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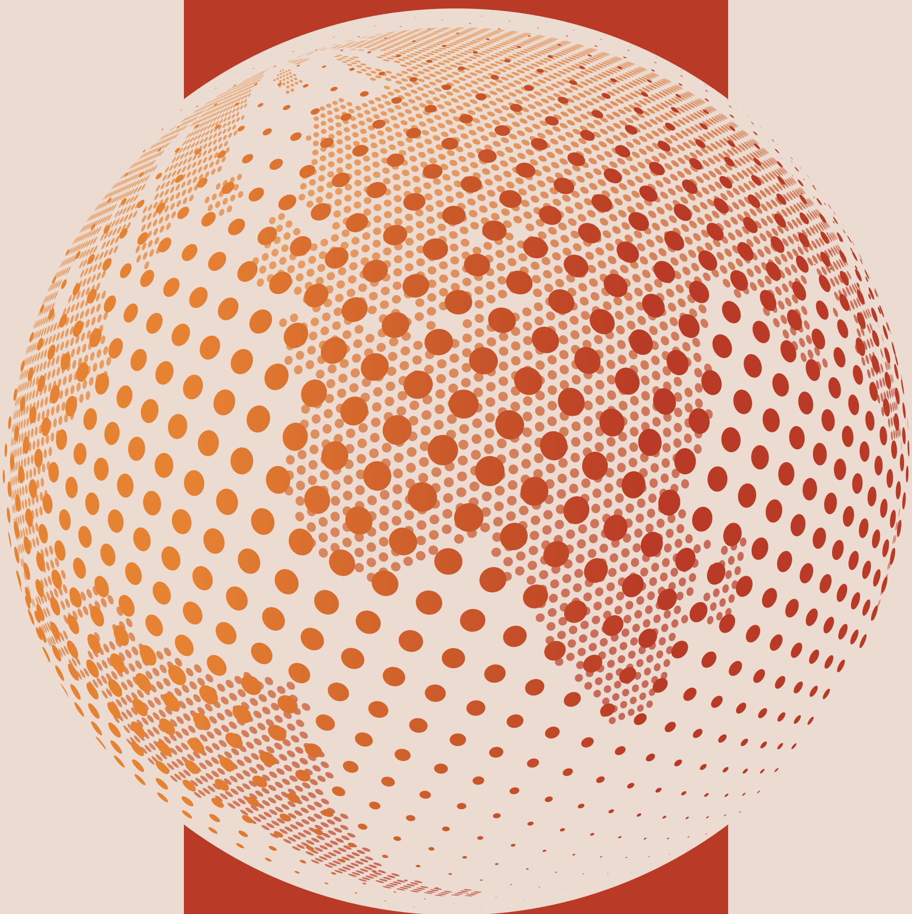

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UVODNA REČ

Poštovane koleginice i kolege, uvaženi saradnici i prijatelji časopisa,

Prvo izdanje naše periodične publikacije *Strani pravni život* objavljeno je u prvoj godini rada Instituta za uporedno pravo, i to u formi biltena juna 1956. godine. U uvodniku uz prvi broj jasno je definisano da će se u *Stranom pravnom životu* objavljivati prilozi bibliografsko-referentnog sadržaja. Oni su obuhvatali prikaze odabranih članaka iz relevantnih stranih naučnih časopisa, odluke inostranih sudova u kojima su se razmatrala pitanja od posebnog značaja za domaću pravnu teoriju i praksu, izvodi stranih zakona, kao i druge informacije od interesa za pravnu javnost u Jugoslaviji. Uz to, objavljivani su i prilozi u kojima su praćene i prikazivane važnije međunarodne konferencije, kongresi i slični naučni i stručni skupovi iz oblasti prava. Časopis je tako od samog početka imao ulogu mosta između domaće i strane pravne misli.

Tokom prvih šest godina Strani pravni život izlazio je dvomesečno u pomenutoj formi, da bi od 1962. godine, pored prikaza, počeli da se objavljuju i naučni članci. U narednim decenijama fokus uredništva sve se više usmeravao ka originalnim naučnim radovima, da bi se od 1989. godine časopis u potpunosti profilisao kao isključivo naučna serijska publikacija. Tada je uvedena i hronološka numeracija po godištima (od broja 1 do broja 3), koja se zadržala sve do 2015. godine, kada je uveden i četvrti broj, u kome se objavljuju isključivo radovi na engleskom jeziku. U poslednje četiri godine ustaljena je praksa da ovaj broj uređuju gostujući urednici, ugledni naučnici i profesori iz zemlje i inostranstva, čime se dodatno osnažuje međunarodna vidljivost časopisa i potvrđuje njegova reputacija u akademskoj zajednici. Zahvaljujući takvom pristupu, nastavili smo da negujemo tradiciju da u našem časopisu, pored domaćih autora, rezultate svojih istraživanja redovno objavljuju i istraživači iz inostranstva.

Tematska orijentacija časopisa određena je već u njegovom prvom broju, kada je jasno definisana posvećenost međunarodnom pravu, inostranim pravnim sistemima, zakonodavstvima i praksi, uz obaveznu primenu uporednopravnog metoda kao osnovnog istraživačkog pristupa. Ova tematska konstanta, nepromenjena do danas, u spoju sa tradicijom dugom sedam decenija, čini časopis *Strani pravni život* jedinstvenim dokumentom o evoluciji pravnih sistema u komparativnom pravu.

Tokom decenija časopis je pratio velike promene u svetu prava: od posleratne obnove i jasne podele pravnih sistema na kontinentalna, common law i socijalistička prava, preko evropskih integracija, harmonizacije nacionalnih zakonodavstava, tranzicije centralno-planskih privreda ka tržišnom modelu, jačanju ljudskih prava, pa sve do izazova digitalnog doba, globalizacije, ekološke krize, pandemije virusa kovid 19 i veštačke inteligencije. Autori su pratili i analizirali ove procese u njihovom istorijskom i savremenom kontekstu, čime su doprineli razvoju pravne nauke, unapređenju institucionalnih praksi i jačanju društvene svesti o značaju prava u oblikovanju globalnog poretka.

Naučni časopis *Strani pravni život* već sedamdeset godina izlazi bez prekida, a od 2008. godine je, pored tradicionalnog izdanja, dostupan i u posebnom onlajn izdanju, čime je dodatno proširena vidljivost njegovih sadržaja. Kontinuitet izlaženja časopisa omogućen je zahvaljujući resornom ministarstvu nauke, koje je prepoznalo njegov kvalitet i značaj. Ministarstvo nam redovno pruža finansijsku podršku putem godišnjeg javnog konkursa namenjenog izdavačima naučnih časopisa u Republici Srbiji.

Danas je pred nama moderan naučni časopis, jedan od najstarijih pravnih časopisa u našoj zemlji, sa više od 1200 objavljenih naučnih članaka, prevoda zakonskih tekstova, međunarodnih konvencija i nacrta zakona. Od 2021. godine *Strani pravni život* je svrstan u kategoriju nacionalnog časopisa međunarodnog značaja (M24) i indeksiran je u prestižnim bazama kao što su DOAJ, CEEOL, ERIHplus i *HeinOnline Law Journal Library*. Od decembra 2025. godine uveden je i model online first objavljivanja, čime smo čitalačkoj publici obezbedili dostupnost radova odmah nakon pozitivnog ishoda dvostrukog anonimnog recenziranja i odluke uredništva o objavljivanju. Navedena promena predstavlja značajan iskorak u unapređenju izdavačke prakse, jer omogućava bržu cirkulaciju naučnih rezultata, povećava vidljivost autora i doprinosi dinamičnijem uključivanju pravne nauke u međunarodne tokove razmene znanja.

Ovaj jubilej ne bi bio moguć bez truda i podrške brojnih pojedinaca i institucija – pre svega istraživača Instituta za uporedno pravo koji su, u prvim decenijama, svojim radovima postavili temelje časopisa, kao i autora i saradnika iz zemlje i inostranstva, čiji su prilozi obogatili sadržaj i učvrstili ugled časopisa u akademskoj zajednici. Posebnu zahvalnost dugujemo resornom ministarstvu, koje je kontinuiranom podrškom podržalo redovno objavljivanje časopisa. Konačno, zahvaljujemo uredničkom timu i članovima redakcije, sadašnjim i bivšim, na njihovoj profesionalnosti i posvećenosti koje su doprinele tome da svaki broj časopisa bude objavljen u skladu sa najvišim naučnim i uredničkim standardima. Njihov rad i predanost tokom sedam decenija svedoče o istrajnoj misiji razvoja pravne nauke i komparativnog pravnog istraživanja.

Obeležavajući sedamdeset godina neprekidnog izlaženja, časopis Strani pravni život potvrđuje da je njegova snaga u zajedničkom radu, podršci i viziji svih koji su verovali i veruju u njegovu misiju. Uredništvo, saradnici i autori kontinuirano su se zalagali da se kvalitet časopisa podiže kako u pogledu forme tako i u pogledu sadržine, što je rezultiralo time da se u akademskoj i stručnoj javnosti časopis često prepoznaje kao najreprezentativniji izraz naučnog i istraživačkog rada Instituta za uporedno pravo. Taj uspeh nas čini ponosnim, ali nas istovremeno obavezuje da istrajemo u daljem unapređenju izdavačke politike, jačanju međunarodne saradnje i očuvanju visokih standarda naučne relevantnosti i metodološke doslednosti kako bi časopis i u budućnosti ostao pouzdan oslonac pravne nauke i komparativnog istraživanja.

U Beogradu, **Uredništvo**
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Boris Đ. Krivokapić*

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CONSULS AND CONSULAR LAW – PAST, PRESENT, AND FUTURE

Summary

The article examines the development of the institution of consuls and consular law, tracing its origins from the forerunners of consuls in the time of the first states to the present day. Following an overview of its historical development, the article compares contemporary consuls with their predecessors from earlier periods, as well as with diplomatic representatives. It then provides a concise analysis of the concept and historical development of consular law. Particular attention is devoted to the potential developments that may shape the future of the institution of consuls and consular law in the relatively near future. The author believes that the institution of consuls may disappear more rapidly than is commonly assumed. This development may result from a combination of factors, including the gradual erosion of state sovereignty, changes within the international community, the disappearance of certain functions currently performed by consuls, the transfer of some consular responsibilities to other bodies (including diplomatic agents and domestic state authorities), and the growing use of artificial intelligence, robots, and other technical innovations. In the meantime, any substantial changes in the role and status of consuls will necessarily entail the adoption of a new universal codification of consular law.

Keywords: Consuls, Consular Law, International Law, International Relations, Legal History.

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KONZULI I KONZULARNO PRAVO – JUČE, DANAS, SUTRA

Sažetak

Rad se bavi razvojem ustanove konzula i konzularnog prava, počev od preteča konzula u vreme prvih država pa do naših dana. Nakon pregleda istorijskog razvoja, dato je poređenje savremenih konzula sa onima iz prethodnih epoha i diplomatskim predstavnicima, a zatim su ukratko obrađeni pojam i istorijski razvoj konzularnog prava. Posebno interesantan je osvrt na ono što nas možda čeka u relativno bliskoj budućnosti. Autor smatra da će konzuli nestati brže nego što mislimo. To će biti posledica dejstva raznih faktora kao što su: slabljenje suvereniteta država i promene u međunarodnoj zajednici, nestanak određenih poslova kojima se danas bave konzuli, prenošenje dela konzularnih funkcija na druge organe (diplomatske agente, ali i unutrašnje organe država), sve veće korišćenja veštačke inteligencije, robota i drugih tehničkih novotarija i dr. U međuvremenu, sve dok postoje konzuli, bilo kakve ozbiljne promene njihove uloge i statusa nužno će zahtevati suštinske promene u univerzalnom međunarodnom pravu, a možda i novu kodifikaciju konzularnog prava na globalnom nivou.

Ključne reči: konzuli, konzularno pravo, međunarodno pravo, međunarodni odnosi, pravna istorija.

1. Introduction

Consuls are among the oldest institutions of international law. They, or rather their predecessors, emerged in antiquity and developed independently of diplomatic representatives. Even today, consuls have retained their distinctive functions and continue to occupy a specific position within the international legal order, governed by a framework of universal, regional, and bilateral agreements.[1]

As has been rightly observed, among the many institutions of modern society few are as widespread or well known as the consular institution, yet few have been as neglected outside their own professional circles. Consuls have traditionally been

[1] Almost a century ago, the League of Nations experts rightly noted that the consular institution, which predates embassies, has undergone various stages in its historical development, while its original purpose – the protection of nationals in a foreign country – has remained unchanged (Guerrero & Mastny, 1928, p. 105).

regarded as the 'poor cousins' of ambassadors and ministers. However, since consular offices were established long before diplomatic services, the history of consuls cannot be reduced to the history of diplomats alone (Leira & Neumann, 2011, p. 223).

Much has been written about consuls and consular law. Comprehensive accounts of the origins and development of consular institution can be found in numerous works devoted to the history of international law, the history of international relations, and political history in general. Moreover, the study of international consular law, together with at least a brief overview of the genesis of the consular institution, constitutes an integral component of virtually every systematic treatment of international law. Accordingly, while the continued examination of contemporary issues in consular law is readily understandable, the question arises as to whether it is justified to revisit the origins and historical development of the consular institution.

First, it should be noted that the topic continues to be addressed in monographs and scholarly works by authors from various parts of the world, which in itself suggests that the subject has not yet been exhaustively examined. It may further be observed that the doctrinal literature often contains imprecise and even contradictory positions, as well as divergent opinions, particularly regarding the emergence of consuls, the precise role of the institutions that preceded their appearance, and related issues. In a certain sense, this is understandable, given that both the predecessors of consuls and consuls themselves manifested in numerous forms throughout history, varying in structure and content across different periods, experiencing fluctuations in significance, and having developed unevenly across regions.

Bearing all this in mind, this article seeks to address the origins and development of consuls and consular law in as original a manner as possible, highlighting certain aspects that appear to be insufficiently addressed in the literature and offering the author's own conclusions and assessments.

2. The Concept of Consul

The term 'consul' (Latin consul, derived from *consulere*, meaning to consult, deliberate, or consider) denotes 'counsellor' or 'councilor.' However, consuls were never mere advisers. The title first appeared within the domestic legal systems of states and only later emerged, in a distinct function and with a different legal status, in the sphere of international relations and international law.

Originally, the term 'consul' referred to the highest executive authorities of the state, namely heads of state. In Ancient Rome during the Republic (509–27 BC), the highest state officials (supreme magistrates) were designated as consuls, a term most likely derived from the notion of a 'counsellor of the Senate.' The Centurion Assembly elected two consuls who, during their one-year term in office, governed the state in conjunction with the Senate. The office of consul persisted into the imperial period, although it gradually became an honorific position rather than one of real power, which was concentrated in the hands of the emperors.

Subsequently, for a time, the term was adopted by various European rulers, and from the 10th century it designated the elected elders of many Italian and French cities, i.e., members of collective bodies governing the city (city councils). These officials soon acquired different titles, while the term 'consul' became associated with other institutions. Nevertheless, even in later periods, the title was occasionally used to denote high state officials. Notably, in 1799–1804, France was governed by the Consulate as a collective head of state, composed of three elected consuls. Within this system, executive authority was concentrated in the First Consul (Napoleon Bonaparte, who controlled the military), while the other two consuls played largely advisory roles.

In addition to the aforementioned and other possible meanings, the term 'consul' has also been used to designate individuals who were not the highest state officials. At certain historical stages, it referred to persons responsible for resolving maritime and commercial disputes in ports, as well as those who adjudicated contentious issues within merchant colonies in foreign territories. Over time, the term became firmly associated with modern consuls, who constitute a category of external state representatives in international relations.

In contemporary international law, consuls constitute a distinct category of state representatives. In the simplest terms, the term denotes those state officials who are authorized to exercise consular functions in a foreign country within clearly defined frameworks and who, for the performance of these functions, are accorded specific privileges and immunities. This is a working definition, intended solely for the purposes of the present analysis and without any claim to being exhaustive or definitive.

Understood in this way, consuls developed in response to the needs of international trade, with their functions varying across different historical periods. It has been rightly noted that consular missions have a longer and more diverse history than diplomatic missions and that, over time, they have performed a wide range of functions – diplomatic, political, commercial, judicial, and maritime – all of which have left their imprint on the activities of the modern consul (Lee & Quigley, 2008, p. 3).

3. The Development of the Consular Institution and Consular Law

3.1. The Forerunners of Consuls

The origins of consuls, understood from the perspective of international law, should be traced back to the slave-owning era and the period of the earliest state formations, when two mutually opposing phenomena emerged and at a certain point came into conflict.

On the one hand, at that time a generally hostile attitude towards foreigners prevailed in most regions. Foreigners were regarded with repulsion, contempt, mistrust, and even hostility (Стояновъ, 1875, pp. 41-61; Bartoš & Nikolajević, 1951, pp. 19-29; Krivokapić, 2004, pp. 49-63). The reasons for this varied, including beliefs in different deities, fears that foreigners would introduce harmful customs and practices to the local population, suspicions that they may act as spies seeking to identify weaknesses in a country's defenses, and the awareness that such individuals could later become enemies on the battlefield, among others.

On the other hand, the development of international relations and transnational traffic, particularly in the maritime sphere, as well as the expansion of international trade, both facilitated and necessitated the growing presence of foreigners and, consequently, the improvement of their legal and practical status. Accordingly, over time, a need emerged for specific institutions capable of providing foreigners with support and assistance and, where necessary, a degree of protection. Such institutions consequently came into existence.

They emerged under various names and institutional forms already in the earliest state formations. For example, in Mesopotamia, such arrangements are attested as early as the 20th–18th centuries BC. In certain locations, special trading posts, streets, and even separate districts situated just outside city walls – known as *karum* (from the Akkadian *kārum* – meaning port or trading district) – were established, where foreign merchants resided under a degree of protection. Similarly, Phoenician merchants are known to have enjoyed certain privileges in Memphis, the ancient capital of Egypt, as early as the 13th century BC, among other examples.

The protection of foreign traders was, at least indirectly, subject to legal regulation. This was achieved through domestic regulations which, in cases of robbery or theft, prescribed severe punishments and an obligation to compensate damages (e.g. the Code of Hammurabi, c. 1750 BC),[2] as well as through international treaties. Some

[2] Articles 22-24 provided that, in cases where a merchant was robbed and the perpetrator was not apprehended, the local authorities or community were obliged to compensate the victim for the loss. This established a system in which the state assumed responsibility for the security of trade, including international commerce, and for the protection of foreign merchants.

treaties in the ancient Near East, in particular, provided for the responsibility of the territorial state (and its ruler) for the safety of foreign merchants and their property.

However, in these and similar cases, the primary concern was the protection of the life, health, and property of foreign merchants, rather than a more detailed regulation of their legal status. In particular, no special bodies for the protection of foreigners were envisaged. Such bodies nevertheless emerged somewhat later. Frequently, especially in city-states, these functions were performed by citizens of a given city who were specially authorized to represent and protect foreigners. It appears that, in some regions, foreigners themselves could select one of their own members to act on their behalf as a form of non-state, quasi-representative before the authorities of the territorial state, while also serving as an internal elder responsible for the orderly functioning of their community.

Various institutions for the protection of foreigners were particularly characteristic of Ancient Greece, which consisted of numerous Hellenic city-states[3] sharing a common culture, broadly similar historical traditions, a common language, and shared religious beliefs, as well as participation in common artistic and sports competitions. At the same time, these city-states were persistent rivals, frequently engaged in disputes and recurrent warfare. Within this context of enduring rivalry and intermittent hostility, a form of regional international law, with its own rules and institutions, developed. Some of these institutions were specifically related to the legal and social position of foreigners.

3.1.1. Ancient Greece

Ancient Greek city-states were characterized by xenophobia and hostility towards foreigners, to the extent that the terms 'foreigner' and 'enemy' were initially used interchangeably (Пероговский, 1859, p. 25, cited in Гетьман-Павлова, 2023, fn. 21, p. 17).

In Sparta, there also existed a specific institution known as *xenelasia*, which is traditionally attributed to the legendary lawgiver Lycurgus (c. 820–730 BC). It comprised the authority to exclude or expel foreigners, meaning that their presence in Sparta was permitted only with the express authorization of the Spartan state. The rationale for this practice was primarily practical in nature. On the one hand, it reflected an effort to protect local culture and lineage from perceived 'harmful' external influences; on the other hand, it was grounded in military considerations,

[3] It is generally believed that, from approximately 650 to 325 BC, there were around 1,500 city-states scattered throughout the Hellenic world, from southern Spain to the Caucasus and from the Crimea to Libya. A more precise figure of 1,035 identified *poleis* is sometimes cited, although it is regarded as incomplete (Hansen & Nielsen, 2004, pp. 53-54).

namely the concern that foreigners should not be allowed to ascertain the exact number of Spartan citizens (and thus warriors). However, in the case of demonstrably friendly relations with Sparta, the strict application of this rule was relaxed, and hospitality extended to such individuals.

Even in Athens, where foreigners were treated more favorably than in other Greek city-states, their legal and social position remained relatively disadvantaged. Nevertheless, over time, particularly from the late 6th and early 5th centuries BC, the status of foreigners gradually improved.

With regard to the position of foreigners, Athens is of particular interest, as the largest and most developed Greek city of the period, with an unusually large number of foreigners residing there, and considering that its practice in this area is the most extensively documented. In other *poleis*, by contrast, there were few, or in some cases virtually no resident foreigners (as in Sparta or Crete). Exceptions include Corinth, Syracuse, Thessaly, Delos, Kos, Megara, and several other *poleis,* where, as in Athens, there was a relatively high proportion of resident foreigners. However, the elements of their legal position have not been sufficiently studied due to the limited availability of surviving material evidence. Taken together, these factors make Athenian practice not only the most interesting but also the most extensively studied and best known.

Four categories of foreigners were distinguished in Athens. The first two (the so-called 'native foreigners')[4] consisted of *isopolities*[5] and *metics*, while the remaining two ('true foreigners') comprised non-resident foreigners in Attica[6] and barbarians.[7]

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4 Some authors (e.g. Stuart, 1936, p. 23) prefer to use the term 'domiciled aliens,' which, it may be acknowledged, is more precise.

5 Foreigners who were granted rights equal to those of citizens (from Ancient Greek: *ἰσοπολιτεία* – 'equal citizenship'). This status could arise either through an international agreement on *isopolity* – a treaty whereby all citizens of one city acquired civil rights in another city without losing their original citizenship or acquiring a new one – or through domestic regulation in the form of an individual privilege. Such persons were entitled to acquire property, conclude legal transactions, and participate in judicial proceedings before public courts. They were also exempted from taxes imposed on foreigners and enjoyed other benefits typically reserved for citizens of the host city.

6 They occupied a less favorable position not only in relation to the *metics*, but also did not enjoy many of the rights associated with them.

7 Those born outside the boundaries of Hellenic civilization and differing from the Greeks in origin, appearance, language, customs, and religion. In principle, they were deprived of any rights or protection and exposed to contempt. Greeks authors such as Isocrates and Aristotle, among other, compared them to animals, and generally regarded them as natural enemies and persons by nature destined for slavery (Стояновъ, 1875, 57). Nevertheless, due to the growing need to develop commercial exchange and strengthen other international ties, their position gradually improved over time.

In relation to the forerunners of consuls in the Hellenic world, the most interesting are the *metics*[8] – free foreigners originating from other Greek *poleis* who permanently settled in Athens (i.e., who remained there for more than one month). Freed slaves also had the status of a *metic*.

Namely, in the context of prevailing hostility towards foreigners and under the pressure of the need to develop trade and other non-political relations between Greek *poleis*, *proxenia* emerged in Athens in the late 6th century BC as an institution reflecting a form of hospitality and favorable treatment of foreign citizens. Initially, this hospitality was limited, and it was extended only occasionally and primarily to high-ranking figures, such as foreign statesmen and parliamentarians. With the strengthening of economic and other ties, it gradually expanded to other foreigners and acquired a more permanent character. In this regard, the term *metic* itself gradually lost its meaning from the 4th century BC, alongside the increasing recognition of certain rights for that category of the Athenian population preciously reserved for citizens, including the right to marry Athenian women and the right to appear in court directly without a patron, among others.

As long as they existed as a distinct social and legal category, the *metics* occupied a special status that was considerably more favorable than that of ordinary foreigners or barbarians, but which could not be equated with that of full citizens. They enjoyed personal freedom and certain civil rights; however, they were in the position, albeit conditionally, of a form of second-class citizens, as they were not granted the full rights, while, on the other hand, being subject to specific obligations. The *metics* also held a lower social status for cultural reasons, i.e., due to their foreign origin. Even when born in Athens and among its wealthiest residents, this did not alter their legal position. Despite the fact that their families may have lived in Athens for several generations, a *metic* did not acquire the citizen status. Citizenship could be granted only exceptionally, as a form of honor in recognition for special merit, and even then only rarely.

They enjoyed freedom of movement and the right to work; they could own slaves and chattels, but not land; and they had procedural capacity before the courts, i.e., they could appear as plaintiffs or defendants. This should be understood in light of the fact that the arrival of a large number of foreigners in Athens, who were essential to the functioning of its economy, intellectual life, and culture, would have been undermined if such individuals had not been afforded legal protection in commercial and other disputes.

On the other hand, *metics* did not have the right to marry Athenian citizens. They were required to pay a special tax imposed on foreigners, known as *metoikion*

[8] Ancient Greek μέτοικοι (from μετα, 'change,' and οἶκος, 'home'); meaning migrants or settlers.

(Ancient Greek: μετοίκιον), amounting to 12 drachmas annually, as well as a small tax for the right to engage in trade. They were also subject to higher direct levies, known as *eisphora* (Ancient Greek. εἰσφορά), than citizens. Furthermore, *metics* were excluded from political life; they could neither participate in the Assembly nor vote, and they were ineligible to serve as judges or priests). They could initiate legal proceedings against both fellow *metics* and citizens, and could be sued; however, access to the courts required representation by a patron (representative). In addition, they could be subjected to judicial torture, and the penalties imposed on them were generally more severe than those applicable to citizens, while the punishment for killing a *metic* was less severe than that prescribed for killing a citizen. Moreover, *metics* were subject to military service and, in times of war, often served in the front ranks, i.e., in the most dangerous positions. They could also be reduced to slavery as a consequence of certain offences (Стояновъ, 1875, pp. 52-54; Bartoš & Nikolajević, 1951, pp. 21-23).

The number of *metics* increased over time, and in different periods of the 4th century BC they made up one-third, and at times even one-half, of the free population. A census conducted by Demetrius of Phaleron between 312 and 305 BC reportedly recorded approximately 21,000 citizens, 10,000 foreigners (*metics*), and 400,000 slaves residing in Athens. It is further estimated that during certain periods of the 4th century BC, the number of *metics* living in Athens may have reached as many as 25,000 (Доватур, 1980, p. 29).

Many of them were engaged in trade, while others came to Athens because it was the cultural center of Ancient Greece and offered opportunities for individuals possessing specialized knowledge and skills, including philosophers, scholars, physicians, sailors, craftsmen, actors, and musicians.

The presence of a substantial foreign population in Athens necessitated the establishment of mechanisms for their representation and protection. To this end, the institution of *prostates* and *proxenia* emerged.

1. *Prostates.* If they remained in Athens for more than one month, *metics* were required to register at the local administrative unit in which they resided, known as *deme* (δῆμος), and to appoint a *prostates*[9] (a representative, protector, or patron who acted as an intermediary between them and the city authorities) from among Athenian citizens. Failure to comply with this requirement could result in criminal liability and expose the *metic* to the confiscation of property and even enslavement.

In principle, *prostates* bore certain similarities to the earliest consuls who, during the Middle Ages, were elected by members of merchant colonies established in foreign territories. For this reason, some authors regard them as precursors of

[9] Ancient Greek prostates (προστάτη) – 'one who stands in front,' meaning a leader, representative, or protector.

the modern consular institution. Nevertheless, the differences between the two are substantial. *Prostates* were chosen by individuals to represent their personal interests, they were citizens of the host state, and their functions differed in many respects from those traditionally associated with consuls.

***2. Proxenia* (*proxeny*).** In the simplest terms, what the *prostates* were to individual foreigners, the *proxenos* (plural: *proxenoi*) was to a foreign city-state (Stuart, 1936, p. 23). The *proxenos* was a particular type of patron, or protector, of a foreign *polis* and its citizens.[10]

The earliest known reference to a *proxenos* appears in an inscription discovered on the island of Corcyra (modern Corfu), dating from approximately 625–600 BC. The inscription, found on the tombstone of Menekrates, son of Tlasias, who perished at sea, contains the phrase: "*proxenos*, friend of the people, was he." Nevertheless, it is generally accepted that *proxenoi* began to emerge during the 6th century BC and that by 460 BC, *proxenia* had become a widely recognized and firmly established institution throughout the Hellenic world (Wallace, 1970, p. 189). Lists of *proxenoi* recognized by individual Greek states have even been preserved. One such document, compiled around 350 BC, records the names of all 86 *proxenoi* recognized by Karthaia (Carthea or Cartaya), one of the four city-states on the island of Kea (also known as Tzia) in the Cyclades, an archipelago in the southern Aegean Sea (Mack, 2022, p. 3).

Proxenoi were appointed from among the citizens of the host *polis* to represent the interests of another *polis* and its citizens The appointment of a *proxenos* gave rise to a form of a contract between the *proxenos* and the sending state, under which the former was entrusted with certain authority and assumed the obligation to act as the official protector of the interests of the state that had conferred the appointment.

The position of *proxenos* was often transferred from generation to generation, and, in practice, frequently became a hereditary office within certain families. *Proxenoi* were regarded as 'public friends' of a foreign *polis* and enjoyed clearly defined duties and privileges, including personal inviolability, exemption from certain taxes, and the enjoyment of rights comparable to those of citizens in the city-state they represented (Guerrero & Mastny, 1928, p. 105). They hosted foreign visitors and settled disputes between foreign merchants. The office of *proxenos* was generally honorary and performed without remuneration (Guerrero & Mastny, 1928, p. 105).

The principal duties of the *proxenoi* were to promote the development of trade and economic relations between their own *polis* and the *polis* whose interests they represented, as well as to gather relevant information. In order to perform these functions effectively, they were endowed with a range of powers and obligations. They

[10] Ancient Greek *proxenos* (πρόξεινο) – acting on behalf a foreigner, in favor of a foreigner, in place of a foreigner.

received foreign visitors, ensured the protection of their rights and acted as intermediaries between them and the local authorities. They could represent foreigners before local assemblies, attest to wills, and assist in the regulation of the inheritance of deceased foreigners. In addition, they provided assistance to envoys of the represented *polis*, facilitated their introduction before the local assembly, and secured their access to public spaces such as temples or theaters, among other facilities. At times, *proxenoi* also performed additional political, diplomatic, and judicial functions. They promoted amicable relations between their own *polis* and the *polis* they represented, contributed to the drafting of treaties between the two communities, and assisted in the prevention or peaceful resolution of disputes, often acting in an arbitral capacity. They could also participate in the settlement of conflicts between their own *polis* and the *polis* they represented. Although *proxenoi* sought, by virtue of their social position and influence, to prevent armed conflict between the two *poleis*, in the event that war did occur, their established reputation and networks within the foreign community often enabled them to participate in peace negotiations. In such circumstances, they acted as intermediaries striving to reconcile the positions of both sides, thereby functioning as mediators acceptable to each party.

A *proxenos* held an official status vis-à-vis the government of the *polis* he represented and typically received certain rights and privileges from it (including, in some cases, the right to participate in the Assembly and to own land). However, in principle, he did not hold a special public position in his own *polis*, since he was not regarded as performing an official state function (Guerrero & Mastny, 1928, p. 105; Stuart, 1936, p. 23). In his home *polis*, he remained essentially an ordinary citizen (a private individual), although his actual standing depended in practice on the relationship between his *polis* and the foreign *polis* he represented. In some cases, *proxenoi* paid for their position with their lives, such as the Athenian *proxenos* in the *polis* of Ioulis on Keos, who was killed in 363 BC during a local uprising against Athens, aimed at withdrawing from its alliance (Шарнина, 2014, p. 136).

However, some authors argue that *proxenoi* enjoyed certain privileges in their home *polis*, such as the right to display the emblem of the *polis* they represented on the door of their residence and to use a special seal bearing that emblem, among others. It has also been suggested that they later acquired certain immunities. If this interpretation is correct, it would bring the institution of *proxenia* closer to that of honorary consuls.

The *proxenoi* were typically selected from among respectable and wealthy individuals. Thus, for example, the renowned lyric poet Pindar (6^{th}–5^{th} century BC) acted as a *proxenos* Athens in Thebes, while, conversely, the eminent Athenian orator and statesman Demosthenes (4^{th} century BC) served as a *proxenos* of Thebes in Athens. Many other well-known figures also held the office of *proxenos*, including the historian Thucydides (5th century BC), the statesmen and military leaders Alcibiades (5th century BC) and Callias III (5th–4th century BC), and the philosopher Aristocreon (3rd–2nd century BC), among others.

Cimon, the Athenian general and statesman from the 5th century BC, is remembered as one of the most prominent *proxenoi* and a leading opponent of Persia. He served as a *proxenos* of Sparta and Thessaly and was so closely associated with these states that he named two of his sons after them, one, Lacedaemonius, after Lacedaemon – the official Ancient Greek name for Sparta, and the other, Thessalus, after Thessaly (Hazel, 2002, pp. 56-57).

The institution of *proxenia* was recognized by at least 78 ancient Greek states, cities, or confederations (Stuart, 1936, p. 25).

The similarity between *proxenoi* and *prostates* lay in the fact that both institutions served to promote trade and other connections between *poleis* and protect the rights and interests of foreigners. However, unlike *prostates*, who acted as representatives of individual foreigners, *proxenoi* protected the rights and interests of the citizens of the *polis* that appointed them, including the *polis* itself. Accordingly, although both institutions performed a broadly comparable protective function in relation to foreigners, they differed significantly in their legal nature: *proxenoi* were appointed by city-states rather than by individuals, and they enjoyed broader powers, as well as greater rights and privileges.

A tentative parallel may be drawn between *proxenoi* and the modern honorary consuls. This is especially because the primary functions of *proxenoi* consisted in taking care of the development of trade between the two cities and protecting the rights of the state that appointed them before the local authorities, as well as because not only were they not part of the state apparatus of the city they represented, but they were elected exclusively from among the citizens of the city in which they lived and performed their functions without remuneration.

3.1.2. Other Countries

The solutions developed in the Hellenic world were not entirely new and unique. Various factors, particularly the unstoppable development of international trade, led to comparable arrangements being adopted in other regions of the ancient world.

It has been claimed that in Egypt, as early as 726 BC, the Greeks enjoyed the right to appoint magistrates who adjudicated their mutual disputes in accordance with their laws (Guerrero & Mastny, 1928, p. 105). However, the accuracy of this assertion is open to question, particularly in light of sources indicating that Naucratis was the first established Greek settlement in Egypt, founded only in the 7th century BC.

It is generally accepted that the last great Egyptian pharaoh, Amasis II (Ahmose II), around 570 BC, officially designated the city of Naucratis as the sole authorized Greek trading colony in Egypt, granting Greek settlers the right to elect their own magistrates – also referred to as *prostates* – who ensured the application of Greek law to members of the Greek community. Around the same period, comparable practices involving the appointment of separate judges for foreigners are also reported to have existed in China and in certain regions of India (Zourek, 1957, p. 73; Đorđević & Mitić, 2000, pp. 161-162).

In Ancient Rome, foreigners were initially disenfranchised and exposed to violence. However, their position later improved significantly, which was facilitated, among other factors, by the emergence of *hospitium* and patronage (*clientela*). These institutions, although characterized by distinct features, were primarily concerned with the personal status of individual foreigners rather than with the status of foreign citizens as such.

Hospitium (hospitality) referred to two distinct yet interconnected phenomena. First, it denoted a standardized contract concluded between a foreigner and a Roman citizen. Second, the same term was used to describe the relationship established by such an agreement, the essence of which lay in the Roman citizen's obligation to receive the foreigner, provide protection and care in case of illness, and, in particular, defend their interests before Roman courts. Unless terminated by mutual agreement, the contract was inheritable and remained in force even during periods of war between Rome and a foreign state. In later developments, the Roman state itself admitted certain distinguished foreigners into *hospitium*, recognizing their merits towards Rome. Moreover, through international treaties, it extended *hospitium publicum,* or public hospitality, to all citizens of a foreign state (Phillipson, 2011, I, pp. 217-227; Bartoš & Nikolajević, 1951, pp. 23-24).

Similar, yet sufficiently distinct, was the institution of patronage (Latin, *clientela*). *Patronatus* referred both to a specific contractual arrangement and to the relationship it established between a foreigner (client) and a Roman citizen (patron). The client was expected to show deference to the patron and to provide certain services or benefits, such as contributing to dowries to his daughters. In return, the patron assumed the obligation to assist the client in various matters, including instruction in Roman law and representing him before the courts. In effect, the client relinquished his former citizenship and became a form of Roman protégé, a status that became even more pronounced with the emergence of public patronage. Under this system, certain aristocratic families were entrusted with entire cities and provinces (e.g. Sicily, Cyprus, Spain), thereby acting as their representatives and protectors before the Roman Senate, while the clients acquired a quasi-civic status approaching Roman citizenship (Стояновъ, 1875, p. 62; Bartoš & Nikolajević, 1951, pp. 24-25).

Although there is a substantial difference between *hospitium* and patronage on the one hand, and consular institution on the other, a certain resemblance to the institution of honorary consuls cannot be denied.

Similar solutions, by the logic of circumstances, must have existed in other states of the period, as economic and other considerations necessitated the presence of foreigners, and someone had to safeguard their rights and interests.

3.2. First Consuls

The development of consular functions is sometimes divided into several stages: (1) the initial phase in which consuls primarily acted as judges, (2) a second phase in which they functioned as representatives of states, and (3) a third phase in which their role focused on the protection of commercial and shipping interests (Zourek, 1957, pp. 74-76). However, for a better overview and understanding of this matter, it is preferable to adopt an alternative periodization.

3.2.1. Consuls of Merchants, Consuls-Judges, Consuls of the Sea

Some authors maintain that the institution of the consul, or a comparable magistrate under a different designation, may be traced to the early Middle Ages or early feudal period (5th to 11th centuries). According to this view, such institutions emerged in eighth-century China and in ninth-century India and the Arab world, i.e., “wherever international trade arose” (Zourek, 1957, p. 74).

Nevertheless, for several reasons, and particularly from the perspective of the development of international law, events in Europe and the Mediterranean remain of particular importance.

The collapse of the Western Roman Empire and the invasions of barbarian groups in the 5th and 6th centuries led to a decline in urban life and a reversion to an agricultural economy. Foreign trade experienced a significant downturn, surviving primarily through the *emporia*[11] – trading settlements in northwestern Europe that emerged in the 6th and 7th centuries and disappeared in the 9th century.

However, from the 8th century onwards, international trade began to recover gradually. This revival was driven, among other factors, by the emergence of a large number of new states on the ruins of the Western Roman Empire, the construction of new cities and the reconstruction of previously abandoned cities. It was further facilitated by the shift of major trade routes from the Mediterranean towards the North Sea and Baltic Sea regions, as well as by an overall increase in the supply

[11] Latin: *emporium*, derived from the Ancient Greek *émporos* (ἔμπορος), meaning traveler or merchant.

of goods. Trade encompassed a wide range of commodities, including raw wool, textiles (including fine finished cloth), silk, fur, grain, spices (such as salt, pepper, ginger, nutmeg, and cinnamon), aromatic substances (notably, frankincense and myrrh), wine, porcelain, timber, iron, weapons, precious metals, gemstones, pearls, and animals.

Although land and river trade still retained its importance, the development of maritime navigation – particularly the introduction of larger and more robustly constructed ships, equipped with better sails, more comfortable conditions for the crew, and greater cargo capacity – led to a significant expansion of maritime trade. As a result, seaports, which had always held considerable importance, increasingly became, in the true sense of the term, centers of international trade.

Under the influence of the rapid expansion of maritime trade in the 9th and 10th centuries, specialized institutions emerged in the coastal cities of southern Europe. These bodies developed rapidly and gained wide acceptance. They appear under various names and in different local contexts, although predominantly in port cities. Their primary function was the supervision of international trade and the resolution of disputes between foreigners (including seafarers, cargo carriers, and merchants) and local merchants. Accordingly, they were commonly referred to as 'consuls of merchants' (*consules mercatorum*), 'consuls-judges' (*juges consules*), 'consuls of the sea' (*consules maris*), among other designations. At this time, consuls thus functioned as judges in maritime and commercial disputes, while their offices – the buildings or premises in which they performed their functions – were known as consulates.

In adjudicating disputes, these judges were in a position to interpret and more closely define customary and other applicable rules governing a range of issues, including compensation for damages arising from non-performance of contracts, and the apportionment of losses incurred when a shipowner, during a storm, jettisoned part of the cargo to save the ship and the remainder of the shipment. Given that such adjudication also included rules concerning the right to stop and inspect vessels, as well as the conditions for the seizure of the ship and cargo, it exerted a significant influence on the development of international law of the sea (Rivijer, 1897, p. 555; Rivijer, 1898, pp. 246-247).

Maritime consuls (French, *consuls de mer*)[12] were originally magistrates founded in the early 12th century by Guilhem V de Montpellier. Their function was to protect the interests of Montpellier in foreign trade, as well as to oversee diplomatic relations and the maintenance of waterways and port facilities in Lattes, an area south of Montpellier. There were four such officials, elected annually on 31

[12] It is believed that this designation stems from the fact that, at the time, rules governing consulates and consuls formed part of maritime law (Đorđević & Mitić, 2000, p. 162).

December for a one-year term, typically from among the nobility. Subsequently, other magistrates were created to further support the development of the city's international trade: sea consuls (*consuls sur mer*), responsible for protecting the interests of Montpellier at sea, and overseas consuls (*consuls d'outre-mer*), tasked with protecting its commercial interests in trading posts in other Mediterranean cities.

Similar institutions were established in other trading cities across the Mediterranean. For example, in Dubrovnik, there existed a consul for civil cases (*console delle cause civili*) and a consulate for maritime disputes (*consolatus maris*) (Mitić, 2006, pp. 30-32).

In this way, the earliest consuls were heads of merchant groups (typically reputable traders), functioning as magistrates in the ports of their respective countries – primarily in Italy, France, and Spain – charged with resolving maritime and commercial disputes as a distinct category of judges (*consules iudices*). In doing so, they applied the prevailing maritime and commercial law of the relevant region. The applicable legal norms were often drawn from or codified in sources such as the Byzantine Maritime Code, also known as Rhodian Sea Law (7th–8th century AD), the Amalfian Laws (12th century), and the *Book of the Consulate of the Sea* (c. 1330), among others. In certain cases, such consuls accompanied caravans or ships and exercised their authority over traveling merchants.

These institutes emerged in response to the need to ensure the regulation of international trade and the protection of foreign merchants, seafarers, and other foreigners at a time when such matters were not adequately addressed by states.

3.2.2. Byzantium

Following the fall of the Western Roman Empire in 476, the center of international trade, diplomatic and other relations gradually shifted to the Eastern Roman Empire – Byzantium. It engaged in intensive trade with the East, Italy, and the Frankish kingdoms, as well as, in the 9th and 10th centuries, with the Slavic world, especially Moravia, Bulgaria, and Kievan Rus' (Zourek, 1957, p. 73).

Attracted by the prospect of trading not only with Byzantium itself but also with distant regions of the world – since goods arrived from many directions and found buyers from various countries – numerous foreign merchants settled in Constantinople and other Byzantine cities, particularly in major ports. Merchants originating from the same city or state naturally connected, residing in the same districts, cities or quarters, and establishing their own independent communities, including brotherhoods and trading colonies. These communities built and maintained their own houses, shops, warehouses, administrative offices, churches, and other institutions (Zourek, 1957, p. 73). Owning to differences in language and customs, as well as lack of knowledge of each other's legal regulations, these communities were granted a degree of autonomy. Among other privileges, they enjoyed the right to appoint their own leaders (magistrates, later known as consuls), who were authorized to adjudicate civil disputes and criminal matters arising between their compatriots.

Thus, as early as 945, Byzantium agreed, in a treaty with Kievan Rus', that Russian merchants would enjoy the protection of their chief, who was empowered to resolve disputes among them. A similar privilege – the right to appoint magistrates with jurisdiction over civil and criminal matters involving their compatriots – was granted by Byzantium also to the Venetians in 1060. Subsequently, in 1190, by means of a Golden Bull, the Byzantine authorities authorized Venetian elders to adjudicate disputes between Venetians and local (Byzantine) citizens. Comparable rights were soon extended to the trading colonies of other cities, including Genoa (1204), Montpellier (1243), and Narbonne (1340) (Zourek, 1957, pp. 73-74; Lee, 1961, pp. 4-5; Đorđević & Mitić, 2000, p. 161).

Byzantium is highlighted here because of its particularly important role in international trade during this period, but even more because consulates and consuls first emerged in Europe within the Byzantine Empire as mechanisms for regulating relations between Byzantium and the rest of Europe. From there, these institutions gradually spread to other regions.

3.2.3. Overseas Consuls

In pursuit of profit, wealth, and influence, merchants throughout the Mediterranean were often willing to relocate from one commercial center to another and to reside for extended periods, sometimes for years, in foreign trading hubs. Consequently, most major commercial centers hosted a significant number of foreign merchants who had settled abroad in the course of expanding international trade. Thus, Italian cities were home to a large number of merchants from the Levant. Nevertheless, large-scale merchant migrations was even more pronounced in the opposite direction, from the ports of southern and western Europe towards the East (Koehler, 2014, p. 187).

This practice became particularly widespread during the time of the Crusades (11^{th}–13^{th} centuries), when many European trading cities established commercial settlements in the Middle East and North Africa. The Italian city of Amalfi founded their commercial settlements in Acre (1110), Tire (1123), the Kingdom of Jerusalem (1157), and Antioch and Tripoli (1170). Likewise, Marseilles obtained permission to appoint consuls in its colonies at Tyre and Beirut (1223), while Montpellier acquired similar rights in Antioch and Tripoli (1243) (Zourek, 1957, pp. 73-74). Indeed, it may be said that during and after the Crusading period many Italian, French, Spanish, and other European commercial cities maintained overseas trading colonies in the Middle East and North Africa, and subsequently in other regions. Among the most prominent were Venice, Genoa, Naples, Florence, Amalfi, Pisa, Bari, Ancona, Savona, Marseille, Montpellier, Narbonne, Valencia, Barcelona, and Ragusa (Dubrovnik).

One author goes so far as to argue that the institution of the consul originated during the Crusades, stating that: "The crusaders took with them a multitude of merchants, who boldly settled in the Levant and remained there among the Muslims, who again have become masters of the land. In this way, in the larger ports of the East, some kind of Christian colonies were formed, which sought the protection of the great trading cities of the Mediterranean Sea. There were, for example, colonies of Venetian merchants, colonies of Genoese, colonies of the corporation of Montpellier or Barcelona, etc. These Christian groups, competing with each other and lost in the midst of the hostile population, soon felt the need to group themselves in quarters and to create an autonomous organization for themselves. In order to use the prestige of the Roman consuls, the heads of these groups took the name of consul, as a symbol of the sovereign heads of ancient Rome" (Moa, 1025, p. 234).

Some scholars likewise contend that consular institutions emerged in the aftermath of the Crusades, when Italian, French, and Spanish merchants settled permanently in the cities and ports of the Levant. According to this interpretation, the distinctive nature of Islamic law made the application of Sharia law to these foreign communities problematic. At the same time, Muslim rulers, seeking to encourage and maintain commercial activity, granted foreign merchants various privileges, including exemption from the jurisdiction of local Islamic courts. Under such circumstances, the members of the trading colonies elected consuls who exercised extensive jurisdiction over their compatriots in civil and criminal matters (Degan, 2011, p. 322).

While there is no reason to denying that such developments occurred, it is doubtful that this account provides a fully accurate picture of the origins of the consular institution. First, the Crusades took place between the late eleventh and the late 13th centuries (1095-1291), whereas the earliest foreign trading communities with their own elected leaders (whether magistrates or consuls) had already appeared much earlier, during the 8th to 10th centuries, and in some cases even before that. Moreover, simple logic suggests that mere organization of European merchants into self-governing groups would not, in itself, have guaranteed their survival, if their protection and freedom had not been guaranteed by local rulers.

Historical evidence confirms that Western merchant colonies were established and survived only where local authorities permitted their presence and afforded them protection and specific privileges necessary for life and business. A notable example is provided by Harun al-Rashid, the most renowned Abbasid caliph, who as early as the 9th century granted certain guarantees and privileges to merchants from Western Europe, including subjects of the Frankish king Charlemagne.

What is particularly important in this context is that European merchants residing in overseas trading colonies began to elect consuls-judges, following a model already familiar in European port cities. Over time, however, these officials gradually transcended their original judicial function, acquired additional powers, and came to serve as the leaders of all persons belonging to the respective colony.

Indeed, foreign merchant settlements, which were concentrated primarily in port cities, succeeded in obtaining a degree of autonomy from the territorial authorities. Local rulers, particularly in Muslim countries, had a strong interest in securing the inflow of certain Western goods, including timber, iron, high-quality armor, salt, wool, furs, and various food products. They also sought to promote trade with other regions through foreign merchants. At the same time, however, they recognized that foreign traders would be unwilling to settle and conduct business without adequate security guarantees and the granting of specific privileges. Moreover, this period was characterized by the prevalence of the principle of the personality of the law, according to which individuals were subject to the legal system of the state to which they owed allegiance rather than that of the territory in which they resided. On this basis, foreign merchant communities succeeded in securing the right to have civil disputes among their members, and in some cases even criminal matters, adjudicated by their own elected elders. Initially, these were known as magistrates, but later came to be referred as 'overseas consuls' (*consules ultramarini*). Over time, the designation was shortened to simply 'consuls.'

This development is widely regarded as the origin of modern consular institution (Мартенс, 1996, p. 45).

These elected elders performed a dual function. On the one hand, they exercised administrative and judicial powers, and were responsible for ensuring compliance with maritime and commercial laws and customs, as well as for adjudicating civil and commercial disputes among members of the respective communities. On the other hand, they fulfilled a representative function by acting on behalf of their fellow merchants from the same colony before local authorities and at trade fairs.

Such 'consuls abroad' were already present in the 12th-13th centuries in the principal ports and cities of the Western Mediterranean, and subsequently appeared along the Atlantic, North Sea, Baltic, and Black Sea trade routes. Their presence was not limited to seaports, but also extended to inland commercial centers.

Thus, for example:

- The Italian city-states appointed consuls not only in other Italian cities but also in France, Spain, London, the Netherlands, and elsewhere. As early as the 13th century, they were granted the right to maintain their own consuls in Spain, endowed with extensive powers. In some cases, these consuls were authorized to adjudicate not only disputes among members of their own merchant colony but also disputes between those merchants and Spanish subjects. In 1251, the Spanish king Ferdinand III recognized such rights, together with other privileges, for Genoese merchants and their consuls (Đorđević & Mitić, 2000, p. 162);
- Venice maintained its consuls in more than 30 foreign cities;
- During the same period, the Hanseatic and Flemish cities established a large number of trading posts along the Atlantic and the Mediterranean coasts. These were headed by elected elders bearing various titles – alderman, conservator, praetor, and consul (Rivijer, 1897, p. 556; Đorđević & Mitić, 2000, p. 162);
- other states likewise maintained their own merchant colonies and appointed consuls to lead them. For example, England had consuls in the Netherlands, Sweden, Denmark, Norway, and in Pisa, Italy, who for a certain period exercised both civil and criminal jurisdiction over merchants of English nationality (Oppenheim, 1920, p. 589);
- Owing to the presence of its merchant communities in the interior of the Balkan Peninsula, Dubrovnik appointed its first consuls in the non-coastal Balkan states as early as the 13th century. By the end of the 14th century, it maintained 15 consuls in the region. By the 16th century, Dubrovnik had as many as 81 consular representatives in various countries: 50 consuls and consuls general, and 31 vice consuls. Of these, 23 were stationed in Italian and 23 in Ottoman ports, 19 in Spanish ports, five in French ports, five in North African ports, and one each on the Venetian islands of Zante and Corfu, as well as in Portugal, in Odesa, Malta and in Rijeka (Mitić, 2006, 35, pp. 39-40).

3.3. Further Development

Since the 16th century, the institution of consuls developed along divergent lines in relations among Western European states and in their interactions with the so-called non-Christian nations.

2.3.1. Consuls in Western Europe

As already noted, in Western Europe until the 12th and 13th centuries, consuls-judges were known to resolve disputes among members of merchant colonies in foreign territories (Kreća, 2012, p. 140). This aspect is typically foregrounded in the literature and rightly so.

Moreover, at a time when powerful centralized states with effectively absolute jurisdiction over their territories had not yet emerged, and when a network of permanent diplomatic missions had not yet developed, consuls exercised a broad range of powers and responsibilities, which varied according to time and place. Among other functions, they:

- performed occasionally diplomatic functions, ensuring the consistent implementation of agreements concluded between their home state and the country in which they perform their functions, and in some cases acting as diplomats or political representatives of their state;
- exercised also a range of powers over their compatriots abroad, including the protection of their rights and safeguarding them against insults or abuses committed by local authorities or residents; ensuring compliance by their compatriots with both the laws of their state of origin and the regulations of the host territory; exercising a form of supervisory authority over their nationals abroad; compiling birth and death certificates; and conducting probate proceedings following the death of their nationals;
- hey also dealt with maritime matters, including supervising the payment of maritime dues and taxes, maintaining order on their country's merchant ships in port, participating in investigations in cases of a shipwrecks involving their country's ships, and taking measures to ensure the rescue of both crew and cargo;
- performed certain commercial functions, such as authenticating trade contracts, acting as witnesses to their conclusion, and performing related activities (Кожевников, 1968, p. 76).

Along with the consolidation of states and the strengthening of their sovereignty, territorial jurisdiction gradually supplants personal jurisdiction, as states increasingly extend their authority over all persons and objects within their territory. As a result, consuls cease to exercise criminal and civil jurisdiction, which is transferred to the exclusive competence of the courts of the territorial state.

At the same time, during the 17^{th} and 18^{th} centuries, modern permanent diplomatic missions emerged. Consequently, consuls gradually lost their former diplomatic functions and the associated diplomatic status, as well as many of their privileges and immunities.

Although consuls ceased to function as independent heads of merchant colonies in a foreign ports and as adjudicators in disputes among members of those community (Bartoš, 1956, p. 537), they did not disappear but instead acquired new functions and a transformed role. In terms of status, they evolved from elected elders of autonomous merchant communities into state officials, endowed with corresponding powers, privileges, and immunities.

The changes also extended the functions of consuls. In the period marked by the rapid development of shipping and transport more broadly, and particularly by the expansion of international trade, the role of the consul came increasingly to be defined by the protection of the interests of the designating country and its citizens and legal entities, especially in the fields of trade, navigation, and industry, as well as by assistance to national ships and their crews, among other duties. In this way, consular activity gradually assumed the contours of the functions performed by consuls in the modern era.

3.3.2. European Consuls in Non-Christian Countries

Regardless of the institutional changes that took place in Europe, in the countries of the East, Africa, and later Asia (the so-called 'non-Christian countries'), European consuls retained – and in many cases even strengthened – their earlier role, along with their special powers and privileged status (Rivijer, 1897, pp. 577-592; Moa, 1925, p. 236; Le Fir, 1934, pp. 282-283; Novaković, 1938, pp 66-72; Bartoš, 1956, p. 537). This status had already been legally recognized from the 12th-13th centuries onward and became increasingly formalized in later periods.

The agreements known as capitulations, which European powers imposed on the territorial states, established a special international legal framework (the so-called capitulatory regime).[13] Its essential features included the exemption of subjects of Christian countries from the authority and laws of the territorial state; their exemption from local taxation; the right to reside in a designated city district enjoying inviolability and extraterritorial status; and their freedom of movement, trade, crafts, and related activities.

An integral component of that regime consisted of the special rights and privileges granted to consuls of Christian countries, including diplomatic immunity; the right to exercise the so-called consular jurisdiction (i.e., the tight to adjudicate civil and commercial disputes among their nationals, between them and other foreigners, and, in some cases, even between their nationals and subjects of the territorial state, as well as, on occasion, criminal cases); the right to exercise certain administrative and police functions; the right to grant the so-called consular asylum

[13] It is believed (e.g. Moa, 1925, p. 240) that the term for these agreements derives from their division into chapters (Latin *capitulum,* meaning a chapter of a book, document, or contract). Another explanation is that the term originates from the fact that these were often unequal agreements, typically imposed after the military defeat of the one party (i.e., its capitulation) or, at minimum, under military pressure.

(refuge within the consular premises); and the right to receive free of charge from the territorial state an armed guard for the continuous protection of the consulate and an armed escort for the consul personally, among other privileges (Thayer, 1923, pp. 207-233; Lopičić & Lopičić Jančić, 2013, pp. 24-27).

Privileges of this type were obtained by Genoa in Antioch (1098); Venice (1123), and Marseilles (1136) in Jerusalem; Pisa in Morocco (1133) and Egypt (1173); Montpellier (1267) and Narbonne (1377) in Alexandria; and then subsequently by other countries in other regions, including Beirut, Tripoli, Rhodes, and Cyprus (Zourek, 1957, p. 73). Similar arrangements also existed in the Ottoman Empire (Thayer, 1923, pp. 207-233; Sousa, 1933), as well as in Egypt, Abyssinia (modern Ethiopia), Persia, Lebanon, Tunisia, Syria, Libya, Algeria, Morocco, China, Japan, Siam (modern Thailand), and Korea.

When Muslim countries regained control over territories in which colonies of Western traders were already established (for example, the Arab states following the expulsion of the Crusaders, and the Ottoman Empire after the conquest of Constantinople in 1453), they found it advantageous to continue granting certain privileges, as such concessions were essential to ensure the continued presence of foreign merchants. Accordingly, the Ottoman Empire concluded a series of special treaties with Genoa (as early as 1453), Venice (1454), France (1535), England (1583), and the Netherlands (1612), among others, which exempted foreigners from local jurisdiction, while simultaneously recognizing the civil, criminal, and administrative (police) jurisdiction of foreign consuls. Thus, for example, the Franco-Ottoman treaty of 1535 expressly provided that only the French consul was competent to adjudicate civil and criminal disputes arising between merchants and other subjects of the French king (Ильин, 1969, pp. 8-9). Once established, this regime was subsequently renewed through successive treaties, whereby the rights of Western countries were generally confirmed and, in some cases, even expanded (Đorđević & Mitić, 2000, pp. 162-164; De Groot, 2003, pp. 575-604; Cassano, 2021, pp. 171-199; Krivokapić, 2023, pp. 158, 718).

In highlighting the exceptionally privileged position of Christian consuls, Novaković cites Ribeiro dos Santos and Barrett, although he provides only the authors' names without identifying the work from which the quotation is taken. According to this account: "Consuls can live wherever they want. They have complete freedom of religion; they may establish places of worship in their homes and invite their countrymen to attend worship. They may appoint whomever they wish to travel on official business by land and sea without hindrance. Nothing may be taken from them or withheld. They may leave the country whenever they wish. They have the right to list the property of their countrymen who die without heirs in their territory. They, their officials, and their servants are exempt from duties and taxes. They are the natural judges of their countrymen. Not even the slightest insult may be inflicted upon them, whether by actions, gestures, or words. They may take under their protection any ship or any other person upon request. If a person under their protection is arrested, they may demand his release, vouching for him. Their houses are safe havens. They are exempt from customs duties on goods intended for their personal use, as well as from other similar charges. They may neither be arrested, nor tried; if they commit abuses, they would be returned to their own governments. They are provided with Janissary guards or other soldiers, for whom they are required to pay nothing...” (Novaković, 1938, p. 70). From the reference to Janissary guards, it may reasonably be interred that the privileges described in this passage relate to the position of consuls in the Ottoman Empire during the relevant period.

This practice subsequently expanded, particularly during the 19th century, when Western powers secured through treaty arrangements a privileged legal status for their nationals and consuls in many Asian countries.

One author described this situation in the following terms: “In certain non-Christian states of Asia and Africa, consuls were entrusted with much greater functions and enjoyed much greater privileges than was normally the case in relations among modern civilized states... The differences between European states and those countries in terms of culture, state organization, and the understanding of morality in public and private law led European states to maintain commercial and political relations with the aforementioned states of the East and the Far East only under certain conditions, and among these conditions was the requirement that the subjects of European states be exempt from the jurisdiction of the local authorities and be placed under to the judicial and police authority of their own state. The European state entrusted this exceptional power to its consul, and, in addition, sought full diplomatic privileges for him. However contrary this arrangement may have been to the state’s independence and its right to exercise exclusive police and judicial powers within its territory, the non-Christian states accepted this limitation of their sovereignty because it was the only means by which regular economic relations with European states could be maintained.” (Novaković, 1938, p. 66).

Without questioning the sincerity of the author’s convictions, we believe that his description of the relationship between Christian and non-Christian states, particularly their legal inequality, is broadly accurate. However, serious reservations must be expressed regarding some of the assumptions and arguments used to explain the establishment of the capitulatory regime. In effect, the author appears to accuse, even if inadvertently, non-Christian countries of being uncultured and immoral. Similarly, the argument implies that the European states were conferring a benefit upon the countries of Asia and Africa by maintaining economic relations with them. Such an interpretation is difficult to reconcile with the broader historical record, which generally portrays European expansion as closely connected with colonial domination and the imposition of political, economic, and legal arrangements favorable to European powers. Indeed, the capitulatory regime in China was established through a series of unequal treaties following the country's defeat in the First (1839-1842) and Second (1856-1960) Opium Wars.

Over time, the circle of privileged countries expanded to include not only the European powers but also the United States and Japan. The last treaty establishing this regime was concluded between Austria-Hungary and Korea in 1893 (Omčikus, 1934, p. 5).

The capitulatory regime, including the privileged status of consuls and the exercise of consular jurisdiction, constituted one of the legal manifestations of colonial domination. Consequently, its decline followed the broader retreat of colonial system, which began to be dismantled in the early 20th century and disappeared entirely after the Second World War. More specifically, the Ottoman Empire abolished the capitulatory regime in 1923, Thailand in 1925, Iran in 1928, Egypt in 1937, China in 1943, Morocco and Tunisia in 1956 (Zourek, 1957, p. 76).

3.3.3. Consuls as Public Officials

As an institution with a long and fascinating history, the consuls evolved from a judge in maritime and commercial disputes in seaports, to an elected representative and elder chosen by the members of merchant community abroad (Latine, *consules electi*, from *electus*, meaning 'chosen'), and ultimately to a public official, a distinct category of state emissary. Beginning in the 16th and17th centuries[14] consuls increasingly came to be appointed by states as their official organs. Accordingly, they became known as sent consuls (Latine, *consules missi*, from *missus*, meaning 'sent', derived from *mittere*, 'to send').

During the era of absolutist monarchies, as the central government of states became increasingly consolidated, the countries from which merchant communities originated, or whose nationality their members possessed, gradually established greater control and supervision over those communities and their members. At the same time, they extended their protection to them. As a result, consuls evolved into public officials of the state, systematically dispatched abroad with the special task of safeguarding national interests, particularly by promoting international shipping and trade, protecting the state's nationals, and regulating relations among them.

[14] There are, however, views that certain cities, such as Marseille, had already begun by the 13th century to dispatch their own consuls as state officials to other countries for the purpose of protecting the interests of their citizens (Moa, 1925, p. 234).

At the same time, the territorial states, i.e., receiving states, whose central government had likewise become stronger, were increasingly unwilling to permit any entity other than their own authorities to exercise administrative or judicial powers within their territory. Consequently, these functions were gradually excluded from the sphere of consular activity. One reason for this development was that, although the powers exercise by elected consuls within foreign merchant communities could previously be understood as a form of autonomy, such an interpretation lost its basis once consuls became officials of foreign states. The exercise of administrative or judicial authority by foreign state organs would have constituted an infringement of the sovereignty of the territorial state.

Although known since the 13th century, honorary consuls came into increasingly frequent use from the 18th century onward (Ernst, 2011, para. 7). Unlike career consuls – public officials for whom consular service is a profession and who are, as a rule, nationals of the sending state – honorary consuls are most often appointed from among prominent citizens of the receiving state. They perform consular functions on an incidental basis, alongside their principal occupation, and without remuneration. Their motivation for accepting such appointments is usually a degree of affinity for the sending state, although it is also evident that the position confers certain benefits, including social prestige and enhanced opportunities for establishing and maintaining important professional and diplomatic contacts.

On the other hand, the interests of the sending state are evident; the use of honorary consuls results in considerable cost savings, as it eliminates the need to dispatch career officials and bear the associated expenses. At the same time, owning to their personal reputation and networks, honorary consuls may enhance the representational capacity of the sending state and facilitate access to influential circles in the host country. Although their international legal status is, in principle, comparable to that of career consuls – subject to certain differences in the scope of privileges and immunities – in practice their functions are generally more limited than those of career consuls, since states typically entrust them with only selected consular functions rather than the full range of consular responsibilities. In subsequent centuries, the institution of honorary consuls became increasingly widespread.[15]

The further development of international cooperation, particularly in trade but also in transport, tourism, and sports, led to the rapid expansion of consular relations and consular law. This development, together with the continuous

[15] It is estimated that there are approximately 20,000 honorary consuls worldwide today, of which around 1,200 are located in the United States alone. At the same time, the United States has not appointed honorary consuls since 1924. (Diplo, Honorary Consuls, www.diplomacy.edu/topics/honorary-consuls/, 3. 7. 2026)

emergence of new states, contributed to the steady increase in the number of consular missions and consular officials, a trend that continues to the present day.

Today, it is practically impossible to determine the total number of consulates and consular officials worldwide. This is due, first, to the increased number of states (now approximately 200), and second, to the fact that a state may maintain more than one consular post in a single foreign country. In addition, such mission may employ several consular officers, while consular representation includes both career and honorary consuls. Moreover, consular functions are often performed by members of diplomatic missions serving in the consular sections of embassies.

Nevertheless, it is useful to present at least some available data in order to obtain a general impression. According to certain statistics referring only to separate consular missions, and excluding consular officers within diplomatic mission who also perform consular functions, in 2023 the number of consular posts was as follows: Turkey – 93, China – 91, United States – 83, Italy – 74, Russia – 74, France – 72, Mexico – 71, Japan – 66, Spain – 65, South Korea – 60, Germany – 56, Argentina – 54, United Kingdom – 51, and India – 50, among others.[16]

4. Characteristics of Modern Consuls

Compared with the relatively recent past, the role and status of consuls in the contemporary period have undergone substantial transformation. It is, therefore, unsurprising that many authors refer to 'modern consuls' and 'modern consular relations' or contemporary international consular law, thereby emphasizing that consuls, consular relations, and consular law have undergone a series of transformations (Торшина, 2009, pp. 263-282; Haynal *et al.*, 2013; Green Hofstadter, 2020; Milisavljević, 2021, pp. 121-136; Naskou-Perraki, 2025, pp. 71-89, 103-124, 141-152). In order to obtain a clearer picture, it is useful to compare modern consuls both with their historical predecessors and, on the other hand, with diplomatic representatives.

4.1. Comparison with Earlier Consuls

In the course of its evolution, the institution of consuls has undergone numerous fluctuations, which immediately raises the question of which of their predecessors – belonging to which period and which region – should be used as a basis for comparison with modern consuls.

[16] Diplomacy Index 2021, Overall, Lowy Institute, https://globaldiplomacyindex.lowyinstitute.org/country_ranking, 26. 3. 2026.

Recognizing that this approach involves a certain degree of simplification, we will compare contemporary consuls with the earliest consular forms, namely those who emerged in Europe, as well as with consuls who, under the capitulatory regime, continued to operate in certain regions of the world until the end of the Second World War. The differences concern several fundamental aspects, which will be outlined only briefly below.

1. Method of selection or appointment. Unlike consuls in earlier periods, who were elected from among the members of merchant colonies abroad, contemporary consuls are appointed by the state they represent.

2. Functions. The functions of consuls have changed considerably over time, eventually being reduced to those defined by the Vienna Convention on Consular Relations (VCCR, 1963), which codified consular relations at the universal (global) level.

3. Powers. As a consequence of these functional changes, consular powers have also evolved. The most striking difference is that contemporary consuls are, in principle, not authorized to perform diplomatic functions and, in particular, do not exercise judicial powers within the territory of the receiving state.

4. Privileges and immunities. In certain stages of their historical development and in specific regions, consuls enjoyed privileges and immunities that were recognized alongside those of diplomatic representatives and, in some respects, even exceeded those granted to diplomatic agents in the modern era. Today, however, their privileges and immunities are generally of a lower level than those accorded to diplomats and, in certain respects, are more limited than those enjoyed by the administrative, technical, and even service staff of diplomatic missions.[17] In the contemporary period, consuls may exceptionally enjoy diplomatic privileges and immunities only where this is expressly stipulated by a bilateral or other international agreement.

[17] Unlike diplomatic agents and the administrative and technical staff of diplomatic missions, consular officers do not enjoy general immunity from the jurisdiction of the courts of the receiving state, except in respect of acts performed in the exercise of consular duties. In cases serious offences, and pursuant to a decision of the competent judicial authority, a consul may be liable to arrest or detention pending trial. Consuls are exempted from the obligation to give evidence only with regard to matters related to the performance of their official duties (Arts. 40-44 of the Vienna Convention on Consular Relations (VCCR, 1963). Moreover, the VCCR does not guarantee consular officers, including heads of consulates, the inviolability of their private residence. In this regard, it has long been argued that the continuation of the traditional hierarchy of immunities may warrant reconsideration, particularly in light of the paradox that greater immunities may, in some cases, be afforded to certain categories of embassy staff such as cooks, chauffeurs or other service personnel, than to consular officers (Lee, 1961, p. 224).

4.2. Comparison with Diplomatic Representatives

In certain historical periods, in some regions, consuls bore a close resemblance to diplomatic representatives. In the contemporary era, however, a clear distinction is generally drawn between these two forms of external representation of the state.

4.2.1. Differences

Although consuls continue to have many similarities with diplomatic representatives, in the contemporary era, they differ from them in several fundamental respects: (1) their distinct historical origins and patterns of development; (2) the scope of their territorial jurisdiction; 3) the authorities of the receiving state with which they communicate; 4) their subject-matter jurisdiction, i.e., the functions they perform; and 5) the scope of the privileges and immunities accorded to them.

1. Different origins and historical development. The emergence of diplomatic representatives and consuls was driven by different historical needs. Diplomatic representatives – initially within special missions and later within permanent diplomatic missions – have traditionally served as representatives of their sovereign. By contrast, the consul's role was, in principle, more modest and reduced to addressing far less glamorous, albeit important, practical matters. Given their distinct original functions, the historical development of the institution of diplomatic representation and consular representation followed different trajectories. This distinction remains evident today. At the universal (global) level, diplomatic law and consular law are codified in separate international instruments: the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963), respectively.

2. Territorial jurisdiction. Unlike a diplomatic mission, which performs its functions throughout the entire territory of the receiving country, a consul exercises its functions in a more limited and clearly defined territory - a port, a city, a region, or another designated area.[18] This territory is known as a consular district. Its boundaries are determined on the basis of practical considerations, and it often includes a port regularly visited by ships of the sending state, an area in which a significant number of migrant workers from the sending state reside, or a region inhabited by members of a national minority whose kin-state in the sending state.

[18] However, there are exceptions to this rule. In exceptional circumstances, and with the consent of the receiving state, consuls may perform their functions outside their consular district. In addition, where the appointing state maintains only a single consular post, or only one consular section within its diplomatic mission, in the receiving state, the consular district may encompass the entire territory of the receiving state.

In those parts of the receiving state's territory that do not fall within the jurisdiction of a particular consular district, consular functions are generally performed by the consular section of the diplomatic mission of the sending state.

3. Communication primarily with local authorities. Given that their territorial jurisdiction is limited to a specific consular district, consuls, in principle, deal primarily with the competent local authorities within that district rather than with the central authorities of the receiving state. This reflects the nature of their functions, which are generally limited to practical and non-political matters.

This constitutes a significant difference from diplomatic representatives, who, as the political representatives of their sending state, communicate directly with the highest authorities of the receiving state, including the head of state, the prime minister, the minister of foreign affairs, and other senior government officials.

4. Subject-matter jurisdiction. Unlike diplomatic representatives, who act as political representatives of the sending state before the highest authorities of the receiving state, and are therefore concerned with major foreign-policy issues, consuls perform more specialized and practical functions. Their role is generally limited to taking concrete measures, in cooperation with the competent authorities within the consular district, primarily to protect the rights and interests of the sending state and its nationals, as well as its legal entities. Although the functions performed by consuls are of considerable importance in everyday life, they are, strictly speaking, non-political in nature.

The functions of consuls are set out in Article 5 of the Vienna Convention on Consular Relations (1963). They include, *inter alia*:

- protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- furthering the development of commercial, economic, cultural, and scientific relations between the sending state and the receiving state, and otherwise promoting friendly relations between them in accordance with the provisions of the Vienna Convention on Consular Relations;
- ascertaining, by all lawful means, conditions and developments in the commercial, economic, cultural, and scientific life of the receiving state, reporting thereon to the government of the sending state, and providing relevant information to persons interested;
- issuing passports and travel documents to nationals of the sending state, and visas or other appropriate documents to persons wishing to travel to the sending state;
- helping and assisting nationals, both individuals and bodies corporate, of the sending state;

- acting as a notary and civil registrar, and in capacities of a similar nature, and performing certain functions of an administrative nature, provided that such activities are not contrary to the laws and regulations of the receiving state;
- safeguarding the interests of nationals, both individuals and bodies corporate, of the sending state in cases of succession *mortis causa* in the territory of the receiving state, in accordance with the laws and regulations of that state;
- safeguarding, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons;
- subject to the practices and procedures of the receiving state, representing nationals of the sending state, or arranging for their appropriate representation, before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of that state, provisional measures necessary to preserve the rights and interests of these nationals, where, owning to absence or any other reason, they are unable to assume the defense of their rights and interests in a timely manner;
- transmitting judicial and extrajudicial documents, or executing letters rogatory or commissions to take evidence for the courts of the sending state, in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving state;
- exercising rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels having the nationality of the sending state, and of aircraft registered in that state, and in respect of their crews;
- extending assistance to vessels and aircraft having the nationality of the sending state, and to their crews; etc.

The Convention (Article 5(m)) expressly provides that consular functions also include any other functions entrusted to a consular post by the sending state, provided that such functions are not prohibited by the laws and regulations of the receiving state, are not objected to by the receiving state, or are not referred to in the international agreements in force between the sending state and the receiving state (on consular functions, see: Sen, 1965, pp. 227-244; Đorđević & Mitić, 2000, 188-213; Lopičić, 1992, 45-56; Haynal *et al*., 2013).

From this provision it is evident that consular functions in the contemporary period are not only clearly distinct from diplomatic functions, but also, in their essential structure, correspond broadly to the functions that emerged in Europe several centuries earlier.

5. Privileges and immunities. As non-political representatives, consuls enjoy, under general international law, a significantly lower degree of privileges and immunities than that accorded to diplomatic agents. Similarly, consular officers and consular staff benefit from a lower level of protection and privileges than that granted to the administrative, technical, and service personnel of diplomatic missions. Finally, consular premises enjoy a lesser degree of inviolability than the premises of diplomatic missions.

6. Different classes. While there is a clear hierarchy among the diplomatic staff of a diplomatic mission (i.e., those members who possess diplomatic capacity), there is no comparable system of multiple ranked missions, since the receiving state may host only one permanent diplomatic mission (an embassy) of the sending state, headed by a single chief of mission.

By contrast, since a sending state may maintain several consular posts in the same foreign state, consular establishments may be differentiated according to rank. In such cases, the consulate-general occupies the highest rank, followed by the consulate, the vice-consulate, and the consular agency. Accordingly, heads of consular posts are, in contemporary practice, classified into four categories: (1) consuls general, (2) consuls, (3) vice-consuls, and (4) consular agents.[19]

7. Other distinctions. There are also other, important yet less immediately visible differences, which are particularly apparent to practitioners in diplomatic and consular services. These relate, *inter alia*, to the nature of interactions, i.e., who visits a diplomatic or consular mission, and whom diplomats or consuls themselves visit.

Thus, for example, it has been rightly observed: "In addition to senior officials of the receiving country, senior political and economic delegations of the sending country usually visit diplomatic missions, while consulates are usually (albeit not always) approached by individuals in need of assistance, most often from the lowest social ladder of the sending state's nationals. These are often persons affected by measures taken by the authorities of the receiving state, such as imprisonment, expulsion, denial of certain rights, or various accidents, or by difficulties such as loss of money or travel documents, etc.)" (Đorđević & Mitić, 2000, p. 160).

A further, and in practice, quite clear, distinction also exists in the reverse direction, i.e., with regard to those whom diplomatic agents and consuls respectively visit. In this regard, it has been observed: "The daily work of a diplomat consists in visiting the Ministry of Foreign Affairs and other high institutions of the receiving state, and attending various receptions and official gatherings, whereas a consul, in most cases, visits prisons, police stations, morgues, hospitals, courts, and many other places where his fellow nationals may find themselves in distress

[19] Article 9(1) of the he Vienna Convention on Consular Relations (1963).

or in a particularly difficult circumstances. The State Department, in a popular brochure on consular functions – functions which are so broad and difficult to exhaust – begins its information by listing those matters with which consulates do not deal, and in which citizens cannot expect consular assistance and service." (Đorđević & Mitić, 2000, p. 160).

4.2.2. Cumulation of Diplomatic and Consular Functions

As has been shown, consuls and diplomatic agents emerged and developed independently, and even today they remain, in principle, distinct categories. Nevertheless, in the contemporary period, the gap between them has gradually become less pronounced.

In the past, diplomatic and consular functions, as well as the officials performing them, were clearly separated. Although this distinction formally persists, in modern practice, both diplomatic and consular functions are often performed by officials permanently employed within the Ministry of Foreign Affairs of the respective state. Moreover, it is not uncommon for the same officials to serve abroad at different times, sometimes in a diplomatic capacity and other times in a consular capacity.

Furthermore, consular functions may be performed not only by consular posts but also by consular sections of diplomatic missions.[20] Indeed, it is a common practice for consular affairs to be entrusted to members of a diplomatic mission who, in such cases, retain their diplomatic privileges and immunities and are not removed from the diplomatic list. This practice is referred to as the cumulation of diplomatic and consular functions.

On the other hand, consuls may, in exceptional circumstances, perform certain diplomatic functions on behalf of their state. Thus, in a state where the sending state has no diplomatic mission and is not represented by a diplomatic mission of a third state, a consular officer may, with the consent of the receiving state and without prejudice to his consular status, be authorized to perform diplomatic functions. The performance of such functions by a consular officer does not, however, confer upon him any entitlement to claim diplomatic privileges and immunities. A consular officer may also, after notification to the receiving state, act as the representative of the sending state to any intergovernmental organization having its seat in the territory of the receiving state. In such cases, the officer is entitled to enjoy

[20] This practice was confirmed in the Vienna Convention on Diplomatic Relations (1961), which in Article 3(2) provides that nothing in the Convention shall be construed as preventing a diplomatic mission from performing consular functions, and in the Vienna Convention on Consular Relations (1963), which (Article 3) establishes that consular functions may also be performed by diplomatic missions.

any privileges and immunities accorded to such representatives under customary international law or applicable international agreements. However, in respect of the performance of consular functions, the officer would not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the Vienna Convention on Consular Relations. [21]

5. Consular Law Throughout History

5.1. The Concept of Consular Law

In the most general sense, consular law may be defined as a body of legal rules governing the appointment, activities (functions), and legal position (rights, duties, privileges, and immunities) of consular officials (consuls) and consular posts (consulates), as well as other related matters.

This formulation is, of course, not without limitations. It lacks precision insofar as it is closely tied to the institution of the consul itself. Accordingly, a full understanding of it presupposes a prior definition of the consul. In addition, it does not explicitly address the social relations regulated by consular law, nor does it refer to its sources. Nevertheless, it remains as a broad introductory definition encompassing the entire range of legal norms concerning consular relations, which have varied significantly throughout history.

5.2. Development of Consular Law

The position, role, and powers of consuls have evolved considerably over time and across different regions. Owning to the nature of consular relations, these and others related matters – including the procedures for the appointment of consuls, as well as their privileges and immunities – have consistently been regulated by both international law and domestic law of states. In this regard, it may be noted that, as with many other legal matters, domestic (national) law initially played a particularly prominent role.[22] At the same time, international law has always been of significant importance and, over the course of time, has increasingly assumed a predominant position. Many scholars contend that by the 20th century, consular law had become established as a separate branch of international law. Although closely related to diplomatic law, it remains clearly distinct from it, just as consuls are differentiated from diplomats.

[21] Article 17 of the Vienna Convention on Consular Relations (1963).

[22] Various bulls, charters, orders, and other sovereign acts, and similar legal instruments.

Upon closer examination, it becomes evident that even the earliest consuls, known as consul-judges, operated within established legal frameworks determined primarily by domestic regulations. At the same time, they applied maritime and commercial codes that, in essence, constituted an early form of codification of customary law, including elements of international public law, international economic law, and international private law at the local and regional levels.

Subsequently, during the 16th to 18th centuries, as consuls increasingly became integrated into the state apparatus, national regulations governing the organization and functioning of consular services on a uniform basis throughout the state became progressively more common. The first provisions concerning the consular service were contained in the French decree *Ordonnance de la Marine* (1681), whose significance lies in the fact that it served as a model for the organization of consular services in other countries. Thereafter, additional regulations were enacted in France (1778, 1781, and 1833), while the United States (1792), Prussia (1796), Sardinia (1815), Russia (1820), Great Britain (1825), and the Netherlands (1838), among others, adopted their first legislation governing consular services (Đorđević & Mitić, 2000, p. 164). Although such instruments generally lack broader significance at the international level, they continue to constitute an important category of legal sources within individual states. Even today, the legal framework governing consular services in each country is largely determined by relevant provisions of domestic legislation, including consular statutes, consular rules of procedure, laws on consular services, and consular regulations.

In addition to regulating their own consular services, states have historically addressed certain issues concerning foreign consuls. Such matters were typically regulated by the local ruler, who guaranteed the special position and protection of foreign consuls through edicts, firmans, or similar legal instruments.

Nevertheless, the rules governing consular relations have always been contained primarily in the principal sources of international law, namely international customs and international treaties. Over time, the importance of these sources steadily increased.

For a considerable period, customary international legal constituted a very important source of rules governing consular relations. However, its reliance on custom gave rise to several significant limitations. First, the number of established customary rules in this field was relatively limited. Second, like customary law, in general, such rules often lacked precision as their content was not formally codified and was therefore subject to differing interpretations. Third, and perhaps most importantly, these rules lacked uniformity, with different regions often adhering to divergent practices and legal solutions as the appointment of consuls, the scope of their functions, and their legal status.

However, states with interest in developing and regulating consular relations soon began to conclude international agreements. Moreover, some authors argue that consular law was initially governed by bilateral agreements and only subsequently evolved into a body of customary international law (Angelet, 2023, para. 1).

In states operating under the capitulatory regime, the status of consuls was regulated through bilateral agreements concluded between the respective Christian and non-Christian states. These agreements defined the special legal status and exceptionally broad powers of consuls representing Christian states, while also granting substantial privileges to European merchants. Among the earliest examples of such treaties were those concluded between Pisa and Morocco (1133), Venice and Egypt (1238), and Aragon and Tunisia (1285), among others. Notwithstanding their numerous shortcomings, these agreements represented a significant step forward at least from a formal perspective, as they regulated consular matters through international instruments negotiated between the states concerned. Bilateral treaties continue to constitute an important source of consular law today.

A particular curiosity lies in the fact that, in some cases, certain issues were regulated not by agreements between the sending and receiving states, but rather by agreements concluded exclusively among sending states, without the participation of the receiving state. This primarily concerns the order of precedence among foreign consuls. It was not uncommon for the receiving state – particularly in the case of smaller countries – in order to avoid disputes with more powerful foreign states, to refrain from regulating this matter directly, thereby allowing foreign consuls or their respective states to determine the order of precedence among themselves.

In practice, such arrangements frequently gave rise to disputes, as illustrated by the case in Belgrade in 1875 involving the German Consul General, Georg Rosen. Departing from the practice established by an agreement between foreign representatives in Belgrade in 1867, according to which precedence within the consular corps was accorded to those who, in addition to the rank of consul general, also held the status of diplomatic agent – Rosen demanded that foreign consuls be presented to the Serbian prince strictly according to the dates of presentation of their credentials. The Serbian Minister of Foreign Affairs rejected this claim, arguing that he was not competent to determine the rank of foreign representatives in Serbia and that such matters fell within the competence of the consuls themselves. At that, the German ambassador in Constantinople (Serbia at the time being an autonomous principality within the Ottoman Empire) issued a forceful demarche, demanding that the Porte instruct its vassal state, Serbia, on the appropriate conduct toward the representative of the major power such as Germany. Through the mediation of Russia and Austria, this incident, which threatened to have major diplomatic and political implications, was successfully resolved (Popov, 2006, pp. 455-468).

Further progress was observed in Europe as responsibility for the appointment and reception of consuls became fully assumed by the states, thereby giving rise to consular relations in their modern form. This trend gradually spread around the world and ultimately became the prevailing global model. The first international agreements that regulated, in a relatively modern manner, the reciprocal exchange of consuls between contracting states emerged in the second half of the 18th century. Notable examples include agreements concluded by France with Spain (1769), England (1787), Russia (1787), and the United States (1787), among others (Bartoš, 1956, p. 537).

The institution of the consul, in its modern form, and consular law more broadly, developed rapidly during the 19th century, when a wide network of bilateral consular conventions was concluded among a large number of states. Examples include agreements between France and the United States (1853), France and Venezuela (1856), the United Kingdom and the Netherlands (1856), France and Spain (1862), and France and Austria (1866) among others (Angelet, 2023, para. 2). Such agreements were concluded not only by major powers but also by smaller states.[23] Many of the rules and principles that remain in force today were established during this period.

This development was facilitated by the transition from the earlier system of elected consuls, who, as heads of expatriate merchant colonies, enjoyed a degree of autonomy in respect to the receiving state and performed their functions primarily in relation to members of their own community, to the modern institution of consuls, which constitute a distinct category of state officials, specialized in maintaining consular relations between states.

Consular relations constitute a specific form of relationship between two states (and thus between two sovereign entities), established through the conclusion of a relevant international agreement, such as a convention on the opening of a consulate on the basis of which each party permits the establishment of consular representation of the other party within its territory, subject to the limits defined by the agreement. In contemporary international law, this entails: (1) a clear recognition of consular relations; (2) their character as a specific type of official interstate relations; (3) their mutual establishment through treaty between two interested states; (4) their distinctness from diplomatic relations; and (5) the fact that their establishment and maintenance are not contingent upon the existence of diplomatic relations between the two states.

[23] Thus, after gaining full independence in 1878, Serbia concluded consular conventions with a number of states within a relatively short period. These included agreements with Italy (1879), Austria-Hungary (1881), the United State (1881), the Netherlands (1881), Germany (1883), France (1883), and the Ottoman Empire (initially on a provisional basis in 1886, and subsequently on a permanent basis in 1896), among others (Lopičić & Lopičić Jančić, 2013, pp. 33-47).

This leads to the concept of modern consular law. It may be defined as a body of norms, institutions, and principles governing consular relations between states, in particular the establishment and conduct of such relations, the procedures for the appointment and admission of consuls, consular functions, and consular facilities, privileges and immunities, among other matters.

In a narrower sense, consular law comprises treaty-based and customary international legal norms from this sphere of social relations. In a broader sense, it also encompasses relevant state legislation, which, within the limits established by international law, provides more detailed regulation of certain aspects essential to the functioning of consular services.[24] Accordingly, the sources of consular law are predominantly international in character, although they are supplemented by internal state regulations.

Alongside certain customary legal rules, which were not always sufficient and were at times ambiguous or even contradictory,[25] international treaties, particularly consular conventions, emerged in the 19th century as key sources of modern international law in this field. Consular conventions, understood as interstate agreements governing matters essential to the proper conduct of consular relations and the functioning of consular missions and their personnel, addressed issues such as the establishment of consular relations, consular functions, facilities, privileges, and immunities, among others.

As already noted, the earliest international agreements concerning consuls took the form of bilateral treaties concluded between the states concerned. This practice remains widespread today, with states frequently regulating their consular relations through bilateral consular conventions.[26] In addition to these, various other bilateral agreements between states, such as legal aid agreements, immigration agreements, and the like, also constitute relevant sources of consular law.

In addition to the bilateral instruments, consular matters are likewise regulated by certain regional agreements. Among the most notable in the American

[24] Thus, for example, the general arrangement of French consulates was first established by the *Ordonnance de la Marine* (1681) (Rivijer, 1897, p. 556).

[25] At the beginning of the 19th century, customary international law contained only a limited number of rules governing consular relations, privileges, and immunities. This gave rise to frequent misunderstandings and disputes, and in order to address these difficulties, states gradually developed a broad network of bilateral and, to a lesser degree, regional consular conventions, culminating in instruments such as the Havana Convention (1928) (Satou, 2013, p. 251).

[26] It has rightly been noted that, although consular law has been universally codified by the Vienna Convention on Consular Relations (1963), bilateral consular conventions concluded prior to its adoption remain in force. Moreover, states continue to conclude such treaties, which often address most of the issues regulated by the Convention, thereby reflecting the evolving needs of international cooperation (Angelet, 2023, para. 1).

context are the Agreement on Consular Functions (1911) and the Havana Convention on Consular Representatives (1928), while in Europe relevant examples include the European Convention on Consular Functions (1967).

The Consular Agreement between Bolivia, Colombia, Ecuador, Peru, and Venezuela, commonly referred to as the 1911 Agreement, was signed on 18 July 1911 in Caracas with the purpose of establishing uniform rules governing consular relations among the member states, particularly in situations where one of the contracting parties did not maintain a consular representative in the territory of another. In this regard, one of the most significant provisions is Article IV, which provides that a consul of one member state may represent the interests of nationals of another member state that lacks consular representation in the relevant locality. The agreement further contained provisions regulating additional matters, including extradition and asylum, among others).

Much more interesting, both in terms of the breadth and quality of its provisions and the relatively large number of participating states, is the Havana Convention on Consular Representatives, signed in the capital of Cuba on 20 February 1928. The Convention is particularly notable for its classification of consuls into distinct categories, while leaving the criteria for their appointment to the discretion of individual states. It is further significant in that it expressly prohibited the granting of diplomatic or consular asylum to persons accused or convicted of ordinary crimes. The Convention represented an important step in further development of international law in this field. It was ratified by 14 member states of the American States and entered into force in 1929.

The European Convention on Consular Functions was opened for signature within the Council of Europe on 11 December 1967, approximately four years after the signing and nearly one year after the entry into force of the Vienna Convention on Consular Relations (1963). In this respect, it is complementary to the Vienna Convention and may be regarded as a supplementary instrument, as it focuses specifically on consular functions. The Convention regulates the functions of consuls in member states, covering a broad range of those duties and powers, including the protection of nationals, assistance in relations with local administrative and judicial authorities, legal assistance, the performance of notarial acts (such as the legalization of signatures, certification of documents, and issuance of certificates), the administration of estate of deceased nationals, as well as functions related to shipping. It entered into force only on 9 June 2011, following the deposit of five ratifications, which constituted the requisite threshold for its entry into force. As of March 2026, its membership includes only Georgia, Greece, Norway, Portugal, and Spain. A further four states have signed it, but did not ratify it, while the remaining 37 member states of the Council of Europe have neither signed nor ratified it.[27] Nevertheless, it has been argued that the Convention has made a meaningful contribution to the development of international law in this field (Green, 1972, pp. 176-188; Maftei, 2016, pp. 102-108).

The most significant achievement in this field was the conclusion of the Vienna Convention on Consular Relations, signed in Vienna on 24 April 1963, and entering into force on 19 March 1967. This instrument effected the codification and progressive development of international law on a universal scale by regulating the principal issues of consular law, including the establishment of consular relations, the relationship between consular and diplomatic relations, consular functions, classes of consuls, honorary consuls, the issuance of exequatur, and consular immunities and privileges, among others. In contemporary international law, it constitutes the most important source of consular law. Along with the Convention, two optional protocols were concluded – the Optional Protocol on the Acquisition of Citizenship and the Optional Protocol on Mandatory Dispute Resolution. In addition to the Convention, the Optional Protocols entered into force on 19 March 1967. As of 26 March 2026, the Convention has 182 members. Although more than six decades have passed since its adoption despite the fact that it governs largely non-political matters of general interest to all states, it is noteworthy that 12 of the total 193 United Nations Member States are not yet parties to the Vienna Convention.[28]

6. The Perspectives of Consuls and Consular Law

Relying on the foregoing analysis, it might be concluded that the sphere of consular relations and consular law belongs to those areas which, after undergoing several transformations driven by practical needs, have been definitively and comprehensively regulated by general international law. However, such a conclusion would be incorrect.

First, experience demonstrates that no set of social relations is permanently stable or immutable. It follows that legal norms governing such relations cannot be regarded as fixed once and for all. Everything changes (*panta rhei*); one cannot step into the same river twice.

[27] Chart of signatures and ratifications of Treaty 061, Status as of 26 March 2026, Council of Europe, www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=061, 3. 7. 2026.

[28] Among the parties to the Convention is the Holy See, which is not a Member of the United Nations. Accordingly, only 181 United Nations Members States are currently bound by the Convention.

Consuls and consular relations are no exception to this general principle. Both they and consequently the branch of international law governing them (consular law) are subject to ongoing change. This is to be expected. While incremental adjustments are self-evident, the present discussion is concerned primarily with more substantial transformations. In this regard, there are grounds for anticipating that fundamentally different solutions may emerge in the relatively near future.

At first glance, the importance of the institution of consuls, the number of consuls, and thus the significance of consular law may be expected to increase over time. Given the current proliferation of consular actors and instruments, including consular conventions and related legal documents, this tendency appears to be reinforced by the growing number of states, expanding international economic and other cooperation, implying sustained growth of foreign investments and mobility. The rising number of foreigners in host states, including migrant workers, tourists, and athletes, further contributes to the expansion of cross-border relations falling under the purview of modern consular authorities. This suggests that the number of consuls and consular representations will continue to expand. Such assessments appear, at present, to be both logical and well founded. In this respect, it has been rightly pointed out that, within the global framework, the work of consuls is acquiring increasing importance, and that the notion of a form of 'consular internationalism' is even being formulated (Johns, 2025, pp. 60-83).

However, there is also room for an alternative line of reasoning. It is equally conceivable that, in the relatively near future, consuls may experience a gradual reduction in their functions and, ultimately, cease to exist. This outcome could arise for a variety of reasons.

We live in an era in which changes in the way of life, including international relations, occur at an exceptionally rapid pace. Many developments are changing, quite literally, before our eyes.

Indeed, if the current situation is compared with that prevailing at the time of the adoption of the Vienna Convention on Consular Relations (1963), i.e., little more than six decades ago, not only do many things look different, but contemporary realities are also undergoing continuous transformation. In this regard, three principal outcomes regarding the future of consuls may be envisaged: (1) the disappearance of consuls as a consequence of the physical extinction of humanity, (2) the transformation of the institution of consuls; and (3) the disappearance of consuls as an obsolete institution of international law.

1. The extinction of humanity. Given the contemporary global context, characterized by deep antagonisms and large-scale armed conflicts with consequences that remain difficult to predict, it is necessary to acknowledge the possibility of a broader civilizational catastrophe.[29] Indeed, some scholars argue that the world has already entered a Third World War, which began in the early 1990s but has thus far manifested primarily through a series of localized low-intensity conflicts that are not easily perceived as components of a single global confrontation. At the time of writing (early April 2026), armed conflicts continue to spread across different regions of the world, involving an increasing number of states, including nuclear powers. Consequently, the risk of a large-scale catastrophe may be greater today than it was during the Cold War (Krivokapić, 2024, pp. 79-116).

In this context, if humanity is confronted with a total global war, the institution of consuls may become irrelevant, as neither the need for such functions nor the individuals who would perform them would remain. Conversely, if such a conflict does not result in total devastation, it is conceivable that, within the surviving segment of humanity, certain relationships could revert to forms characteristic of earlier historical periods. In that case, consuls would likely retain their current functions, while certain aspects of consular activity might revert to practices associated with previous eras, such as those related to the capitulatory regime.

2. Transformation of the consul. If humanity demonstrates the wisdom and strength to survive in relative peace, the international community may enter a new reality more rapidly than is commonly anticipated. In such a scenario, the role of states is likely to diminish as many functions are transferred both to global and regional government structures and to a variety of non-state actors. Under these circumstances, the institution of the consul would probably persist, at least for a transitional period. Although consuls might lose some of their traditional functions, they could simultaneously acquire new functions. At this point, however, any more precise assessment of these potential developments would be largely speculative.

3. Disappearance of the consul. Although the prospect of a world that endures and the institution of the consuls disappears may appear unrealistic today, such a development is not inconceivable. Throughout history, many institutions of international law and international relations have, at various points, been completely abandoned, or even banned. Examples include the abolition of the capitulatory regime, consular judges, the right of states to wage war, the institution of formal declarations of war, privateering, the principle of *cuius regio eius religio*, bilateral river commissions (subsequently replaced by multilateral international bodies), the

[29] Less than four years ago, we published a paper examining the relationship between the Cuban Missile Crisis (1962) and the Ukrainian crisis that had just erupted at that time (2022), arguing that the world had once again found itself on the brink of a world war (Krivokapić & Vukadinović, 2022, pp. 349-366). The military actions undertaken by United States and Israel against Iran on 28 February 2026 have made the situation even more complicated and uncertain, threatening to spill over into a global armed conflict.

taking and retention of hostages, the international slave trade, and the belligerent right of angary.

But why might consuls disappear? Several developments suggest that such a possibility cannot be entirely dismissed. Various phenomena and processes that already characterize our reality could, in principle, indicate the potential trends in the near future. Only a few of the most significant examples will be considered here.

1. Today's world is characterized by processes of globalization, integration, and regionalization, as well as by the gradual demise of the role of the state and the emergence of new actors in international relations. These developments are also reflected in the evolution of international law (Кривокапич, 2022, pp. 515-544). At the same time, an increasing number of issues are being addressed the international level, accompanied by growing tendencies toward unification, rationalization, and automation. Over time, these trends may contribute to a decrease in the importance of bilateral diplomatic and consular relations, as an expanding range of functions is transferred to specialized and other international authorities and bodies.

2. At the same time, the role of the state continues to undergo gradual but persistent transformation. An increasing number of functions and competences are being transferred to various non-state actors, including non-governmental organizations, private enterprises, and other entities. While this process may alleviate certain burdens on the state apparatus, it also weakens its role. These developments also have implications for state institutions entrusted with the maintenance of international relations, and among them consular authorities.

3. Whereas states traditionally communicated with one another primarily through their official organs of international representation – namely heads of state or government, ministers or ministries of foreign affairs, and diplomatic and consular missions – contemporary international relations are characterized by an expanding range of issues addressed through direct contacts among specialized state institutions. Parliaments, competent ministries, courts, armed forces, police agencies, and other competent authorities increasingly engage in direct cooperation, finding new channels and reducing the need for the involvement of consular services.

In this regard, it has been rightly observed that "the state is not disappearing; it is disaggregating into its separate, functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. Today's international problems – terrorism, organized crime, environmental degradation, money laundering, bank failure, and securities fraud – create and sustain these relations" (Slaughter, 1997, p. 184). Indeed, it can be observed that state authorities increasingly communicate directly with their counterparts in other countries, establishing stable horizontal forms of cooperation without the need for consular involvement.[30] There is an ever-increasing range of activities and functions that, in the past, were carried out with greater or lesser participation of consuls but are now performed through other mechanisms.

4. Even diplomatic relations are today conducted in a manner that differs significantly from the past. Increasingly, heads of state or government negotiate directly and make joint decisions, whether through videoconferencing, telephone communications, or by using modern means of transportation that enable them to meet at the agreed place within a very short period of time. Within this framework, the role of embassies and ambassadors has gradually declined, as they increasingly lose their autonomy and assume a role of coordinators of activities that are even more firmly controlled by other, higher-level authorities. In a situation in which the position of diplomatic missions is weakening, it is only natural that these processes are also reflected in the position and role of consuls.

5. The role of transnational (multinational) companies – economic enterprises with branches in multiple countries and, in some cases, throughout the world – is constantly increasing. The largest among them already possess greater economic resources than most states, while their economic, political, informational, and other forms of influence continue to expand. As a result, they are increasingly engaged in conducting their own business diplomacy and managing their own international relations independently. Moreover, there are already grounds for considering such corporations a distinct category of subjects of international law (Krivokapić, 2017, pp. 110-127).

Although consuls, in principle, continue to provide the necessary information, interpret local regulations, and facilitate foreign investment and access to the host country's market, many transnational corporations prefer to rely on other mechanisms, such as direct contacts with the authorities of the respective state, the deployment of their own experts and negotiators, the engagement of leading local legal counsel, and similar arrangements. Because they regularly transfer personnel from one country to another, transnational corporations also develop mechanisms for overcoming visa-related obstacles that would otherwise require consular involvement. By communicating directly with the governments of the host countries, which are often highly interested in attracting foreign investment and therefore willing to offer various concessions, transnational corporations are able to resolve many issues that would traditionally fall within the scope of consular

[30] For example, today ministries of the interior directly conclude cooperation agreements; organizational units within these ministries communicate and cooperate directly with their counterparts abroad; and ministries of the interior are represented in corresponding institutions of other states through liaison officer, among other mechanisms.

functions. This leads to the conclusion that consuls are becoming progressively less important for the largest and most powerful economic actors.

6. To this, it may be added that business meetings and agreements are increasingly conducted through videoconferencing, the electronic exchange of correspondence and documents, and similar means, without the physical presence of the representatives of the parties concerned. This, in itself, reduces the circumstances in which consular assistance might be required. Since the individuals involved do not travel to a foreign country, many of the most common reasons for consular intervention naturally cease to exist. Such persons are not exposed to situations that may arise during a stay in a foreign country, including the loss of passports, theft of money or other property, arrest, death, and similar incidents.

7. In all likelihood, many of the functions currently performed by consuls (such as issuing documents to own nationals and granting visas to foreign nationals) will, in the foreseeable future, be performed much faster and at lower cost by computer programs and automated systems. This trend is likely to become increasingly pronounced as artificial intelligence, smart robotics, automation, digital data processing, and other technological innovations continue to develop and find wider practical application (Choi, 2006, pp. 117-132).

8. If an individual loses their passport or it is stolen, their identity can already be reliably established through modern biometric identification systems, including fingerprint analysis, iris scanning, face recognition, and voice recognition. In addition, given the increasingly comprehensive nature of data systems and the cooperation of states within Interpol, it is relatively easy to determine whether the person concerned is wanted or poses a security risk. Where no additional complications arise, once the identification has been completed, the foreign (territorial) state may also provide certain traditional consular services, such as issuing a one-way travel document enabling the individual to return to their country of origin. This is already done in some cases – for example, for foreign nationals who have lost their passports and whose countries do not maintain a diplomatic or consular mission in the host state. For such practices to evolve from exceptional measures into a general rule, a broader framework of international legal regulation would be required; however, there appear to be no fundamental preventing such a solution.

9. In our time, means of communication such as mobile phones and the Internet have developed at an extraordinary pace, so that a national who, for any reason, requires assistance abroad can very quickly and easily establish contact not only with their embassy, but also directly with their family members, friends, and the competent authorities in their home country.

If an individual has run out of money, family members can quickly and easily transfer funds through payment cards, postal or other money transfer services, or even settle debts and cover medical or other expenses remotely. If legal assistance is required, it is highly likely that relatives would prefer to seek out a lawyer themselves, rather than relay on a consul. Where intervention by the state of citizenship becomes necessary, the embassy of that state in the receiving state can assume responsibility for providing assistance, and, in exceptional cases, a special diplomatic mission may be dispatched. One possible option is for ministries of foreign affairs to establish a system of so-called ‘flying consuls’ (or ‘consular service shuttles’), namely *ad hoc* consular officers who would travel to a foreign country when necessary in order to resolve specific situations. Naturally, such arrangements would require prior regulation under international law; however, there appear to be no fundamental obstacles in principle that would prevent their development.

These brief remarks already suggest that, in the relatively near future, there may be no consular functions defined by the Vienna Convention on Consular Relations (1963) that cannot be performed equally effectively by other actors. Functions that cannot be provided through alternative mechanisms could, at least initially, be performed by the honorary consuls. If this development were to materialize, it would imply consuls, as traditionally understood, could become largely redundant.

At the same time, the gradual abandonment of the consular institution may also produce certain tangible benefits.

First, this would eliminate a certain ‘double-track’ system that exists today, resulting from the simultaneous operation ministries of foreign affairs, their diplomatic missions abroad, and consular posts, particularly in situations where several consuls may operate within the same foreign state. While the very existence of such actors indicates that they perform necessary functions, it also creates potential for certain difficulties, such as conflict of jurisdiction and divergent administrative practices.

In addition, the replacement of consular officials and consular staff with intelligent machines would, notwithstanding the disadvantages associated with a certain dehumanization of relations, lead to increased efficiency (as robots operate 24 hours a day, seven days a week, do not require annual leave, do not fall ill, and do not consume alcohol) as well as greater precision, particularly through the reduction of human error. This is especially significant when considering that the costs of maintaining consular services in their current form are substantial, as they include relatively high salaries of consuls and other consular staff, expenses related to accompanying family members, transportation costs to and from the place of service, the acquisition or rental of consular offices, the procurement of office furniture and supplies, as well as the organization of official receptions and similar events. All of these elements could, at some point, become redundant, thereby relieving national budgets of considerable expenditure. Such savings would be substantial for individual states and potentially immense when considered at the global level.

The changes under discussion cannot occur overnight. Initially, it would likely be natural to implement a full integration of diplomatic and consular services through the formal cumulation of diplomatic and consular functions, thereby eliminating distinctions between the personnel performing them.

This would imply that consulates and consuls, as they exist today, would be abolished, and that most of their functions would be fully assumed by embassies and their consular sections. After all, many of these functions have long been carried out by diplomatic missions, and not only by their consular sections. Embassies are, in any case, responsible for protecting the interests of the sending state and its nationals in the receiving stat; for promoting the development of trade, economic, cultural, and scientific relations between the sending and receiving states; for gathering, through lawful means, information on the commercial, economic, cultural, and scientific conditions and developments in the receiving state; for reporting such information to the sending; and for performing similar tasks.

Every coin has two sides. The main weakness of the scenario described above would be the loss of direct personal contact within the immediate consular environment (i.e., within the consular district) between consuls, on the one hand, and local authorities, emigrants, members of the national minority of the sending state, and other relevant actors, on the other. However, the mere existence of a consul does not necessarily imply that they perform their duties effectively or responsibly, nor that they have established meaningful relations with the aforementioned entities. In addition, in contemporary conditions, communication – including face-to-face interaction – can be rapidly and efficiently established through modern technical means. Moreover, videoconferencing via the Internet makes it possible, when necessary, to urgently connect and communicate directly with various actors, not only consuls and representatives of local authorities, but also embassy officials, ship captains, consuls of other countries in the same location, and others, meetings between whom would otherwise be difficult to organize, not to mention the time saved by eliminating travel. Finally, with regard to the establishment and maintenance of personal relations, honorary consuls have traditionally proven to be considerably more effective than career consuls.

With regard to the weaknesses, it is true that nationals facing certain difficulties abroad, such as the loss of a passport, arrest, and similar situations, or engaged in other matters in a foreign country, for example, employment, inheritance issues, and the like, as well as crew members of merchant ships or aircraft located in foreign ports or airports, would in foreseeable future likely prefer direct interaction with a human consul. On the other hand, digital platforms and intelligent automated systems are expected to facilitate many tasks that are currently carried out in consular offices at considerable cost in terms of time and resources. Indeed, many problems are already being prevented or resolved through automated data processing and inter-agency information exchange. This development forms part of a broader and ongoing tendency to replace human labor, wherever feasible, with intelligent automated systems, including in roles such as bank clerks, truck drivers, translators, and others. While this trend may be interpreted as a form of societal dehumanization, it appears to be a trajectory that is difficult to reverse. As a partial consolation, one may recall the advantages already provided by ATMs and various automated systems at airports, ports, and other facilities, which enable essential tasks, such as cash withdrawals or flight check-in, to be completed within seconds and without waiting in queues.

The changes in question would also imply a somewhat different definition of the status of diplomatic representatives themselves. They could, *inter alia*, provide an opportunity to reduce the scope and extent of diplomatic privileges and immunities for all diplomatic agents, not only for those performing consular functions. Indeed, there are reasons to consider whether the level of protection currently enjoyed by diplomats should be reduced to that accorded to contemporary consuls. In practice, this would mean that diplomatic agents would enjoy not absolute immunity, but rather functional immunity limited to acts performed in the exercise of their official duties, together with immunity in respect of minor offenses. This would represent an adaptation to the conditions of contemporary life and could contribute to reducing various abuses of diplomatic privileges and immunities that are frequently encountered in practice (Ahmad, Lilienthal & bin Haji Asmad, 2021, pp. 165-190; Кривокапич, 2022, pp. 62-73).

To the considerations outlined above, it may be added that a portion of the activities traditionally performed by consuls is increasingly being assumed by various non-state actors. In contemporary conditions, international trade, economic, cultural, scientific, sporting, and other forms of cooperation are increasingly developed outside official state channels, through direct contacts among interested individuals, groups, and organizations. With regard to obtaining information about developments in a foreign country, embassies are no longer the sole source of such information, as various alternative channels have been increasingly important, including the media, reports of international organizations, and international and national non-governmental organizations. Indeed, in a world in which virtually every significant event is immediately recorded by someone with a mobile phone and disseminated through the Internet, there is relatively little important information that could become available to a consul through lawful means without simultaneously becoming known to the embassy and the broader public.

Some functions currently performed by consuls will eventually become unnecessary. In a world in which information about individuals is instantly accessible and identification is carried out through advanced technological methods, not only could a territorial state issue a one-way travel document to a person who has lost their passport, but travel documents themselves may eventually become entirely unnecessary. Visas are already being abolished with increasing frequency,[31] and it is quite possible that they will disappear altogether in the future, as a result of several developments, including advances in personal identification technologies, digital processing of documents and data, the growing use of electronic documents, the improvement of various databases, and similar innovations.

The strengthening of international law and international institutions also plays an important role in this regard. Among other developments, international mechanisms for the protection of individuals and legal persons against unlawful actions by foreign states are becoming increasingly sophisticated and accessible. Whereas in the past such persons had to rely on consular assistance or the diplomatic protection of their country of nationality, an increasing number of procedures now allow them to bring their claims before the competent international bodies, such as the European Court of Justice. A consul can undoubtedly react more quickly, which may be of crucial importance in urgent situations; however, the question remains how effective such intervention would ultimately be. By contrast, decisions of international courts and other international bodies are generally reached more slowly, but they offer greater prospects of achieving a fair resolution and providing appropriate redress. Although these mechanisms do not exclude one another – the interested party must ordinarily exhaust all available remedies within the domestic legal system of the territorial state before turning to an international forum – to the extent that international mechanisms continue to be strengthened, they are likely to relegate various forms of unilateral state action to the background, thereby reducing the need for consular intervention.

If developments proceed in the direction described above, existing international consular law will also have to undergo fundamental changes. It will need to incorporate a greater number of standardized rules and new legal solutions in order to regulate more precisely the conditions under which entities other than consuls may perform functions that are currently entrusted to them. Consequently, a new codification of this branch of international law may become necessary. Although it may currently appear unlikely that such developments will occur in the near future, one should not be too confident in that assumption. It is sufficient to recall the extent to which international relations changed and international law evolved

[31] States are increasingly concluding bilateral and multilateral agreements providing for the abolition of visa requirements.

during the first two decades following the end of the Second World War. Moreover, life continues to accelerate, generating new challenges and creating demand for new legal and institutional solutions.

6. Concluding Remarks

Several basic conclusions may be drawn from the foregoing analysis.

Consuls and their historical predecessors constitute one of the oldest institutions of international law. Their existence, in one form or another, has been documented since antiquity.

They did not emerge spontaneously. Rather, the emergence and development of the consular institution were driven by the needs of cross-border relations, particularly the maintenance of international trade and, subsequently, the expansion of other forms of international cooperation. In other words, consuls emerged when there was an objective need for them and evolved in response to changing circumstances and requirements.

Over time, consuls have undergone a long process of development, evolving through a series of transformations into state officials who serve the interests of the state they represent, i.e., the sending state, and its individuals and legal persons, but also – an aspect which is often overlooked – the interests of the state in which they perform their functions, i.e., the receiving state. This is because the receiving state likewise has an interest in the promotion of international cooperation, to the advancement of which foreign consuls contribute in numerous ways.

We live in a period in which the international community appears to be at a crossroads, making it difficult to predict the future of states as sovereign entities and, consequently, of their institutions, including consuls. Nevertheless, a number of developments suggest that, in the relatively near future – although most likely not before the middle of this century – the institution of the consul, as it is known today, may undergo profound transformations, and could even disappear altogether. Such developments would result from the combined effect of various factors, including the relative weakening of the state sovereignty and broader changes within the international community; the gradual disappearance of certain functions currently performed by consuls; the transfer of some consular functions to other actors (diplomatic agents, domestic state authorities, non-state actors, and others); and the increasing use of artificial intelligence, robotics, and other technical innovations.

Parallel to the emergence and development of consuls, and as a foundation for their existence and functioning, the relevant norms of international law gradually evolved, eventually giving rise to a distinct branch of that legal system known as consular law. This branch was codified at the universal level by the Vienna Convention on Consular Relations of 1963, but that does not mean that its development has come to an end. As long as consuls continue to exist, any significant changes to their role and status will necessarily require corresponding adjustments to universal international law and, perhaps, a new codification of consular law at the global level.

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ON THE EVE OF THE DAYTON PEACE AGREEMENT ANNIVERSARY: WAS IT SUSPENDED?**

Summary

This paper critically examines the legal and political implications of the legislative actions taken by the High Representative (HR) in Bosnia and Herzegovina (BiH) and the subsequent institutional responses of the Republic of Srpska. The analysis focuses on whether these actions constitute a suspension of Annex 10 of the Dayton Peace Agreement (DPA) and assesses the legal basis for the HR's authority. Through a detailed examination of relevant international legal frameworks, including the Vienna Convention on the Law of Treaties (VCLT), the paper explores the transfer and oversight of powers from the United Nations Security Council (UNSC) to the HR. It argues that the absence of UNSC endorsement of Mr. Hans Christian Friedrich Schmidt's appointment undermines the legitimacy of his actions under international law. Furthermore, the study examines the legal countermeasures taken by the Republic of Srpska, particularly the 2023 Law excluding HR's decisions from its official publications, as a de facto partial suspension of Annex 10. The paper also evaluates whether the HR's actions constitute a material breach of the DPA, thereby justifying the Republic of Srpska's response under VCLT provisions. It highlights the erosion of effective UNSC oversight over the HR and the evolving role of domestic institutions within BiH constitutional framework. This analysis contributes to ongoing debates regarding international intervention, the rule of law, and the limitations

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of external governance in post-conflict societies, offering valuable insights for scholars, policymakers, and legal practitioners concerned with the future of the Dayton Peace Agreement and international oversight mechanisms.

Keywords: Dayton Peace Agreement, Material Breach, Treaty Suspension, Post-Conflict States.

UOČI GODIŠNJICE DEJTONSKOG MIROVNOG SPORAZUMA: DA LI JE SPORAZUM BIO SUSPENDOVAN?***

Sažetak

U ovom radu kritički su ispitane pravne i političke implikacije zakonodavnih aktivnosti koje je preduzeo visoki predstavnik (VP) u Bosni i Hercegovini (BiH), kao i naknadni institucionalni odgovori Republike Srpske. Analiza se fokusira na to da li te aktivnosti predstavljaju suspenziju Aneksa 10 Dejtonskog mirovnog sporazuma (DMS) i procenjuje se pravni osnov za ovlašćenja VP-a. Na osnovu detaljne analize relevantnih međunarodnih pravnih okvira, uključujući Bečku konvenciju o pravu ugovora (VCLT), u radu se ispituje prenos ovlašćenja sa Saveta bezbednosti Ujedinjenih nacija (SBUN) na VP-a i kontrola istih. Tvrdi se da nepostojanje podrške od strane SBUN-a za imenovanje gospodina Hansa Kristijana Fridriha Šmita potkopava legitimitet njegovih postupaka i usklađenost istih sa međunarodnim pravom. Osim toga, u studiji se ispituju i pravne kontramere koje je preduzela Republika Srpska, posebno Zakon iz 2023. godine kojim se odluke Visokog predstavnika isključuju iz zvaničnih publikacija RS, koji de fakto predstavlja delimičnu suspenziju Aneksa 10. U radu se takođe procenjuje da li postupci visokog predstavnika predstavljaju materijalno kršenje Dejtonskog mirovnog sporazuma, čime se opravdava odgovor Republike Srpske prema odredbama Bečke konvencije o pravu ugovora (VCLT). Ističe se urušavanje efektivne kontrole od strane Saveta bezbednosti UN nad Visokim predstavnikom i sve veća uloga domaćih institucija u okviru ustavnog okvira BiH. Ova analiza doprinosi aktuelnim debatama o međunarodnoj intervenciji, vladavini prava i ograničenjima spoljne uprave u postkonfliktnim

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društvima i pruža korisne uvide za naučnike, formulatore politike i pravne stručnjake koji se bave budućnošću Dejtonskog mirovnog sporazuma i mehanizama međunarodnog nadzora.

Ključne reči: Dejtonski mirovni sporazum, materijalno kršenje, suspenzija sporazuma, postkonfliktne države.

1. Introduction

In 2021, during the final days of his tenure, the High Representative to Bosnia and Herzegovina (HR) invoked the so-called Bonn Powers and issued Decision No. 26/21, enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina. A particular amendment within this law, which criminalized the public denial of crimes established by a final adjudication of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court, or a court in Bosnia and Herzegovina, triggered a profound crisis in the country. The Republic of Srpska perceived this as infringement of freedom of speech and freedom of thought. In response, the Republic of Srpska enacted the Law on Non-Application of the Decision of the High Representative Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina[1], which stipulates that the HR's Decision and its amendments shall not apply within the territory of the Republic of Srpska. This was the first instance of an exceptional institutional response that suspended the authority of the High Representative. Since then, Bosnia and Herzegovina has remained in a continuous state of political and constitutional turmoil.

The crisis escalated when Mr. Hans Christian Friedrich Schmidt assumed his position at the Office of the High Representative (OHR). Although Mr. Schmidt was designated by the Peace Implementation Council (PIC) on May 27, 2021, his appointment did not receive approval from the United Nations Security Council (UNSC), as evidenced by Draft Resolution S/2021/667 and the 8823rd UNSC meeting held on July 22, 2021. This situation is unprecedented in the context of the High Representative's position and introduced a new dimension to the ongoing dispute.

Prior to this development, on March 11, 2021, the National Assembly of the Republic of Srpska enacted the Conclusions regarding the Evaluation of the Work of the High Representative, and the Implementation of Annex X of the General Framework Agreement for Peace in Bosnia and Herzegovina during the Period of Talks on the Appointment of a New High Representative. Among the key points in these conclusions, it was emphasized that the Republic of Srpska rejects the

1 *Official Gazette of the Republic of Srpska*, No. 89/21.

imposition of any individual as High Representative, stressing that the appointment process requires consultations and the consent of the signatory parties to Annex 10 of the Dayton Agreement. Consequently, the National Assembly of the Republic of Srpska contends that prior nominations, elections, and confirmations of the High Representative contradict Annex 10, lack transparency, and fail to adhere to the necessary consultations and advice stipulated in Annex 10.

The National Assembly concluded that this provides sufficient justification to dismiss any appointment of a High Representative that does not adhere to the procedures outlined in Annex 10. Furthermore, the conclusions asserted that the National Assembly, as the highest authority of the Republic of Srpska that had approved Annex 10 – which pertains to the implementation of the civilian aspects of the Dayton Peace Agreement – would communicate its position to the signatory parties of that Annex. This communication would include a proposal to terminate the High Representative and reassess the decisions made by the High Representative that fall outside the scope established by Annex 10.

Not only were the parties to Annex 10 not consulted regarding Mr. Schmidt's appointment as a High Representative (HR), but the United Nations Security Council (UNSC) was also disregarded in the process. Despite these circumstances, Mr. Schmidt invoked the so-called Bonn Powers and proceeded to take substantial actions. Since October 2, 2022, a series of legislative actions were initiated by him, starting with the decisions dated June 22 and July 22, 2022, which were published in the "Official Gazette of BiH" No. 67/22. These decisions resulted in amendments to the Constitution of the Federation of Bosnia and Herzegovina and Articles 1 to 5 of the Election Law of Bosnia and Herzegovina. Additionally, Mr. Schmidt enacted changes to the Criminal Code of Bosnia and Herzegovina on July 1, 2023, and to the Criminal Code of the Republic of Srpska on April 27, 2023.

Following the amendments of the Constitution of the Federation of Bosnia and Herzegovina and the Election Law of Bosnia and Herzegovina, Messrs. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina, and Šefik Džaferović, Chairman of the Presidency of Bosnia and Herzegovina, challenged the legitimacy of these amendments before the Constitutional Court of Bosnia in cases labeled U-27/22 and U-30/22. The Constitutional Court ruled that Mr. Schmidt's competences derive from Article II (1), items (a) and (d) of Annex 10 to the Dayton Peace Agreement (Case No. U-27/22, para. 63). Furthermore, in assessing Mr. Schmidt's law-enacting authority, the Court drew parallels with the powers vested in the High Representative. It reiterated its position that the High Representative's authority is derived from Annex 10 of the General Framework Agreement, relevant UN Security Council resolutions, and the Bonn Declaration. The Court emphasized that these powers, and their exercise, fall outside the scope of its judicial review.

However, when Mr. Schmidt intervened in Bosnia and Herzegovina's legal system, supplanting domestic authorities, he effectively assumed the role of a Bosnian and Herzegovinian authority (Case No. U-27/22, paras. 73, 74). Consequently, in accordance with its theory of functional duality (see Case No. U-9/00, para. 5), the Constitutional Court recognized Mr. Schmidt as a Bosnian and Herzegovinian body with law-enacting competences. Arguably, the absence of a power transfer from the UNSC to the HR was substituted by a transfer of power from the Constitutional Court to the HR.

The intention herein is not to evaluate this delegation of power to an unelected foreign diplomat, particularly not from a human rights standpoint. Instead, the focus will be on the legal remedies taken by the Republic of Srpska in response to the HR's legislative alterations to both the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Republic of Srpska. Specifically, we will examine whether the Republic of Srpska suspended Annex 10 to the Dayton Peace Agreement by enacting the Law on Amendments to the Law on the Publication of Laws and Other Regulations of the Republic of Srpska.[2] This new legislation excludes the HR's decisions from the list of acts published in the Official Gazette of the Republic of Srpska, effectively stripping them of any binding authority within its territory. Unlike the previous law from 2021, which specifically targeted Decision No. 26/21, the 2023 Law is broader in scope and applies to all future decisions made by the HR.

To achieve this, we will begin with a general argument arising from Annex 10, which outlines the criteria for legitimate international intervention through the Office of the High Representative (OHR). Next, we will analyze both the procedural and substantive challenges surrounding the appointment of Mr. Hans Christian Friedrich Schmidt as High Representative, with a particular focus on the absence of UNSC resolutions validating his actions and the implications this has for the legitimacy of his operations. By applying international legal principles, we will assess whether the actions of the current officeholder at the OHR can be considered representative of the international community – the High Representative – and whether they meet the requirements for legitimate intervention as specified in Annex 10.

2. Suspension of Annex 10 of the Dayton Agreement

Acting in the capacity as a Contracting Party to Annex 4 and Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Gaeta, 1996. p. 148), the National Assembly of the Republic of Srpska, on behalf of the Republic of Srpska, adopted the Request for arbitral settlement of the dispute (hereinafter: the

[2] *Official Gazette of the Republic of Srpska*, No. 60/23, Law 2023.

Request)[3] between itself and Bosnia and Herzegovina during a session held on March 13, 2025.[4] In this Request, the Republic of Srpska asserts that the Law on Amendments to the Law on the Publication of Laws and Other Regulations of the Republic of Srpska,[5] which removes the decisions of the High Representative from the list of acts published in the Official Gazette of the Republic of Srpska, thereby depriving them of legal effect within its territory, constitutes a remedial measure adopted in accordance with the provisions of Article 60 of the Vienna Convention on the Law of Treaties (VCLT). In this context, the Republic of Srpska argues that a temporary partial suspension of Annex 10 of the Dayton Peace Agreement has occurred.

The material breach of Annex 10, as claimed in the Request, essentially arises from the material breach of Annex 4, which governs the agreed-upon distribution of legislative authority in post-war Bosnia and Herzegovina. Specifically, the Constitutional Court's conferral of legislative competences to Mr. Schmidt (Case No. U-27/22), despite the lack of UNSC authorization, is viewed as a material breach of both Annex 4 and Annex 10. Regarding the specific breach of Annex 10, the Republic of Srpska argues that the actions of the Constitutional Court violated the intervention conditions. By granting legislative powers to the High Representative without the necessary UN resolution or consultation with the contracting parties, the Constitutional Court overstepped its legal authority, undermining the legitimate governance structure. The introduction of an unauthorized legislative entity into Bosnia and Herzegovina's legal system is regarded as a breach of the duty to act in good faith by Bosnia and Herzegovina. This violation raises doubts about the legality of the Constitutional Court's decisions, suggesting they may not impose binding obligations on the Republic of Srpska.

The Request includes a section arguing the fulfilment of procedural conditions for suspension and the tacit acceptance of the measures taken. The Republic of Srpska asserts that the procedural requirements for the suspension of Annex 10 of the Dayton Peace Agreement, as prescribed by Articles 65 and 67 of the Vienna Convention on the Law of Treaties (VCLT), have been met. This is based on the fact that the remedial acts of the Republic of Srpska were adopted in the form of laws, published in its official gazette, and are of a public nature. Furthermore, due to the absence of any objections or protests by the other contracting parties in response to the aforementioned publicly promulgated laws, the Republic of Srpska asserts that the international legal acceptance of these acts by all parties has been implicitly recognized.

[3] For the review of the distinct sort of arbitration in Bosnia and Herzegovina see Brodlija, 2025, pp. 783-801.

[4] For legal remedies available to the Republic of Srpska see Dakić, 2024, pp. 376-377.

[5] *Official Gazette of the Republic of Srp*ska, No. 60/23.

3. Analysis of the Republic of Srpska's Arguments on the Material Breach of Annex 10

3.1. General Argument: Conditions for Legitimate Intervention

In the context of international law, certain circumstances can preclude the wrongdoing typically associated with interventions that might otherwise violate the principle of non-intervention. The article by Maziar Jamnejad and Michael Wood identifies three principal situations that can justify such actions without constituting unlawful intervention (Jamnejad & Wood, 2009; see also: *United Kingdom v. Albania*). First, Security Council authorization under Chapter VII of the UN Charter serves as a critical safeguard. When the Security Council determines that there is a threat to international peace, a breach of peace, or an act of aggression, it has the authority to take measures to restore peace and security. This authorization allows member states to act in ways that might otherwise be seen as interventions, as they are operating under the collective mandate of the international community. Second, the concept of consent plays a vital role. If a state consents to the intervention by another state or entity, this consent legitimizes the action. This situation often arises in humanitarian crises or when a government requests assistance to maintain order or address specific issues. The principle of sovereignty is respected when a state voluntarily invites external assistance, thereby precluding any claims of wrongdoing. Lastly, countermeasures can also serve as a justification for actions that might otherwise be deemed unlawful. In international law, countermeasures are actions taken by a state in response to an unlawful act by another state, aimed at inducing compliance with international obligations. These measures must be proportionate and directed at addressing the initial wrongdoing, thus providing a legal basis for intervention that is not considered wrongful.

The first and second demands for lawful intervention are conjointly integrated in Annex 10 to the Dayton Peace Agreement, titled: "Agreement on Civilian Implementation", which, in its Article 1, reads:

> 37. In view of the complexities facing them, the Parties request the designation of a High Representative (*second condition, emphasis added*), to be appointed consistent with relevant United Nations Security Council resolutions (*first condition, emphasis added*), to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a UN Security Council resolution, the tasks set out below.

Consequently, the procedure for appointing a High Representative is crucial for being recognized as a legitimate intervener. This process, which involves the United Nations Security Council (UNSC), is inseparably tied to the transfer of authorization under Chapter VII of the UN Charter and effective oversight over their conduct. These provisions were further certified by the UNSC. Specifically, acting under Chapter VII of the Charter of the United Nations, the UNSC "[w]elcome[d] and support[ed] the Peace Agreement" in Bosnia and Herzegovina (para. 1) (Resolution 1031 (1995), UN Doc. S/RES/1031(1995)). Additionally, in the same Resolution 1031 (1995), the UNSC "[e]ndorse[d] the establishment of a High Representative" in Bosnia and Herzegovina (para. 26), in line with Annex 10 of the Dayton Peace Agreement.

The text of Annex 10 is clear regarding the UNSC's role in appointing a High Representative and has never been amended or modified in this regard. Annex 10, Article 1 of the Dayton Peace Agreement uses straightforward language, with no ambiguity or vagueness, and the meaning of the terms used is evident and cannot be interpreted in any other way. According to the Vienna Convention on the Law of Treaties 1969 (VCLT), specifically its Article 31, paragraph 1, the meaning of Article 1 of Annex 10 can be interpreted through three fundamental approaches in international law: a strict textual interpretation of the terms used, one that considers the parties' intentions, and one that examines the agreement's object and purpose (Edwards & Worboys, 2021, p. 127). Whether applied individually or in conjunction, all three methods of interpretation lead to a unified conclusion regarding the role of the UNSC in appointing a High Representative for Bosnia and Herzegovina under Article 1 of Annex 10 to the Dayton Peace Agreement: beyond any reasonable doubt, the involvement of the UNSC in the appointment process appears mandatory.

However, a procedural fragmentation of the appointment process was simultaneously conceived. The Peace Implementation Conference in London (1995) laid the groundwork for the establishment of the Peace Implementation Council (PIC), which was endorsed by UN Security Council Resolution 1031 (1995). Although neither the Conference nor the Resolution explicitly granted the PIC the authority to appoint a High Representative to Bosnia and Herzegovina, this practice has been consistently followed ever since. The PIC's powers are derived from paragraph 18 of the Conference Conclusions (hereinafter: the Conclusions) and are supported by the aforementioned Resolution 1031. According to paragraph 18 of the Conclusions, the Conference, in consultation with the Government of Bosnia and Herzegovina, approved the designation of Mr. Carl Bildt as High Representative and invited the UN Security Council to endorse his appointment. Thus, the three essential elements of the appointment process were introduced: consultation with the Government of Bosnia and Herzegovina, the PIC designation, and the UNSC agreement.

While the first element was abandoned with the appointment of the second High Representative in 1997, the second and third elements have remained consistent throughout the implementation of the Dayton Peace Agreement.

The title and authority of the High Representative to exercise Chapter VII of the UN Charter on behalf of the UNSC is less contestable when the PIC designation and the UNSC endorsement align. However, the situation becomes ambiguous in the absence of UNSC endorsement, as is currently the case with Mr. Hans Christian Friedrich Schmidt. While the Steering Board of the PIC appointed him, the UNSC rejected this decision, as evidenced by Draft Resolution S/2021/667 and the 8823rd UNSC meeting on July 22, 2021. This appointment prompted strong protests from UNSC members, including the Russian Federation, which was also a PIC member, and the People's Republic of China. Furthermore, the Republic of Srpska – a party to Annex 10 – has persistently objected to the appointment on the grounds of the lack of consultation with the Government of Bosnia and Herzegovina, i.e., the parties to Annex 10, as reflected in the National Assembly's conclusions regarding the High Representative's report on the civilian implementation of the peace agreement in BiH from 2009 to 2020.

While Mr. Hans Schmidt's suitability for the position of High Representative may be called into question, it is essential to consider the multifaceted nature of this role. The title encompasses not only a trusted individual wielding UNSC powers but also the chairperson of the Office of the High Representative (OHR) (see Annex 10, Article III, Section 9, and paragraph 19 of the Conclusions) and the president of the PIC's Steering Board (as outlined in paragraph 21 (c) of the Conclusions). It is possible that the OHR and PIC may assert their autonomy in appointing their own bodies, including a High Representative (cf. Džakić, 2023, 59-63). However, it remains debatable whether the PIC has the authority to unilaterally confer powers derived from Chapter VII of the UN Charter.

3.2 Argument(s) for Suspension of Annex 10: Absence of Power Transfer

To determine whether Mr. Hans Christian Friedrich Schmidt acts as a legitimate representative of the international community it is crucial to examine the delegation of Chapter VII powers of the UN Charter and the extent of the UNSC's oversight. The Chapter VII powers in question correspond to the Bonn Powers (see Whittle, 2015. pp. 677-680). It remains unclear whether the Bonn Powers are attached to the individual officeholder or to the Office of the High Representative (OHR) as an international organization. One possible interpretation of UNSC Resolution 1144 is that it confers Chapter VII powers to the OHR for an indefinite period, thereby empowering each successive officeholder with the Bonn Powers.

This interpretation aligns with the approach of interpreting the Bonn Powers within the concept of implied powers (see: Banning, 2015). However, even in such an interpretation, Mr. Schmidt would still require explicit UNSC authorization to lawfully exercise the Bonn Powers. This is due to the nature of the UNSC resolutions and the three-decade-long practice of power transfer to a High Representative. Specifically, UNSC resolutions regarding the appointment of a High Representative for Bosnia and Herzegovina can have either direct substantive effects or causative effects (see: Öberg, 2006).

The three main components of substantive effects are binding effects, authorizing effects, and (dis)empowering effects. A key element of substantive effects is the binding effect, which involves the creation of legal obligations for states and other entities through UNSC resolutions. In *Nicaragua v. United States* (ICJ, *Nicaragua v. United States of America*, *Military and Paramilitary Activities*), the International Court of Justice (ICJ) analyzed the binding nature of UNSC resolutions related to the use of force and determined that states must adhere to these resolutions. Furthermore, the authorizing effects of UNSC resolutions provide specific rights or powers to entities, enabling them to undertake certain actions. An illustration of this can be observed in the *East Timor* case (*East Timor (Portugal v. Australia*) [1995] ICJ Rep 90), where the ICJ discussed the authorizing effect of UNSC resolutions in the context of self-determination (refer to Öberg, 2006, p. 892). These authorizing effects empower entities to act in alignment with the directives outlined in UNSC resolutions. In addition, the (dis)empowering effects of UNSC resolutions can either strengthen or weaken the legal capacity of states or organizations. For instance, a resolution that disempowers a state from engaging in particular activities due to breaches of international law can have profound implications. While the ICJ has not extensively deliberated on this aspect, the potential influence of (dis)empowering effects on the legal rights and capabilities of entities is noteworthy.

Qualifying the effect of UNSC resolutions in transferring its powers to a High Representative for Bosnia and Herzegovina as substantive reveals the crucial interplay among various key aspects of such effects. When considering the binding effects of a UNSC resolution, it becomes evident that states and entities would be under a legal obligation to adhere to the decision of transferring power to a High Representative. The absence of such a resolution, however, could introduce uncertainties and potential obstacles in enforcing the power transfer, as the lack of a well-defined mandate may leave room for ambiguity regarding the parties' obligations. Conversely, the authorizing effects of a UNSC resolution would confer the necessary rights and authorities to facilitate the smooth transition of power to a High Representative. Without such authorization, the process could encounter setbacks due to the absence of a clear mandate, which is essential for implementing such a substantial governance change. The legitimacy and competence of the High Representative could also be called into question without the authorizing effect of a UNSC resolution, potentially undermining the transition's effectiveness. Addressing the (dis)empowering effects, the presence or absence of these effects in a resolution could significantly influence the roles and responsibilities of key actors, including former High Representatives. In the absence of such effects, there may be a lack of clarity regarding the distribution of powers and authorities, which could introduce challenges in governance and decision-making processes during the power transfer.

The adoption of resolutions by the UNSC can also have a crucial impact on the initiation of legal consequences driven by determinations of law or fact – causative effects. A key aspect of these effects is their ability to produce legal outcomes through determinations of law or fact. An example of this can be seen in the *Certain Expenses of the United Nations* case (*Certain Expenses of the United Nations* [1962] ICJ Rep 151), where the ICJ indirectly recognized the impact of UNSC resolutions in establishing the legality of UN actions (see Öberg, 2006, p. 905). Additionally, these causative effects can influence the development of customary international law, especially when supported by authoritative bodies. In situations where a UNSC resolution establishes specific facts that are later endorsed by states, the legal ramifications arise from this endorsement, rather than from the initial determination (Öberg, 2006, p. 904). The ICJ's jurisprudence further emphasizes the intrinsic nature of causative effects, underscoring their foundation in the unique treaty powers of the UNSC. By generating legal consequences based on determinations within UNSC resolutions, these effects are vital for ensuring the enforcement and application of international law.

In the absence of a UNSC resolution addressing the transfer of power to a High Representative, despite its potential consequential impacts, several significant implications arise. Without a UNSC resolution containing factual determinations pertaining to the power transfer, there may be a lack of clarity regarding the factual grounds for the transition. This uncertainty could lead to difficulties in ascertaining the legitimacy and rationale for the transfer of power to a High Representative, potentially undermining the overall efficacy and acceptance of the decision. Causative effects arising from legal determinations involve the interpretation and application of legal principles to guide substantive legal outcomes. In the absence of a UNSC resolution incorporating explicit legal determinations regarding the power transfer, the legal foundation for the transition could be uncertain. The absence of clear legal determinations could raise doubts regarding the legality and authorization of the transfer, thereby introducing complexities in executing and upholding the decision within the international legal framework. The non-existence of a UNSC resolution with causative effects could have far-reaching implications on substantive legal consequences. Without the activation of factual and legal determinations through a resolution, the process of transferring power to a High Representative may lack a solid legal footing. This could lead to obstacles in executing the transfer, as well as potential disagreements on the legitimacy and adherence to international legal standards.

Therefore, if the effect of the UNSC resolutions in transferring its powers to a High Representative for Bosnia and Herzegovina is qualified as substantive, it implies that, without an explicit UNSC resolution, Mr. Hans Christian Friedrich Schmidt has neither the authorization nor the entitlement to exercise any powers. If the effect of the UNSC resolutions in transferring powers is qualified as causative, it implies that the High Representative, as a body itself, is substantively conferred with the powers from Chapter VII of the UN Charter, thereby continuously bearing the UNSC's authorization for activities that would otherwise be unlawful. Even in that case, a UNSC resolution is needed to trigger such authorization. The conclusion remains the same if the UNSC resolutions in transferring its powers to a High Representative are presumed to have modal effects (see Öberg, 2006, p. 892).

3.2.1 Overview of Practice in Implementing Annex 10

Further insights into the connection between the actions of a High Representative and the international community can be gained by examining the process of transferring power to a High Representative, as established through practice. Mr. Carl Bildt was the first High Representative. Following the Conclusions of the London Peace Implementation Conference, and acting under Chapter VII of the UN Charter, the UNSC adopted Resolution 1031 (1995), agreeing to the designation of Mr. Carl Bildt as High Representative. An overview of this particular resolution reveals that the UNSC reiterated the authorizations previously conferred to member states in peace-implementing tasks, which suggests temporal constraints to these authorizations and an intent to maintaining effective oversight. Mr. Carlos Westendorp was the second High Representative. In Resolution 1112 (1997), the UNSC "welcome[d] the conclusions of the Ministerial Meeting of the Steering Board of the Peace Implementation Council held in Sintra, Portugal on 30 May 1997 (S/1997/434, Annex) and "agree[d] to the designation of Mr. Carlos Westendorp as High Representative in succession to Mr. Carl Bildt." This power-transfer process marks a significant departure from the previous procedures, as it no longer included consultations with the Government of Bosnia and Herzegovina as a constitutive step. While this change deviated from established precedent, it faced no significant protests. The designation of Mr. Wolfgang Petritsch as High Representative by the

Steering Board of the Peace Implementation Council on 12 July 1999, in succession to Mr. Carlos Westendorp, was welcomed and agreed upon by the UNSC in Resolution 1256 (1999). In the preambular part of this particular resolution, the UNSC specifically recalled its previous resolutions – 1031 (1995) of 15 December 1995, 1088 (1996) of 12 December 1996, and 1112 (1997) of 12 June 1997 – acknowledging them as general framework resolutions in the context of a particular situation. The UNSC, by repeatedly referencing these resolutions, brought them closer to the status of precedents, granting them combined and potentially cumulative effects.

In contrast, the UNSC, in the preambular part of its Resolution 1256 (1999), made a direct reference to the conclusions of the Peace Implementation Conferences held in Bonn on 9 and 10 December 1997 (hereinafter: the Bonn Conclusions), which were annexed to the Resolution. This meant that the UNSC effectively suppressed its previous Resolution 1144 (1997), temporarily constraining its effects, disconnecting it from the scope of precedent resolutions, and preventing it from being implicitly relevant to future appointments. Resolution 1144 (1997) was adopted while Mr. Carlos Westendorp was already in office. Although it appeared to be a general resolution, it was effectively revoked, and its effects ceased with the new Resolution on the subject matter. Each subsequent resolution, starting with Resolution 1144 (1997), included references to the Bonn Conclusions. Subsequently, in Resolution 1256 (1999), the UNSC substantively conferred the so-called Bonn Powers upon Mr. Wolfgang Petritsch, agreeing to his designation. This was a clear indication that Resolution 1144 (1997) had empowered only the named officeholder – Mr. Wolfgang Petritsch's predecessor. Through this approach, the UNSC likely sought to maintain effective oversight over the powers deriving from Chapter VII of the UN Charter.

In the executive part of its Resolution 1396 (2002), the UNSC "welcome[d] and agree[d] to the designation by the Steering Board of the Peace Implementation Council (PIC) on 28 February 2002 of Lord Ashdown as High Representative in succession to Mr. Wolfgang Petritsch." In the same Resolution, in its preambular part, the UNSC reiterated its direct reference to the Bonn Conclusions annexed to the Resolution, but notably did not refer to Resolution 1144 (1997), which initially welcomed the Bonn Conclusions and transferred the so-called Bonn Powers to Mr. Carlos Westendorp, nor to Resolution 1256 (1999), which entrusted the so-called Bonn Powers to Mr. Wolfgang Petritsch. Lord Ashdown was substantively assigned with the so-called Bonn Powers by UNSC Resolution 1396 (2002), which welcomed his appointment and explicitly recalled the Bonn Conclusions. Mr. Christian Schwarz-Schilling (a German national) lacks such a UNSC resolution. There is only a letter dated 30 January 2006 from the President of the Security Council addressed to the Secretary-General, stating that the decision of the Steering Board of the

Peace Implementation Council (PIC) to select Mr. Christian Schwarz-Schilling (Germany) as the successor to Paddy Ashdown as High Representative for Bosnia and Herzegovina, effective 31 January 2006, had been brought to the attention of the UNSC members, who welcomed the decision of the Peace Implementation Council. Two key precedential elements still coincide: 1) the selection made by the PIC, and 2) the UNSC's approval.

Mr. Miroslav Lajčák, as the successor to Mr. Christian Schwarz-Schilling, was welcomed, and his designation by the Steering Board of the PIC on 19 June 2007 was agreed upon by the UNSC in Resolution 1764 (2007). Again, in line with its established practice, the UNSC directly recalled the Bonn Conclusions and annexed them to the Resolution. Mr. Miroslav Lajčák was therefore assigned the so-called Bonn Powers by the UNSC Resolution, and not merely through his designation by the PIC. The successor to Mr. Miroslav Lajčák was Mr. Valentin Inzko. His designation by the Steering Board of the PIC on 13 March 2009 was also agreed upon by the UNSC in Resolution 1869 (2009), which, once again, directly recalled the Bonn Conclusions. The latter resolution effectively terminated the former.

The authorization of Mr. Valentin Inzko, who requested dismissal from office, to exercise the so-called Bonn Powers lasted until May 27, 2021, when the PIC designated Mr. Hans Christian Friedrich Schmidt as High Representative. The situation in which Mr. Hans Christian Friedrich Schmidt now finds himself is unprecedented. His legislative actions extend beyond the scope of his authorization and the competencies he would eventually hold as an officeholder at the OHR or as the chairperson of the PIC's Steering Board. The authorization by the UNSC is a mandatory element for these actions to be considered legitimate interventions by the international community.

3.2.2 International Jurisprudence

Another cumulative requirement recognized in the relevant jurisprudence of the European Court for Human Rights (hereinafter: the Court) is effective oversight. As previously noted, for actions to be qualified as carried out on behalf of the international community, in addition to the power transfer, the UNSC's effective oversight is essential. The UNSC enforces this oversight through a set of crucial elements that ensure the accountable exercise of its authority, which is vital for upholding its legitimacy and credibility as a global peacekeeping and security entity. These components include authorization, compliance mechanisms, and monitoring procedures. Notably, the absence of authorization through substantive or causative resolutions has been observed in some instances. Regarding compliance mechanisms, these include the obligation of UN member states to adhere to UNSC resolutions, even when they may conflict with other international commitments. Applied to the current context, this implies that the parties to Annex 10 must comply with Mr. Schmidt's directives under valid power transfer conditions, regardless of any conflicting obligations arising from the Convention, as seen in *Libyan Arab Jamahiriya v. United States of America* and *Libyan Arab Jamahiriya v. United Kingdom* (ICJ Reports, 1992, p. 16, § 42 and p. 113, § 39). Monitoring processes involve regular reporting to the UNSC to facilitate the assessment of decision outcomes. To date, in accordance with Resolution 1031 (UN Doc. S/RES/1031(1995)), Mr. Hans Christian Friedrich Schmidt has submitted six reports to the UN Secretary-General regarding the Peace Agreement in Bosnia and Herzegovina, covering the period from April 16, 2021, to April 15, 2024. While reporting to the UN Secretary-General, as the figure representing the interests of the international community, may suggest effective oversight over the reporting party, it does not provide conclusive evidence of such oversight.

When assessing effective oversight in the context of accountability for the actions of the High Representative in the *Berić* case, the Court relied upon the general legal framework for conferring the Bonn Powers to the High Representative. The Court took into account UNSC Resolution 1031, which confirmed the High Representative as the final authority in the field regarding the interpretation of Annex 10 on the civilian implementation of the Peace Agreement. Furthermore, the Court referred to the Conclusions of the Bonn Peace Implementation Conference (UN Document No. S/1997/979) and UNSC Resolution 1144 (1997), which explicitly endorsed those Conclusions and authorized the High Representative to undertake the actions that were the subject of the complaint. Additionally, the Court recognized the subsequent UNSC endorsement of the contested actions of the High Representative through Resolution 1722 of 21 November 2006, as well as the regular reporting mechanism, as evidence of an ongoing oversight mechanism.

The Court's analysis of the general legal framework, in conjunction with the oversight mechanism, led to the conclusion that the UNSC continued to maintain effective oversight over the High Representative. This decision was deemed justified given the specific circumstances of the case, as the actions in question were carried out by Lord Ashdown, whose status as High Representative and the delegation of powers by the UNSC were undisputed. By focusing on the general framework of power distribution outlined in Chapter VII of the UN Charter to the High Representative, and overlooking UNSC Resolution 1396 (2002), which approved Lord Ashdown's appointment and granted him the Bonn Powers, the Court may have been distinguishing between the substantive and causative effects of UNSC resolutions. While the Court considered UNSC Resolution 1031 and UNSC Resolution 1144 as substantive resolutions, UNSC Resolution 1396 (2002) was viewed as causative. Therefore, there was no need to refer to the latter resolution, as a clear distinction existed between substantive resolutions (1031 and 1144) and the triggering resolution (1396).

The *Berić* case provides valuable insights into the judicially verified oversight mechanism under the regime of valid power transfer. A functioning oversight mechanism consists of two key components: regular reporting in line with Resolution 1031, and the subsequent endorsement by the UNSC of the High Representative's actions. While the first component is effectively in place, the second is conspicuously absent. Since Mr. Hans Christian Friedrich Schmidt assumed office, the UNSC has consistently addressed the situation in Bosnia and Herzegovina through a series of resolutions, including Resolutions 2604 (2021), 2658 (2022), and 2706 (2023), all of which focused primarily on extending the mandate for the EUFOR ALTHEA multinational stabilization force. Notably, these resolutions did not provide any endorsement of or support for Mr. Schmidt's actions. In fact, discussions among permanent member state representatives suggest the opposite (see Johnstone, 2003. p. 453)

During the adoption of Resolution 2604 (2021) on November 3, 2021 (S/PV.8896), and the presentation of Mr. Schmidt's first report, the Chinese representative emphasized the Security Council's crucial role in appointing a High Representative, as stipulated in the Dayton Peace Agreement. Similarly, the Russian representative echoed this concern, criticizing the attempt to appoint Mr. Schmidt as the new High Representative for Bosnia and Herzegovina without the requisite Security Council consensus, which they viewed as a violation of international law and established practices. The Russian representative further emphasized that, as of that date, the Office of the High Representative remained vacant, with no legitimate candidate or incumbent in place.

Similarly, when adopting the Resolution 2658 (2022) on November 2, 2022, the Russian Federation's representative to the UNSC condemned the imposition of Special Envoys and the internationally appointed High Representative for Bosnia and Herzegovina, denouncing the latter an "illegitimate protégé" that undermines the authority of democratically elected officials. The representative further called for the dissolution of the Office of the High Representative, labeling it a "body of colonial governance", and asserting that its continued existence deprived the population of relief. In response, Bosnia and Herzegovina's delegate echoed this sentiment, arguing that the Office's electoral measures violated the Dayton Agreement and failed to ensure fairer elections. Earlier, during the UNSC meeting on May 11, 2022 (SC/14886), several delegates expressed reservations about hearing a briefing from Mr. Schmidt in his capacity as High Representative, citing the Council's lack of authorization for his appointment. This objection was reiterated by the Russian

Federation's representative when Mr. Schmidt addressed the UNSC on May 10, 2023 (SC/15279).

In subsequent UNSC meetings, Mr. Schmidt faced further contestation. At the UNSC meeting on May 15, 2024 (SC/15696), China's representative expressed concern over the High Representative's amendments to Bosnia and Herzegovina's election laws, stressing that the country's affairs should be decided and managed by its own people. The Russian Federation's representative went further, accusing the High Representative of establishing a parallel, extra-constitutional system that makes decisions on behalf of the entire country, effectively bypassing democratic processes. This sharp criticism was reiterated during the UNSC meeting on April 30, 2024 (SC/15688), where the Russian Federation's representative refused to acknowledge Mr. Schmidt's title, referring to him as "a citizen of Germany styling himself as High Representative."

In light of these circumstances, the argument that the UNSC's oversight structure satisfies the *Berić* case loose criteria for effective oversight becomes increasingly untenable. The assumption that the High Representative receives support and endorsement through the adoption of UNSC resolutions concerning EUFOR ALTHEA's mission temporal extensions lacks a solid foundation in both substantive and formal terms. The mandate and responsibilities of multinational stabilization forces were regulated by the Agreement on the Military Aspects of the Peace Settlement – signed between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Srpska – known as Annex 1-A to the Dayton Peace Agreement, and subsequently confirmed in UNSC resolutions. In contrast, the mandate and responsibilities of the High Representative are defined by a separate international agreement between the same parties – Annex 10 to the Dayton Peace Agreement, alongside relevant UNSC resolutions. Article II, Section 34 of the Annex 10 to the Dayton Peace Agreement expressly underlines that the High Representative shall have no authority over the multinational military force and shall not, under any circumstances, interfere in the conduct of military operations or the chain of command.

Considering the lack of valid power transfer and the absence of effective oversight, one might reasonably conclude that the actions taken by the current officeholder at the OHR cannot be ascribed to the international community and, therefore, do not meet the criteria for legitimate intervention as outlined in Annex 10 to the Dayton Peace Agreement.

4. Conclusion

This paper has critically examined the legal and political ramifications of the High Representative's (HR) contested authority in Bosnia and Herzegovina (BiH) and the Republic of Srpska's institutional responses, situating these developments within the broader framework of the Dayton Peace Agreement (DPA). The analysis demonstrates that the appointment of Mr. Hans Christian Friedrich Schmidt as HR without United Nations Security Council (UNSC) endorsement, coupled with his unilateral legislative actions, has significantly destabilized the constitutional equilibrium established under Annex 10 of the DPA (see Bieber, 2013). The Republic of Srpska's 2023 Law on Amendments to the Law on the Publication of Laws and Other Regulations – which excludes HR's decisions from its legal framework – emerges as a de facto partial suspension of Annex 10, justified under international law as a proportionate countermeasure to a material breach of the treaty.

Central to this conclusion is the procedural irregularity in Mr. Schmidt's appointment. Annex 10 explicitly requires UNSC validation for the HR's legitimacy, a condition unmet due to the rejection of Draft Resolution S/2021/667. The absence of UNSC authorization undermines the legal basis for his invocation of the Bonn Powers, rendering his interventions devoid of the international community's collective mandate. This procedural deficit, compounded by the Constitutional Court of BiH's controversial delegation of legislative authority to the HR, constitutes a material breach of Annexes 4 and 10. By transferring powers to an unelected entity without UNSC oversight, the Court eroded the DPA's foundational principle of consensual governance, thereby violating the principle of good faith under the Vienna Convention on the Law of Treaties (VCLT).

The Republic of Srpska's remedial measures, while unprecedented, align with Article 60 of the VCLT, which permits partial treaty suspension in response to a material breach. By enacting laws that reject HR's decisions, the Republic of Srpska has highlighted the breakdown of effective UNSC oversight over the HR – a critical criterion for legitimate international intervention. The UNSC's repeated refusal to endorse Mr. Schmidt's actions, evidenced by resolutions focused solely on EUFOR ALTHEA and vocal objections from permanent members, further invalidates claims of effective oversight. This disconnect underscores a broader erosion of the DPA's institutional safeguards, shifting authority from internationally mandated structures to contested domestic interpretations.

These developments carry profound implications for post-conflict governance and international law. The case of BiH illustrates the fragility of externally imposed constitutional frameworks when key stakeholders perceive procedural inequities. The HR's unchecked exercise of power, divorced from UNSC legitimacy, risks entrenching parallel governance systems that undermine local sovereignty and democratic accountability. Conversely, unilateral countermeasures by sub-state entities such as the Republic of Srpska challenge the coherence of international treaty regimes, potentially incentivizing fragmentation. Moving forward, this paper underscores the urgency of reaffirming the DPA's original procedural safeguards. The HR's authority must be recalibrated to ensure UNSC endorsement and meaningful consultation with all signatory parties, as Annex 10 mandates. Additionally, the international community must address the growing dissonance between the PIC's operational autonomy and the UNSC's oversight role to prevent further institutional decay.

Scholars and policymakers ought to prioritize bridging the gap between sovereignty and external intervention within post-conflict environments, ensuring that treaty mechanisms remain adaptable to changing political dynamics without compromising their legal legitimacy. In conclusion, the contested and partial suspension of Annex 10 symbolizes a deeper systemic failure in the execution of the DPA. Restoring its effectiveness requires a recommitment to multilateral engagement, strict adherence to procedural standards, and a balanced approach that harmonizes international oversight with local autonomy. Only through these steps can BiH and comparable post-conflict states successfully manage the delicate balance between peacebuilding efforts and self-determination.

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THE FOURTH GENERATION OF HUMAN RIGHTS IN THE DIGITAL AGE: THE IMPACT OF THE INTERNET AND MODERN TECHNOLOGIES***

Summary

Contemporary legal theory increasingly recognizes the emergence of a fourth generation of human rights in response to accelerated digitalization and profound technological transformation. This shift reflects fundamental changes in the ways human rights are exercised and protected in the digital environment. The expansion of the internet, artificial intelligence, mass data processing, and digital platforms has generated new forms of social power, but also new forms of individual vulnerability, which the existing normative frameworks do not fully address. This paper examines whether this fourth generation of human rights is theoretically and normatively justified as a distinct category of rights shaped predominantly by modern technologies. The central hypothesis is that digital technologies no longer function solely as means for the exercise of existing rights, but operate as de facto regulators of social relations, significantly altering the traditional relationship between the individual, the state, and private actors. The research is based on the normative-dogmatic method, comparative legal

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analysis of relevant international legal sources, and a critical review of contemporary legal theory on digital rights. Although the concept of a fourth generation of human rights theoretically encompasses a broader range of technologically conditioned rights – including bioethical rights, the right to genetic integrity, and the right to scientific and technological development – the paper focuses primarily on digital rights as its most developed and socially significant segment. The authors analyze the right to personal data protection, the right to internet access, the right to protection against algorithmic discrimination, and the right to cognitive autonomy. They conclude that these rights reflect an objective normative need of contemporary society and require both the systemic adaptation of existing legal frameworks and the development of new protective mechanisms in the digital sphere.

Keywords: Fourth Generation of Human Rights, Digital Rights, Internet Access, Artificial Intelligence, Data Protection, Algorithmic Discrimination, Cognitive Autonomy.

ČETVRTA GENERACIJA LJUDSKIH PRAVA U DIGITALNO DOBA: UTICAJ INTERNETA I MODERNIH TEHNOLOGIJA

Sažetak

Pored klasične podele na tri generacije ljudskih prava, savremena pravna teorija sve intenzivnije razmatra pojavu četvrte generacije ljudskih prava. Ova generacija razvija se kao odgovor na ubrzanu digitalizaciju društva i duboke tehnološke promene koje suštinski menjaju način ostvarivanja i zaštite ljudskih prava. Razvoj interneta, veštačke inteligencije, masovne obrade podataka i digitalnih platformi doveo je do nastanka novih oblika društvene moći, ali i novih vidova ranjivosti pojedinaca, koje postojeći normativni okviri ne obuhvataju u potpunosti. Cilj rada je da se ispita da li se pojava četvrte generacije ljudskih prava može teorijski i normativno opravdati kao posebna kategorija prava koja je nastala pod dominantnim uticajem savremenih tehnologija. Polazna hipoteza rada jeste da digitalne tehnologije više ne deluju isključivo kao sredstva za ostvarivanje postojećih prava, već kao faktički regulator društvenih odnosa, čime se bitno menja klasični odnos između pojedinca, države i nosilaca privatne moći. Istraživanje se zasniva na normativnodogmatskoj metodi, uporednopravnoj analizi relevantnih evropskih i međunarodnih pravnih izvora, kao i na kritičkoj analizi savremene pravne teorije o digitalnim pravima. Iako se koncept četvrte generacije ljudskih prava teorijski odnosi na širi krug tehnološki uslovljenih prava – uključujući bioetička prava, pravo na genetski integritet i pravo na naučni i tehnološki razvoj – rad se primarno fokusira na digitalna prava kao njihov najrazvijeniji i društveno najrelevantniji segment. Autorke analiziraju pravo na zaštitu podataka o ličnosti, pravo na pristup internetu, pravo na zaštitu od algoritamske diskriminacije i pravo na očuvanje kognitivne autonomije. Zaključak je da ta prava predstavljaju objektivnu normativnu potrebu savremenog društva i da zahtevaju sistemsko prilagođavanje postojećih pravnih okvira, kao i razvoj novih mehanizama zaštite u digitalnom okruženju.

Ključne reči: četvrta generacija ljudskih prava, digitalna prava, internet, veštačka inteligencija, zaštita podataka, algoritamska diskriminacija.

1. Introduction

The rapid digital transformation of society is fundamentally reshaping the framework of human rights. In legal theory, human rights are generally understood as a set of rights and freedoms that belong to all individuals, irrespective of their own will or that of the state (Krivokapić, 2017, p. 10). In addition to this core characteristic, human rights are traditionally described as inalienable and universal, grounded in the idea of human equality, which traces its origins to ancient philosophy. The French Revolution of 1789, with its principles of *liberté, égalité, fraternité*, established the foundations for the modern conception of human rights and their subsequent normative development.

Each historical epoch has given rise to its own generation of human rights, designed to address social instability and promote development and progress. The generational dynamics of human rights reflect the progressive nature of legal evolution and the adaptation of legal institutions to shifting social needs (Popovych, 2025, p. 29).

The catalogue of human rights is not exhaustive; rather, human rights emerge and evolve in response to social needs, serving as instruments to enable society to function optimally. The development of the internet, artificial intelligence, mass data processing, and digital platforms has led to the emergence of new forms of social power and new forms of individual vulnerability that are not fully addressed by existing normative frameworks. Digital technologies influence the enjoyment of traditional human rights, modifying them and shifting their previously established boundaries.

The emergence of digital technologies has generated not only new rights but also new obligations – obligations that earlier generations of human rights could not have anticipated. The timely and appropriate regulation of human rights, and their alignment with the demands of the modern world, is crucial for the strengthening of legal systems globally and contributes to the harmonious development of society as a whole (Dovhan, 2021, p. 289). In this context, contemporary legal theory increasingly recognizes the emergence of a fourth generation of human rights, which is evolving in response to the accelerated digitalization of society and profound technological change.

This paper examines whether the emergence of the so-called fourth generation of human rights could be theoretically and normatively justified as a distinct category of rights shaped by the dominant influence of digital technologies. The central hypothesis is that modern technologies no longer function solely as means for exercising rights, but have become de facto regulators of social relations, thereby significantly altering the traditional relationship between the individual, the state, and technology companies as private power holders. The paper addresses the following research questions:

1. Do digital rights represent a new generation of human rights, or are they merely a contemporary manifestation of existing rights?
2. What normative consequences does digitalization have for traditional categories of human rights?
3. What are the primary theoretical and practical challenges involved in the legal recognition and protection of fourth generation rights?

The research is based on the normative-dogmatic method, a comparative legal analysis of relevant international legal sources, and an examination of contemporary legal theory on digital rights. Although the fourth generation of human rights encompasses a wide range of issues – from biotechnology and genetic engineering to the ethics of artificial intelligence and the right to scientific development – this paper focuses exclusively on digital rights as the most developed and socially relevant segment. Considering their growing importance and impact on individuals' daily lives, special attention is devoted to the right to internet access, the right to protection against algorithmic discrimination, the preservation of cognitive autonomy, and the right to personal data protection. Additionally, the paper explores the potential extension of the concept of human rights to artificial entities and the challenges this possibility presents.

2. The Evolution of Human Rights: From the First to the Fourth Generation

From the perspective of international law, human rights are a dynamic category, subject to change and social innovation. In the early decades following the establishment of the United Nations, the dichotomous classification of human rights into two primary generations became predominant. The first generation includes civil and political rights, which emerged in the 17th and 18th centuries as a result of major social revolutions. This group includes fundamental rights and freedoms such as the right to life, liberty, property, freedom of thought and conscience, as well as the prohibition of torture and inhuman treatment. These rights are enshrined in the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and are grounded in the idea of protecting the individual from abuse of state power. In the 19th and early 20th centuries, the second generation of human rights – economic, social and cultural rights – developed. They pertain to human well-being and quality of life, and include the right to work, education, health care, and an adequate standard of living. These rights are normatively affirmed in the Universal Declaration of Human Rights, and elaborated in greater detail in the International Covenant on Economic, Social and Cultural Rights of 1966. Their development expands the classical liberal framework of human rights, emphasizing the social responsibility of the state. In the second half of the 20th century, new issues emerged that extended beyond the individual protection and focused on collective interests. This led to the development of third-generation rights, such as the right to a healthy environment, the right of peoples to self-determination, the right to peace, development, and communication. These collective solidarity rights are rooted in key documents such as the Stockholm Declaration (1972), the Rio Declaration (1992), UN recommendations, and the final acts of international conferences. They focus on global and transnational challenges. Third-generation human rights are predominantly considered to fall within the domain of soft law. One of the few instruments that provides legally binding force for these rights is the African Charter on Human and Peoples' Rights, which enumerates and protects the right to development, the right to peace and security, and the right to a healthy environment.

The division of human rights into three generations is known as the Vašák classification, named after Karel Vašák, who proposed this conceptual framework for the systematization of human rights in the late 1970s. In theory, this categorization is regarded as the most practical, most frequently used, and the most comprehensive. It encompasses several significant dichotomies, such as the distinctions between negative and positive rights, individual and collective rights, and national and international responsibilities (Domaradzki, Khvostova & Pupovac, 2019, p. 424). However, some theorists criticize this division, arguing that it is excessively Eurocentric and rooted in values derived from European historical experience, with insufficient regard for the cultural and socio-economic specificities of non-European societies (Popovych, 2025, p. 30).

Despite its enduring theoretical influence, Vašak's division now faces new challenges. The question arises as to whether this framework is sufficient for understanding contemporary forms of human rights violations and whether it can adequately address the changes brought about by technological advancement. Scientific and technological development has always shaped the evolution of human rights. At one point in history, the printing press represented one of the greatest technological innovations, significantly influencing the emergence of the concept of freedom of the press. Subsequently, radio and television further contributed to the development of the right to freedom of thought and expression. The next step in technological evolution was the internet, which has permanently transformed the ways in which humanity works, learns, communicates, educates, and informs itself. The COVID-19 pandemic has clearly demonstrated that many rights in contemporary society cannot be exercised without access to the internet (Gordanić, 2022). Following the expansion of the internet, artificial intelligence has emerged as a new technological paradigm that has already had a significant impact on all spheres of social life and is expected to have an even greater influence in the years to come.

These changes create an opportunity to reconsider the traditional classification of human rights and raise the question of whether a fourth generation of rights is necessary to address the challenges of the digital age. These questions provide the foundation for exploring the concept of fourth-generation human rights, which is the focus of the following chapter.

3. The Fourth Generation of Human Rights: A Normative Response to the Digital Age

The contemporary development of digital technologies poses a qualitatively distinct challenge to the human rights system when compared with earlier technological innovations. Whereas the printing press, radio, and television primarily served as more efficient means of exercising already recognized rights, digital technologies have the capacity to directly shape social relations, information flows, and the distribution of power within society. They are no longer merely instruments of communication; rather, they are increasingly becoming structural components of the contemporary social order. In such circumstances, the distinction between the virtual and physical realities is becoming progressively less pronounced. An individual's digital life is increasingly complex and exposed, fundamentally transforming the manner in which human rights are exercised. Legal categories developed to regulate relations in the physical sphere are proving to be increasingly ineffective in the digital environment. Digital footprints, algorithmic decision-making, mass data processing, surveillance systems, and virtual reality collectively necessitate the development of new forms of legal protection. Accordingly, there is an objective need to adapt the traditional concept of human rights to the realities of digital society. Digitalization affects human rights in two principal ways. On the one hand, it transforms the manner in which existing rights are exercised: privacy acquires new dimensions in the context of digital footprints, political participation is reshaped through the e-democracy mechanisms, and the concept of property is expanding to include digital and virtual property. On the other hand, the digital environment creates new risks – algorithmic discrimination, mass surveillance, unauthorized data processing, and digital exclusion. These phenomena require not only the adaptation of existing norms but also the development of new legal instruments that reflect the specific characteristics of digital technologies and their impact on the realization of human rights (Popovych, 2025, pp. 31-32). It is in these circumstances that the concept of the fourth generation of human rights has emerged. Unlike previous generations of human rights, which emerged in response to political, economic, or global social challenges, the fourth generation is taking shape under conditions in which technology is no longer merely an instrument but an active agent in the regulation of social relations. This fundamentally alters the traditional relationship among the individual, the state, and holders of private power – particularly large technology corporations, which have access to vast quantities of data and increasingly sophisticated algorithmic systems.

The theoretical foundations of fourth-generation human rights have developed gradually over time. Early scholarly discussions primarily emphasized the broad impact of scientific and technological advancement on human existence. Bustamante Donas argues that modern technologies transform the very structure of social relations and the conditions under which rights are exercised, rendering the traditional human rights catalogue increasingly inadequate for addressing emerging forms of risk and opportunities. From this perspective, the fourth generation encompasses a broad range of rights associated with technological development, extending from bioethical rights and the protection of genetic integrity to those arising within the information society (Bustamante Donas, 2001). This approach has enabled the fourth generation to be conceptualized as a dynamic process of adapting human rights to evolving scientific and technological conditions. In his later work, Bustamante Donas increasingly narrowed this concept, focusing primarily on the digital sphere, and emphasizing that the internet and digital networks have created a new form of social reality in which human rights are exercised in fundamentally different ways. He further develops the concept of digital citizenship, arguing that internet access, digital literacy, free information exchange, and protection against digital exclusion are becoming key elements of a new generation of rights (Bustamante Donas, 2010). In this context, broader reflections on the impact of technology on human rights have evolved into an understanding of digital rights as a central dimension of fourth-generation human rights. Within this broader theoretical framework, fourth-generation human rights encompass a range of emerging interests and rights, including the right to personal data protection, the right to digital identity, the right to cybersecurity, the right to genetic integrity, rights related to bioethics and biomedical technologies, the right to protection against the misuse of artificial intelligence, the right to access information and communication technologies, and the right to equal access to scientific and technological progress. Some authors argue that the unifying principle of this generation may be integration – namely, the integration of human beings into technological lifeworlds that also include entities who intelligence may surpass that of humans (Birhane, van Dijk & Pasquale, 2024). Whereas the first generation of rights concerned the protection of individual freedoms, the second focused on social status, and the third emphasized collective efforts, the fourth generation, according to this understanding, is concerned with humanity's relationship to new intelligent entities (Risse, 2021, p. 9).

In addition to its technological dimensions, fourth-generation human rights also require a clear ethical foundation. Baroni proposes that, by analogy with earlier generations of rights, new reference values should be formulated to address the challenges of the digital age. Whereas the first generation was characterized by freedom, the second by equality, and the third by solidarity, the fourth generation, in his view, should be grounded in the principles of identity and precaution. He argues that these principles should assume a role equivalent to that of the foundational values of earlier generations of human rights (Baroni, 2024). The principle of identity acquires particular importance because modern technologies – especially artificial intelligence, neurotechnologies and biotechnology – have the capacity to fundamentally affect personal and collective identity, the perception of reality, and the social recognition of man as a subject of law. Conversely, the precautionary principle emerges as a general normative criterion under conditions of profound technological uncertainty, in that it enables the legal order to respond to potential risks before serious and irreversible consequences occur. In this context, identity and precaution constitute the value foundation of fourth-generation human rights (Baroni, 2024).

The COVID-19 pandemic provided a significant impetus for the development of digital rights. Under conditions of global restrictions on movement, nearly all spheres of social life shifted to the online environment. Individuals with access to the internet were able to work, pursue education, obtain information, and participate in social processes, while those without digital access were effectively excluded from numerous aspects of life.

This lived experience gave rise to a more robust theoretical reflection on the normative status of digital rights. Alsharif and Hnit introduce the concept of the *theory of normative equivalence*, according to which a certain right acquires the status of a human right when it becomes functionally necessary for the realization of already recognized fundamental rights. In their view, digital rights satisfy this criterion precisely because, in their absence, classic rights remain merely formal rather than practically attainable. Freedom of expression, without access to digital platforms, loses much of its practical scope, while the right to privacy, without effective protection of digital data, becomes increasingly difficult to exercise in meaningful terms. Accordingly, the authors conclude that digital rights represent a logical and inevitable continuation of the evolution of the human rights system in the digital age (Alsharif & Hnit, 2025). They therefore cannot be understood merely as an extension of existing human rights, but rather as a response to qualitatively new forms of power, surveillance, and control that emerge within the digital environment.

4. Digital Rights as the Core of Fourth-Generation Human Rights

Although fourth-generation human rights encompass a broad range of rights related to the development of modern technologies, digital rights are central to this framework. They constitute the most developed and operational segment of this new generation of rights, as they are directly linked to the everyday exercise of freedoms and rights within the digital environment. Contemporary society increasingly functions through digital platforms and information and communication technologies; accordingly, the protection and realization of digital rights have become central concerns of the modern human rights system.

Digital rights may be defined as a set of rights that enable individuals to access, use and actively participate in digital spaces. These rights encompass access to digital resources, the use of information technologies, as well as the right to create, exchange, and disseminate digital content. In this sense, digital rights do not constitute a mere technical upgrade of existing rights but rather a necessary precondition for their effective realization under contemporary social conditions. In a world in which communication, education, work, and civic participation increasingly take place within digital environments, the exercise of human rights is scarcely conceivable without an appropriate level of digital rights (Bieliakov *et al*., 2023). The group of digital rights includes the right to personal data protection, the right to digital identity, the right to cybersecurity, the right to protection against algorithmic discrimination, and the right to digital privacy. These rights address new forms of risk arising from mass data processing, algorithmic decision-making, and expanding surveillance within digital environments. In this context, digital rights become a key mechanism for safeguarding human dignity under conditions of continuous digitalization of social relations (Popovych, 2025).

Digital rights may, in theoretical terms, be systematized into several basic groups. First, a distinction can be made between rights of access to digital infrastructure, including access to the internet and information networks as key resources of contemporary society. The second group are rights relating to the use digital technologies and platforms, including the use of software, digital tools, and communication systems. Finally, a distinct group comprises rights to create, exchange, and distribute digital content, including freedom of digital expression, access to information, and active participation in online communication. This typology represents one possible approaches to the classification of digital rights and contributes to their more precise delineation in relation to traditional civil and political rights, while simultaneously highlighting their functional interdependence (Bieliakov *et al*., 2023).[1]

It is particularly important to emphasize the universal character of digital rights. They cannot be viewed exclusively as rights tied to specific states or legal systems, but rather as rights that arise from the general needs of a globally networked contemporary society. Digital rights arise as a direct consequence of technological transformation and the transition to the digital era; accordingly, they are justifiably viewed as a new generation of human rights adapted to the realities of the information society (Bieliakov *et al*., 2023). This understanding is consistent with earlier theoretical considerations, according to which the development of modern technologies fundamentally alters the conditions under which human rights are exercised and necessitates their continuous adaptation to evolving social circumstances (Bustamante Donas, 2001; 2010).

In addition to their protective function, digital rights also have a strong emancipatory dimension. They enable individuals to participate in the digital economy,

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[1] In legal theory, there is no universally accepted classification of digital rights; rather, they are conceptualized differently depending on the underlying criteria, including their understanding as a set of legal entitlements, an evaluative framework, or a form of collective action, which indicates the pluralism of approaches in contemporary literature (Roberts, 2025, p. 9).

public communication, education, and broader social processes. Accordingly, digital rights are increasingly seen as a functionally necessary condition for the exercise of traditional human rights. It is argued that, without digital rights, traditional rights such as freedom of expression, the right to information, and the right to privacy remain formally recognized but not fully achievable in practice. Digital rights therefore do not constitute an arbitrary expansion of the human rights catalogue but rather its logical and necessary development in response to the technological transformations of contemporary society (Alsharif & Hnit, 2025).

Understanding digital rights as the core of fourth-generation human rights enables a clearer appreciation of their practical and normative significance. They cannot be reduced to a merely technical category; rather, they constitute a set of concrete and operationalized rights, the realization of which is a prerequisite for the individual's full participation in society.

Bearing in mind that digital rights constitute one of the most important categories of fourth -generation human rights, the authors proceed to examine several key digital rights. In particular, attention is devoted to the right to personal data protection, the right to internet access, the right to protection against algorithmic discrimination, and the importance of cognitive autonomy. These rights have become integrated in everyday life, and their effective regulation and protection are essential not only for the dignity of the human person but also for the realization of other human rights. Digital rights are closely interconnected with first- and second-generation human rights. Inadequate regulation of digital rights consequently undermines the effective enjoyment of first- and second-generation human rights. In this sense, digital rights function as a bridge between the traditional human rights system and emerging forms of social reality, thereby confirming that the fourth generation of human rights is not an abstract theoretical construct but a normative response to the profound transformations brought about by the digital age.

4.1. The Right to Personal Data Protection

One of the central rights associated with fourth-generation human rights is the right to personal data protection. Although the protection of privacy has traditionally been classified as a civil and political right, mass data processing, automated decision-making, and the profiling of individuals have led to a situation in which classical concepts of privacy no longer afford sufficient protection. In the 21st century, the protection of privacy has become an exceptionally complex task. The processing of personal data in digital environments enables deep intrusions into individuals' personal, professional and social lives, often without their meaningful control or full understanding of the consequences of such processing. At the same time, organizations invest substantial resources in securing their data to prevent unauthorized access by other entities. Paradoxically, however, the internet and modern technologies also make it comparatively easy to obtain personal data belonging to others, far more easily than in earlier times when such advanced technologies did not exist.

Many instances of personal data theft occur with relative ease as a result of insufficiently strong user passwords. In addition, the use of mobile devices does not necessarily guarantee the protection of data privacy. Numerous applications installed on mobile phones request access to location data, email addresses, dates of birth, and other personal information. If such data fall into the wrong hands, their misuse can cause significant harm for users. One of the crimes increasingly associated with the misuse of personal data is identity theft (Nuredin, 2023, p. 12). All data available on the internet, social networks, and digital applications constitute a form of economic value. Depending on the actors who utilize such data, the consequences may vary significantly.

The society of the future will be compelled to adopt a different mode of thinking, which will increase the complexity of criminal investigations and crime prevention while at the same time expanding regulatory challenges (Petrović, 2022, p. 483). Therefore, contemporary legal theory increasingly emphasizes the need to recognize data protection as a distinct and autonomous right that extends beyond the traditional framework of the right to privacy. In a digital society, the protection of personal data is not merely a matter of privacy but also implicates questions concerning the distribution of power, individual autonomy, and the preservation of human dignity.

4.2. The Right to Internet Access

One of the strongest candidates for inclusion within fourth-generation human rights is the right to internet access. As noted earlier, the internet is a technology that has gradually transformed not only everyday life but also the very concept of human rights. Regarded as a luxury available to a limited number of users in the 1990s, internet access has now become a routine feature of life for a substantial proportion of the world's population. According to data from October 2025, approximately 6 billion people, or 73.2% of humanity, use the internet. In the Netherlands, Norway, and Saudi Arabia, 99% of the population uses the internet (Statista, 2025).

Several states have recognized certain aspects of the right to internet access as a fundamental human right through various mechanisms. In 2000, the Estonian Parliament adopted the *Telecommunications Act*, which defines internet access as a human right essential to life in the 21st century. In Greece, a constitutional amendment in 2001 recognized internet access as a human right. In July 2010, Costa Rica declared internet access a human right, while Finland established broadband access as a legal right by amending their *Communications Market Act*. Italy likewise addressed the digital rights through the adoption of the *Declaration of Internet Rights* in 2015, a non-binding instrument that recognizes internet access as a fundamental right of every person and as a condition for individual and social development (Gordanić, 2022, pp. 173-174). These examples indicate that states are increasingly adapting their legal frameworks to the realities of digital society by recognizing internet access as a key precondition for individual and social development.

The COVID-19 pandemic has further reinforced the importance of internet access. During the pandemic, nearly all spheres of life shifted to digital environments. Individuals with internet access were able to work, pursue education, obtain information, and exercise their human rights. This experience has clearly demonstrated that, under contemporary conditions, the absence of internet access may effectively impede the realization of a wide range of fundamental human rights.

Scholars argue that, even under ordinary circumstances, the full enjoyment of many human rights is not possible without adequate access to the internet. They emphasize that rights such as freedom of speech and expression, the right to privacy, the right to education, the right to health are closely linked to the internet and to conditions of free and equal internet access (Vijayan Pillai *et al*., 2025, p. 239). The absence of internet access may therefore lead to the de facto exclusion of an individual from society. Those without access are deprived of meaningful opportunities to obtain information, and participate fully in the labor market, education, healthcare, and broader economic, political, and cultural life. In this sense, internet access is increasingly viewed not merely as a technical or economic issue, but as a matter of human rights and social equality. This phenomenon is described in the literature as the digital divide, a concept used to denote the gap between those who have access to the internet and those who are excluded from it (Van Dijk, 2020, p. 5). Individuals without internet access are consequently in a disadvantaged position in social, economic, informational, and educational terms relative to those who do use the internet. This inequality is often compared to the concept of literacy, highlighting the distinction between traditional literacy and digital literacy.

4.3. The Right to Protection Against Algorithmic Discrimination

The development of artificial intelligence and algorithmic decision-making systems represents one of the key challenges of contemporary human rights law. Algorithms are now widely used in the areas such as employment, credit allocation, education, healthcare, criminal justice, and social policy, and the decisions they generate have a direct impact on the rights of individuals. In this context, increasing attention has been devoted to the right to protection against algorithmic discrimination as an integral component of fourth-generation human rights. Algorithmic discrimination occurs when automated decision-making systems produce or deepen inequalities among individuals or social groups, whether directly or indirectly. In principle, algorithms are often perceived as objective and neutral tools. However, numerous factors call their objectivity and neutrality into question. For example, the data used to train artificial intelligence systems may create a basis for algorithmic discrimination. The data on which artificial intelligence systems are trained may themselves be based on discrimination, in which case algorithms are likely to reproduce forms of discrimination that already existed. Consequently, algorithmic systems may systematically treat certain groups less favorably on the basis of gender, race, ethnicity, age, disability, socioeconomic status, or other personal characteristics (Prlja, Gasmi & Korać, 2023, p. 63). This phenomenon is particularly concerning because it may have long-term adverse consequences for affected individuals and perpetuate a self-reinforcing cycle of discrimination.

The most significant challenge posed by algorithmic discrimination lies in its often invisible and difficult-to-prove nature. Unlike traditional forms of discrimination, where it is generally possible to identify the human decision-maker and their intention, algorithmic decision-making operates through processes that are frequently complex and non-transparent. Individuals affected by such decisions are often unaware that they have been subjected to discriminatory treatment, nor do they possess effective means of challenging the basis, criteria, or underlying logic of the algorithmic decision-making. This calls into question fundamental principles of the rule of law, legal certainty, and procedural fairness.

Existing anti-discrimination frameworks are not fully adapted to these emerging forms of risk. Although the principle of non-discrimination formally applies to the digital environment, in practice it is often difficult to establish a causal link between algorithmic data processing and an adverse outcome affecting a particular individual. An additional challenge lies in the fact that holders of algorithmic power are large technology corporations, which are not subject to the same obligations of transparency and accountability as state authorities. In this context, the right to protection against algorithmic discrimination implies the development of new normative guarantees, including the right to an explanation of automated decisions, the right to human oversight of algorithmic processes, the obligation to assess the impact of algorithms on human rights, and strengthened institutional supervision over their implementation. These protections are intended to ensure that technological progress does not undermine the fundamental principle of equality.

The recognition of protection against algorithmic discrimination as part of fourth-generation human rights reflects the need to adapt human rights law to the realities of the digital society in order to prevent discrimination and promote greater transparency in algorithmic decision-making. This means that human rights should not be understood as a static category, but rather as a dynamic normative framework capable of responding to new forms of power and vulnerability in contemporary society.

4.4. The Right to Preserve Cognitive Autonomy

The fourth industrial revolution is not only transforming the ways of working and communicating, but also encroaching on the inner sphere of the human personality. Digital systems based on mass data processing, behavioral profiling, and algorithmic personalization make it possible to predict and direct individual behavior, thereby progressively blurring the distinction between information and manipulation. Under such circumstances, freedom no longer depends solely on formal legal guarantees, but also on the structure of the digital environment within which opinions are formed and decisions are made. Accordingly, contemporary human rights theory suggests that the traditional catalogue of rights no longer provides complete protection for the individual inner freedom. A new form of vulnerability emerges from the fact that control is no longer exercised primarily through open coercion, but rather through the structuring of informational environments in which individual consciousness is shaped. Algorithms do not directly restrict freedom; rather, they determine which information becomes visible, relevant, and emotionally amplified, thereby fundamentally shaping cognitive processes and influencing the individual decision-making. Through personalized recommendations and the selective visibility of content, digital platforms create specific "information bubbles" that may narrow individuals' horizons of understanding and distort their perception of reality. Accordingly, freedom of expression in the digital age does not entail only the ability to speak, but also the right to an informational environment in which opinions may be formed autonomously and without systematic algorithmic guidance. It is precisely for this reason that the fourth generation of human rights is increasingly associated with the protection of the mental and moral integrity of the individual (Baroni, 2024).

This understanding of freedom is closely linked to the theory of epistemic rights, according to which freedom of thought necessarily implies the right to undisturbed conditions for its formation. If informational structures are non-transparent or systematically manipulated, individuals may formally retain the right to speak, yet in substantive terms lose autonomy of thought (Risse, 2021). Modern technologies, particularly those based on predictive models and behavioral analysis, enable the shaping of individual decisions in ways that are often invisible and difficult to detect. This fundamentally alters the nature of freedom: it is no longer threatened solely by external restrictions, but also by the internal conditions under which it is exercised.

A distinctive dimension of cognitive autonomy is creativity. Human creativity is not merely the technical production of new combinations, but rather an expression of identity, value orientation, and inner freedom. Modern artificial intelligence systems are increasingly assuming functions related to content generation, idea recommendation, and creative processes modelling, thereby raising important question concerning the preservation of authentic human creativity. Suppressing the creative process in favor of algorithmic optimization risks reducing human beings to predictable objects of digital processing, which, in the long term, may impoverish the intellectual and cultural diversity of society.

Philosophical reflections by contemporary authors further emphasize that digital technologies are transforming the very concept of free will. If individual choices are pre-structured through invisible personalization mechanisms, the question arises as to whether such choices are truly free decisions or behavior directed by the interests of digital platforms. Freedom in the digital age therefore requires new normative safeguards, including algorithmic transparency, the right to an explanation of automated decisions, and the right to protection against manipulative design features in digital systems (Baroni, 2024).

The normative importance of protecting the inner sphere becomes even more pronounced in light of contemporary debates about the extension of rights to artificial entities. If the language of human rights is applied to technical systems, there is a risk of weakening their primary function – protecting human beings against the concentration of power (Gunkel, 2023; Gellers, 2021). Rather than subjectifying technology, the key task of fourth-generation human rights must be to preserve human autonomy in relation to technological systems. The right to preserve cognitive autonomy is therefore not a luxurious new right, but a response to a profound transformation in the ways freedom is threatened in digital society. In modern technological circumstances, the primary line of protection of human dignity no longer runs solely through the body, property, or political rights, but increasingly through the capacity of individuals to think independently. A society that permits the systematic shaping of human consciousness through non-transparent technological mechanisms may remain formally free, but essentially becomes susceptible to control. Accordingly, the right to preserve cognitive autonomy should not be understood as a theoretical novelty, but as a fundamental normative premise for safeguarding human dignity in the digital age.

5. "Robot Rights" in the Context of Fourth-Generation Human Rights: The Danger of Normative Extension of the Concept of Human Rights to Artificial Entities

The development of artificial intelligence and autonomous systems has increasingly raised questions concerning their legal status, often articulated through the emerging discourse of the so-called "robot rights." In contemporary discussions, this concept is often presented as a logical continuation of the historical expansion of the category of legal subjects – from slaves and women to national minorities and other vulnerable social groups. However, such an analogy conceals a fundamental normative distinction between social struggles for the recognition of human dignity and contemporary demands to subjectify technical systems. It is precisely at this point that a central theoretical tension emerges: whether this development represents a further stage in the emancipation of rights or, alternatively, a conceptual transformation that may ultimately undermine the very idea of human rights.

One line of criticism proceeds from the ontological and normative assumptions of the concept of law. Within the contemporary legal order, rights are intrinsically linked to beings that possess the capacity to experience harm, suffering, social exclusion, and violation of dignity. In other words, rights constitute a normative response to human vulnerability within social relations of power. Artificial systems, regardless of their degree of technical complexity or operational autonomy, lack experiential subjectivity, cannot suffer violations of interests in a normative sense, and do not possess an existential perspective that could serve as the object of legal protection. They remain artifacts – tools designed and controlled within the framework of human purposes and institutional structures (Birhane, van Dijk & Pasquale, 2024).

This distinction is not only metaphysical, but also carries direct ethical consequences. Modern artificial intelligence systems already participate in the production of concrete social harms by enabling mass surveillance, systematic data exploitation, automated profiling, and the reproduction of structural forms of discrimination. In this context, a normative shift in focus from the protection of human beings to the potential protection of machines risks producing an inversion of the established value order. Rather than requiring law to respond to new forms of human vulnerability in the digital environment, attention is redirected toward entities that themselves function as instruments of these very risks (Birhane, van Dijk & Pasquale, 2024).

Such a value shift also raises a fundamental legal problem: the question of liability. If autonomous systems were recognized as subjects of rights, the possibility would arise for their gradual transformation into subjects of obligations. This could formally shift responsibility for the harmful consequences of algorithmic decision-making from real actors – programmers, corporations, and users – to the technical systems themselves. The result would not be a strengthening of legal protection, but rather the creation of a new zone of normative uncertainty in which actual centers of power would remain shielded behind the "digital personality" of the robot or algorithm (Birhane, van Dijk & Pasquale, 2024). In contemporary legal and philosophical literature, some authors, such as Gunkel, seek to justify the possibility of recognizing rights for robots on the basis of a more flexible understanding of legal subjectivity. In this context, it is argued that legal entities, ships, and states are also legal constructs, and that the legal order is not necessarily confined exclusively to biological subjects (Gunkel, 2018; Gunkel, 2023).

Starting from this approach, the strictly anthropocentric understanding of law is called into question, and it is suggested that the normative system may adapt to new technological forms of agency. A further development of this argument rests on the view that advances in artificial intelligence and autonomous systems raise the possibility of recognizing certain rights for robots, particularly in light of their increasing autonomy, decision-making capacity, and ability to interact with humans. In this context, it is argued that modern humanoid and autonomous systems no longer function exclusively as passive instruments, but rather as complex agents capable of performing tasks without direct human control, thereby prompting reconsideration of their legal status. Nevertheless, even authors who support this perspective acknowledge that any eventual recognition of rights for robots would require a clear definition of their legal status, the scope of such rights, and their relationship to human rights, in order to avoid legal uncertainty and preserve the primary function of the legal system – the protection of human interests (Daksh & Singh, 2024).

Within a broader theoretical framework, similar considerations are also found in the theory of "non-human rights," which advocates the extension of legal protection to animals, natural entities, and even artificial systems, on the premise that the circle of the moral community has historically expanded over time (Gellers, 2021). Although this approach possesses a coherent internal logic, it simultaneously recognizes that any such extension necessarily reshapes the hierarchy of normative priorities. In a world in which a substantial portion of humanity still lacks effective protection of fundamental rights, the extension of rights to technical systems risks relativizing human dignity and weakening of the very idea of the universality of human rights.

Empirical research further confirms that the concept of robot rights lacks a stable social basis. Analyses of public attitudes reveal a high degree of inconsistency and confusion: respondents frequently conflate elements of human rights, corporate privileges, and the moral protection of animals, often without a clear understanding of the normative consequences that such an extension would entail. These findings indicate that robot rights do not yet constitute a concept that has matured normatively, but rather a notion whose content is being constructed *ad hoc* under the influence of technological discourse and media narratives (Mays, Cummings & Katz, 2024). The same research further demonstrates that such debates are conducted almost exclusively within the context of technologically advanced societies, while global inequalities, labor exploitation within technological production chains, and the asymmetric distribution of digital power remain systematically ignored. (Mays, Cummings & Katz, 2024).

On the whole, the idea of robot rights does not represent a neutral technical innovation within the legal order, but rather a profound transformation the understanding of legal subjectivity, responsibility, and the very function of human rights. In the context of fourth-generation human rights – whose central purpose is precisely to strengthen the protection of human beings against new forms of digital domination – such a normative expansion appears counterproductive.

6. Challenges and Criticisms of Fourth-Generation Human Rights

The emergence of the fourth generation of human rights, together with the growing question of its legal recognition – particularly in relation to digital rights – has increasingly become the subject of theoretical inquiry. Theorists argue that the recognition of new human rights and the expansion of the existing catalogue of rights constitute an important trend in the ongoing transforming the legal status of the individual, driven by the demands and evolving needs of contemporary society (Barabash *et al*., 2024, p. 28). The human rights catalogue is not final. Just as third-generation human rights emerged, contemporary developments likewise point toward the necessity for fourth-generation human rights. However, it is not sufficient merely to recognize the changes brought about by technological and digital transformation as giving rise to new human rights; it is equally important to provide effective mechanisms for their implementation. Legislators must therefore decide which digital and technological developments society is prepared to accept as necessary for the normal existence and flourishing of humanity, and which should be regarded as potentially harmful because of their capacity to produce adverse consequences for future generations. Theorists warn of several shortcomings inherent in the concept of fourth-generation human rights.

A central question that arises is whether rights associated with the digital age truly constitute a new generation of human rights or should instead be understood as modern manifestations of existing rights, adapted to technological circumstances. One strand of legal theory argues that the recognition of a fourth generation of human rights risks producing a fragmentation of rights. The proliferation of newly recognized rights may dilute both the legitimacy and the enforceability of the existing human rights framework (Alsharif & Hnit, 2025). According to this view, human rights lose normative force if the rights catalogue is continually expanded without clear criteria for distinguishing genuinely new rights from existing ones. From a traditional perspective, rights such as personal data protection, freedom of expression in the digital environment, and protection against discrimination can be subsumed under the framework of civil and political rights. Accordingly, the fourth generation of human rights does not represent an entirely new category of rights, but rather a new dimension of traditional rights within a new context. A counterargument to these conclusions holds that digital rights do not constitute an arbitrary expansion of the human rights catalogue, but rather a normative adaptation to new social circumstances. Human rights have historically evolved in response to social change, and the emergence of digital rights may therefore be understood as a natural continuation of that process. Rather than weakening the existing human rights system, digital rights may in fact reinforce it by enabling its effective functioning within a new technological context. In this sense, the recognition of digital rights does not threaten traditional rights, but instead operates as a mechanism for their preservation and modernization (Alsharif & Hnit, 2025).

On the other hand, recognizing certain digital phenomena as human rights may also create obligations for states that they are often unable to fulfill. For example, recognizing the right to internet access as a human right would imply that states are required to ensure universal internet access for all households, which may create technical and financial constraints. For low-income countries in Africa and Asia, this would be practically difficult, if not unrealistic. At the same time, the internet substantially facilitates the exercise of rights such as freedom of expression and freedom of association, and as such it has the potential to be a "time bomb." In non-democratic regimes, it may serve as a means of coordinating and calling for collective action. Even in democratic societies, it can more easily bring attention to neglected issues and expose state failures and systemic dysfunctions. States are aware of this "time bomb" potential and therefore often demonstrate limited political will to recognize internet access as a human right. Instead, they employ a range of restrictive mechanisms, including content-blocking technologies, surveillance and identification of activists and critics, the criminalization of legitimate forms of expression, and the adoption of restrictive legal frameworks (Jelisavac Trošić & Gordanić, 2023, p. 388). Similarly, states frequently show insufficient interest in more advanced regulation of personal data protection, protection against algorithmic discrimination, or the right to preserve cognitive autonomy.

Attention may also be drawn to the currently underdeveloped normative foundation of fourth-generation rights. The first two generations of human rights acquired a firm normative foundation through binding international treaties, while the third generation has largely remained within the domain of soft law, with only limited instances of legally binding obligations. By contrast, the rights that theorists classify as fourth-generation rights still lack uniform recognition at the international level. In this context, contemporary doctrine advocates a more cautious approach to the recognition of new human rights, according to which such rights should first be affirmed at the national level, through legislative development and judicial practice, and only subsequently attain broader international recognition. This so-called "bottom-up" approach emphasizes the need for gradual normative development and verification of the sustainability of new rights in specific legal systems, before their incorporation into the international legal framework (Shany, 2024). In this regard, reference should also be made to earlier doctrinal positions emphasizing the need for a form of "quality control" in the process of recognizing new human rights, in order to avoid their inflation and preserve the coherence of the existing human rights system (Alston, 1984). The absence of universal consensus and binding legal instruments further calls into question the legal precision and practical applicability of this concept, particularly in a global context marked by significant disparities in technological development and in the institutional capacities of states. It should also be recognized that the international community continues to confront numerous issues of greater immediate urgency, and that excessive emphasis on the regulation of digital technologies and the recognition of fourth-generation human rights may risk diverting attention from pressing problems of more immediate importance.

Traditionally, the state has been the primary actor in international law. However, digital technologies have introduced a significant transformation in the constellation of relevant actors on the international stage. In particular, contemporary scholarship emphasizes that power in the digital environment is increasingly shifting from states to private actors, primarily large technology corporations, whose influence over freedom of expression, access to information, and the social visibility of individuals often exceeds the capabilities of traditional public oversight mechanisms. The largest technology corporations now exert a degree of influence on the international stage that, in some respects, surpasses that of many states. As such, they constitute a unique institutional challenge to the international human rights order. The effective enjoyment of digital rights increasingly depends more on the power relationship between individual users and large technology corporations that provide digital services and products than on the relationship between individuals and the states in which they live or work (Shany, 2025).

The operations of major technology corporations give raise to a number of fundamental challenges, including concerns relating to privacy, surveillance, online security, and data ownership. Considerable attention has also been directed toward the impact of online content moderation on democratic freedoms. Given the profound influence that technology corporations exercise on human rights, their future actions have the potential to cause serious harm to the democratic functioning of society (Frost, 2023, pp. 631-633).

With the rise of technology corporations, the international legal order established in the aftermath of the Peace of Westphalia is undergoing a profound transformation. The status of the state as the primary subject of international law has been increasingly challenged, while the power and influence of technology corporations continue to expand. As a result, the individual – as the ultimate beneficiary of human rights – is no longer situated exclusively within a relationship with the state, but also within a complex relationship with private holders of technological power. This development requires a reexamination of traditional theoretical assumptions underlying human rights, as well as the foundational postulates of international law. In light of these considerations, the authors devote special attention to the question of states' positive obligations in protecting digital rights. They emphasize that states can no longer remain passive observers of digital transformation, but instead have a duty to provide a legal and institutional framework that enables the safe and equal participation of citizens in the digital space. This includes protection against digital discrimination, the regulation of algorithmic decision-making, personal data protection, and guaranteeing universal internet access. According to the authors, effective protection of human rights in the 21st century entails an active role of the state in regulating the digital environment, since it is increasingly within the digital environment that fundamental rights and freedoms are today exercised (Alsharif & Hnit, 2025).

Despite these criticisms, the digital age undoubtedly exerts a profound influence on the field of human rights, as well as on the relationships among the principal international law actors and international relations. These transformations are already underway and cannot be ignored. Rather than insisting rigidly on the formal recognition of a new generation of rights, the fourth generation of human rights may be understood as an emerging normative framework that indicates the need to adapt existing legal mechanisms to the conditions of the digital age. Potential fourth-generation rights are not "too new"; rather, the central problem is that existing human rights protection mechanisms were not designed for the power relations of the digital environment, in which the state is no longer the sole – and not always the dominant – holder of power and control.

7. Conclusion

The analysis presented in this paper demonstrates that the accelerated digitalization of society and the expansion of modern technologies are fundamentally transforming the traditional framework of human rights. The internet, artificial intelligence, algorithmic decision-making, and mass data processing are no longer merely technical means for the exercise of existing rights; rather, they are becoming key factors shaping social relations, the distribution of power, and the actual capacity of individuals to enjoy these rights. In this sense, the initial hypothesis – that modern technologies act as de facto regulators of social relations and therefore require a normative reexamination of the classical concept of human rights – has been confirmed through theoretical and comparative legal analysis.

The development of the digital environment has given rise to new forms of vulnerability that are not fully addressed by existing generations of human rights. The right to personal data protection, the right to internet access, protection against algorithmic discrimination, and the preservation of cognitive autonomy represent rights that, in terms of their content, significance, and modes of exercise, extend beyond the traditional framework of civil and political rights. Although some of these rights may be interpreted as contemporary manifestations of previously recognized rights, their specificity lies in the fact that they are conditioned by an entirely new technological context and by reconfigured power relations among individuals, the state, and private technological actors.

The paper has demonstrated that the concept of a fourth generation of human rights should not be understood merely as an expansion of the catalogue of rights, but rather as an attempt to provide a theoretical and normative response to the qualitatively new challenges of the digital age. At the same time, it has highlighted well-founded criticisms of this concept, ranging from the risk of rights inflation and the fragmentation of the existing human rights system to practical difficulties of their implementation and the limited development of its international legal foundation. It is further emphasized that the recognition of digital rights as human rights necessarily entails the creation of effective mechanisms for their protection, as well as a clear definition of the responsibilities of large technological corporations, which in the contemporary world are increasingly becoming key holders of digital power.

In this context, discussions on the so-called "robot rights" highlight the limits of the conceptual expansion of human rights. Extending the notion of rights to artificial entities carries the risk of relativizing the very essence of human rights and shirting attention away from the fundamental objective of the fourth generation – protecting human beings from new forms of digital domination. The future development of law in the digital age must therefore remain firmly oriented toward strengthening of human dignity, autonomy, and freedom, rather than toward the normative subjectification of technical systems.

It may be concluded that fourth-generation human rights still represent a normative framework in the making, while simultaneously reflecting an objective need of contemporary society. Its final affirmation will depend on the capacity of legal systems to recognize new forms of human rights violations and to develop adequate institutional mechanisms of protection. Digital rights should not be understood as a transient trend, but rather as an expression of a profound societal transformation in which the boundary between the physical and digital spheres is increasingly blurred. Accordingly, adapting human rights to the realities of the digital age is not merely a theoretical challenge, but a necessary condition for preserving their essential function – the protection of human dignity in all circumstances of modern life.

In relation to the research questions posed, it can be concluded that digital rights represent both a new stage in the development of human rights and a transformation of their content within a contemporary technological context, thereby transcending the traditional division into generations. Digitalization produces significant normative consequences, reshaping the manner in which existing rights are exercised while simultaneously creating the need for new legal institutions and protection mechanisms. At the same time, the key challenges associated with their legal recognition and protection include an insufficient international legal foundation, the risk of rights inflation, and the increasingly complex relations between the state and private holders of digital power.

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OMBUDSMAN IN SPORT: COMPARATIVE LAW PERSPECTIVE

Summary

Violations of sports law may undermine the effective protection of human rights and the rule of law, potentially warranting ombudsman intervention. Despite this connection, legal scholarship has devoted comparatively little attention to the role of ombudsman institutions in the field of sport. This paper examines the evolution, institutional positioning, and mandates of national sports ombudsman institutions in safeguarding sports law across selected jurisdictions. The paper first establishes a conceptual definition and classification of the ombudsman institution, as analytical benchmarks for assessing sports ombudsman models in the jurisdictions under review. Using comparative and normative approaches, supplemented by a historical-legal analysis of the evolution of the ombudsman institution, the paper assesses whether emerging sports ombudsman bodies conform to established institutional classifications and the extent to which their functions align with the traditional ombudsman mandate of strengthening the rule of law and addressing maladministration.

Keywords: Ombudsman, Sport, Sports Law, Ombudsman in Sport, Comparative Analysis.

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OMBUDSMAN U SPORTU – UPOREDNOPRAVNA PERSPEKTIVA

Sažetak

Povrede sportskog prava ugrožavaju delotvornu zaštitu ljudskih prava i načelo vladavine prava, te stoga iziskuju i delovanje ombudsmana. Uprkos ovoj povezanosti, pravna nauka je do sada posvetila relativno malo pažnje ulozi nacionalnih specijalizovanih ombudsmana u oblasti sporta. U ovom radu se, stoga, analizira mesto, karakter i nadležnosti novonastalih nacionalnih sportskih ombudsmana u uporednom pravu. U radu se najpre uspostavlja pojmovno određenje i klasifikacija institucije ombudsmana kao analitički okvir za vrednovanje modela sportskog ombudsmana u odabranim uporednopravnim sistemima. Primenom uporednopravnog i normativnog pristupa, uz istorijskopravnu analizu razvoja institucije ombudsmana, ispituje se da li se novi oblici sportskih ombudsmana uklapaju u postojeće institucionalne klasifikacije i u kojoj meri su njihove nadležnosti usklađene sa tradicionalnom ulogom ombudsmana u jačanju vladavine prava i otklanjanju loše uprave.

Ključne reči: ombudsman, sport, sportsko pravo, ombudsman u sportu, uporedno pravo.

1. Introduction

The ombudsman is an institution that has gained widespread global acceptance, notwithstanding the significant differences among national legislative systems (Lazarević, 2014, pp. 57-61). In contemporary states, the establishment of an ombudsman serves two principal objectives: first, the promotion of accountability, and second, the strengthening of democracy, the rule of law, and good governance (Diamandouros, 2006). By achieving these objectives, states ensure improved quality of life for their citizens, who are the ultimate holders of sovereignty (Castro Barriga, 2019, pp. 19-20). Addressing and remedying maladministration constitute the principal mandate and primary objective of most national ombudsman institutions across jurisdictions, which is equally important (Davinić, 2013, pp. 20-21).

The *Venice Principles on the Protection and Promotion of the Ombudsman Institution* constitute the most comprehensive and detailed international instrument articulating the values that should guide the performance of ombudsman institutions. The principles attribute to these institutions a significant role in strengthening democracy, the rule of law, and protecting and promoting human rights and fundamental freedoms. At the same time, they place particular emphasis on the ombudsman's core mandate to address maladministration and to promote good governance (Venice Commission, CDL-AD(2019)005, pp. 3-4, paras. 1 and 12; Venice Commission, CDL-AD(2025)002; Knežević Bojović & Ćorić, 2024, p. 192).

In a legal order grounded in the rule of law, all individuals – including those exercising public authority – are bound to comply with the law and its fundamental principles. Consequently, institutions established within such a legal framework must have the capacity to safeguard the rights and freedoms of citizens, protecting them not only from interference by other individuals, but also from unlawful action by the state itself. As human rights, democracy, and the rule of law have emerged as core values of contemporary constitutional systems, the institution of the ombudsman has attained global recognition and prominence (Korbayram & Hoca, 2024, p. 37; Golubović & Galetin, 2024; Tomić & Marković, 2025). In this context, developments in modern democratic states have positioned the ombudsman as one of the principal non-coercive mechanisms for advancing and safeguarding the principles of the rule of law (Zhyvko, Dombrovska & Kiblyk, 2025, p. 88; Kolman, 2010, p. 57).

Sport has transcended its traditional role as a form of mass entertainment and has evolved into a significant and rapidly expanding economic sector. An increasing number of individuals are engaged professionally in sporting activities, and at the global level, sport accounts for approximately three percent of overall financial flows in the trade sector. These developments have contributed to the growing complexity of legal relations arising from sporting activities. The expansion of social interactions within this field has given rise to the establishment of a coherent regulatory framework, resulting in the recognition of sports law as a distinct branch of law. A defining characteristic of this field lies is its inherently cross-sectoral nature, encompassing elements of constitutional, administrative, civil, economic, criminal, and labor law.

Furthermore, as sporting activities often transcend national borders, they necessarily entail an international legal dimension (Stanić, 2023, pp. 415-416; Andonović, 2017, pp. 131-132). Sport is widely recognized as a matter of legal regulation and is therefore governed both at the national level and within the framework of the European Union. Although the economic dimension of sport is undeniable, its incorporation into national and supranational law is not driven exclusively by economic considerations, but also by sociological and cultural factors. The legal norms governing sport thus reconcile economic interests with broader social values. In this regard, sport undeniably holds significant social, economic, and cultural importance, and is recognized as such at the global level (Stanić & Rajić Ćalić, 2022, p. 317; Andonović & Radovanović, 2019, p. 47).

Given the legal dimension of sport, violations of sports law may undermine the effective protection of human rights and the rule of law, potentially warranting ombudsman intervention. In legal scholarship, considerable attention has been devoted to examining the contribution of the ombudsman institution to the advancement of the rule of law and the protection of human rights, as well as the significance and evolution of sports law (Tai, pp. 113-132; Glintić, 2018, pp. 359-372; Mitten & Opie, 2012; Davis, 2012; Rajić Ćalić, 2023). However, comparatively little attention has been given to the specific role of the ombudsman in the field of sport, particularly in situations involving violations of sports law. Accordingly, this paper focuses on analyzing the institutional position and role of national ombudsman institutions in the protection and enforcement of sports law. Specifically, it examines the evolution and mandate of emerging sports ombudsman institutions worldwide in order to determine whether these bodies fall within established classifications of ombudsman institutions and the extent to which their functions align with the general ombudsman mandate of reinforcing the rule of law and addressing maladministration. While both general and specialized national ombudsman institutions are understood to contribute to the protection of human rights and the strengthening of the rule of law in cases involving alleged violations of sports law, the present research is confined to an analysis of the specialized national ombudsmen operating in this field. The practices of general national ombudsman institutions, as well as those of the European Ombudsman, in matters arising from sporting activities are excluded, as that would exceed the scope of this study.

Before turning to the historical development of the ombudsman institution and conducting a comparative analysis of emerging sports ombudsmen, the paper first establishes a definition and classification of the ombudsman institution, which serve as analytical benchmarks for assessing the position and role of sports ombudsmen in the selected jurisdictions. The methodology of this research is determined by the nature of the subject matter. Specifically, the study employs a comparative and normative approach to examine the existing regulatory framework in this field and its prospective development, while also utilizing a historical-legal method to trace the evolution of the ombudsman institution. In addition, the research draws on doctrinal analysis of relevant domestic and international scholarship, which provides essential analytical insights.

2. Definitions and Classification of Ombudsman Institutions

The term "ombudsman" has been defined differently in legal scholarship (Radojević, 2016. pp. 9-40). Such definitional plurality is to be expected. While ombudsman institutions across the globe share considerable similarities in their organizational structures and functional mandates – largely reflecting adopted international standards governing their establishment and operation – scholarship consistently underscores that no two institutions of this kind are exactly the same (Davinić, 2013, p. 37).

One frequently cited definition, offered by the *Columbia Encyclopedia*, describes the ombudsman as a government agent acting as "an intermediary between citizens and the administrative bureaucracy, characterized by independence, impartiality and accessibility, and empowered only to make recommendations" (Finkel, 2006, p. 6). While this definition accurately captures the intermediary and advisory functions of the institution, it remains incomplete, as it understates the proactive and systemic role that ombudsman institutions can play in preventing maladministration and in promoting the rule of law.

Finkel further cites the International Bar Association, which in 1974 defined the ombudsman as an office established by the constitution or legislation, headed by an independent, high-level public official responsible to the legislature, empowered to receive complaints from aggrieved individuals against public authorities or to act on its own initiative, and vested with the authority to investigate, recommend corrective action, and issue reports (Finkel, 2006, pp. 6-7). While this definition provides a comprehensive description of the institution's formal structure, it remains somewhat limited, as it primarily portrays the ombudsman as a reactive complaints-handling body. It does not fully encompass the broader normative and systemic role that ombudsman institutions can play in preventing maladministration and in shaping administrative standards.

Finally, a major study of the institution published in the early 1980s defines the ombudsman as an independent and non-partisan office, often established by the constitution, which supervises public administration and addresses specific complaints from the public concerning administrative injustice and maladministration, with a primary focus on strengthening the rule of law. The ombudsman is empowered to investigate, report, and make recommendations regarding individual cases and administrative procedures, but does not have the authority to issue binding orders or to overturn administrative actions. The office derives its authority from appointment by and accountability to a principal organ of state – typically the legislature or the executive – and relies on independence, impartiality, objectivity, credibility, and professional competence, rather than on coercive powers (Finkel, 2006, p. 7).

This definition captures the essential structural and functional elements of the ombudsman institution. It emphasizes the supervision of public administration as the central function, exercised primarily through complaint-based review aimed at preventing maladministration and reinforcing the rule of law. In performing this role, the ombudsman is empowered to investigate, report, and make recommendations concerning individual cases and administrative procedures, but lacks the authority to issue binding orders or overturn administrative actions. Consequently, the effectiveness of the institution derives not from formal enforcement powers, but from its institutional authority and credibility, which are grounded in independence and accountability to the principal organs of the state.

There are multiple approaches to classifying the institution of the ombudsman based on different criteria. Two principal institutional models are commonly recognized. The first, derived from the Swedish and Finnish traditions, and often referred to as the classic ombudsman model, is characterized by a broad mandate and extensive powers. Under this model, the ombudsman exercises comprehensive supervision over public administration at both the state and municipal levels and may also oversee certain procedural and administrative activities of the judiciary. In addition, this type of ombudsman may possess the authority to initiate or recommend criminal proceedings against public officials. The second model, derived from the Danish tradition, restricts the ombudsman's mandate to the supervision of public administration, excluding judicial oversight. This model is most widely adopted in contemporary practice (Finkel, 2006).

Ombudsman institutions may also be classified according to several additional criteria. With respect to organizational structure, a distinction may be drawn between individual and collective ombudsman bodies, depending on whether the function is exercised by a single office-holder or by a collegial entity. From a territorial perspective, ombudsmen may operate at either the national or local level. Most importantly for the purposes of this paper, classification may also be based on the scope of competence, distinguishing between general and specialized ombudsman institutions (Serzhanova, 2021, p. 102; Rapajić & Logarušić, 2024, pp. 83-86).

With regard to the scope of competence, alongside general-type ombudsman institutions that protect citizens' rights across the full spectrum of administrative activities, an increasing number of specialized ombudsmen have emerged to oversee specific sectors of public administration and safeguard rights within particular areas of social life. In Anglo-Saxon terminology, these bodies are often referred to as single-purpose ombudsmen (Milkov, 2007, p. 112; Rapajić & Logarušić, 2024, pp. 83-86).

Comparative practice demonstrates the proliferation of specialized ombudsman institutions across a wide range of regulatory fields (Korbayram & Hoca, 2024, p. 37; Finkel, 2006). Notable examples include military, environmental, data protection, patient rights, police, and prison ombudsmen. Unlike general ombudsmen, whose mandate extends broadly to the protection of human rights across all administrative authorities and public services, specialized ombudsmen operate within a more narrowly defined jurisdiction. Their competence is typically restricted to the protection of specific categories of rights or groups of persons, or to oversight within a particular administrative sector (Marković & Jugović, 2017, p. 144; Rapajić & Logarušić, 2024, pp. 83-86).

Within the category of specialized ombudsmen, it is important to distinguish between two institutional types. The first comprises specialized ombudsmen established as public authorities and appointed or dismissed by the parliament in a manner broadly analogous to that of general ombudsman institutions. These bodies represent the ombudsman institution in its formal sense and retain its core structural characteristics. Their mandate typically involves protecting the rights of specific categories of persons in relation to the relevant sectors of public administration. For instance, healthcare ombudsmen are tasked with safeguarding patient rights in interactions with public healthcare providers.

The establishment of such specialized institutions reflects an effort to enhance the effectiveness of rights protection and to improve administrative performance through sector-specific expertise. This trend toward institutional specialization is not limited to ombudsman structures but reflects broader developments within contemporary legal systems, driven by the increasing complexity of social relations. Accordingly, these bodies may be characterized as public-law specialized ombudsmen of an external type.

Conversely, a number of bodies that are not established in accordance with the general principles governing the ombudsman institution are also described as specialized ombudsmen. Although some of these entities formally adopt the title “ombudsman,” they do not correspond to this institution in its substantive sense. Such “ombudsmen” typically function as internal complaint mechanisms created by individual state administration bodies or public services to handle grievances from service users (Milkov, 2007, p. 112; Rapajić & Logarušić, 2024, pp. 83-86). As a result, they lack institutional independence, which is one of the fundamental principles underlying the ombudsman institution. Their capacity to perform the core functions of oversight and administrative improvement is limited. These bodies do not exercise external administrative oversight in the strict sense but instead operate as internal complaint units within specific organizations or services. For this reason, such “ombudsmen” are also referred to as private-sector ombudsmen (Milkov, 2007, p. 113; Rapajić & Logarušić, 2024, pp. 83-86).

Their integration within the organizational structure of the entities they are intended to oversee may compromise objectivity, as effective oversight generally requires organizational and functional separation from the bodies under review (Milkov, 2007, pp. 116–117; Rapajić & Logarušić, 2024, pp. 83-86). Moreover, their appointment and dismissal remain subject to the discretion of the very same organizations whose activities they are tasked with monitoring, which further constrains their independence. In practice, such mechanisms often function primarily as channels for collecting user feedback, rather than as genuinely independent rights-protection institutions (Milkov, 2007, p. 118; Rapajić & Logarušić, 2024, pp. 83-86). Examples include banking, insurance, telecommunications, and university ombudsmen, as well as various private-law ombudsmen, such as those in the airport, football, industrial, and hospital ombudsmen (Milkov, 2007, pp. 109–110; Rapajić & Logarušić, 2024, pp. 83-86). This typological distinction, together with the identification of their principal characteristics, provides a conceptual framework essential for the systematic assessment of the nature and role of sports ombudsman institutions from a comparative perspective.

3. The Expansion of the Ombudsman Institution in Comparative Law

The institution of the ombudsman, in its modern form, was first established by the Swedish Constitution of 1809 (Korbayram & Hoca, 2024, p. 38; Beker, 2010, p. 166). The term "ombudsman" originates from Swedish and denotes a "proxy," "deputy," or "authorized representative" (Finkel, 2006). The historical circumstances surrounding the emergence of this institution have been extensively examined in the literature, with several scholars providing largely convergent accounts of its development (Milkov, 2008, pp. 198-200; Milkov, 2018, pp. 432-435; Kijevčanin, 2020, p. 269; Ivković, 2021, p. 2; Gonzalez Volio, 2003, p. 221; Lazarević, 2014, pp. 26, 57-61). Although the rule of law, or the *Rechtstaat* doctrine, did not originate in Sweden, the Swedish invention, the ombudsman institution, has had a profound impact on the advancement of human rights and fundamental freedoms (Jovanović & Rapajić, 2011, p. 206).

The ombudsman institution is now widely recognized, although its diffusion was neither rapid nor straightforward. Rather, its expansion occurred through a gradual, often understated, yet continuous and progressive process (Remac, 2013, p. 63). Initially, familiarity with the institution was confined largely to the Scandinavia countries (Abedin, 2011, p. 897). Since its establishment, the ombudsman has undergone a process of incremental development, described as an "organic historical process" (Castro Barriga, 2019, p. 17). From the 1960s, the international community had increasingly acknowledged the institutional flexibility and functional potential of the ombudsman institution. A particularly significant expansion in the adoption of ombudsman institutions occurred during the 1990s, notably following the collapse of totalitarian regimes (Remac, 2013, p. 62).

Summarizing the historical diffusion of the ombudsman institution, former European Ombudsman Nikiforos Diamandouros identifies three principal expansion waves. The first expansion wave extended until the mid-twentieth century, during which the institution remained largely confined to its Scandinavian origins. The second expansion wave began with the introduction of the ombudsman into the Danish legal system in 1955, which subsequently served as a model for numerous other jurisdictions (Davinić, 2011, p. 105). Finally, the third expansion wave expansion was closely linked to broader processes of democratization in Europe, Africa, and South America (Davinić, 2011, p. 105). A decisive turning point was the establishment of the ombudsman institution in Denmark in 1955, where the office was entrusted with investigating and reporting on complaints against public authorities – excluding the courts – without possessing legally binding decision-making powers (Diamandouros, 2005, p. 4; Jovičić, 1969, pp. 10-12; Božić Savić, 2018, p. 160). The Danish model exerted considerable international influence and inspired the establishment of an ombudsman in New Zealand in 1962, the first such institution in an English-speaking country with a Westminster-style parliamentary democracy (Milkov, 2018, pp. 436-447; Finkel, 2006; Kijevčanin, 2020, p. 270; Korbayram & Hoca, 2024, p. 39; Danilchenko, 2024, p. 55). By the mid-1980s, the number of ombudsman offices worldwide had more than doubled (Ayeni, 2014, p. 499). The fall of the Berlin Wall in 1989 and the subsequent collapse of communist regimes led to a significant expansion of ombudsman institutions in Central and Eastern Europe (Finkel, 2006). In this context, the establishment of an ombudsman increasingly came to be seen as an indicator of a state's commitment to democratic reforms (Ayeni, 2014, p. 499). As a result of these developments, ombudsman institutions were established in more than one hundred countries worldwide, representing a substantial increase compared to previous decades (Finkel, 2006; Kijevčanin, 2020, p. 270; Korbayram & Hoca, 2024, p. 39). Combined, the emergence of new states in the post–Second World War era, the collapse of communist regimes in the late 1980s, and the global movement toward democracy and human rights were the key drivers of the worldwide diffusion of the ombudsman institution, generating significant institutional effects in both newly established and post-communist countries (Abedin, 2011, p. 897; Van Roosbroek & Van de Walle, 2008, p. 288). It should be noted that the first European Ombudsman was appointed in 1995 by the European Parliament, in accordance with the Treaty of Maastricht. This independent office, operating at the level of the European Union, is appointed to investigate cases of maladministration within the EU institutions (Gonzalez Volio, 2003, pp. 220-221; Lazarević, 2014, pp. 57-61). This was a significant milestone in the institutionalization of the ombudsman within a supranational organization (Korbayram & Hoca, 2024, p. 40). As a result of these processes, all EU Member States now maintain national ombudsman institutions within their borders (Diamandouros, 2005, p. 5).

One of the core functions of the ombudsman is the prevention of abuses by administrative authorities. However, experience has shown that a single, general ombudsman institution – tasked with protecting citizens' rights across all areas of public administration and in relation to all state bodies and public services – often proves insufficient. This limitation constitutes the principal rationale for the establishment of specialized ombudsman institutions, as discussed in the previous section (Milkov, 2007, p. 112; Rapajić & Logarušić, 2024, pp. 83-86). Following the global diffusion of the ombudsman institution and the recognition of its functional advantages, the emergence of specialized ombudsman bodies represented a logical development.

4. Ombudsman in Sport: A Comparative Law Analysis

Among the various forms of specialized ombudsman institutions, the sports ombudsman remains relatively underexplored in both legal scholarship and institutional practice. The *Olympic Charter* expressly recognizes the practice of sport as a human right, implying, *inter alia*, that all individuals should have the opportunity to participate in sport free from any discrimination (Kraljić & Drnovšek, 2021, p. 154). Given that the Venice principles, along with other international instruments, underscore the role of ombudsman institutions in the protection and promotion of human rights, the establishment of a national ombudsman for sport appears to be an appropriate mechanism for advancing this objective (Yunin *et al.*, 2021, pp. 173-179).

From a comparative law perspective, the selection of jurisdictions for analysis is necessarily limited, as only a small number of countries have established ombudsman institutions in the field of sport. This analysis therefore focuses on the United Kingdom, the United States, and Slovenia. The relatively limited diffusion of this institutional model may be attributed to two principal factors. First, the significance of establishing a specialized ombudsman in the domain of sport may not yet be fully recognized in many jurisdictions. Second, it is often assumed that the protection of athletes' rights can be adequately ensured through existing ombudsman mechanisms, particularly general ombudsman institutions. In light of this, the following sections will examine the institutional design, jurisdiction and practical functioning of sports ombudsman bodies in the selected jurisdictions.

4.1. Sports Ombudsman in the United Kingdom

The United Kingdom provides an important point of departure for comparative analysis, considering both that the introduction of a specialized sports ombudsman was formally proposed within its 2017 policy framework and that an ombudsman institution already operates in the field of football as a sector-specific oversight mechanism within sport governance.

The proposal to establish a specialized sports ombudsman is particularly significant in the context of the *Duty of Care in Sport Report* (hereinafter: the DoC in Sport Report), commissioned and published by the Department for Digital, Culture, Media and Sport (hereinafter: the DCMS) from April 2017. This report included seven priority recommendations (Anderson & Partington, 2018, p. 1). The first one, outlined in Baroness Tanni Grey-Thompson's *Duty of Care Review of UK Sport* (hereinafter: the Report) (2017), proposed the establishment of a Sports Ombudsman. The Report detailed several potential institutional models, emphasizing an accessible, athlete-centered, and fully accountable approach to dispute resolution in sport. Of particular significance is the proposed maladministration model, which envisages extensive oversight and redress powers and could, if successfully implemented, serve as a template for an independent and athlete-accountable international sports ombudsman. Under this model, the Sports Ombudsman would ensure compliance with the principles of good governance established by the UK's *Code for Sports Governance*. Although the concept of "maladministration" lacks a precise definition, it is generally understood to encompass poor governance and, as previously discussed, constitutes the core of the ombudsman institution's universally recognized mandate and *raison d'être*.

This proposal is also consistent with the broader British practice of sector-specific ombudsman institutions, as evidenced by more than forty such bodies listed by the Ombudsman Association, ranging from the Financial Ombudsman to the Furniture Ombudsman (Anderson & Partington, 2018, pp. 1-2).

Turning to established institutional practice, the United Kingdom provides an example of sector-specific oversight through the Independent Football Ombudsman (IFO) in England, which has been in operation for over a decade. The IFO was established in July 2008 by the English football authorities, with the agreement of the Government. These authorities include the Football Association, the Premier League, and the English Football League.

The IFO is mandated to receive and adjudicate complaints that have not been resolved by football clubs or governing bodies, with an exclusive focus on relations between clubs and supporters (The Independent Football Ombudsman, About the IFO). In practice, such complaints commonly involve ticketing disputes, stadium ejections, and the conduct of stewards, many of which are of limited financial value. Supporters are entitled to lodge complaints regarding the practices of football clubs, particularly in relation to fan engagement policies, ticketing, and membership arrangements. Such complaints may be submitted to the Independent Football Ombudsman, which examines grievances concerning club conduct. Where a complaint is upheld, the ombudsman does not have the authority to impose binding measures but may recommend appropriate remedial action, including an apology or assurances that similar conduct will not recur. If a club declines to implement a recommendation, it is required to provide a public explanation of its reasons and to propose an alternative resolution (Anderson & Partington, 2018, pp. 5-7; *A Guide to England's Independent Football Ombudsman*).

The IFO procedure is particularly significant in that it offers an accessible and cost-free mechanism for resolving disputes without recourse to civil litigation, reducing financial and procedural barriers for supporters (Anderson & Partington, 2018, pp. 5-7; Kraljić & Drnovšek, 2021, p. 155). The non-binding nature of the IFO's recommendations aligns with the widely accepted understanding of the ombudsman as a soft oversight mechanism, relying on persuasive rather than coercive authority.

The IFO constitutes the final stage in the resolution of customer-related complaints within English football. Complainants – whether individuals, groups of individuals, or organizations – submit first their grievances to the relevant service provider, typically the football club concerned or, where applicable, one of the football authorities responsible for the service in question. Each club and authority maintains a customer charter or a comparable document outlining the applicable complaints procedure. Only after the internal process has been exhausted, or where the service provider has failed to respond adequately within six weeks without reasonable justification, may a complaint be referred to the IFO for investigation and adjudication.

The IFO normally completes its investigation within ninety days, and summaries of adjudications are published in its annual report and on the website of the relevant authority. Where a complaint is upheld, in whole or in part, the IFO may issue recommendations. Although these recommendations are not legally binding, the football authorities have indicated that they, together with their member clubs, generally comply with the IFO's findings. No further appeal is available within the football complaints framework, as the IFO represents its ultimate stage (The Independent Football Ombudsman, *Complaints Procedure*).

From an institutional perspective, this mechanism represents an internal ombudsman model established by sector-specific entities to regulate and govern relations between football clubs, national football association, and supporters. The non-binding nature of its recommendations, a common feature of ombudsman institutions as discussed above, underscores the broader institutional logic of ombudsmanship, which relies on persuasive authority and soft oversight mechanisms, rather than coercive enforcement. As noted, the complaints handled by the IFO primarily concern ticketing disputes, stadium ejections, and the conduct of stewards, many of which are of limited financial value. Despite their modest economic scope, this mechanism plays an important role in strengthening sectoral integrity and enhancing access to justice, thereby contributing to the prevention of maladministration and the reinforcement of the rule of law – the core objectives of ombudsman institutions.

4.2. Sports Ombudsman in the United States

Another important comparative example is the United States Olympic and Paralympic Committee Athlete Ombudsman (hereinafter: the USOC Ombudsman), established by the 1998 amendments to the *Amateur Sports Act of 1978* (Anderson & Partington, 2018, p. 4). The USOC Ombudsman operates on the core principles of confidentiality, privacy, independence, and impartiality, and is mandated to represent athletes and provide cost-free, impartial advice on issues relating to their rights and obligations within the Olympic and Paralympic Movement. In practice, the USOC Ombudsman advises athletes on a broad range of matters, including team selection disputes, the interpretation of commercial agreements, eligibility concerns, and anti-doping issues. Through these activities, the USOC Ombudsman promotes integrity and compliance with the applicable legal and regulatory framework, exercising a form of institutional "soft" authority characteristic of ombudsman mechanisms.

In addition to its advisory function, athlete advocates appointed by the USOC Ombudsman monitor compliance by sports bodies with relevant codes of conduct and legal responsibilities. By issuing recommendations and facilitating the early resolution of disputes, the office contributes to the stability and integrity of the national sports system, reducing the need for escalation to formal litigation. It has also been commended for promoting an equality of arms between athletes and other stakeholders – such as coaches, administrators, and sponsors – in the dispute resolution process (Anderson & Partington, 2018. pp. 4-5).

From an institutional perspective, this model may be characterized as an internal ombudsman mechanism operating within the Olympic Committee, combining educational, advisory, and preventive functions in the protection of athletes' rights. By enhancing athletes' understanding of their rights and available remedies, promoting procedural fairness in the dispute resolution through the principle of equality of arms, and providing a secure channel for raising concerns, the USOC Ombudsman contributes to the advancement of fairness, transparency, and the consistent application of relevant policies and procedures (United States Olympic & Paralympic Committee, 2025*;* The Ted Stevens Olympic and Amateur Sports Act, 1978). In this respect, the office reflects the widely recognized role of ombudsman institutions in upholding the rule of law, promoting good governance, and protecting human rights.

4.3. Sports Ombudsman in Slovenia

In Slovenia, the institutional framework for the protection of athletes' rights is established through the Office of the Ombudsman for the Rights of Athletes. The legal basis for this office is set out in Article 66 of the Slovenian Sports Act.[1] Adopted in 2017, the Act provides for the operation of the Athlete's Ombudsman within the Ministry of Education, Science and Sport. Following its appointment by the Government of the Republic of Slovenia, the Ombudsman commenced operations within the Ministry on 1 April 2018.

The Slovenian Athlete's Ombudsman safeguards the rights of athletes and sports professionals, and examines complaints, comments, proposals, and initiatives submitted by athletes, their legal representatives, sports practitioners, sports program providers, and public authorities at both the national and local levels. The Office also promotes transparency in sport by publishing good and poor practice examples and by informing the public accordingly. The Ombudsman is authorized to issue proposals and recommendations to relevant entities, which are required to consider them and provide a response within a time limit specified by the Ombudsman. These entities are further obliged to grant the Ombudsman access to all relevant information necessary for the examination of a specific matter, no later than five days following receipt of a request (Kraljić & Drnovšek, 2021, p. 154; Sports Act of Slovenia, Art. 66; *2022 Annual Report of the Athlete's Ombudsman and Mandate Report for 2018-2023*).

One of the principal features distinguishing ombudsman procedures from other forms of dispute resolution is confidentiality. Parties may seek advice or request an assessment without the immediate involvement of the opposing party. The Ombudsman is required to inform participants that the procedure is confidential and that any information obtained would not be disclosed without explicit consent. Outcomes are published only with such consent or, alternatively, in anonymized form. In addition to confidentiality, another advantage of the procedure before the Slovenian Athlete's Ombudsman is that it is free of charge.

The procedure is informal and does not require legal representation. This informality implies that the Ombudsman cannot issue binding decisions; rather, the Ombudsman may provide recommendations, initiate proposals, and facilitate mediation and negotiations. The Office may also publish anonymized good and bad practice examples in sport for public information purposes (Kraljić & Drnovšek, 2021, p. 155; Sports Act of Slovenia, Art. 66; *2022 Annual Report of the Athlete's Ombudsman and Mandate Report for 2018-2023*).

[1] *Official Gazette of the Republic of Slovenia*, Nos. 29/17, 21/18 – ZNOrg, 82/20, and 3/22 – Zdeb.

From an institutional standpoint, this body is a highly specialized external ombudsman that nevertheless embodies the core characteristics generally associated with ombudsman institutions, including the non-binding nature of its recommendations and the confidentiality of its procedures. By safeguarding the rights of athletes and promoting accountable administrative conduct in the sport sector, the Slovenian model contributes to the fundamental objectives of ombudsman institutions: reinforcing the rule of law, preventing and remedying maladministration, and protecting human rights.

4.4. Other Comparative Developments: Proposed Models and the Canadian Alternative Dispute Resolution Framework

The establishment of a sports ombudsman has also been considered by several other jurisdictions. In India, proposals have been advanced for the creation of an ombudsman competent to adjudicate disputes in cricket, the country's most prominent sport. Similarly, in Australia, discussions have centered on the establishment of a dedicated commission within which an ombudsman would exercise specific oversight powers. These initiatives, however, have remained at the level of policy proposals and have not let do the creation of fully operational institutions (Anderson & Partington, 2018, p. 3; Fowlie, 2017).

A distinct institutional approach is observed in Canada through the Sport Dispute Resolution Centre of Canada (hereinafter: SDRCC). Established under Section 10 of the *Physical Activity and Sport Act* (S.C. 2003, c. 2), the SDRCC provides a national alternative dispute resolution mechanism for sport-related disputes and offers expertise and assistance in the field of alternative dispute resolution. Its mission emphasizes education and prevention by equipping stakeholders with the tools and guidance necessary to resolve disputes efficiently and informally (CRDSC-SDRCC, *About Mission*). The SDRCC Code further establishes the procedural framework governing disputes submitted to the SDRCC and serves as a central reference for parties, mediators, arbitrators, and Dispute Resolution Secretariat staff (CRDSC-SDRCC, *About Mission*). From an institutional perspective, the Canadian model does not constitute an ombudsman mechanism in the strict sense, but rather functions as a specialized dispute resolution body that contributes to the protection of athletes' rights through structured alternative dispute resolution processes. However, it does not appear to provide the same institutional guarantees of independence typically associated with ombudsman institutions, and its mandate remains confined primarily to dispute resolution. Consequently, its role in promoting the rule of law and addressing maladministration differs both in scope and character from that of classical ombudsman mechanisms.

5. Conclusion

In recent decades, the ombudsman institution has expanded globally, taking diverse institutional forms across all major legal systems. This evolution has been accompanied by the emergence of specialized ombudsman mechanisms designed to provide targeted protection within specific sectors of social life. Concurrently, sport has developed beyond a purely recreational activity into a significant social and economic domain, shaped in part by the growth of the media and commercialisation. In this context, the establishment of an appropriate legal framework for sport assumes increasing importance.

From a legal perspective, the extension of the ombudsman principles into the sport sector is a promising avenue for strengthening accountability, safeguarding rights, and promoting good governance. It should be noted that practicing sport has been expressly recognized as a human right under the *Olympic Charter*. The comparative analysis presented in this paper demonstrates that specialized oversight mechanisms in sport can play a meaningful role in enhancing institutional integrity and access to justice, indicating that the development of sports ombudsman models constitutes a logical and desirable direction for contemporary legal systems.

Accordingly, certain developments can already be observed in comparative law, including initiatives in several Anglo-Saxon legal tradition countries and in Slovenia. It should be noted, however, that the establishment of sports ombudsmen remains at an early stage of development. As demonstrated above, it exists in some form in two Anglo-Saxon countries and in Slovenia. Nevertheless, if the established theoretical ombudsman definitions and models were applied, it may be argued that a sports ombudsman in the strict sense currently exists only in Slovenia.

As previously explained, the UK and the US ombudsmen are internal in nature, and are designed to perform specific institutional functions. In the UK context, their primary role is the protection of fans' rights and the improvement of relations between the football clubs and their supporters. This approach may be understood in light of the fans' economic importance or the clubs, although its primary objective is not the protection of the rule of law or the exercise of administrative oversight. By contrast, the United States Olympic and Paralympic Committee Sports Ombudsman protects the rights of athletes within the Olympic and Paralympic Movement, but cannot be regarded as an ombudsman in the strict sense. The Office is established within the Olympic and Paralympic institutional framework and focuses primarily on safeguarding the rights and interests of American Olympians. In this respect, it appears to be oriented toward practical considerations related to athlete preparation for the Olympic Games, rather than toward the broader objectives of rights protection and administrative accountability.

In light of the foregoing analysis, it appears that many legislatures have yet to fully recognize the importance of protecting athletes' rights through specialized ombudsman mechanisms. It is often assumed that general ombudsman institutions can provide adequate legal protection in this field. However, given the transformation of sport from a purely recreational activity into a significant economic sector, such assumptions may warrant reconsideration. The development of sports ombudsman institutions may therefore constitute an additional and appropriate component of the legal framework governing sport.

The examined models collectively demonstrate the diversity of institutional approaches to protecting rights and resolving disputes in the sport sector. Despite their structural differences, these models share a common objective: enhancing accountability, improving access to justice, and strengthening governance in sport. In this context, a sports ombudsman may be understood as a complementary mechanism for strengthening the rule of law and addressing maladministration. Given the widely acknowledged value of specialized ombudsman mechanisms, extending such institutional models to the sport sector has the potential to prevent unlawful or ineffective administrative practices and to protect athletes' rights, thereby contributing to the broader objective of reinforcing the rule of law in contemporary societies.

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SAVREMENE TENDENCIJE RAZVOJA SUDSKE KONTROLE DISKRECIONIH AKATA UPRAVE

„Sud može – načelno – da snese diskreciono 'jaje' [...], ali ne može neposredno da utvrđuje šta je diskrecioni 'mućak'."

Zoran Tomić

Sažetak

Sudska kontrola akata uprave predstavlja završni element građevine koja se zove pravna država. Posle uvodnih izlaganja, u drugom delu rada obrađene su osnovne teorijskopravne postavke sudske kontrole diskrecionih akata. Treći deo rada posvećen je analizi sudske kontrole zakonitosti i celishodnosti diskrecionih akata u uporednom pravu, a četvrti deo analizi stanja u Republici Srbiji. Autor zaključuje da se savremena sudska praksa razvija u smeru šire kontrole diskrecionih akata – u skladu sa svojom ulogom u sistemu vlasti sud primenom različitih metoda tumačenja pravnih standarda i osnovnih pravnih načela utvrđuje granice zakonitosti i celishodnosti. Šira sudska kontrola zakonitosti diskrecionih akata u savremenoj pravnoj državi ne remeti načelo podele vlasti, već obezbeđuje odgovorniji rad uprave i ujedno viši stepen pravne zaštite subjektivnih prava i pravne sigurnosti.

Ključne reči: sudska kontrola, diskreciona ocena, diskrecioni akt, zakonitost, celishodnost.

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CONTEMPORARY TRENDS IN THE DEVELOPMENT OF JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETIONARY ACTS

Summary

Judicial review of administrative acts represents the final element in the structure known as the rule of law. After introductory remarks, the second part of the paper addresses the fundamental theoretical and legal principles of judicial review of discretionary acts. The third part is dedicated to the analysis of judicial control of legality and expediency of discretionary acts in comparative law, while the fourth part analyzes the situation in the Republic of Serbia. The author concludes that modern caselaw is evolving toward broader review of discretionary acts—in order to fulfill its role within the system of government, the judiciary, through the application of various methods of interpreting legal standards and fundamental legal principles, determines the boundaries of legality and merits. Broader judicial control of the legality of discretionary acts in a modern rule-of-law state does not disrupt the principle of separation of powers, but rather ensures a more accountable administration and, at the same time, a higher level of legal protection of subjective rights and legal certainty.

Keywords: Judicial Review, Discretionary Judgment, Discretionary Act, Legality, Expediency.

1. Uvod

U modernoj, pravnoj državi delatnost uprave može biti vezana zakonom potpuno ili nepotpuno (Jovanović, 1990, p. 231). Prva situacija, kao ideal pravne države, postoji kada zakon ne ostavlja upravi mogućnost izbora prilikom odlučivanja, pa ona mora da postupi na zakonom propisani način (jedina solucija) i donese upravni akt čija je sadržina određena zakonom (potpuna pravna vezanost uprave). Druga situacija, kao najznačajnije odstupanje od prvobitnog shvatanja pravne države, postoji kada zakon ostavlja mogućnost upravi da radi najboljeg zadovoljenja javnog interesa izabere jednu od dve ili više jednakih zakonskih mogućnosti i donese upravni akt čija je sadržina određena najboljom solucijom za konkretni slučaj (nepotpuna pravna vezanost uprave). Takva pravom priznata mogućnost izbora prilikom upravnog odlučivanja, to jest zakonsko ovlašćenje uprave za izbor one koja je između nekoliko zakonom dopuštenih mogućnosti (alternativa) najpodesnija za zadovoljenje javnog interesa u konkretnom slučaju naziva se – diskreciona (slobodna) ocena, a upravni akti doneti na osnovu takve ocene – diskrecioni akti.

Načelo zakonitosti uprave, kao izraz težnje za potpuno podvrgavanje uprave pravu, sadrži u osnovi zahteve da pojedinačni akti i radnje svih organa uprave moraju imati osnov u zakonu i da građani uživaju zaštitu nezavisnog suda od nezakonitih pojedinačnih akata uprave kojima se odlučuje o njihovim pravima, obavezama ili interesima (Marković, 1998, pp. 44-45). Upravni akti, a samim tim i diskrecioni upravni akti, potpadaju pod sudsku kontrolu u pogledu njihove zakonitosti, a kontrola njihove celishodnosti zadržava se u krugu uprave (Milosavljević, 2017, p. 255). Preciznije, kontrolu zakonitosti upravnih akata vrše organi uprave i sudovi, a kontrolu celishodnosti jedino organi uprave, pa je u tom smislu kontrola celishodnosti ograničena u odnosu na kontrolu zakonitosti.

Cilj ovog rada je da ispita različite tehnike koje sudovi koriste prilikom kontrole diskrecionih akata. Polazna hipoteza je da, uprkos opštem pravilu prema kome kontrola celishodnosti pripada isključivo nadležnosti višeg organa uprave, sudovi vrše opsežniju kontrolu diskrecionih akata i povlače granicu između zakonitosti i celishodnosti. Dopunska hipoteza je da šira sudska kontrola diskrecionih akata nema za posledicu kršenje načela podele vlasti.

2. Osnovne teorijskopravne postavke

Period apsolutističke (policijske) države bio je obeležen arbitrarnim i nesputanim delovanjem upravne vlasti, pa su njeni akti (tzv. akti čiste uprave) bili izraz slobodnog nahođenja, to jest u punom smislu diskrecionarni (diskrecioni) akti. U modernoj, pravnoj državi više se ne govori o diskrecionim aktima,[1] već o diskrecionoj oceni povodom nekog upravnog akta zbog činjenice da upravni akti doneti na osnovu diskrecione ocene imaju svoje pravno vezane i pravno nevezane delove (Krbek, 1950, pp. 142-143). Prvi su pravilo i podležu sudskoj kontroli zakonitosti, a drugi su izuzetak i mogu da se osporavaju samo pred višim organom uprave.

Prilikom kontrole pravno vezanih delova diskrecionih akata sud utvrđuje da li je organ uprave ovlašćen za rešavanje po diskrecionoj oceni, da li se kretao u granicama datog ovlašćenja, da li je poštovao zakonske norme o cilju u kome je ovlašćenje dato, da li je poštovao pravila postupka i način utvrđivanja činjeničnog stanja i da li je stvarno i mesno nadležan (Dimitrijević, 1983, pp. 343-344; Popović, 2001, pp.

[1] Ipak, u savremenoj (u)pravnoj literaturi uobičajeno je da se radi jednostavnijeg izlaganja koristi termin „diskrecioni akti“ kao skraćeni naziv za upravne akte donete na osnovu diskrecionog ovlašćenja (vlasti) ili na osnovu diskrecione (slobodne) ocene, pa će taj pravni izraz biti korišćen i u ovom radu.

533-536). Uz to, organ uprave je u vršenju diskrecione ocene, osim konkretnim merodavnim pravilima upravnog postupka, vezan i osnovnim pravnim načelima, ljudskim pravima i slobodama i ograničenjima etičke prirode (Milosavljević, 1998, p. 1050). Sudska kontrola zakonitosti diskrecionog akta, dakle, podrazumeva ispitivanje da li se uprava prilikom donošenja takvog akta pridržavala pravnih pravila, odnosno da li je pravilno primenila zakon. Nasuprot tome, kontrola celishodnosti diskrecionog akta koju vrši viši organ uprave svodi se na ispitivanje pravno nevezanih delova takvog akta, odnosno na to da li je prilikom njegovog donošenja izabrana ona od više mogućih i jednakih zakonom propisanih alternativa koja prema datim okolnostima na najbolji (najcelishodniji) mogući način zadovoljava javni interes u konkretnom slučaju.

Pravila prema kojima se kontrola diskrecionih akata koju vrši sud ograničava na kontrolu zakonitosti, a kontrola njihove celishodnosti iscrpljuje u granicama upravne vlasti, izvode se iz ustavnog načela podele vlasti koje proklamuje međusobno proveravanje (kontrolu) i ravnotežu tri grane jedinstvene državne vlasti (Perić, 1899, pp. 58, 82-83). U tom razdvajanju (podeli), zakonodavna vlast donosi pravna pravila (zakone), izvršna (upravna) vlast izvršava zakone donošenjem opštih i pojedinačnih akata, a sudska vlast (na osnovu zakona!) rešava sporove o pravu. Zakonodavac nije sveznajući, nije u stanju da detaljno reguliše sve društvene odnose i čitavu delatnost uprave, niti zakon kao opšte pravno pravilo može unapred da predvidi sve moguće životne situacije. Otuda se kao nužna dopuna pravnog normiranja javlja diskreciona ocena, to jest upravi se radi ostvarivanja njene uloge u sistemu vlasti priznaje izvesna sloboda akcije u izvršavanju zakona (Tasić, 1995, p. 214). Kako zakonodavac nije u stanju da predvidi sve elemente oportunosti i celishodnosti koji čine sadržinu diskrecione ocene, izvodi se pravilo da sud može kontrolisati jedino zakonitost diskrecionih upravnih akata, to jest samo one elemente koje zakon propisuje, a ne može vršiti kontrolu njihove celishodnosti (Stefanović, 1924, pp. 328-329). Zbog svoje stručnosti, sposobnosti prilagođavanja promenljivim mesnim i vremenskim prilikama, poznavanja lokalnih prilika i relevantnih okolnosti konkretne upravne stvari (Živanović, 1924-1927, p. 14) uprava može najbolje da proceni na koji način će javni interes biti optimalno zadovoljen, pa kontrola celishodnosti njenih akata izvire i uvire u granicama nadležnosti viših organa upravne vlasti. Skladno tome, iza pravila da sudovi kontrolišu isključivo zakonitost diskrecionih (upravnih) akata stoji pravilo o nadležnosti kao element načela o podeli vlasti (Marković, 1995, pp. 398, 404).

U pravnoj nauci postoje i suprotna gledišta prema kojima sudska kontrola diskrecionih akata, pored kontrole zakonitosti, obuhvata i kontrolu njihove celishodnosti. Jelinek (1928, p. 307), кako navodi Popović (1968, pp. 33-34), smatra da u punom upravnom sporu (*volle*) sudija može da ispituje kako pravna i činjenična pitanja tako i vršenje diskrecione ocene (celishodnost osporenog akta), za razliku od ograničenog spora (*beschraenkte*) u kome se ocenjuje isključivo zakonitost, to jest pravna i činjenična pitanja ili samo pravna pitanja. Polazeći od širine osnova za pobijanje osporenog akta, Nigro (1994, p. 214) navodi da se u sporu „i u meritumu“ (*giurisdizione „anche in merito*“), suprotno sporovima o zakonitosti, akti mogu osporavati i zbog nezakonitosti i zbog necelishodnosti. Prema mišljenju Stjepanovića (1978, p. 768), sud može u sporu pune jurisdikcije da rešava ne samo o zakonitosti već (istina ne često) i o celishodnosti akta, radnje, postupka ili propuštanja uprave, pri čemu se ne izjašnjava samo o zakonitosti akta nego i raspravlja sam sporni pravni odnos (određuje neko davanje, dosuđuje naknadu štete ili povraćaj stvari i dr.).

3. Kontrola zakonitosti *versus* kontrola celishodnosti

Pravilnim vršenjem diskrecione ocene ne može se učiniti bilo kakva nezakonitost, a takvo vršenje diskrecione ocene postojaće ako su poštovane svrha i granice zakonom datog ovlašćenja. U suprotnom, protiv diskrecionog akta može se pokrenuti upravni spor. Tako, primenom čl. 114 Zakona o upravnim sporovima (*Verwaltungsgerichtsordnung* – VwGO), nemački upravni sudovi ispituju da li se organ prilikom donošenja ili preduzimanja diskrecionih akata kretao u granicama svojih ovlašćenja i da li je diskreciono ovlašćenje koristio saglasno zakonom određenom cilju. Ili, prema Zakonu o upravnom postupku SAD (*Administrative Procedure Act* – APA), svako lice čija su prava povređena delatnošću agencije, ili su pogođena ili oštećena takvom delatnošću prema nekom propisu, ima pravo na sudsku kontrolu takve delatnosti (odeljak 10[a]), osim u meri u kojoj zakoni isključuju sudsku kontrolu ili se delatnost agencije obavlja na osnovu diskrecionog ovlašćenja (odeljak 10[c]). Sud će ipak smatrati nezakonitim i poništiti akt, nalaz ili zaključak agencije za koji nađe da je samovoljan, proizvoljan, zloupotreba diskrecionog ovlašćenja ili inače nesaglasan sa zakonom (APA, odeljak 10[e]). Konačno, Preporukom Saveta Evrope br. (80)2 u vezi sa vršenjem diskrecionih ovlašćenja od strane organa uprave (*Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities*) predviđeno je da pored unutrašnje kontrole, koja podrazumeva kontrolu zakonitosti i celishodnosti, treba da postoji i spoljna kontrola suda ili drugog nezavisnog organa. Preporuka nije odredila obim spoljne kontrole, pa shodno obrazloženju može obuhvatiti i meritornu kontrolu. U tom smeru ide aktuelna sudska praksa ne samo u Nemačkoj već i u drugim državama.Tako, na primer, francuski sudovi ne kontrolišu samo takozvani spoljni legalitet upravnih akata (nadležnost, proceduru i formu) nego i motive i razloge delovanja uprave, takozvani unutrašnji legalitet (Drenovak Ivanović, 2011, p. 99).

Prilikom kontrole diskrecionih akata, nemački upravni sudovi ispituju pravilnost primene načela srazmernosti koje je Savezni ustavni sud u presudi o apotekama (*Apotheken-Urteil* – BVerfGE 7, 377) iz 1958. godine precizirao kroz elemente „podesnosti“, „neophodnosti“ i „srazmernosti“ (u užem smislu). Trostepeni test podrazumeva da mera javne vlasti mora biti: (1) podesna, to jest kao rezultat mora imati cilj koji se želi postići; (2) neophodna, to jest takva da ne postoji nijedna druga manje restriktivna mera i (3) srazmerna, to jest takva da ne sme nametati preterena ograničenja, odnosno ne sme dovoditi do preteranog otežavanja situacije subjekta na koga se odnosi. Francuski Državni savet je takav, trostepeni, test prvi put primenio 2011. godine (C. E., Ass., 26 octobre 2011, *Association pour la promotion de l'image e.a.*), mada je u sudskoj praksi veoma dugo egzistirao stav da upravne mere, osim što moraju biti opravdane, moraju biti i srazmerne konkretnoj situaciji – upravna mera neće biti zakonita ako nije srazmerna; zadiranje u javne slobode primenom upravne mere mora biti neophodno za ostvarenje zakonitog cilja; upravne mere moraju biti najmanje restriktivne, među efikasnim merama koje se mogu preduzeti (C. E., 19 mai 1933, *Benjamin*, G.A.). Sudije u Engleskoj su se dugo opirale primeni principa proporcionalnosti iako im njegova suština nije bila nepoznata (*R v. Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 3 All ER 452). Nepoverenje prema evropskom konceptu principa proporcionalnosti, koji su nakon usvajanja Zakona o ljudskim pravima (*The Human Rights Act* – HRA, 1998) podsticali Evropski sud za ljudska prava (Hadži Stević, 2023, pp. 25-28; Golubović & Galetin, 2024, pp. 67-68) i Evropski sud pravde, dolazi otuda što su sudije, pored ispitivanja zakonitosti, razumnosti i proceduralne ispravnosti (Venzburi test), morale da ispituju i da li je akcija uprave bila neophodna i srazmerna cilju kome se teži, a takav test zahteva ulazak u meritum postupanja uprave, čime se sudija upliće u upravni postupak na način koji bi se mogao smatrati povredom načela podele vlasti (Barnett, 2009, p. 663). Uprkos tome, princip proporcionalnosti je s vremenom postao jedan od osnovnih principa engleskog pravnog sistema.

Iz ustavnog načela jednakosti građana pred zakonom propisanog u čl. 3, st. 1 Osnovnog zakona (*Grundgesetz für die Bundesrepublik Deutschland* – GG) nemački upravni sudovi izvode princip samoograničenja (*Selbsbindung*), koji je uporediv sa načelom legitimnih očekivanja stranaka, prema kome se uprava smatra vezanom sopstvenim internim aktima i ranijom upravnom praksom od kojih ne sme da odstupi bez valjanog obrazloženja. Kod ovakvog postupanja sudova mogu se uočiti dva interesantna momenta. Prvo, ovakvo postupanje u suprotnosti je sa diskrecionom ocenom koja *per se* podrazumeva izvesnu slobodu uprave da vodeći računa o javnom interesu u sličnim slučajevima odluči na različite načine (Tasić, 1998, pp. 214-215). Drugo, reč je o preciziranju zakonske odredbe kojom je dato diskreciono ovlašćenje kroz upravnu praksu – kada zakonodavac ne može da proceni koji bi bio pravi način uređenja svih pojedinačnih slučajeva iste vrste, uprava sužava diskreciju doslednim postupanjem (Cucić, 2015, p. 163). Sličan instrument u francuskom pravu predstavlja „teorija direktiva" prema kojoj organi uprave koji mogu donositi pojedinačne diskrecione odluke mogu ponekad da definišu uslove u kojima će se takvo ovlašćenje vršiti i politiku koju će sprovoditi (Breban, 2002, p. 206). Organ uprave mora da se pridržava takve orijentacione norme, osim u slučajevima koje opravdavaju posebne okolnosti. Državni savet je podržao zakonitost ovakvog postupka (C.E., 11. decembar 1970, *Crédit foncier de France*, G. A., no 106), a prilikom kontrole primenjuje dvostepeni test – (1) ispituje saglasnost direktive sa zakonom koji uprava primenjuje u vršenju diskrecione ocene i (2) ispituje primenu direktive u konkretnom slučaju kako bi proverio da li je eventualno odstupanje od direktive bilo zakonito.

Jedno od važnijih pitanja koje se u uporednoj sudskoj praksi postavilo jeste pitanje da li uprava prilikom vršenja diskrecione ocene ima pravo da učini grešku. Profesor Vilijam Vejd (William Wade), kako navodi Breban (2002, p. 205) ističe da „sama suština diskrecionog ovlašćenja znači i pravo da se načine greške". Francuski Državni savet je skrojio pojam „očigledna greška u proceni" (*erreur manifeste d'appréciation*) koja će postojati kada je uprava napravila grubu grešku u proceni činjenica koje su motivisale njenu odluku (Breban, 2002, pp. 205-206). Uprava može da napravi grešku, ali ta greška ne bi smela da bude osobito teška i evidentna, to jest karakteristična po svojoj težini ili očiglednosti (C. E., 3. februar 1975, *Pardov*). Premda se u praksi vrlo brzo proširila (Breban, 2002, p. 206), greška u proceni čak i ako je očigledna ne može se kontrolisati u svim oblastima, na primer ocenjivanje kandidata na umetničkom konkursu (C. E., 20. decembar 1986, *Crépin Loredon*) ili odluke sudije u sportskim takmičenjima u kojima on procenjuje igru učesnika (C. E., 25. januar 1991, *Vigier*). U nemačkom pravu podlogu za uvođenje teorije „greške u ocenjivanju" činio je koncept „stvarne pravde" (*Sachgerechtigkeit*). Kako navodi Petrović (1981, pp. 205-208), na osnovu prakse saksonskog suda suštinu teorije formulisao je Valter Jelinek (Walter Jellinek), prema kome greška u ocenjivanju može nastati usled „nedovoljne pažnje u odmeravanju razloga i protivrazloga" (koja se odnosi na izbor stanovišta i ciljeva upravne odluke, kao i vrste i načina njihovog vrednovanja) ili „nedovoljne doslednosti" – u slučaju kada nema saglasnosti upravne odluke sa prethodno valjano odabranim načelima i ciljevima. Sud ocenjuje odluku uprave prema onom od više mogućih stanovišta na kojem je uprava svoju odluku postavila, pa će takva odluka biti nevaljana ako je to, izabrano, stanovište ne pokriva. Uporediv pravni institut u engleskom pravu predstavlja takozvano pravo na grešku (*power to error*), koje obuhvata ne samo greške u činjenicama (*errors of fact*) nego i greške u pravu (*errors of law*) (Barnett, 2009, pp. 665-670). Sud će dodatno ispitati bitne (*crucial*) greške, posebno u činjenicama, i ukinuti odluku ako je zasnovana na činjenicama za koje ne postoje dokazi, ili je doneta na osnovu bitnih činjenica za koje je dokazano da su pogrešne, ili su pogrešno shvaćene ili ignorisane. Takođe, sudovi u SAD poništiće diskrecioni akt ako utvrde da je prilikom njegovog donošenja agencija učinila „jasnu grešku u rasuđivanju" (*clear error of judgment*). Prema stavu suda iznetom u presudi *Motor Vehicle Manufacturers Association of the United States, Inc., et al. v. State Farm Ins., 463 U.S. 29 (1983)*, mora postojati racionalna veza između utvrđenih činjenica i izbora koji je agencija napravila, to jest akt agencije biće samovoljan i proizvoljan ako bi se agencija oslonila na faktore koje zakonodavac nije imao u vidu, ako bi potpuno propustila da razmotri značajan aspekt problema, ponudila objašnjenje koje se ne slaže sa dokazima koje je utvrdila ili je objašnjenje u toj meri neverovatno da se ne može pripisati različitom viđenju stvari, odnosno stručnosti agencije (Reagan, 1985, p. 157).

Poseban mehanizam kontrole kojim nemački upravni sudovi eksplicitnije zalaze u ocenu celishodnosti predstavlja takozvano svođenje diskrecije na nulu (*Ermessensreduzierung auf Null*) (Kopp & Schenke, 2014, p. 1450). Sud, naime, isključuje pojedine zakonom propisane solucije kao nepravilne i smatra da je za konkretan slučaj, prema postojećim okolnostima, zakonita samo jedna alternativa. Ostale, isključene alternative sud ocenjuje nezakonitim, a ne necelishodnim (*sic!*), pa ih shodno toj oceni i sankcioniše. Teorijskopravno opravdanje ovog koncepta (Kopp & Schenke, 2014, p. 1452; Grosche, 2023, pp. 628-633) izvodi se, s jedne strane, iz principa samoograničenja u vršenju diskrecione ocene, to jest načela jednakosti građana pred zakonom, a, s druge strane, iz ustavnih garantija osnovnih prava (BVerwGE 47, 280 [283]), jer bi prema okolnostima konkretnog slučaja drugačiji način postupanja uprave mogao imati opasne posledice po život i zdravlje ljudi, imovinu i druge važne pravom zaštićene interese.

Eskurs. Vrelog avgustovskog popodneva, policajac u patroli uočava da se u automobilu koji nije parkiran u hladu nalazi beba i da dete već pokazuje znake toplotnog udara. Nije poznato gde se nalazi vozač automobila. Policajac prinudno otključava automobil i predaje dete službi hitne pomoći. Prilikom vršenja diskrecione ocene, policajac mora uzeti u obzir sukobljene interese – imovinu, s jedne strane, i život deteta, s druge strane (Hufen, 2010, p. 605). Čl. 14, st. 1 GG jemči pravo na imovinu pa bi policajac mogao da izbegne oštećenje imovine tako što će ispitati vlasnika i odrediti lokaciju vlasnika ili vozača. Međutim, policajac uočava pretežniji interes, odnosno da postoji konkretna opasnost po život deteta, za koje svako dalje čekanje može značiti smrt.

Diskreciona ocena koju zakon propisuje ovde je redukovana, svedena na nulu. Odluka policajca formalno je diskreciona, a u suštini je vezana (obavezujuća). Ako bi policajac u ovakvim situacijama doneo drugačiju odluku, takva odluka bi predstavljala grešku u vršenju diskrecionog ovlašćenja, a samim tim bila bi nezakonita. Dužnost policije da deluje i pruži zaštitu zaštićenom dobru proizlazi iz čl. 2 GG, a policiji preostaje jedino diskreciono ovlašćenje u pogledu mera i radnji koje treba preduzeti i sredstava koje treba primeniti. Drugim rečima, diskreciono ovlašćenje u takvom slučaju je zakonom ograničeno do te mere da se samo jedna odluka može smatrati zakonitom.

Kontrolu diskrecionih akata sudovi vrše i kroz kontrolu tumačenja neodređenih pravnih pojmova (*unbestimmte Rechtsbegriffe*) kao što su „javna sigurnost“, „javni red i mir“, „javni interes“ i dr. Neodređeni pravni pojmovi sadrže opšte formulacije kod kojih je teže pronaći pravu volju zakonodavca pa ih organ uprave uz manju ili veću meru subjektivnog promišljanja mora tumačiti u svakom pojedinačnom slučaju. Pre primene pravnog standarda koji sadrži nejasne pravne izraze, organ uprave treba da ga protumači polazeći od opštih pravnih načela, doslovnog značenja, pravne tradicije, značenja, svrhe i sistematskog konteksta norme, duha ustava, a može i da se osloni na stavove sudske i upravne prakse i upravnih propisa. Budući da tumačenje pravnih pojmova predstavlja pravno pitanje, upravni sud može poništiti akt uprave koji je zasnovan na pogrešnom (neadekvatnom) tumačenju takvog pojma s pozivom na njegovu nezakonitost (Jerinić, 2012, p. 214). Prema stavu Saveznog ustavnog suda (BVerfGE 103, 142 [156]), sudski utvrđeno i potpuno sudsko tumačenje pravnih pojmova u principu nema polje slobodne procene, to jest može da postoji samo jedno zakonito tumačenje neodređenog pravnog pojma, a sudovi mogu da preispitaju da li je do tog tumačenja došlo i da li je norma primenjena u skladu sa ovim tumačenjem. Kako navodi Hufen (2010, pp. 606-607), upravi se, izuzetno, priznaje izvesna sloboda u tumačenju i primeni neodređenih pravnih pojmova, koja u ograničenoj meri podleže sudskom preispitivanju (na primer državni ispiti ili odluke o riziku i prognozama). Međutim, diskreciono ovlašćenje ni ovde nije nesputano (BVerwGE 59, 213 [216]) jer sud, bez obzira na to što ne može da ispituje celishodnost, može da vrši neposrednu spoljnu kontrolu takvog ovlašćenja – da preispita da li je odluka zasnovana na nebitnim razmatranjima, da li je ispoštovan princip pravičnosti, da li su primenjeni opšteprihvaćeni kriterijumi i dr. (BVerfGE 84, 34 [53 f.]).

U ovom toku misli nameće se stav Vrhovnog suda SAD kojim je rešena naizgled kontradiktornost pojedinih odredaba APA, odnosno odgovoreno je na pitanje kako će sud utvrditi nezakonitost i poništiti diskrecioni akt agencije zbog zloupotrebe (diskrecionog) ovlašćenja (samovoljan, proizvoljan ili akt inače nesaglasan sa zakonom) kada su prema odredbama APA takvi akti izuzeti iz sudske kontrole. U presudi *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)*, sud je naveo izuzetak od „pretpostavljene mogućnosti kontrole akata uprave“ (*presumed reviewability of administrative action*), to jest da se sudska kontrola može isključiti samo izuzetno, kada su zakonske odredbe u toj meri neodređene da prilikom donošenja akata uprave „nema prava koje bi se primenilo" (*no law to apply*) u konkretnom slučaju. Taj stav sud je kasnije preformulisao u presudi *Heckler v. Chaney, 470 U.S. 821 (1985)* tako da se pretpostavka primenjuje kada su „zakonske odredbe formulisane tako da ne sadrže standarde u odnosu na koje bi mogla da se kontroliše upotreba diskrecionih ovlašćenja" (Jerinić, 2012, p. 2015).

U tesnoj vezi sa prethodnim sredstvom sudske kontrole diskrecione ocene jeste i standard razumnosti (*reasonable*), koji takođe predstavlja jedan neodređen pojam (Stevandić, 2019, pp. 70-71). Engleski sudovi nakon donošenja odluke u predmetu *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB* 223 primenjuju test racionalnosti ili razumnosti, koji je poznat i pod nazivom „Venzberi pravilo" (*Wednesbury Principle*) (Bradley & Ewing, 2007, p. 689). Sud može diskrecioni akt oceniti nezakonitim ako nađe da je takav akt u toj meri nerazuman da ga nijedno razumno telo (javni službenik) ne bi moglo doneti (Craig, 1999, p. 537). Sud se zaustavlja na oceni da li konkretna odluka ima karakteristike koje je čine nerazumnom, a ne upušta se u ispitivanje koja bi odluka bila razumna jer bi to podrazumevalo razmatranje pitanja celishodnosti. Povodom spora *Chevron U.S.A., Inc. v. Natural Resources Defence Counil, Inc., 467 U.S. 837 (1984)*, Vrhovni sud SAD je uspostavio teoriju „Ševron" (*Chevron Doctrine*) – dvostepeni test kojim su određene granice sudske kontrole u pogledu tumačenja zakona od strane agencija (Beermann, 2008, pp. 61-64). Ako u postupku ocene jasnoće i određenosti zakonskih odredaba u pogledu predmeta konkretnog spora (prvi deo testa) oceni da su zakonske odredbe nejasne i neodređene, sud je u obavezi (drugi deo testa) da potvrdi tumačenje zakona utvrđeno od strane agencije ukoliko je ono razumno (*reasonable*) ili dopustivo (*permissible*). Na prvi pogled, doktrina „Ševron" je neopravdano omogućila agencijama da tumačenjem pravnih pitanja, koja tradicionalno pripadaju nadležnosti sudova, samostalno određuju granice sopstvenih ovlašćenja. Međutim, kako ističe Davinić (2004, pp. 197-198), prema mišljenju jednog dela američke pravne nauke (Gelhorn, Levin, 1997, p. 87) reč je o veštom triku Vrhovnog suda budući da su američke sudije postale toliko vešte u pronalaženju jasnih zakonskih odredaba i određivanju tumačenja agencija kao nerazumnog da lako mogu poništiti svaki akt agencije sa kojim se ne slažu.

3.1. Švajcarski model

U odnosu na izložena uporednopravna iskustva, kontrola diskrecionih akata koju vrši Savezni upravni sud u Švajcarskoj je sveobuhvatna i potpunija budući da pored kontrole zakonitosti i utvrđenog činjeničnog stanja može obuhvatiti i kontrolu njihove celishodnosti. Takvo ovlašćenje sadržano je čl. 37 Zakona o Saveznom upravnom sudu (*Verwaltungsgerichtsgesetz* – VGG) u kome je propisano da se odredbe čl. 49 Saveznog zakona o upravnom postupku (*Verwaltungsverfahrensgesetz* – VwVG), kojima su propisana široka ovlašćenja organa uprave koji vrši instancionu kontrolu, supsidijarno primenjuju i na Savezni upravni sud. Kontrola celishodnosti neće biti moguća ako je pre obraćanja Saveznom upravnom sudu prethodno podneto pravno sredstvo nekom kantonalnom organu (čl. 49, st. 1, tač. c VwVG). Tankerel (Tanquerel) (2011, pp. 173-174) ističe, kako navodi Cucić (2015, pp. 192-194), da kontrola celishodnosti predstavlja nesrećno rešenje koje ne priliči sudskoj kontroli rada uprave, ali da su mogućnosti Saveznog upravnog suda u vršenju te kontrole sužene odlukama Saveznog suda. Naime, prema stavu Saveznog suda, ne bi trebalo da kontrola celishodnosti obuhvati i kontrolu tumačenja pojmova u vezi sa kojima je upravi ostavljeno polje slobodne procene, osim pravno vezanih elemenata.

4. Sudska kontrola diskrecionih akata u Srbiji

U Republici Srbiji diskrecioni akti nisu izuzeti od sudske kontrole, s tim da su mogućnosti suda ograničene na kontrolu njihove zakonitosti (Milosavljević, 2017, p. 375). Pored ispitivanja stvarne i mesne nadležnosti, poštovanja pravila upravnog postupka (Odluka Upravnog suda, broj Už 144/2016 од 14. 4. 2016. i broj U 13583/2017 од 25. 3. 2021) i utvrđenog činjeničnog stanja (Odluka Upravnog suda, broj U 10429/2017 од 15. 3. 2019), Upravni sud kao pravno vezane delove diskrecionog akta kontroliše i da li je organ pri donošenju diskrecionog akta postupao na osnovu zakonskog ovlašćenja (Presuda Upravnog suda, broj 9 U 4831/2017 од 30. 5. 2019), da li je poštovao granice zakonskog ovlašćenja i da li je takav akt donet u skladu sa ciljem u kojem je ovlašćenje dato (čl. 3 i čl. 24, st. 1, tač. 5) Zakona o upravnim sporovima – ZUS; Presuda Upravnog suda, broj U 15833/2017 од 8. 3. 2019). Postojanje zakonskog ovlašćenja i poštovanje njegovih granica sud relativno lako može da utvrdi. Međutim, procena poštovanja zakonskog cilja predstavlja nešto teži zadatak, a njegovo izigravanje može se ispoljiti u izdavanju akta u svrhu koja nema bilo kakve veze sa javnim interesom ili u neku svrhu javnog interesa, ali ne onu koju je zakon imao u vidu (Tomić, 2006, pp. 294-295).

Prema opštem pravilu, kada nađe da osporeni upravni akt treba poništiti, sud će u upravnom sporu pune jurisdikcije presudom rešiti upravnu stvar ako priroda stvari to dozvoljava i ako utvrđeno činjenično stanje pruža pouzdan osnov za to, a takva presuda u svemu zamenjuje poništeni akt (čl. 43, st. 1 ZUS-a). Međutim, u st. 2 istog člana, ZUS *expressis verbis* propisuje da je spor pune jurisdikcije isključen kada je predmet upravnog spora upravni akt donet po diskrecionoj oceni. Kako veli Tomić (2010, p. 523), diskreciona ocena je „čist, na Upravni sud neprenosiv upravni posao" – „niti tužilac može da pobija, niti je sud ovlašćen da proverava pravilnost upravnog diskrecionog ocenjivanja, tj. celishodnost akta" (2021, p. 381) – pa kao takva „ostaje zabranjeno polje pune sudske jurisdikcije" (2023, p. 14).

Pre donošenja važećeg ZUS-a, u domaćoj pravnoj nauci nije bilo saglasnosti oko pitanja da li je spor pune jurisdikcije dopušten u slučaju poništavanja diskrecionog upravnog akta. Prema mišljenju nekih domaćih autora (Lilić *et al*., 1997, pp. 546-547), načelno je bilo moguće, na posredan način, voditi upravni spor pune jurisdikcije i o celishodnosti upravnog akta, s obzirom na to da se u takvom sporu rešava i sama upravna stvar, a sudska odluka u potpunosti zamenjuje upravni akt. Drugi naši autori (Drenovak Ivanović, 2011, p. 66) ističu da je u to vreme sudska kontrola diskrecione ocene u sporu pune jurisdikcije bila moguća i u slučaju dvostrukog „ćutanja uprave". Kada prvostepeni i drugostepeni organ uprave propuste da reše upravnu stvar, sud će ako nađe da je predmetna tužba osnovana presudom tužbu uvažiti i odrediti da nadležni organ donese rešenje. Ako nadležni organ donese novi upravni akt protivno pravnom shvatanju suda ili protivno primedbama suda u pogledu postupka, ili ponovo neosnovano „ćuti" a tužilac podnese novu tužbu, sud će poništiti upravni akt i po pravilu sam rešiti stvar presudom.

Suprotno tome, Popović & Savinšek (1997, pp. 49, 59-61) smatraju da su u čl. 10, st. 2 Zakona o upravnim sporovima – ZUS 1996 bile postavljene granice sudovima koji rešavaju upravne sporove zato što „sudovi mogu da cene u upravnim sporovima samo zakonitost osporenog upravnog akta, a *ne i celishodnost*, odnosno *primenu slobodne volje*."[2] Autori, takođe, opravdano navode da „priroda stvari" ne može biti osnov za donošenje presude u sporu pune jurisdikcije kada je reč o rešenju donetom na osnovu diskrecione ocene (Popović & Savinšek, 1997, p. 156), a takvo gledište je preovlađujuće u domaćoj pravnoj nauci (Bačić & Tomić, 1985, p. 155; Milosavljević, 2017, p. 372; Dimitrijević, 1998, p. 85; Vasiljević, 2009, pp. 370-371; Pljakić, 2011, p. 329). Cucić (2015, p. 302) takođe smatra da u našem pravnom sistemu ne bi trebalo dozvoliti da Upravni sud vrši diskrecionu ocenu u upravnom sporu pune jurisdikcije i ukazuje da u ranijoj praksi s pozivanjem na ograničenja nametnuta „prirodom stvari" sudu nije bilo dopušteno da odluči u punoj jurisdikciji o poništenju diskrecionog upravnog akta. Isključenje spora pune jurisdikcije (kada je predmet upravnog spora upravni akt donet po diskrecionoj oceni) važeći ZUS je „izdvojio iz ʼprirode stvariʼ u poseban uslov – zabranu odlučivanja u punoj jurisdikciji" (Cucić, 2015, p. 302). Popović & Savinšek i drugi navedeni autori su u pravu – bez obzira na to što raniji zakon nije

[2] ZUS 1996 je propisivao u čl. 10 da se upravni akt može pobijati ako „u aktu nije ili nije pravilno primenjen zakon, drugi propis ili opšti akt" (st. 1, tač. 1), ali da „Nema nepravilne primene propisa ako je nadležni organ rešavao po slobodnoj oceni na osnovu i u granicama ovlašćenja koje mu je dato propisima i u skladu sa ciljem u kome je ovlašćenje dato" (st. 2).

izričito isključio spor pune jurisdikcije kada je predmet upravnog spora upravni akt donet po diskrecionoj oceni, sud u sporu pune jurisdikcije ne može ocenjivati celishodnost diskrecionog upravnog akta jer bi u suprotnom to bio akt apsolutne nenadležnosti.

5. Zaključak

Prema opštem pravilu, preovlađujućem u uporednom upravnom pravu, sudska kontrola diskrecionih akata iscrpljuje se u proveravanju njihove zakonitosti, a sud nipošto ne bi smeo da se upušta u ocenu celishodnosti jer bi u suprotnom to bio napad na načelo podele vlasti. Izuzetno, celishodnost može biti predmet sudske kontrole (upravnog spora), ali je ta kontrola značajno ograničena strogim procesnim uslovima i praksom najviše sudske instance (Švajcarska).

Savremena sudska praksa pokazuje tendenciju konstantnog proširivanja sudske kontrole diskrecionih akata, a konsekventno i obima pravne zaštite subjektivnih prava. Dinamika razvoja i neprestanog preobražavanja društvenih odnosa ima za posledicu da zakon, slično kao i kod diskrecione ocene, ne može unapred regulisati sve društvene odnose, pa sud radi obavljanja svoje funkcije – rešavanja sporova o pravu i ocene zakonitosti – ponekad mora ići šire od zakona koji regulišu određene odnose u društvu i svoje odluke donositi u duhu osnovnih ustavnih načela, to jest čitavog pravnog sistema. Granice zakonitosti diskrecione ocene utvrđuje zakonodavac pravnom normom, a demarkacionu liniju između zakonitosti i celishodnosti tamo gde je ta granica nedovoljno jasna povlači sud primenom različitih metoda tumačenja pravnih normi (pravnih standarda) i osnovnih pravnih načela (zaštite ljudskih prava, srazmernosti, jednakosti, predvidivosti). Linija razdvajanja nije povučena jednom za svagda – fino podešavanje je neprekidni proces, zadatak stalnog karaktera, čijim izvršavanjem sud zavisno od trenutnog odnosa političkih snaga pažljivo balansira između efikasnog rada uprave, s jedne strane, i zaštite osnovnih ljudskih prava i pravne sigurnosti, s druge strane.

Načelo podele vlasti i načelo samostalnosti u radu uprave iziskuju ograničenje sudske kontrole uprave u primeni diskrecione ocene. Sud ne bi smeo da ulazi u pitanje čistog oportuniteta i pređe određenu granicu kako ne bi zauzeo mesto organa uprave u sistemu organizacije državne vlasti. Međutim, kada utvrdi da je organ uprave izabrao jednu od više zakonom dopuštenih solucija, sud se tu ne zaustavlja – on ide dalje i ispituje da li su pri njenom izboru poštovane i druge merodavne pravne norme i pravna načela. U tom smislu, pravo je teorijsko, ali i praktično pitanje da li je, na primer, ocena srazmernosti izabrane zakonom dozvoljene solucije pitanje čiste zakonitosti ili i (makar i samo malo) pitanje celishodnosti.

Dozirano šira sudska kontrola ne narušava načelo podele vlasti i ne uvodi sudokratiju u pravni život moderne države. Šira sudska kontrola dovodi u sklad načela zakonitosti, zaštite ljudskih prava i odgovornog rada uprave sa načelom podele vlasti i pomera klatno sa tačke razdvajanja grana vlasti na tačku njihove međusobne kontrole. Diskreciona ovlašćenja se priznaju upravi radi što potpunijeg (najboljeg) zadovoljenja javnog interesa, a upravni sud blagovremenom, potpunom i delotvornom kontrolom štiti ljudska prava (i pravne interese) od njenih grešaka i samovolje.

Sudska kontrola nije koncept kompatibilan sa celishodnošću rada uprave (diskrecionom ocenom), ali predstavlja najjače jemstvo i stabilizujući faktor pravne države. Sudska kontrola je nastala zbog toga što se kontrola zakonitosti diskrecionih akata od strane viših organa uprave nije potvrdila kao efikasno sredstvo zaštite zakonitosti i postala je nezaobilazna pretpostavka pravne države. Međutim, mera zakonite primene diskrecione ocene nisu slučajevi koji dođu na sud, već slučajevi koji se nikad ne pojave na sudu. Zbog toga je od vrhunske važnosti integritet službenika uprave i njihovo zakonito, profesionalno i etičko postupanje. „Zakone primenjuju ljudi. Od moralnih kvaliteta primenjivača zakona, možda mnogo više nego od njihove stručne spreme, zavisi da li će se i koliko jedna određena država približiti idealu pravne države." (Marković, 1998. p. 69). Mi bismo dodali – i od političke neutralnosti – jer u pravnoj državi organi uprave kao deo izvršne (političke) vlasti moraju da postupaju nepristrasno i politički neutralno kako bi svakom omogućili jednaku pravnu zaštitu u ostvarivanju prava, obaveza i pravnih interesa.

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Način oblikovanja naučnih članaka i ostalih priloga koji se dostavljaju redakciji *Stranog pravnog života* uređen je ovim uputstvom. Molimo autore da svoje priloge prilagode tematici časopisa i predviđenom načinu oblikovanja rukopisa, kako prilozi ne bi bili eliminisani nakon početne provere, budući da uredništvo primenjuje kriterijume iz važećeg podzakonskog akta o uređivanju naučnih časopisa.

Naučni i stručni članci mogu biti napisani na srpskom ili engleskom jeziku. Oni moraju sadržati podatke o autoru, naslov, sažetak, ključne reči i spisak referenci (literaturu i pravne izvore, po potrebi i spisak citiranih sudskih i drugih odluka). Uz priloge koji se objavljuju na srpskom jeziku, dostavlja se prevod naslova rada, rezimea i ključnih reči na engleskom jeziku. Prilozi koji se dostavljaju na engleskom jeziku sadrže prevod naslova, sažetka i ključnih reči na srpski jezik.

Autorski članci po pravilu ne prelaze obim od jednog autorskog tabaka (28.800 znakova sa razmacima), font Times New Roman, veličina 12pt, prored 1,5, leva margina 3,5 cm, a desna 3 cm. Izuzetno, prihvatiće se duži rukopis i to obima do 1,5 tabaka, ako to zahteva tema rada, po prethodnom dogovoru autora sa glavnim i odgovornim urednikom. U ostalim situacijama, rad većeg obima biće vraćen autoru radi skraćivanja. U obim se ne računaju tekstovi navedeni u beleškama na dnu strane (dodatni podaci o autoru, organizaciji u kojoj je zaposlen, druge napomene), naslov članka, sažetak (do 800 karaktera sa razmacima), ključne reči (do 5 pojmova ili sintagmi), spisak literature, pravnih izvora i sudskih odluka. Naučni članci se klasifikuju u: originalne (u kojima se iznose prethodno neobjavljeni rezultati sopstvenih istraživanja zasnovanih na primeni naučnih metoda) i pregledne (koji sadrže originalan, detaljan i kritički prikaz istraživačkog problema ili područja u kojem je autor ostvario određeni doprinos, prikazan u vidu autocitata). Za razliku od naučnih radova, u stručnom radu autor na osnovu izvršenog istraživanja zasnovanog na prikupljanju postojećih teorijskih saznanja i raspoloživih činjenica ukazuje na iskustva značajna za unapređenje prakse u određenoj oblasti, preporučuje promene u načinu primene propisa i slično.

U časopisu je moguće objaviti i **naučnu kritiku ili polemiku**, koja predstavlja raspravu, zasnovanu na naučnoj argumentaciji, na određenu naučnu temu. Obim naučnog rada ove vrste može da iznosi do 10.000 znakova sa razmacima. Osim podataka o autoru i naslova članka, naučna kritika mora da sadrži apstrakt (do 400 znakova sa razmacima), ključne reči (do 5 pojmova ili sintagmi) i spisak bibliografskih izvora. Svi navedeni podaci ne uračunavaju se u obim rada.

Ostali prilozi. Komentari sudskih odluka mogu da imaju najviše do 15.000 znakova. Izlaganja sa naučnih i stručnih skupova, prikazi knjiga i slično po pravilu ne smeju biti obima većeg od 7.000 znakova. Ne sadrže apstrakt i rezime.

Osnovno oblikovanje teksta

Svi prilozi moraju biti sačinjeni u Microsoft Word-u, u formatu A4, latiničkim pismom, fontom Times New Roman, veličine 12 pt sa proredom 1,5; sa automatskim uvlačenjem pasusa za 9 mm, bez umetanja tabulatora i bez deljenja reči na slogove (hifenacije). Posle svakog znaka interpunkcije staviti samo jedan razmak. Za posebna slova iz srpskog i stranog latiničkog pisma koriste se raspoloživi simboli – dijakritički znaci. Ćirilički znaci iz stranog pisma i iz drugih pisama (kineskog, japanskog, arapskog itd.) transliterišu se i transkribuju prema tablici dostupnoj na: *https://www.loc.gov/catdir/cpso/roman.html*. Imena i prezimena stranih autora navode se u originalu, osim kada se moraju transkribovati na latinicu (na primer imena iz ruskog jezika). Kada se autor poziva na radove objavljene u *Stranom pravnom životu*, koristi isključivo naziv časopisa na srpskom jeziku. Reference na srpskom jeziku koje se citiraju u radu pisanom na engleskom jeziku se ne prevode.

Prevod stručnih pojmova iz strane literature, kada je to moguće, treba da bude zamenjen odgovarajućim nazivom u srpskom jeziku. Prevod latinskih pravnih izraza ili izreka nije potreban. Strani pojmovi pišu se kurzivom. Druge strane reči ili sintagme koje označavaju specifične izraze ili institute u stranom pravu, koje se ne mogu sa preciznošću prevesti na sprski jezik ili ne postoje u srpskom pravu, zadržavaju se u originalnom nazivu (složene kurzivom), s tim što se objašnjava njihovo značenje na srpskom jeziku. U tekstu ne treba koristiti podebljana (boldirana) niti podvučena slova.

Strani pravni život prihvata citiranje i oblikovanje referenci prema stilu citiranja i referenciranja – Harvard britanski standard, prema modelu autor/rad. Navedeni stil je modifikovan jedino u pogledu načina citiranja pravnih izvora. Način primene navedenog stila pri citiranju i sastavljanju spiska literature i popisa pravnih izvora objašnjen je detaljno u ovom uputstvu.

S obzirom na prihvaćeni stil referenciranja, beleške u dnu teksta (fusnote) sadrže dopunska objašnjenja, a ne treba da upućuju na korišćenu literaturu, što se čini u tekstu. Članovi i stavovi pravnih odredbi na koje se poziva autor navode se u tekstu, a ne u fusnotama.

Ime, srednje slovo i prezime autora (jednog ili više njih) navode se na prvoj strani rukopisa u gornjem levom uglu. Pišu se uz upotrebu posebnih znakova (č, đ, š itd.), bez naučnih titula. Imena stranih autora takođe se pišu dijakritičkim znacima, bez obzira na jezik rada.

Ostali podaci koji se odnose na autore: naučna i stručna zvanja, akademske titule, ORCID broj autora, naziv ustanove autora i podaci za kontakt (mejl autora) navode se u posebnoj belešci (fusnoti) na istoj strani ispod teksta, označeni zvezdicom.

Naziv ustanove autora (afilijacija): navodi se potpun, zvanični naziv i sedište ustanove (grad i država) u kojoj je autor zaposlen ili u kojoj je obavio istraživanje. Studenti poslediplomskih studija navode naziv ustanove u kojoj studiraju.

Istraživački podatak / istraživački projekat. Autor može nakon naslova uneti posebnu fusnotu u kojoj će navesti tačne, potpune i aktuelne podatke o okolnostima pod kojima je rad nastao (u okviru međunarodne saradnje, međunarodnog programa, kao deo naučnog ili istraživačkog projekta, u okviru postdiplomskih studija ili postdoktorskih studija, kao saopštenje sa održanog naučnog skupa, gostujuće predavanje i slično) i/ili naznaku o instituciji, državnom organu ili međunarodnoj organizaciji koja je finansijer ili korisnik projekta.

U zahvalnici (posebnoj napomeni na prvoj strani rada ispod teksta označeno zvezdicom posle naslova rada) navode se imena drugih lica koja nisu autori, ali su imala učešća u istraživanju ili su pomagala u priređivanju rada, sa objašnjenjem njihove uloge. U fusnoti se može navesti i obaveštenje da je rad urađen u okviru određenog naučnoistraživačkog projekta, da je ranije usmeno izlagan na naučnom skupu i slično.

Naslov rada piše se malim slovima na sredini, font 14 pt. Naslov ne bi trebalo da ima više od 10 do 12 reči.

Sažetak se navodi ispod naslova članka. Sažetak ne sme da bude duži od 800 znakova sa razmacima. Veličina fonta je 11 pt (složeno kurzivom). U sažetku autor ukazuje na značaj teme, osnovno istraživačko pitanje/hipotezu, cilj istraživanja, metodologiju i rezultate istraživanja. U apstraktu treba koristiti termine koji se često koriste za indeksiranje i pretraživanje članaka.

Ključne reči su termini ili fraze koji najbolje opisuju sadržaj članka za potrebe indeksiranja i pretraživanja. Potrebno je dati pet ključnih reči ili sintagmi na srpskom. U članku se navode ispod apstrakta (veličina fonta 11 pt, kurzivom).

Naslov rada, Sažetak i ključne reči na engleskom jeziku (ako je članak na srpskom jeziku), **odnosno, na srpskom jeziku** (ako je članak na engleskom jeziku) navode se dva reda ispod.

Podnaslovi u tekstu se pišu na sredini, malim slovima i podebljanim (boldiranim) slovima, veličine 12 pt i numerišu se arapskim brojevima. Uvod i zaključak se, takođe, označavaju rednim brojevima. Podnaslovi drugog reda se pišu podebljanim (boldiranim) slovima, složeno kurzivom. Podnaslovi trećeg reda se pišu kurzivom.

Tabele, grafikoni i slični prilozi dostavljaju se posebno u formatu i rezoluciji pogodnoj za štampu.

Popis korišćene literature, pravnih izvora i spisak sudskih i drugih odluka navode se na kraju rada, fontom 11 pt. Popis bibliografskih jedinica sastavlja se po abecednom redosledu imena autora, bez numerisanja.

NAČIN CITIRANJA I SASTAVLJANJA SPISKA REFERENCI

Navođenje izvora unutar teksta

Od autora se očekuje da navedu korišćene izvore, i to potpuno i tačno, i da precizno prenesu tuđe navode, te se prilikom citiranja knjiga ili članaka preporučuje da, gde je moguće, budu navedene strane sa kojih se preuzima tuđi tekst. Brojevi stranica moraju biti sadržani kod doslovnog citiranja tuđeg teksta, prilikom parafraziranja ili upućivanja na određeni deo knjige ili članka. Jedna stranica se označava sa „p.", a više strana sa „pp." (skraćeno lat. *paper – pluta paper).* Moguće je koristiti i rad prihvaćen za objavljivanje, pod uslovom da je za rad određen digitalni identifikator (DOI broj), koji će biti naveden u spisku literature uz druge podatke o citiranom radu.

Način navođenja izvora zavisi od toga da li je potrebno istaći ime autora ili sadržaj njegovog teksta. U prvom slučaju se ime autora čiji se rad koristi navodi u samoj rečenici; u drugom slučaju se navodi na kraju rečenice u zagradi, uz godinu objavljivanja rada (po potrebi i strana). Na primer:

> Kako je istakao profesor Konstantinović (2006, p. 36) obimnost Skice za Zakonik o obligacijama i ugovorima bila je posledica težnje da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu.
>
> Skica za Zakonik o obligacijama i ugovorima bila je obimna, zato što se težilo da zakon bude razumljiv svima, a ne da učesnike u prometu nauči pravu (Konstantinović, 2006, p. 36).

Isticanje imena autora. Kada se u rečenici pominje ime nekog autora, bez dodatnih informacija o sadržaju rada koji se citira (sumarni pregled ili ukazivanje na izvor), dovoljno je navesti prezime autora i u zagradi godinu u kojoj je objavljen rad. Navodimo primer:

> U svom radu Ćirić (2008) konstatuje da je…

Kada se upućuje na posebne delove u radu, mora biti naveden i broj stranice ili stranica na kojima se nalazi citat. Primeri:

> U svom radu Ćorić (2017, pp. 26-30) opisuje procesna sredstva za naknadu štete u sudskom poretku Evropske unije.
>
> Stoga, prema Đorđeviću (2016, pp. 28-29), trebalo bi da se uzmu u obzir i drugačija rešenja iz uporednog prava.

Preuzeti sadržaj drugog autora se može saopštiti i parafraziranjem:

> Stoga Perović u predgovoru ponovljenom izdanju Skice za Zakonik o obligacijama i ugovorima (Konstantinović, 2006, p. 16) zaključuje da svaki pravni sistem dopušta slobodu ugovaranja, ali do izvesne granice.

Ako se citira neodređen broj strana, navodi se samo početna stranica sa koje se preuzima citat, dok iza nje stoji „i dalje". Na primer:

> Sve ove teorije se mogu podeliti u nekoliko grupa (Čolović, 2009, pp. 83 i dalje)…

Kada se upućuje na izvor iz fusnote nekog rada, posle broja strane piše se skraćenica „fn.":

> Navedeno rešenje je nesumnjivo podložno kritici (Jovanović, p. 8, fn. 14)…

Doslovno citiranje koristi se retko, uglavnom da bi se izbeglo pogrešno tumačenje originalnog teksta, da se istakne bitan argument ili ideja koja će potom biti posebno analizirana ili pobijana ili kada je na lep i efektan način autor izrazio svoju misao, a taj efekat bi parafraziranje poništilo. U svakom slučaju doslovnog citiranja teksta drugog autora neophodno je navesti tačnu stranicu (ili strane) na kojima se citat nalazi, kako bi zainteresovani čitalac mogao proveriti iznete podatke.

Kraći citati, dužine do 30 reči, sastavni su deo rečenice, istaknuti navodnicima. Mogu biti direktno ili indirektno citirani, na primer:

> Kako ističe Stanković (1972, p. 177) „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe".

Ili:

> Sve su to razlozi što treba prihvatiti da „neimovinska šteta predstavlja posebnu pojavu i pojam za sebe" (Stanković, 1972, p. 177).

U citate duže od 30 reči autor nas uvodi svojim rečima, a zatim počinje citat, koji ističe navodnicima, obavezno uz naznaku prezimena autora i tačne strane ili strana na kojima se nalazi citat. Tekst se može preuzeti direktno:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*. Prema Stankoviću (1972, p. 307) reč je o slučajevima: „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika".

Indirektno se isti tekst može preuzeti na sledeći način:

> Nemogućnost korišćenja uništene stvari može da izazove neimovinsku štetu, nezavisno od *pretium affectionis*, u slučajevima „u kojima nemogućnost upotrebe uništene odnosno oštećene stvari unosi veliki poremećaj u

oštećenikov svakodnevni praktični život, lančanu reakciju raznovrsnih maltretiranja i ograničavanja, koja mogu predstavljati potpunu dezorganizaciju oštećenikovog načina života i njegovih svakodnevnih navika” (Stanković, 1972, p. 307).

Dugačke citate bi najpravilnije bilo preuzeti tako što se iza dve tačke navedu u posebnom redu uvučeno, složeno manjim fontom (11pt), uz naznaku izvora i stranice. Izostavljeni deo reči iz citata označava se trima tačkama u ugaonim zagradama, na primer:

Prilikom organizacije izvršenja rada u javnom interesu „pragmatični razlozi […] ukazivali bi na potrebu većeg učešća lokalne zajednice (u sektoru službi socijalne zaštite)” (*Alternative zatvorskim kaznama*, 2005, p. 44).

Citiranje različitih radova dva autora. Kada se u istoj rečenici upućuje na radove dva autora (bilo da imaju saglasne ili oprečne stavove) u tekstu se navodi prezime svakog od autora, uz godine kada su radovi objavljeni, prema sledećim primerima:

I Đorđević (2012, p. 34) i Mrvić Petrović (2011, p. 86-87) smatraju da uvođenje sistema dani-novčane kazne nije ostvarilo željene efekte u pravnom sistemu Republike Srbije.

Kauzalitet kod propuštanja se različito objašnjava po teoriji aliud agere u odnosu na teoriju prethodno preduzete radnje (vid. za prvu Welp, 1968, p. 30, a za drugu Rudholphi, 1972).

Citiranje imena dva ili tri autora istog rada. U tekstu se upućuje na zajednički rad autora uz navođenje prezimena oba autora povezana simbolom &, dok se u zagradi navodi godina u kojoj je rad objavljen.

Na ovakav odnos države i crkve trebalo bi da obratimo posebnu pažnju (Đorđević & Stanić, 2015, p. 63).

U svom radu Nikolić & Čović (2018) ukazali su na…

Uporednopravno istraživanje (Mrvić Petrović & Petrović, 2018) potvrdilo je…

Mrkšić, Popović & Novaković (2018, pp. 477) analiziraju…

Citiranje rada koji ima više od tri autora. U tekstu se navodi samo prezime prvog autora i iza njega opšteprihvaćena skraćenica „*et al.*” (*et alia*). Na primer:

Ćeranić *et al.* (2018) istražili su..

Citiranje više radova istog autora, objavljenih iste godine. U tekstu se uz prezime autora i godinu dodaju latinična slova a, b, c, d, kako bi se označili različiti radovi istog autora objavljeni iste godine. Primer:

Svakako, navedeni vid krivice trebalo bi da je više u našem fokusu (Ćirić, 2004a, p. 70)… Pored „tvrde", ne bismo smeli da zaboravimo „meku moć"… (Ćirić, 2004b, p. 334).

Citiranje rada objavljenog pod okriljem organizacije. U slučaju da je navedeni tekst objavila neka organizacija (pravno lice, udruženje, ustanova, međunarodna, nevladina organizacija i slično), tako da pojedini autor nije posebno naveden, u tekstu treba uputiti na naziv organizacije i godinu objavljivanja rada. Dozvoljena je upotreba uobičajenih službenih skraćenica međunarodnih organizacija ili njihovih tela, na primer:

Od presudne je važnosti istraživati izborne procese u domaćem i stranom pravu (Institut za uporedno pravo, 2013, pp. 32-35).

Media and information technologies can offer such spaces to allow different groups to interact with each other, so in Tallin Guidelines on National Minorities and the Digital Age (OSCE, 2019)…

Citiranje rada nepoznatog autora. Umesto podataka o autoru koristi se naslov rada:

U *Teoriji države i prava* (1995, p. 204) jasno se kaže…

Rad nepoznate godine izdanja. U navedenom slučaju koristi se skraćenica n.d. (od *no date*):

Zirojević (n.d.) ukazuje na obeležja terorizma…

Ili indirektno:

Obeležja savremenog terorizma su… (Zirojević, n.d.).

Sekundarne reference. Ako primarni izvor nije bilo moguće pronaći, nego ga autor preuzima iz rada drugog autora, mora se pozvati na primarni izvor i sekundarnu referencu na sledeći način:

Zlatarić (1967), kako navodi Kambovski (2005, p. 701) uključuje u saizvršilaštvo i radnje preduzete pre ili posle dovršenja krivičnog dela.

Ili:

U ranijoj teoriji se smatralo da saizvršilaštvo uključuje i radnje preduzete pre ili posle dovršenja krivičnog dela (Zlatarić, 1967, navedeno u Kambovski, 2005, p. 701).

Navođenje propisa. Naziv zakona i drugog propisa navodi se u tekstu punim nazivom (složeno običnim slovima), uz broj godine kada je usvojen, sem kada se analizira određena izmena ili dopuna propisa, kada se navodi kao izvor službeno glasilo u kome je objavljena takva izmena. Prilikom prvog pominjanja propisa može se dodati crta posle naziva i navesti skraćenica pod kojom će se isti propis dalje u tekstu navoditi. U daljem tekstu dovoljno je koristiti samo skraćenicu. Isto pravilo važi i za inostrane pravne akte, s tim što se podaci koji se na njih odnose navode na način kako je to uobičajeno za to strano pravo. Skraćenice se sačinjavaju prema izvornom nazivu propisa, a ne prema njihovom prevodu na srpski ili engleski jezik.

> U krivičnom zakonodavstvu Srbije (Krivični zakonik RS, 2005 – KZ).
>
> Temeljna reforma krivičnih dela protiv privrede u pravu Republike Srbije izvršena je 2016. godine (Zakon o izmenama i dopunama Krivičnog zakonika, 2016).
>
> Pravo na obeštećenje se žrtvama nasilja u Nemačkoj priznaje od 1976. godine na osnovu posebnog saveznog zakona, s tim što je 1985. godine donet novi (*Gesetz* über *die Entschädigung für von Gewalttaten* – OEG) s tim što je 1985. godine donet novi zakon koji je i sada na sanzi (OEG, 1985).
>
> U francuskom Građanskom zakoniku (*Code civil* – CC), prema poslednjoj verziji od 1. oktobra 2018. Godine predviđeno je… (CC, 1804).

Akti međunarodnih organizacija citiraju se tako što se u tekstu navodi donosilac akta i pun naziv akta, koji se, po potrebi skraćeno, navodi u zagradi uz naznaku godine u kojoj je donet.

> U Istanbulskoj konvenciji Saveta Evrope (CETS No. 210) od 11. 5. 2011. godine (CoE CETS, 2011) predlaže se…
>
> Prava deteta, regulisana Konvencijom Organizacije ujedinjenih nacija o pravima deteta (Zakon o ratifikaciji Konvencije Ujedinjenih nacija o pravima deteta, 1990)…
>
> U pravu Evropske unije doneta je Uredba o stečajnim postupcima br. 1346/2000 (Concil Regulation (EC), 2000)…

Na isti način kako je citiran propis naveden u tekstu, mora biti označen u popisu literature.

Autor može da koristi tekst propisa preuzet sa interneta sa službene stranice nadležnog organa ili javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. U tom slučaju u popisu literature moraju biti označeni osnovni podaci o propisu i godini u kojoj je objavljena poslednja verzija dostupna na službenoj stranici nadležnog organa ili preuzeta sa javnog servisa zaduženog za objavljivanje pravnih propisa i praćenje izmena. Autor može da koristi tekst propisa i prema objavljenom službenom prevodu na engleski (ili neki drugi) jezik (što mora biti naznačeno).

Član, stav i tačka propisa skraćeno se pišu čl., st. i tač., a iza napisanih brojeva se ne stavlja tačka. Na primer:

čl. 5, st. 2, tač. 3 ili čl. 5, 6, 9 i 10 ili čl. 4–12.

Navođenje sudske prakse i odluka drugih organa. Autor u tekstu treba da navede što potpunije podatke: vrstu odluke sudskog, upravnog tela ili Ustavnog suda, naziv donosioca i druge podatke na osnovu kojih je odluka klasifikovana (slovo koje označava vrstu postupka, broj postupka, godinu pokretanja postupka) i datum kada je doneta i, ako postoji, izvor iz kog je preuzeta. Za presude Evropskog suda za ljudska prava merodavan je i broj predstavke. Iza teksta autor navodi u zagradi skraćeno oznaku odluke, koja će biti korišćena i u popisu literature. Na primer:

Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 utvrđena je nesaglasnost… (Odluka US, 2017).

Cass. crim., 19 December 1991, RCA 1992.170 (*Ius Commune Casebook for the Common Law of Europe*, 2018).

… kako se navodi u obrazloženju Presude Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012 (*Arhiv Apelacionog suda u Beogradu*, 2012).

Odluke međunarodnih sudova i tribunala treba da sadrže što potpunije podatke (vrsta odluke, podaci o sudskom veću koje je odluku donelo, datum donošenja odluke, uobičajeni naziv predmeta, registarski broj, kod (ako ga ima), strana, stav ili tačka na koju se upućuje ili sa koje je citiran deo odluke). Odluke međunarodnih sudova ili tribunala navode se uz korišćenje skraćenica za nazive sudova npr: PCIJ, ECHR, ICJ, ICTY i slično. Prilikom citiranja sudskih slučajeva koristi se veznik skraćenica „*v*" za veznik *versus*, npr. *Fremkin v Russia*, *Goobald v Mahmood*.

Prilikom citiranja prakse Evropskog suda za ljudska prava navodi se i broj podnete predstavke. Na primer:

Borodin v Russia, predstavka br. 41867/04, presuda ECHR, 6. 2. 2013, par. 166.

Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI). Na primer:

Judgment of the General Court (Second Chamber) of 13 October 2015.

Intrasoft International SA v European Commission (Case 403/12, ECLI:EU:T:2015:774)

Citiranje referenci preuzetih sa interneta. Ukoliko se u radu koriste sadržaji sa interneta, navode se na isti način kao i ostali sadržaji, ako su poznati autori ili organizacije ili državne ustanove koje su ih publikovale, s tim što će u spisku literature na odgovarajući način biti naglašeno da je reč o URL izvoru ili o članku sa DOI brojem. Elektronski dostupni sadržaji retko imaju označene stranice, pa se preciznost kod navođenja citata postiže pozivanjem na odeljke ili pasuse, ako su numerisani u tekstu.

Citiranje rada nepoznate godine izdanja ili rada nepoznatog autora. U radu se navedena vrsta rada citira tako što se na mestu gde bi trebalo da stoji godina navodi „n.d." (*non dated* – nepoznat datum), na primer:

> Njihov značaj za parlamentarne procese je nemerljiv (Ostrogorski, n.d).

Ako se u rukopisu koristi rad nepoznatog autora, navešće se naslov rada koji se citira, uz godinu, ako je poznata:

> Sve nam to potvrđuje i mešovita, objektivno-subjektivna teorija (Elementi krivičnog dela, 1986, p. 13).

Sastavljanje spiska literature i popisa pravnih izvora

Spisak literature je obavezan na kraju rada. U spisak literature se unose sve bibliografske jedinice korišćene u radu, osim pravnih izvora i spiska sudskih odluka, koji se posebno navode, iza spiska literature.

U spisku literature se bibliografske odrednice (reference) navode po abecednom redu, prema početnom slovu prezimena autora, početnom slovu organizacije u slučaju da je autor nepoznat ili, ako su nepoznati i autor i organizacija, prema početnom slovu naslova bibliografske jedinice. Kod koautorstva, neophodno je navesti prezime i početno slovo imena svakog koautora.

1. Knjige (elektronske), druge monografije i udžbenici, poglavlja u monografijama

Navode se obavezno sledeći elementi po modelu: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov: podnaslov*. Podatak o izdanju. Mesto izdanja: izdavač. Kada ima više od četiri autora, knjiga se sortira prema početnom slovu prezimena prvog autora, a umesto imena ostalih autora može se koristiti skraćenica „*et al.*". Kada knjiga nema podatak o autoru, ali je istaknuto ime urednika ili organizacije, umesto autorovog imena navodi se ime urednika (uz naznaku tog svojstva) ili naziv organizacije koja je izdala publikaciju.

Za urednike koristiti skraćenicu „ur." (ako je knjiga izdata na srpskom jeziku), a „ed." (za knjige na engleskom jeziku sa jednim urednikom) ili „eds." (kada ima dva ili više urednika). Na primer:

- Ćirić, J. 2008. *Objektivna odgovornost u krivičnom pravu.* Beograd: Institut za uporedno pravo.
- Ćeranić, J. 2015. *Unitarni patent*. Beograd: Institut za uporedno pravo; Banja Luka: Pravni fakultet Univerziteta.
- Sime, S. 2018. *A Practical Approach to Civil Procedure*. 31st ed. Oxford: Oxford University Press.
- Carlen, P. & Worrall, A. 1987. *Gender, Crime and Justice*. Philadelphia: Open University.
- UNICRI. 1997. *Promoting Probation Internationally.* Publ. no 58. Rome/London: UNICRI.
- Tappan, P. W. (ed.). 1951. *Contemporary corrections*. New York: McGraw-Hill.
- Srzentić, N., Stajić, A. & Lazarević, Lj. 1995. *Krivično pravo Jugoslavije. Opšti deo*. 18. izd. Beograd: Savremena administracija.

Obavezni elementi koji se moraju navesti kada se citira sadržaj elektronske knjige su: Autor, Inicijal(i) godina. Naslov knjige, [e-book], Izdanje (samo u slučaju da se ne radi o prvom izdanju), Mesto izdavanja e – knjige: Izdavač, pristup preko Naziv baze podataka, URL za tu e – knjigu (datum pristupa). Na primer:

- Molan, M. T. 2012. *Series: Questions & Answers*, [eBook]. 8th ed, 2012-2103. Oxford: OUP Oxford. Database: eBook Academic Collection. Dostupno na: http://eds.a.ebscohost.com/ (18. 1. 2019).

2. Doktorske disertacije, magistarski ili završni master radovi

Obavezno se navode: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov*. Doktorska disertacija. Mesto publikovanja: fakultet/univerzitet na kome je odbranjen. Na primer:

- Stanić, M. 2017. *Pravna priroda poslaničkog mandata*. Doktorska disertacija. Beograd: Pravni fakultet Univerziteta u Beogradu.

3. Poglavlja u knjigama i naučni/stručni radovi objavljeni u zbornicima i zbirkama radova sa naučnih skupova

Podaci o navedenim bibliografskim jedinicama sadrže obavezno sledeće elemente koje treba navesti po modelu: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. U: Prezime, inicijal(i) urednika (ur.). *Naslov zbornika: podnaslov.* Mesto izdavanja: izdavač, str. od-do.

Za urednike koristiti skraćenicu „ur." (ako je zbornik na srpskom jeziku), a „ed." (za zbornike na engleskom jeziku sa jednim urednikom) ili „eds." (kada zbornik uređuju dva ili više urednika). Primer:

- Moss, G. 2015. New World and Old World: Symphony or Cacophony?. In: Parry, R. & Omar, P. (eds.), *International Insolvency Law: Future Perspectives.* Nottingham/Paris: INSOL Europe, pp. 17-42.
- Čolović, V. 2011. Status stranog stečajnog postupka u nemačkom zakonodavstvu. U: Vasiljević, M. & Čolović, V. (ur.), *Uvod u pravo Nemačke.* Beograd: Institut za uporedno pravo i Pravni fakultet Univerziteta u Beogradu, pp. 524-541.

4. Članci

Obavezni elementi koji se navode su: Prezime, inicijal(i) autora. Godina izdavanja. Naslov članka: podnaslov. *Naslov časopisa,* oznaka sveske/godišta/volumena (broj), str. od-do. Ako je članak prihvaćen za objavljivanje ili je već objavljen sa DOI brojem, taj broj treba dodati u obliku linka: https://doi.org/DOIbroj.

Navodimo primere:

- Kostić, J. 2018. Investiranje društava za osiguranje na tržištu kapitala Republike Srbije. U: Petrović, Z. & Čolović, V. (ur.), *Odgovornost za štetu, naknada štete i osiguranje: zbornik radova sa XXI međunarodnog naučnog skupa*. Beograd/Valjevo: Institut za uporedno pravo, pp. 463-476.
- Gasmi, G., Prlja, D. & Jerotić, A. 2017. European leading legal principles of combating gender based violence: "Istanbul Convention". U: Lilić, S. (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije: zbornik radova. Knj. 7*, (Biblioteka Zbornici). Beograd: Pravni fakultet, Centar za izdavaštvo i informisanje, pp. 335-349.
- Đukić-Milosavljević, I. *et al*. 2017. Jedinice za podršku deci žrtvama i svedocima u krivičnom postupku – Domaće pravo i praksa. *Temida,* 20(1), pp. 45-64.
- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://doi.org/10.5937/spz1803065V (18. 1. 2019).

5. Članci objavljeni u elektronskom časopisu ili online bazi podataka

Navode se sledeći podaci: Prezime, inicijal(i) autora. Godina izdavanja. Naslov rada: podnaslov. *Naslov časopisa* volumen/godište (broj). DOI broj, ako ga članak ima ili URL adresa elektronskog izdanja časopisa ili naziv *online* baze podataka (datum posete stranici). Odlučujući kriterijum za određeni način navođenja jeste kako korisnik najlakše može pronaći dokument koji ste citirali. Na primer, prethodno navedeni izvor u kome je naznačen link sa DOI brojem (Višekruna, A.) može biti citiran i na sledeće načine:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno na: https://www.stranipravnizivot.rs/index.php/SPZ/article/view/686 (18. 1. 2019).

Ili:

- Višekruna, A. 2018. Ostvarivanje saradnje u stečajnim postupcima sa elementom inostranosti: primer protokola. *Strani pravni život*, 62(3), pp. 65-88. Dostupno u: SCIndeks.ceon.rs (18. 1. 2019).

6. Članci, izveštaji, radovi iz zbornika dostupnog na internetu, koji imaju autora

Članci koji su dostupni na internetu, sa poznatim autorom, ali nisu iz elektronskog časopisa, i različiti izveštaji navode se prema sledećem modelu: Prezime, inicijal(i) autora. (godina izdavanja). *Naslov: podnaslov*. Mesto izdavanja: izdavač ili organizacija odgovorna za održavanje stranice na internetu. URL: (datum posete stranici). Na primer:

- Mutavdžić Obradović D. 2015. *Odgovornost vlasnika odnosno držaoca psa za štetu koju je prouzrokovao drugom licu*. Beograd: Paragraf. Dostupno na: https://www.paragraf.rs/ (18. 1. 2019).
- Lietonen, A. & Ollus, N. 2017. *The costs of assisting victims of trafficking in human beings: a pilot study of services provided in Latvia, Estonia, Lithuania, Report Series 87.* Helsinki: HEUNI. Dostupno na: https://www.heuni.fi/material/attachments/heuni/reports/HY3EXasQ3/HEUNI_Report_no.87.pdf (18. 1. 2019).

Podaci o radu iz zbornika čiji je sadržaj objavljen na internetu navode se na sledeći način: Prezime, inicijal(i) autora. Godina izdavanja. *Naslov rada* (sa nazivom časopisa i drugim podacima koji se zahtevaju za članak). URL: (datum posete stranici).

- Rabrenović, A. 2008. Razvoj službeničkog sistema federalne uprave SAD: od potrage za političkim plenom ka ostvarenju javnog interesa. U: Ćirić, J. (ur.), *Uvod u pravo SAD*. Beograd: Institut za uporedno pravo, pp. 49-70. Dostupno na: http://iup.rs/wp-content/uploads/2017/10/Uvod-u-pravo-SAD.pdf (18. 1. 2019).

7. Članak dostupan na internetu koji nema naznačenog autora

Osnovni podaci koje treba navesti su: Naslov rada, godina izdanja, URL ili naziv *online* baze podataka, (datum pristupa stranici). Na primer:

- *National Action Plan to combating corruption – Mongolia*. 2016. Dostupno na: https://www.opengovpartnership.org/.../06-national-action-plan-combating-corruption (18. 1. 2019).

8. Spisak korišćenih pravnih izvora i izvora sudske prakse

Popisuju se nazivi zakona i drugih propisa korišćenih u radu, sa brojevima službenih glasila u kojima su objavljeni ili podacima o elektronskim izvorima sa kojih su preuzeti. U slučaju potrebe, razdvajaju se domaći od stranih propisa (u podnaslovima se navodi na koju se državu propisi odnose). Propisi se navode prema hijerarhiji citiranih pravnih akata (od Ustava, preko zakona do uredbi i pojedinačnih akata). Ako se navodi više akata iste pravne snage, koristi se abecedni red. Kada se navode akti Evropske unije, obavezno se navodi broj službenog glasnika u kome je propis objavljen i strana na kojoj se nalazi:

- Krivični zakonik RS 2005. *Službeni glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.
- Izmene KZ RS 2016. *Službeni glasnik RS*, br. 94/2016.
- OEG, 1985. Gesetz über die Entschädigung für Opfer von Gewalttaten, od 7. januara 1985 (*BGBl*. I S. 1), sa poslednjom izmenom od 17. jula 2017 (*BGBl*. I S. 2541). Dostupno na: https://www.gesetze-im-internet.de/oeg/ (18. 1. 2019).
- CC, 1804. Code civil, poslednja verzija od 25. decembra 2018. Dostupno na: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (18. 1. 2019).
- CETS, 2011. Council of Europe, Convention on preventing and combating violence against women and domestic violence (CETS No.210) od 11. 5. 2011. godine. Dostupno na: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210 (18. 1. 2011).

- EU Decision 2010. EU Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under document C(2010) 593 (Text with EEA relevance). *OJ* L 39, 12. 2. 2010, pp. 5-18.
- Rec 2011. Council of Europe, Recommendation CM/Rec (2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care. Adopted by the Committee of Ministers on 16 November 2011.
- UNSC Resolution 1286, UN dok. S/RES/1286 (19 January 2000).

Izvori sudske prakse ili prakse drugih državnih organa se posebno navode. Praksa međunarodnih sudova ili tribunala navodi se uz korišćenje službenih skraćenica sudova, na primer: ICJ, PCIJ, ICTY, ICTR, ECHR, zatim se piše naziv predmeta, vrsta odluke, datum donošenja, publikacija u kojoj je odluka objavljena i strane na kojoj je objavljena.

Kod presuda međunarodnih krivičnih tribunala se nakon naziva predmeta navodi i sudsko veće (po potrebi i podaci koji se tiču izdvojenih sudskih mišljenja, ako se na njih pozivao autor u radu), dok se kod odluka Evropskog suda za ljudska prava navodi i broj predstavke. Sudska praksa Suda Evropske unije obavezno se navodi uz korišćenje evropske identifikacione oznake sudske prakse (*European Case Law Identifier* – ECLI).

Domaće i strane sudske presude, pravna shvatanja i slično, kao i presude međunarodnih sudova mogu se navoditi uz pozivanje na elektronske pravne baze iz kojih su preuzete (Paragraf Lex, Intermex, EUR-Lex, CURIA, Lexiweb.co.uk, Légifrance, HUDOC itd.).

Različite načine navođenja ilustruju sledeći primeri:

- Pravno shvatanje, 1999. Pravno shvatanje utvrđeno kroz odgovore na pitanja na sednici Odeljenja za privredne sporove Višeg privrednog suda od 6. oktobra 1999, dostupno u elektronskoj pravnoj bazi Paragraf Lex.
- Odluka US, 2017. Odluka Ustavnog suda Republike Srbije, broj IUo-173/2017 o utvrđivanju nesaglasnosti sa Ustavom i Zakonom Pravilnika opštine Bečej iz 2013. godine o kriterijumu i postupku dodele sredstava crkvama i verskim zajednicama, *Službeni glasnik RS*, br. 68/2018.
- Cass. crim., 19 December 1991, RCA 1992.170. *Ius Commune Casebook for the Common Law of Europe*, 2018.
- Presuda Apelacionog suda u Beogradu, Gž.636/2011 od 28. 5. 2012. *Arhiv Apelacionog suda u Beogradu*, 2012.
- *Goobald v Mahmood*, 2005 All ER (D) 251 (Apr). Dostupno na: https://Lexisweb.co.uk/cases/2005/april/godbold-v-mahmood (18. 1. 2019).

- *Intrasoft International SA v European Commission*, 2015. EGC, Judgment of the General Court (Second Chamber) of 13 October 2015 (Case 403/12, ECLI:EU:T:2015:774). Dostupno na : https://eur-lex.europa.eu/l (18. 1. 2019).

Uredništvo stoji na raspolaganju autorima i za sva druga neophodna razjašnjenja (pitanja uputiti elektronskom poštom na adresu uredništva).

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