.gov.pl/download/81/18110/deklaracjaopolicji.pdf (accessed on 9.12.2024).

initiatives and cultural shifts to remove barriers that may prevent victims from accessing justice. In cases where the right to dignity is violated—whether by police officers or other institutions—victims have the right to seek compensation and redress under Article 448 of the Civil Code[53] and the Act on Healthcare Institutions.[54]

The right to security and privacy protection for victims complements the principles of dignity and compassion. The Polish Victims' Rights Charter emphasises the importance of minimising the risk of secondary victimisation and ensuring that victims can navigate legal procedures with the least possible burden. Legal provisions such as Article 184 of the Code of Criminal Procedure allow for the concealment of a victim's personal data if there is a concern for their safety, while Article 191 § 3 of the Code of Criminal Procedure restricts disclosure of the victim's residence to investigative authorities only. The Charter also stresses the need to limit contact between the victim and the accused, for example, by providing separate waiting rooms in courts to prevent additional emotional distress. Additionally, the right to anonymity in the media is safeguarded: Article 13(2) of the Press Law[55] prohibits the disclosure of a victim's personal details or image without their consent, which is especially crucial in cases of sexual offences, helping to prevent stigmatisation. The Charter also highlights the responsibility of public authorities, including the police, prosecution, and courts, in ensuring victim safety. Article 15(1)(3) of the Police Act grants law enforcement the power to immediately detain a perpetrator in situations where a victim's life or health is at risk, serving as a protective measure against escalating violence.[56]

The right of victims to unrestricted access to the justice system is an essential element of protecting their security and privacy. The Polish Victims' Rights Charter emphasises their ability to assert their rights, actively participate in criminal proceedings, and access legal assistance on an equal footing with defendants, including the right to a free legal representative in specific cases. These principles stem from Article 6 of the Convention for the Protection of Human Rights and Article 16 of the Code of Criminal Procedure, which obliges authorities to inform victims of their rights.[57] One of the most important rights of victims is the ability to act as an auxiliary prosecutor in public cases, which allows them to influence the course of the trial and independently uphold the charges if the public prosecutor withdraws (articles 53–55 of the Code of Criminal Procedure). The Charter also addresses victims' right to reliable information at every stage of the proceedings, aiming to prevent negative procedural consequences resulting from lack of knowledge.[58] Victims can pursue financial claims in criminal proceedings

53 Act of 23 April 1964, Civil Code. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf (accessed on 9.12.2024).
54 Act of 30 August 1991 on Healthcare Institutions. Available at: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19910910408 (accessed on 9.12.2024).
55 Act of 26 January 1984, Press Law. Available at: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19840050024/U/D19840024Lj.pdf (accessed on 9.12.2024).
56 Małgorzata Filip: Media a ofiara przestępstwa, *Biuletyn Kryminologiczny*, 2011, pp. 5–29.
57 Piotr Gensikowski (2020): Art. 16 [Zasada informacji], in Dariusz Drajewicz (ed.): *Kodeks postępowania karnego. Komentarz*, Legalis, Warszawa.
58 Arkadiusz Habiera: Oskarżyciel posiłkowy jako instrument ochrony praw pokrzywdzonego, *Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM*, 2017 (special issue), pp.

by filing a civil lawsuit or requesting asset security (articles 62 and 69 of the Code of Criminal Procedure). The Charter highlights their right to actively participate in procedural actions, such as submitting evidence requests, filing complaints, or accessing case files, which strengthens their legal and procedural position.[59]

The Polish Charter of Victims' Rights emphasises the importance of alternative dispute resolution methods such as mediation and reconciliation between the victim and the offender. These approaches not only complement traditional legal mechanisms but also allow for a more flexible and individualised way of addressing the harm caused by a crime. Mediation, which facilitates conflict resolution and restitution, can be initiated at both the pre-trial and trial stages with the approval of the prosecutor or the court. The outcomes of mediation, such as a settlement or actions taken by the offender, may influence the sentencing process, as stipulated in Article 53 § 3 of the Penal Code. Equally significant is the role of reconciliation in the context of conditional discontinuance of criminal proceedings, as outlined in Article 66 § 3 of the Penal Code.[60] Mediation holds particular significance in cases where the parties seek an agreement regarding damages or compensation. In private prosecution cases, reconciliation proceedings, as mandated by Article 489 of the Code of Criminal Procedure, are a compulsory stage before the main trial. At the request of the parties, mediation may also take place before the case is referred to court, and reaching a settlement results in the discontinuation of proceedings. It is also important to mention the possibility of agreements between the parties without the involvement of a mediator, as regulated in Article 341 § 3 and 4 of the Code of Criminal Procedure. Such negotiations can influence the court's decision on the conditional discontinuance of proceedings, highlighting the flexibility of this mechanism as an alternative to traditional judicial procedures.[61]

In addition to alternative methods such as mediation, the right to restitution remains a crucial element of victim protection, particularly in cases where the offender is unable to compensate for the harm caused. The Justice Fund plays a vital role in providing financial compensation and support to crime victims and their families, offering legal, psychological, and material assistance. The Fund's initiatives align with international standards, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[62] strengthening the victim protection system and enabling them to effectively assert their rights and obtain compensation for their losses.

37–48.

59 Matylda Gwoździcka-Piotrowska: Uprawnienia jednostki w procesie karnym – ochrona oskarżonego i pokrzywdzonego, *Przegląd Naukowo-Metodyczny. Edukacja dla Bezpieczeństwa*, 2/2009, pp. 92–97.

60 Agnieszka Rękas (2011): *Mediacja w polskim prawie karnym*, Ministerstwo Sprawiedliwości, Warszawa.

61 Janina Waluk: Mediacja jako forma sprawiedliwości naprawczej – korzyści dla stron, *Archiwum Kryminologii*, 2008, pp. 871–883.

62 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Available at: https://arch-bip.ms.gov.pl/Data/Files/_public/bip/prawa_czl_onz/prawa_czlow_26_7.doc (accessed on 9.12.2024).

V. CONCLUSIONS AND PROSPECTS FOR FURTHER DEVELOPMENT OF VICTIMS' RIGHTS

The political transformation of 1989 was a turning point that initiated an evolution in the perception of victims' roles within the Polish legal system. As a result of this process, not only were national regulations aligned with international standards for the protection of crime victims, but new legal mechanisms were also introduced, such as mediation between the victim and the offender, the obligation to compensate for damages, and the strengthening of victims' positions in criminal proceedings. These changes aimed to enhance access to justice and make the legal system more responsive to the needs of victims, including their right to security, dignity, and support.

The Justice Fund plays a crucial role in implementing these objectives by providing support to crime victims and their families. Its activities include legal, psychological, and material assistance, as well as supporting the development of institutions dedicated to victim protection. The Fund serves as a tool for implementing international standards, such as Directive 2012/29/EU, enabling victims to effectively assert their rights and mitigating the consequences of crimes.

Nevertheless, the accessibility of mechanisms such as mediation and compensation still leaves much to be desired in terms of their practical implementation. From an international perspective, the discussed regulations highlight the need for the systematic strengthening of victims' rights. Fundamental areas of protection, including the right to dignity, privacy, a fair trial, and the effective pursuit of financial claims, form the basis of both national and international standards for crime victim protection. Documents such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Directive 2012/29/EU emphasise the necessity of a comprehensive and sensitive approach to victims' needs. To translate these standards into reality, it is essential not only to introduce further legislative changes but also to eliminate procedural barriers that hinder victims from effectively enforcing their rights. The development of support institutions, such as the Justice Fund, is particularly important, as they provide access to legal, psychological, and material assistance. Achieving these goals requires the engagement of all entities working for victims, which would help create a more effective, accessible, and internationally compliant protection system. A key role in the recovery process is played by legal and psychological assistance, which should be easily accessible and tailored to the individual needs of victims. Additionally, promoting alternative dispute resolution methods, such as mediation, can not only facilitate restitution but also enhance victims' sense of justice and active participation in proceedings. By enabling direct dialogue between the victim and the offender, mediation creates a space for developing satisfactory solutions that support the process of rebuilding victims' lives after the harm they have suffered.

The future development of victims' rights should focus on implementing comprehensive solutions that not only align with international standards but also address the specific needs of groups particularly vulnerable to victimisation. In this context, legislative changes alone are not enough—greater involvement of public institutions and non-governmental organisations is crucial in building an integrated support system

for victims. This system should provide a wide range of services, including legal and psychological assistance, as well as access to swift and effective procedures for pursuing claims and obtaining financial support. It is also essential to recognise the crucial role of education in raising awareness of victims' rights both among law enforcement representatives and within society. Such initiatives can significantly reduce secondary victimisation, which often results from the inappropriate treatment of victims by those involved in criminal proceedings.

Improving the competence and sensitivity of law enforcement officers and other professionals plays a key role in creating a legal system better suited to the needs of victims. Effective changes in this area can only be achieved through an integrated approach that combines legislative reforms, public education, and the development of institutional support mechanisms. These efforts can contribute to building a more inclusive and victim-sensitive protection system, one that not only meets international standards but also proves effective in practice, genuinely improving the situation of victims.

It is important to emphasise that emerging challenges, such as cybercrime, necessitate the introduction of additional protection and support mechanisms for victims. Given the rapid advancement of technology, it is crucial to adapt the legal system to effectively counter new forms of crime, which can lead to large-scale victimisation. The development of online support tools, specialised protection programmes, and international cooperation in combating cybercrime should become a priority to effectively address these challenges and enhance victim protection in the 21st century.

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Development of Extended Confiscation in the Republic of Croatia and Its Relationship with Other Forms of Confiscation

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ABSTRACT
The paper explores the historical and legal evolution of property confiscation in Croatia, emphasising the ideological and political motives behind its use during the Second World War and in post-war Yugoslavia and its transformation in the contemporary legal framework. Confiscation is a legal term whose meaning has changed across different historical periods and legal systems, making it interpretatively complex. Legal irregularities, vague definitions of crimes, and the broad scope of confiscated assets characterised confiscation as a sanction. In 2006, extended confiscation was introduced into Croatian criminal legislation as a special measure distinct from and outside the system of criminal sanctions. However, its punitive elements raise concerns about its compatibility with fundamental legal principles, including the presumption of innocence and the principle of guilt. While ordinary confiscation aims to restore property obtained through specific and determined crimes, extended confiscation targets the broader property of perpetrators, reflecting one of the key similarities with confiscation penalty from former Yugoslavia. The study highlights the need for clear legal definitions and alignment with constitutional safeguards. It questions whether extended confiscation risks undermining the rule of law, drawing parallels with the controversial confiscation penalties of former Yugoslavia.
KEYWORDS
Confiscation, ordinary confiscation, extended confiscation, proceeds of crime, criminal law evolution.

Dezvoltarea confiscării extinse în Republica Croația și relația acesteia cu alte forme de confiscare

REZUMAT
Lucrarea explorează evoluția istorică și juridică a confiscării proprietății în Croația, punând accent pe motivele ideologice și politice din spatele utilizării acesteia în timpul celui de-al >>

1 ORCID iD: 0009-0006-2082-3794.

>> Doilea Război Mondial și în Iugoslavia postbelică, precum și pe transformarea sa în cadrul juridic contemporan. Confiscarea este un termen juridic a cărui semnificație s-a schimbat de-a lungul diferitelor perioade istorice și sisteme de drept, ceea ce o face complexă din punct de vedere interpretativ. Neregularitățile juridice, definițiile vagi ale infracțiunilor și amploarea largă a bunurilor confiscate au caracterizat confiscarea ca sancțiune. În 2006, confiscarea extinsă a fost introdusă în legislația penală croată ca o măsură specială, distinctă de și în afara sistemului sancțiunilor penale. Totuși, elementele sale punitive ridică îngrijorări privind compatibilitatea sa cu principiile juridice fundamentale, inclusiv prezumția de nevinovăție și principiul vinovăției. În timp ce confiscarea obișnuită urmărește restituirea bunurilor obținute prin infracțiuni specifice și determinate, confiscarea extinsă vizează proprietățile mai largi ale făptuitorilor, reflectând una dintre asemănările cheie cu sancțiunea de confiscare din fosta Iugoslavie. Studiul subliniază necesitatea unor definiții juridice clare și a alinierii cu garanțiile constituționale. De asemenea, se ridică întrebarea dacă confiscarea extinsă riscă să submineze statul de drept, realizând paralele cu controversatele sancțiuni de confiscare din fosta Iugoslavie.
CUVINTE CHEIE
Confiscare, confiscare obișnuită, confiscare extinsă, bunuri obținute prin infracțiuni, evoluția dreptului penal.

I. INTRODUCTION

The principle that no one can retain proceeds of crime obtained through a criminal offence is one of the fundamental principles of criminal law. The current Croatian legal framework governing asset confiscation results from the evolution of legal thought and legislation over the past 80 years. This development, influenced in part by international criminal law, has progressed from wartime and post-war confiscation of proceeds of crime as a form of punishment to extended confiscation as a *sui generis* measure, distinct from the system of criminal sanctions. Confiscation from the period of the former Yugoslavia[2] serves as a precursor to the measure of extended confiscation.

All of these criminal law instruments—confiscation prescribed as a punishment, ordinary confiscation, previously categorized as a security measure within the framework of criminal sanctions distinct from penalties but later reclassified as a *sui generis* measure distinct from criminal sanctions, and the more recent extended confiscation, also a *sui generis* measure—share the characteristic of state intervention into the property of perpetrators and, in some cases, other individuals.

For this paper, the term "confiscation" will be used to denote the historic penalty of taking away all or part of the perpetrator's property, sometimes even from his family members, regardless of the (lawful) origin of that property. "Ordinary confiscation" refers to the measure of taking away the proceeds of crime that the perpetrator obtained through the criminal offence for himself/herself or others. "Extended confiscation" is a measure of taking away property or part of the property of a perpetrator or other individuals when

2 For this paper, the term "former Yugoslavia" will be used to denote the Yugoslav state colloquially referred to as the Second, Socialist, or Tito's Yugoslavia, with particular emphasis on the period of the Second World War and the immediate post-war years, as the punishment of confiscation was most commonly imposed during that period.

that property was not acquired through the specific criminal offence, but under legally prescribed conditions, it can be presumed to have been obtained through the commission of other criminal offences that are not the subject of prosecution.

Ordinary and extended confiscation share a common denominator, which will be referred to in this paper as "asset confiscation".

II. EXTENDED CONFISCATION IN CONTEMPORARY CROATIAN CRIMINAL LAW

1. The notion and nature of extended confiscation

Extended confiscation is a *sui generis* measure introduced in Croatian criminal legislation in 2006.[3] In Croatian legal theory, it is noted that the measure was actually reintroduced in 2006, considering the confiscation of property from the era of former Yugoslavia as its precursor. Substantive legal norms of this institute are provided in the Croatian Penal Code,[4] while the procedural norms are sustained in the Code of Criminal Procedure.[5] Substantive regulation of this type of asset confiscation is provided in Article 78 of the Penal Code, located in Chapter IV, which regulates the asset confiscation, the confiscation of objects, and the public announcement of the verdict.

The measure of extended confiscation is regulated outside the framework of criminal sanctions and, as such, does not constitute a punishment, at least nominally. However, its predominantly punitive nature brings it closer to a concealed penalty, which raises the question of respecting the principle of guilt.[6] This is also one of the reasons why the legal nature and conceptual definition of asset confiscation in general, and these two types of asset confiscation, are essential.[7] It is essential to define

3 Article 13 of the Act on Amendments to the Penal Code (Official Gazette of the Republic of Croatia, *Narodne novine*: number 71/06), which entered into force on 1 October 2006, added a new paragraph 2 to Article 82 of the Criminal Code (pertaining to the confiscation of property benefits obtained through criminal offences). The new paragraph reads: "[p]roceeds of crime referred to in paragraph 1 of this Article shall also include those benefits obtained by a group of people or a criminal organisation that are temporally connected with the committed criminal offence and for which it can be reasonably assumed to originate from that offence, as their lawful origin cannot be established."

4 The current Croatian Penal Code was published in the Official Gazette of the Republic of Croatia, *Narodne novine*: numbers 125/11, 144/12, 56/15, 61/15 (correction), 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, and 36/24.

5 The current Criminal Procedure Act was published in the Official Gazette of the Republic of Croatia, *Narodne novine*: numbers 152/08, 76/09, 80/11, 121/11 (consolidated text), 91/12 (Decision of the Constitutional Court of the Republic of Croatia), 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 80/22, 36/24, and 72/25.

6 The principle of guilt is a fundamental principle of criminal law, which states that no one can be punished unless they are guilty of a criminal offence. Article 4 of the Penal Code.

7 Many studies on extended confiscation fall into the trap of basing their conclusions on the rules of ordinary confiscation. Although they stem from the same underlying principle, they

and classify asset confiscation properly, especially extended confiscation, because different classifications result in different scopes of guarantees of perpetrators' rights in criminal proceedings. Despite the position taken by the Supreme Court and the prevailing opinion of criminal law theorists regarding the legal nature of ordinary and extended confiscation, classifying them as *sui generis* measures, the legal nature of extended confiscation and its placement outside the criminal sanctions should be redefined.[8]

Extended confiscation, "given the scope of confiscation, also contains certain punitive elements, as the object of confiscation can include the perpetrator's entire property, making it resemble the confiscation",[9] by which it is meant when confiscation was, in previous times, regulated as a criminal sanction, more accurately as a punishment. Under the extended confiscation, there is no proven link to the commission of any criminal offence, which is presumed.[10]

Not only has the perpetrator not been convicted for the criminal offences whose commission is presumed under the institute of extended confiscation, but it is not even possible to prove the commission of those presumed criminal offences. If it were possible to prove that some property of the perpetrator is obtained through the criminal offence, that property would have and could have been confiscated under the ordinary confiscation based on conviction for that criminal offence.

Allowing extended confiscation basically avoids the struggles of conducting criminal proceedings and actually having to prove and judge the perpetrator for those presumed criminal offences, justifying it by saying that they are very hard to prove. Moreover, for some of these presumed criminal offences, there may have been obstacles to criminal prosecution (for example, the statute of limitations), and certain unlawful acts may constitute misdemeanours rather than criminal offences.

should be regarded as distinct and separate legal institutes. To ensure analytical clarity, statistical data should be reported separately for ordinary and extended confiscation, which currently is not the case. For statistical data on asset confiscation, see more in: Ivan Turudić (2025): *Izvješće Glavnog državnog odvjetnika Republike Hrvatske o radu državnih odvjetništava u 2024. Godini*, DORH, Zagreb.

8 "Re-examining the legal nature of the measure of asset confiscation is necessary, especially in the light of the new measure of extended confiscation. It is certainly not possible to insist on the special restorative legal nature of this type of measure, as extended confiscation, given its fundamental characteristics, undoubtedly has a punitive character towards the perpetrator." Elizabeta Ivičević Karas: Utvrđivanje imovinske koristi stečene kaznenim djelom primjenom bruto ili neto načela s obzirom na pravnu prirodu mjere (proširenog) oduzimanja imovinske koristi, *Hrvatski ljetopis za kazneno pravo i praksu,* 1/2010, pp. 191–210, p. 93.

9 Dražen Tripalo, Tomislav Brđanović (2022): *Imovinskopravni zahtjev, oduzimanje imovinske koristi i privremene mjere osiguranja – teorijski i praktični aspekti za suce i državne odvjetnike – Priručnik za polaznike/ce*, Pravosudna akademija, Zagreb, p. 32.

10 "In other words, extended confiscation can also cover economic advantage obtained from 'ordinary' criminal offences, the commission of which does not necessarily have to be established in criminal proceedings, and even property that was not acquired through illegal activities, provided that the defendant fails to demonstrate the lawful origin of such property." Ivičević Karas (2010): p. 204.

Under the institute of extended confiscation, the principle of guilt and the presumption of innocence apply only regarding the predicate criminal offence, but since the presumed criminal offence is completely non-determined, the principle of guilt regarding that abstract criminal offence is completely annulled. The extended confiscation regulation is justified mostly for pragmatic reasons. But on a theoretical (doctrinal) level, it is very hard to find (appropriate) justification for imposing (any kind of) measure under the criminal law for alleged criminal behaviour described in abstract terms, treating it as a (non-determined) criminal offence.

Regarding the principle of guilt, it is important to note that the current Penal Code limits the principle of guilt only to penalties by prescribing in Article 4, "no one can be punished unless they are guilty of the committed criminal offence", which, unlike the previous Penal Code from 1997,[11] no longer prescribes guilt as a prerequisite for other types of criminal law sanctions[12]—security measures.[13]

Similarly, proceeds of crime cannot be confiscated outside the framework of criminal proceedings, nor can they be confiscated if the perpetrator has been acquitted or the charges have been dismissed. In those cases, extended confiscation can only occur through a court decision establishing that an unlawful act was committed, which is equivalent to a conviction.[14] Therefore, in this sense, guilt is a condition or prerequisite for both a conviction, which imposes a penalty on the perpetrator, and the decision on the confiscation of proceeds of crime.

Is it justifiable to confiscate assets based on a presumption of their illicit origin (whether they are most probably deriving from criminal activities or because the perpetrator simply failed in proving otherwise, i.e. legal origin)[15] because it is proclaimed as an effective tool in combating organised crime? And is it even effective?[16]

11 Which prescribed in its Article 4: "[n]o one can be punished, nor can any other criminal sanction be applied to them, unless they are guilty of the committed act."

12 However, the current regulation of the principle of guilt overlooks the fact that security measures cannot be imposed outside criminal proceedings, nor if the perpetrator has been acquitted or if the charges against them have been dismissed (i.e. if the proceedings do not conclude with a conviction). This is because, outside criminal proceedings, the question of an individual's danger is irrelevant and cannot, by itself, serve as the basis for imposing any criminal sanction. Therefore, although guilt is not the foundation of security measures, it should—in the author's view—be a prerequisite or condition for their imposition, as was prescribed in the Penal Code from 1997.

13 Finally, even a mentally incapacitated person can be subjected to a security measure only if it is undoubtedly established that they have committed an unlawful act. Therefore, the commission of such an act is not presumed even in the case of a mentally incapacitated person. As a result, the presumption of innocence and the rules regarding the burden of proof apply to them in the same way as they do to a perpetrator of a criminal offence.

14 Exceptions include the "declaratory" judgment rendered against a mentally incapacitated perpetrator who has committed an unlawful act (in legal theory, different views are expressed regarding this issue; see more in footnote 35) and the "declaratory" judgment issued in an *in rem* proceeding. However, in the latter case, the question of the perpetrator's guilt is determined as a preliminary issue, and the proof of such guilt is a prerequisite for rendering such a judgment.

15 "[T]rivially put, chocolate for which the defendant does not have a receipt." Mario Hrupec (2019): *Oduzimanje i prošireno oduzimanje imovinske koristi stečene kaznenim djelom: diplomski rad*, p. 22.

16 Extended confiscation was primarily adopted and regulated as a supplementary form for ordinary confiscation concerning criminal offences committed by criminal organisations.

Although no right or principle is absolute in its nature, regulation of extended confiscation is in contradiction with the principle of guilt and the presumption of innocence, which are enshrined in the Constitution,[17] in the Penal Code,[18] in the Criminal Proceeding Act,[19] and in the European Convention on Human Rights[20] and are also considered to be fundamental principles of criminal law in every state that proudly strives to respect and promote rule of law, and to be regarded as such.

2. Asset confiscation—Differentiating extended and ordinary confiscation

To understand the extended confiscation of unlawfully obtained assets and to properly regulate it legally, it is essential to understand and to highlight its relation to the institute of ordinary confiscation, which is regulated with a single substantive provision of the Penal Code as well (Article 77). Ordinary confiscation was explicitly introduced into Croatian criminal legislation within the Socialist Federal Republic of Yugoslavia in 1959,[21] and before its introduction, the question of criminal economic advantage acquired through specific criminal offence was "resolved through the analogous application of civil law principles, primarily based on the rules concerning the obligation to return unjust enrichment",[22] which is based on the institute of civil law—*condictio sine causa*.[23]

According to Europol data, criminal organisations generate revenues estimated at a minimum of 139 billion EUR annually, and it is estimated that only two per cent is recovered. See more in Ioannis Androulakis: Recovery of Proceeds from Crime – Time to Upgrade the Existing European Standards?, *Focus: The Protection of the Financial Interests in a Changing Context*, 4/2023, pp. 360–365.

17 Everyone is innocent, and no one can be considered guilty of a criminal offence until their guilt is established by a final court verdict: Art. 28 of the Croatian Constitution.

18 No one can be punished unless they are guilty of committing a criminal offence: Art. 4 of the Penal Code.

19 Everyone is innocent, and no one can be considered guilty of a criminal offence until their guilt is established by a final court verdict: Art. 3 of the Criminal Proceedings Act.

20 Additionally, the right to a fair trial, as guaranteed by the European Convention on Human Rights, includes the right of every person charged with a criminal offence to be presumed innocent until proven guilty according to law.

21 For the first time, ordinary confiscation was introduced into the General Part of the Criminal Code of 1947 by the 1959 Amendment (which came into force in 1961), placing ordinary confiscation within security measures, which are a type of criminal sanctions.

22 Franjo Bačić, Ljubo Bavcon, Miroslav Đorđević, Božidar Kraus, Ljubiša Lazarević, Miomir Lutovac, Nikola Srzentić, Aleksandar Stajić (1982): *Komentar Krivičnog zakona Socijalističke Federativne Republike Jugoslavije*, Savremena administracija, Beograd, p. 330.

23 Some authors argue that before introducing ordinary confiscation in 1959, "[t]he principle that no one may retain material gain acquired through a criminal offence was respected, but this principle was implemented based on special regulations for individual criminal offences or through the imposition of a security measure involving the confiscation of items, which also included the confiscation of items obtained as a reward for committing a criminal offence." Damir Kos: Problematika oduzimanja imovinske koristi, *Hrvatski ljetopis za kazneno pravo i praksu*, 2/1998, pp. 753–759, p. 754.

In Croatian legal theory, it is also considered that ordinary confiscation has a primarily restorative function, and that it is an expression of the broader principle of justice.[24]

> *Namely, due to its in rem[25] nature, it does not have a punitive character, and its purpose is restorative: through the confiscation of economic advantage, it aims to restore the property-legal state to what it was before the commission of the criminal act by which that economic advantage was obtained. In doing so, it also upholds the broader principle of justice.*[26]

In this context, it is particularly emphasised that the purpose of introducing this measure is not for the state to gain wealth but primarily to prevent the perpetrator of a criminal offence from profiting from committing a crime.[27]

The Supreme Court expressed its opinion regarding ordinary confiscation, stating,

> *confiscation of proceeds of crime acquired through criminal offence has primarily a restorative function, which is why it does not constitute a type of sanction but rather a specific so-called in rem measure, which follows the object or the form of benefit that has been obtained.*[28]

Novoselec and Martinović stated a different opinion regarding the nature of asset confiscation: "[a]sset confiscation is a *sui generis* sanction, which, due to its importance, is placed among the fundamental provisions."[29] On the contrary, asset confiscation in general and at least nominally is a measure, not a criminal sanction, because the Penal Code itself places it outside the system of criminal law sanctions. Its nature is *dual*,[30] restorative, and punitive, and depending on whether it is an

24 "Confiscation of assets in comparative law has a varied legal nature; it can be a criminal sanction (punishment, security measure, or special criminal law sanction), a specific consequence of a judgment, or a special measure of a restorative nature." Ivičević Karas (2010): p. 192.

25 *In rem* means it is following an object, i.e. economic advantage, in whose possessions it is, and under certain conditions, this benefit can be confiscated from a third person, not only from the perpetrator.

26 Elizabeta Ivičević Karas: Kaznenopravno oduzimanje nezakonito stečene imovinske koristi, *Hrvatski ljetopis za kazneno pravo i praksu*, 2/2007, pp. 673–694, p. 674.

27 "The Penal Code does not prescribe the confiscation of assets with the aim of enabling the state to gain profit, but rather to ensure that the assets do not remain in the hands of the perpetrator of the criminal offence." Zorislav Kaleb: Novo uređenje instituta oduzimanja imovinske koristi prema noveli kaznenog zakona s osvrtom na dosadašnju sudsku praksu – Usporedba s odlukom o imovinskopravnom zahtjevu, *Hrvatski ljetopis za kazneno pravo i praksu,* 2/2003, pp. 449–478, p. 455.

28 VSRH, I Kž 378/06-6 from April 8, 2009.

29 Petar Novoselec, Igor Martinović (2019): *Komentar čl. 77. i 78. Kaznenog zakona – ulomak iz Komentara Kaznenog zakona,* p. 2.

30 "The confiscation of proceeds of crime is a dual measure *sui generis*." Tripalo, Brđanović (2022): p. 32.

ordinary or extended one, it has a restorative or punitive character.[31] Today, asset confiscation in Croatian criminal legislation, practice, and among the majority of academics is certainly not perceived as a sanction (more accurately as a punishment), at least nominally, but it undoubtedly possesses the characteristics of a sanction due to its punitive nature.[32]

Given everything stated so far, it is necessary to emphasise that the legal nature of ordinary confiscation is neither controversial nor ambiguous, since the perpetrator, through a specifically determined criminal offence for which he/she is convicted (or an established unlawful act in the case of an incapacitated perpetrator), has acquired a precisely defined economic gain, which is confiscated from him/her by that judgment. In this way, even if ordinary confiscation were regulated and defined as a punishment, neither the principle of guilt nor the presumption of innocence would be violated.

On the other hand, the same logic cannot be applied to extended confiscation. The main issue with extended confiscation is that it applies to a criminal offence defined in abstract terms and for which the perpetrator has neither been charged nor convicted.

The institute of extended confiscation differs from the institute of ordinary confiscation in a practical sense, primarily due to the scope of the state intervention in the perpetrator's property.[33]

Not only that, but difference is considerable furthermore in conditions under which those two types of asset confiscation can be applied,[34] confiscation from the third parties and in the *bona* or *mala fide* of third parties (if the benefits have been transferred to them), the court's authority to impose a measure (in)dependently of the public prosecutor's proposal,[35] given the commission of a criminal offence or an

31 "Although the asset confiscation as a criminal law measure inevitably contains a certain degree of repression, it primarily has a restorative rather than a punitive character, which justifies its qualification as a special measure regulated outside the framework of criminal sanctions to which the principle of guilt applies." Ivičević Karas (2010): pp. 192–193.

32 "Asset confiscation is not a criminal law sanction, but it does have some of its characteristics, such as legality, personal nature, proportionality, and reversibility (revocability)." Željko Horvatić (2002): *Rječnik kaznenog prava*, Masmedia, Zagreb, p. 349.

33 "In Croatian legislation, the asset confiscation can be distinguished by the scope of intervention in the perpetrator's property: ('ordinary' and extended)." Vanja Marušić, Marija Vučko, Mirta Kuštan: Oduzimanje imovinske koristi i privremene mjere osiguranja s posebnim osvrtom na trajanja mjere i poteškoće u praksi, *Hrvatski ljetopis za kaznene znanosti i praksu*, 2/2020, pp. 471–496, p. 476.

34 A condition for ordinary confiscation is that an economic advantage has been obtained through the criminal offence for which the perpetrator is being prosecuted or through an unlawful act in a case of an incapacitated perpetrator. In contrast, for the application of extended confiscation, in addition to the requirement that an economic advantage has been obtained through the criminal offence for which the perpetrator is being prosecuted and convicted, the public prosecutor is also required to prove a disproportion between the perpetrator's property and its lawful income.

35 In the case of ordinary confiscation, the court has the authority to seize economic advantage regardless of whether the public prosecutor has failed to propose their confiscation. However,

unlawful act,[36] criminal offences that trigger application of those two types of confiscation institutes[37] and especially regarding burden of proof.[38]

Namely, while ordinary confiscation involves confiscating the proceeds of crime obtained through a specifically determined criminal act, the object of extended confiscation can be the entirety of the perpetrator's property. It is important to emphasise that extended confiscation is not a replacement for the ordinary confiscation.[39] Both forms of this measure can (and should) be applied if the (different) conditions for their imposition are met.

In conclusion, although both institutes derive from the same fundamental principle, their differences are significant and should be carefully considered during their regulation. Namely, the purpose of ordinary confiscation is not to reduce the perpetrator's assets (unlike a fine) but rather to restore the financial state of the individual who unlawfully obtained some economic gain to what it was before the acquisition, thus serving a restorative function. On the other hand, the same line of argument cannot be applied to extended confiscation, which encompasses all assets of the perpetrator—and, in some cases, even those of third parties—for which the perpetrator is unable to demonstrate the lawful origin. In such circumstances, extended confiscation becomes the sole response of society and the state to criminal offences that are not proven but

in the case of extended confiscation, the court cannot do so, especially considering the distribution of the burden of proof.

36 In Croatian legal theory, there are opposing views on whether extended confiscation can be applied to a mentally incapacitated perpetrator. Novoselec and Martinović criticise the fact that ordinary confiscation can seize economic benefits derived from an unlawful act, while extended confiscation can only be applied in cases of conviction for a criminal offence, which means it cannot be applied to an incapacitated perpetrator. Novoselec, Martinović (2019). Similarly, Mrčela and Vuletić identify a conviction for the predicate offence as the first precondition for the application of extended confiscation; see more in Marin Mrčela, Igor Vuletić (2021): *Komentar Kaznenog zakona, Opći dio,* Libertin naklada, Rijeka. Compare: Lucija Sokanović (2025): Extended Confiscation in Croatia, in Elżbieta Hryniewicz-Lach (ed.): *Extended Confiscation of Illicit Assets and the Criminal Law: National and EU Perspectives*, Routledge, New York.

37 The application of ordinary confiscation is possible in relation to any criminal offence through which an economic advantage is acquired, as only that specific benefit is subject to confiscation. In contrast, extended confiscation is possible only if economic advantage is obtained through one of the four types of criminal offences listed in the catalogue. This activates the presumption that the perpetrator's entire property was acquired through any other criminal offences which are not the subject of the indictment.

38 Within ordinary confiscation, the burden of proof lies with the public prosecutor to prove the guilt of the accused for the criminal offence, as well as the acquisition of economic advantage through that offence. In the case of extended confiscation, however, the public prosecutor is required to prove the disproportion of the economic advantages, which then triggers a rebuttable presumption regarding the unlawful origin of the offender's entire property. The burden of proof then shifts to the perpetrator, who must prove the lawful origin of his/her individual assets.

39 "Extended confiscation does not replace but rather complements ordinary confiscation." Hrupec (2019): p. 22.

merely presumed, thereby making it resemble a form of punishment rather than a preventive measure.

Namely, the Penal Code prescribes the assumption that the perpetrator of one criminal offence acquired all of their assets through other criminal offences, which are neither charged against them nor proven. Moreover, the burden of proving the lawful acquisition of these assets shifts to the perpetrator, placing him/her in a position where he/she must prove his/her innocence, which contradicts the presumption of innocence, as well as the principle that the prosecution bears the burden of proving guilt, which is derived from this presumption. The fact that the perpetrator, in criminal proceedings concerning one offence, fails to prove the lawful origin of all or part of his/her assets, even if their acquisition is unrelated to the charged offence, does not necessarily mean that these assets were acquired through a criminal offence. In this way, extended confiscation diverges from the restorative function of asset confiscation and moves closer to a punishment, resembling the confiscation of property, which was historically used to legalise the seizure of even lawful assets from a convicted person.

Owing to this resemblance of extended confiscation to a form of punishment, this institute, in the author's view, also undermines the principle of guilt, as it attributes responsibility to the perpetrator not only for the criminal offence that has been established but also for other unproven and merely presumed criminal acts that have not even been formally charged and in respect of which the perpetrator is unable to exercise the right to defence. Even though no formal punishment is imposed for these presumed acts, the confiscation effectively punishes the perpetrator despite his/her guilt for those acts not being determined.

3. Evolution in the regulation of extended confiscation

When this measure was first introduced into Croatian criminal legislation in 2006, extended confiscation was prescribed only for criminal offences under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime[40] (further USKOK), modelled on certain foreign legislations and considering international legal documents[41]

40 USKOK is a specialised prosecutor's office that fights against organised crime and corruption, and whose jurisdiction is prescribed with a special Act for the entire territory of the Republic of Croatia. The legal basis for its organisation is the Act on the Office for the Suppression of Corruption and Organised Crime.

41 "Therefore, in recent years, international legal documents and comparative criminal law have increasingly provided for special forms of measures known as extended confiscation of assets acquired through criminal offences, which approach is specifically applied in cases of organised crime, where regular, non-extended forms of confiscation measures have proven to be inadequate or ineffective in practice." Ivičević Karas (2007): p. 674. The United Nations Convention against Transnational Organised Crime, called The Palermo Convention of 2001, which Croatia ratified in 2002, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and others.

as well as European Union regulations.[42] Even before the introduction of extended confiscation, positions were taken within Croatian criminal law theory emphasising the need to introduce its extended form in order to combat organised crime effectively.[43] Namely, in the fight against various forms of organised crime, ordinary confiscation was not sufficient.[44] The reason behind this is the nature and ever-evolving characteristics of criminal organisations and organised crime.[45]

The initial regulation was characterized[46] by a failure to satisfy the principle of legality in terms of *lex certa*, mainly because of the "undefined category of the temporal connection between the acquired proceeds of crime and the commission of the criminal offence".[47] According to the literal interpretation of legal provision in the initial regulation of this institute, "extended confiscation could only be applied to the proceeds of crime derived from the offence for which the perpetrator was being tried, and not for any other criminal offences",[48] which brings to the question the point and purpose of the institute of extended confiscation.

Initially, the regulation of this institute was designed to provide for a division of the burden of proof, meaning that the public prosecutor was required to establish a certain degree of probability that the perpetrator's property derives from a criminal offence. By proving the lawful origin of their property, the perpetrator could avoid extended confiscation.

With the subsequent amendment to the Penal Code in 2008, an inversion of the burden of proof was introduced, replacing the aforementioned division of the burden of proof:

42 Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime. Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities, and property. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

43 "It is believed that the effective fight against organised crime largely depends on the development and expansion of this institute, which has not significantly progressed beyond its original provision." Kaleb (2003): p. 449.

44 "The growing expansion of various forms of crime has recently brought increased attention to the institute of confiscation of economic advantage as a special measure that has existed in our legislation for 43 years. However, even after the latest amendments concerning the mandatory judicial consequences of illegal acquisition, particularly the confiscation of illegal profits gained through organised crime, these measures have proven to be insufficient." Kaleb (2003): p. 450.

45 Imprisonment sentences for convicted members of organised crime groups are often ineffective in combating and suppressing organised crime because the strength of organised crime does not lie in its membership but in the illegally acquired assets that provide a financial foundation for expanding criminal activities.

46 For a detailed critique from the perspective of *lex certa*, see Igor Bojanić: Promjene u općem dijelu Kaznenog zakona prema Prijedlogu zakona o izmjenama i dopunama Kaznenog zakona iz 2005, *Hrvatski ljetopis za kazneno pravo i praksu*, 2/2005, p. 338.

47 Ivičević Karas (2010): p.203.

48 Ivičević Karas (2010): p.203.

> *[i]f a criminal offence under the jurisdiction of the Office for the Suppression of Corruption and Organised Crime has been committed, it is presumed that the perpetrator's total property was acquired as proceeds of crime from the criminal offence, unless the perpetrator makes it probable that its origin is lawful.*[49]

Therefore, the public prosecutor was not required either to prove the temporal connection between the acquisition of assets and the committed criminal offence or to make their unlawful origin probable. However, the perpetrator could demonstrate the lawful origin of their assets. This situation involves a shifting of the burden of proof.

This amendment also expanded the scope of extended confiscation, as it could also encompass proceeds of crime acquired not only from the criminal offence under USKOK's jurisdiction for which the perpetrator was convicted but also from other criminal offences.[50] Therefore, this was the first real implementation of this institute.

The new Penal Code, which entered into force on 1 January 2013,[51] reinstated the division of the burden of proof by stipulating:

> *[i]f the perpetrator of a criminal offence referred to in paragraph 1 of this Article (under the jurisdiction of USKOK) possesses or has possessed assets disproportionate to their lawful income, it is presumed that such assets represent proceeds from a criminal offence unless the perpetrator makes it probable that their origin is lawful. (Article 78, paragraph 2)*

In this way, it remains possible to confiscate assets presumed to have been acquired through any criminal offence, not solely those under the jurisdiction of USKOK.

Subsequent amendments to the Penal Code have expanded the application of extended confiscation beyond USKOK's jurisdiction to include other criminal offences. Today extended confiscation is applicable for 4 categories of criminal offences, called predicate criminal offences (criminal offences that are the basis for triggering the application of extended confiscation): (a) under the jurisdiction of the Office

49 Article 2 of the Act on Amendments to the Criminal Code (Official Gazette of the Republic of Croatia, *Narodne novine*: number 152/08) came into force on 1 January 2009.

50 "In other words, extended confiscation can encompass economic advantage acquired from 'ordinary' criminal offences, whose commission may not be established in criminal proceedings, and even property not obtained through illegal activities, provided that the defendant does not make the lawful origin of such property plausible. This significantly expanded the potential for encroachment upon the perpetrator's property, thereby emphasising the punitive nature of the measure, which, in certain aspects, resembles confiscation as a criminal sanction—a concept considered a relic in modern criminal law." Ivičević Karas (2010): p. 204.

51 Official Gazette of the Republic of Croatia, *Narodne novine*: numbers 125/11 and 144/12.

for the Suppression of Corruption and Organized Crime,[52] (b) criminal offences of sexual abuse and sexual exploitation of children,[53] (c) criminal offences concerning computer systems, programs, and data,[54] and (d) criminal offences of unauthorized production and trafficking of drugs (Art. 190) and unauthorized production and trafficking of substances prohibited in sports (Art. 191.a).[55] A general prerequisite of extended confiscation is that the predicate criminal offence resulted in an economic advantage.

Some Croatian criminal law theorists rightfully point out the significant detrimental impact of economic crimes[56] and emphasise the need to expand the application of extended confiscation to these types of criminal offences, especially when a substantial economic advantage is acquired.

There is no logical reasoning to propose that the catalogue of criminal offences expands and includes criminal offences that do not aim to acquire economic advantage (such as crimes against humanity and human dignity, especially genocide, crime of aggression, or war crime), as some authors have questioned.[57] Considering that those serious crimes are not offences aimed at obtaining illicit economic advantage (unlike criminal offences related to war profiteering), they cannot and should not be subjected to extended confiscation.

The same reasoning is demonstrated through the criminal offence of giving[58] and receiving[59] a bribe. Namely, the perpetrator of the criminal offence who gives a bribe does not obtain any economic advantage by committing that crime.[60] That is why it is

52 Offences under USKOK's jurisdiction are proscribed in Art. 21, Act on the Office for the Suppression of Corruption and Organised Crime.

53 From Chapter XVII of the Penal Code.

54 From Chapter XXV of the Penal Code. With the implementation of the Directive (EU) 2014/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation into the Croatian criminal justice system in 2015, extended confiscation was enabled for criminal offences of sexual abuse and exploitation of children, as well as criminal offences against computer systems. "In this way, extended confiscation is no longer limited to organised crime and corruption, which was its original purpose." Novoselec, Martinović (2019).

55 From Chapter XIX of the Penal Code. This catalogue expansion made in 2024 was motivated by the recognition that such offences can yield significant financial gains even when not committed as part of a criminal organisation.

56 Sunčana Roksandić Vidlička, Marta Šamota Galjer: Političko-gospodarski kriminalitet i prošireno oduzimanje imovinske koristi, Quo vadis, Hrvatska?, *Hrvatski ljetopis za kazneno pravo i praksu,* 2/2015, pp. 523–557, p. 537.

57 Sunčana Roksandić Vidlička, Marta Dragičević Prtenjača: Does the Crime Pay Off – (Un) efficiency of Confiscation in Croatia – New Proposals for Its 60th Birthday, *EU and Comparative Law Issues and Challenges Series (ECLIC),* 3/2019, pp. 549–582, p. 551.

58 The criminal offence of active corruption.

59 The criminal offence of passive corruption.

60 In line with the teleological interpretation and application of the principles that no one can retain assets derived from criminal offence, from which these confiscation institutes derived, the following straightforward examples demonstrate the unjustifiability of extended confiscation, as well as the absence of conditions for ordinary confiscation, in cases where no economic advantage has been obtained through the criminal offence: a student bribing a

illogical that the entirety of the perpetrator's property could be confiscated through the application of extended confiscation. A different situation is if a perpetrator who gave a bribe profited in some kind of property/financial benefit because of giving a bribe.[61] A completely different logic and reasoning apply to a perpetrator of the criminal offence of receiving a bribe.[62] Namely, the bribe itself could and should be confiscated through ordinary confiscation (simply because that bribe is an economic advantage that was obtained through the commission of a criminal offence of receiving a bribe). Furthermore, since this criminal offence falls into the first category of the aforementioned catalogue (under the USKOK jurisdiction) and if disproportion of perpetrator's assets and income is determined, and if the perpetrator fails to prove the lawful origin of his/her property, his/her entire property could be confiscated through the application of the extended confiscation.[63] This shows us that the passive corruption crime falls under both ordinary and extended confiscation, while the active corruption crime, *per se*, does not.

These examples demonstrate the importance of interpreting any principle—such as the principle that no one should retain unlawfully obtained assets—teleologically. This involves examining its purpose and relationship with the current regulation of confiscation institutes, which is one of the main questions addressed in this paper. Consequently, this underscores the importance of having appropriate and adequate justification and reasoning for any legal regulation which has a significant impact not only on the realisation but also on the limitation of certain fundamental rights, especially in criminal law.

professor to pass an exam or a party in a legal proceeding bribing a judge to rule in their favour. In these scenarios, the active parties in the corruption (the student or the litigant/defendant or any other participant, depending on the nature of legal proceedings) differ significantly from the passive parties (the professor or the judge receiving the bribe) concerning the aforementioned principle. What is the logical justification for presuming that all the assets of a student or a party in a legal proceeding were acquired through criminal activities?

61 For instance, if an individual bribes a judge to perform a criminal act that results in the acquisition of an illicit economic advantage for the briber, it can be reasonably concluded that the briber has obtained an economic advantage through that new criminal offence of the bribed person. In that case, that economic advantage can be confiscated under ordinary confiscation. And by profiting from that crime (if it is also under the jurisdiction of USKOK) in terms of acquiring economic advantage, extended confiscation could also be applied in this case against the person giving a bribe.

62 Unless it concerns a bribe that constitutes a non-material benefit, as non-material benefits are encompassed by the term "bribe" according to Article 87, paragraph 24 of the Penal Code.

63 Thus, in the judgment of the County Court in Zagreb, I Kž Us 23/2020-6 dated 10 June 2021: "[f]rom the defendant M. M., economic advantage was confiscated, as it was established that the total monetary amount of 5,912,092.49 HRK represents the economic advantage obtained by the defendant M. M., partly from one criminal offence of accepting a bribe in the amount of 13,194.84 HRK and two criminal offences of abuse of position and authority in the amount of 160,000.00 HRK, while it is presumed that property amounting to 5,738,897.65 HRK represent economic advantage derived from criminal activities." Consequently, in this case, from the person who committed the criminal offences of accepting bribes and abuse of position and authority, a total of 173,194.84 HRK (22,986.91 EUR) was confiscated through ordinary confiscation, while an additional 5,738,897. 65 HRK (761,682.61 EUR) was confiscated under extended confiscation.

III. CONFISCATION AS A PENALTY DURING THE WARTIME AND POST-WAR PERIOD

1. Ideological basis of confiscation and coexistence of different legal systems

The coexistence of different legal systems characterised the history of Croatian criminal law during the Second World War. On one side, the Independent State of Croatia[64] (hereinafter as NDH) established its legal framework, which largely relied on the laws of the Kingdom of Yugoslavia. On the other side, the anti-fascist forces, the Yugoslav Partisans led by the Communist Party of Yugoslavia, established their own legal system in territories liberated from the NDH authorities, which was not based on the legal traditions of the Kingdom of Yugoslavia.

The confiscation of property in Croatia during and immediately after the Second World War took place within the framework of drastic political changes that characterised this period, and they were driven by the ideological and political objectives of the ruling powers.[65]

"The system of sanctions fulfils the functions of the criminal law of a state and expresses the fundamental principles of that law and criminal policy."[66] Considering that, it is important to emphasise the role of criminal law in establishing the power of the Yugoslav Partisans as the leading anti-fascist force.

> *Criminal law was supposed to be an instrument of the revolution. [...] A new criminal law had to be created. The goals and needs of the revolution were the primary source and main inspiration for substantive criminal law, for determining what and how to punish.*[67]

People's Liberation Committees were key governing bodies established during the National Liberation Struggle[68] in the Second World War on the territory of Yugoslavia. They had a dual role: to ensure the political control of the Communist Party of Yugoslavia and to organise daily life in the areas liberated from the Ustaša regime. They were created in response to the need to establish governance that would enable the effective administration of areas liberated from occupying forces

64 The NDH was established on 10 April 1941 and dissolved on 4 May 1945.

65 This paper will not analyse confiscation regulated as a penalty under the Ustaša regime but will instead focus on confiscation carried out in former Yugoslavia in the period of the Second World War and the immediate post-war years.

66 Anita Kurtović: Zakonska rješenja u svjetlu primjene mjera upozorenja, sigurnosnih mjera i oduzimanja imovinske koristi, *Hrvatski ljetopis za kazneno pravo i praksu*, 2/2000, pp. 349–379, p. 377.

67 Franjo Bačić (1980): *Krivično pravo, opći dio*, Informator, Zagreb, p. 81.

68 The National Liberation Struggle was part of the anti-Nazi and anti-fascist fight in the territory of occupied Yugoslavia, led by the Communist Party of Yugoslavia.

and their collaborators, and they operated under the direct influence and control of the Communist Party of Yugoslavia.[69] Their role in implementing confiscation was significant.

2. Legal basis for confiscation

> *With the adoption of the Foča Regulations[70] in February 1942, it was determined that all property of the Kingdom of Yugoslavia in the liberated areas would be declared national property, and the property of "enemies of the people", based on military court rulings, would be confiscated and placed under the administration of the People's Liberation Committees (NOOs).*[71]

This decision marked the beginning of a systematic approach to property confiscation, justified under the disguise of revolutionary justice. By transferring ownership to the state, the new authorities sought to consolidate their power and ensure that material resources were exclusively in their hands.

> *NOOs, as bodies of popular authority, carried out the seizure and confiscation of property belonging to all "enemies of the people": Ustaše, spies, traitors, etc., whenever the military authorities or courts made a decision based on a proposal by the NOO or ex officio.*[72]
> *The retribution did not affect only members of the NDH apparatus, Ustaše, Četniks, wealthy individuals, intellectuals, Nazis, and fascists, but, for example, in Istria and Slavonia, it also targeted Germans and Italians in general. The retribution had war-related, revolutionary, national, and personal motives.*[73]

In some cases, entire communities were labelled as collaborators, leading to mass confiscations, disregarding individual responsibility. These measures not only aimed at punishing perceived enemies but also served as a tool to reshape the demographic and economic structure of the regions.

"Property was confiscated in a manipulative manner, under the pretext that it was being taken from owners due to their collaboration with the occupiers."[74] This is also the reason why the penalty of confiscation was in practice mostly imposed during the Second World War and the immediate post-war period even though it was later regulated as a sanction in former Yugoslavia.

69 See more about their role and activities in Tomislav Anić: Normativni okvir podržavljenja imovine u Hrvatskoj/Jugoslaviji 1944.–1946., *Časopis za suvremenu povijest*, 1/2007, pp. 25–62.
70 The Foča Regulations fall within the context of the early attempts by the Partisan movement to establish a legal framework for the new socialist regime, which directly links them to the later confiscations of property and nationalisations that took place after the Second World War—author's remark.
71 Filip Benić (2019): *Konfiskacija imovine u Slavonskom Brodu od 1945. do 1948.: diplomski rad*, p. 36.
72 Anić (2007): p. 32.
73 Zdenko Radelić (2006): *Hrvatska u Jugoslaviji 1945.–1991.: od zajedništva do razlaza*, Školska knjiga, Zagreb, p. 66.
74 Radelić (2006): p. 178.

> *Before the enactment of the Act on the Confiscation of Property and the Execution of Confiscation, that is, during the war, two types of confiscation were distinguished: partial and complete. Partial confiscation applied to cases where one family member was marked as a "people's enemy" due to their actions, while the others were not. In such cases, property was seized only from the individual declared a "people's enemy", leaving the property of other family members untouched. Complete confiscation involved the seizure of all property, and in such cases, all family members had to be declared "people's enemies". Confiscation was applied to all property rights.*[75]

Confiscation as a secondary punishment was regularly imposed alongside any other sentence handed down.[76] Thus, it is evident that numerous verdicts were rendered solely to enable the confiscation of the convict's property. This was particularly facilitated by the broad definition and interpretation of the terms "crime" and "enemy of the people".[77]

It can be concluded that during this period authorities used criminal law as a means to eliminate political opponents and suppress social groups they perceived as threats to their ideological stability while simultaneously confiscating their property. Individuals were often convicted without actual evidence for acts that, if described at all, were portrayed in a vague and imprecise manner.

Significant in this regard is the verdict of the District Court in Dvor na Uni from 1946, which confiscates "the entire movable and immovable property of all residents of the village of Zrinj, enemies of the people, regardless of where such property is located".[78] The confiscation, as stated in the reasoning of the verdict, was ordered against "all residents of the village of Zrinj as war criminals and enemies of the people, even against who were executed, killed, died, or had to flee during the war". The justification for such a verdict, which today would be considered irregular and unlawful for multiple reasons, is expressed as follows:

> *Since the village of Zrinj was destroyed due to battles, all archives of local institutions and authorities were destroyed, so it is impossible to determine which families or individuals were present in the village during the battles fought against the People's Liberation Army, nor who fled, it was necessary to issue a collective verdict for all residents of the respective village.*

Undoubtedly, such reasoning is nowadays irreconcilable with the fundamental principles of criminal law.

75 Anić (2007): p. 39.

76 Similarly, "it almost became a rule that every punishment was accompanied by the confiscation of property." Radelić (2006).

77 The General Part of the Criminal Code, adopted in 1947, although proclaiming the principle of legality, allowed for analogy, thereby significantly weakening the principle of legality itself. Specifically, the Criminal Code stipulated that criminal responsibility existed for an act that was socially dangerous, even if it was not explicitly defined in the law, as long as its characteristics were similar to those of a criminal act explicitly prescribed by the law.

78 Vladimir Geiger, Mate Rupić, Mario Kevo, Egon Kraljević, Zvonimir Despot (2008): *Partizanska i komunistička represija i zločini u Hrvatskoj 1944.–1946.: dokumenti. Knjiga 3: Zagreb i središnja Hrvatska*, Hrvatski institut za povijest, Zagreb, p. 799.

> *The highest communist leaders were aware that, for the goals of the revolution, they had to use false accusations of treason, as it turned out that there were too few real traitors among class enemies. The first immediate goal was to punish war criminals and enemies of the people, the second goal was to nationalize private property by dispossessing all those who were or could potentially be obstacles to revolutionary objectives, and the third goal was to create political conditions for securing election outcomes in their favour—both local elections and those for the Constituent Assembly—by revoking the voting rights of dissenters. These three goals could be achieved through accusations of treason against national or state interests, according to the Communist Party's criteria.*[79]

An intriguing aspect of this period is that Croatian criminal legislation simultaneously recognised, as criminal law sanctions, the confiscation of property as a punishment, the institution of ordinary confiscation, and monetary fines.

> *Yet, the most fundamental aspect is not evident—what is the function and purpose of this penalty in our criminal law? Why is such a property-related penalty necessary alongside monetary fines and measures of asset confiscation? A satisfactory answer to this question is not apparent, which raises doubts about the justification of this penalty.*[80]

Today, confiscation carries a negative connotation and is considered to be an unacceptable relic of the past.[81] "The majority of criminal law systems have abolished the sanction of confiscation of the perpetrator's entire personal property due to its abuses under totalitarian regimes, and therefore it no longer exists in Croatian legislation."[82]

IV. CONCLUSIONS

Even prior to the introduction of criminal-law measures addressing illicit economic gain through the institute of ordinary confiscation, the criminal law of the former Yugoslavia had already recognised the need for its deprivation, which was achieved through the civil-law institute of unjust enrichment. The principle that no one should profit from crime had neither been explicitly formulated nor sufficiently acknowledged, even in international instruments of that period. Ordinary and extended confiscation, grounded in this principle, have different purposes, objectives, and regulatory

79 Radelić (2006): p. 61.
80 Bačić (1980): p. 426.
81 In the dictionary of criminal law, confiscation (from the Latin *confisco*: to collect, seize for the state treasury, fiscus) is defined as a "criminal sanction applied historically from ancient times to the present, consisting of the seizure of all movable and immovable property of a person convicted of certain criminal offences. It is important to note that this does not refer to property acquired through the criminal act for which the person was convicted but rather to property acquired in any other lawful manner." Horvatić (2002): p. 191.
82 Anita Kurtović, Velinka Grozdanić: Kaznenopravne mjere oduzimanja dobiti kao odgovor na organizirani kriminal, *Zbornik radova Pravnog fakulteta u Splitu*, 1–2/1999, pp. 163–174, p. 169.

frameworks. Nevertheless, while ordinary confiscation is not problematic, extended confiscation is.

The confiscation carried out during the Second World War and in the immediate post-war period under the newly formed regime was presented as a key instrument for transforming society towards the socialist model, alongside other nationalisation measures that were not punitive in nature and did not form part of criminal law. However, in reality, the determination and implementation of confiscation measures were often marked by legal irregularities and deficiencies, primarily due to deliberately broad and vague formulations and definitions of criminal offences and penalties. These were particularly conducive to achieving the goals of such an ideology, which in turn caused significant injustices.

Additionally, the particular severity of confiscation was reflected in the fact that it generally involved the seizure of the entire property of the person against whom it was imposed, without any compensation for the confiscated property. This aspect is especially emphasised in the theory of criminal law, as precisely this characteristic distinguishes confiscation from other bases by which the state could (then and now) acquire ownership of the property of private and legal entities.

Although the nature of a legal institute does not depend on its designation or terminology, in the case of confiscation, it is crucial to devote particular attention to its regulation and the terminology used, because European states that belonged to the socialist system recognised and regulated confiscation as a penalty, whereas other states did not conceptualise it in such a manner.

There is no doubt that confiscation in former Yugoslavia, particularly in the early years of its existence, was imposed without regard for the fundamental principles of criminal law and was instead aligned with the instrumental purpose that criminal law served at the time.

The broad scope of property subject to confiscation demonstrates an undeniable similarity to today's measure of extended confiscation, which is why some Croatian legal theorists consider confiscation to be a precursor to extended confiscation.

Furthermore, similarities between extended confiscation and a penalty raise significant concerns regarding the principle of guilt and presumption of innocence. In Croatian legal theory, the institute of extended confiscation has been insufficiently and infrequently problematized and criticised, particularly concerning its relationship with the abovementioned basic principles of criminal law. EU law tends towards further expanding the scope of extended confiscation. However, it is up to the Member States, when implementing these provisions, to adapt this institute to their legal traditions and the fundamental principles of criminal law.

Has extended confiscation, at least in practice, justified its introduction into national legislations and become an effective (or at least a more effective) tool in combating organised crime? Is it necessary to redefine this institute and propose appropriate and legitimate solutions for its regulation and application?

Extended confiscation blurs the line between preventive measures and punitive sanctions by shifting the burden of proof onto the perpetrator and disregarding the requirement for a conviction regarding presumed but not proved criminal offences. Although no formal penalty is imposed for these presumed offences, the extended

confiscation has a punitive function, penalising the individual without a legally established guilt.

There are ongoing debates in comparative theory about the balance between the rights of the perpetrator and the need for society to reclaim assets obtained through presumed criminal activities.

In the author's opinion, extended confiscation is primarily justified on pragmatic grounds, as it remains theoretically challenging to provide a sound doctrinal basis for applying criminal law measures similar to punishment to vaguely defined, abstract criminal conduct.

All of these questions are both pertinent and worthy of thorough consideration, particularly in the light of the continuous expansion of the scope of extended confiscation in EU law; however, addressing them falls beyond the scope of this article.

Pentru autori

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