Hominum causa omne ius constitutum

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How do we ensure a clean and healthy environment in Slovenia?

Jernej Letnar Černič

Slovenia is a country that prides itself on green diversity, rich nature, and plentiful animal species. It uses its natural diversity to promote tourism, trade, and investment. As one of the few countries worldwide, it has placed the protection of nature at the center of the constitutional system. It constitutionally protects natural heritage, the right to a healthy environment, and drinkable water (Constitution of the Republic of Slovenia, Articles 70a, 72, and 73). The Slovenian authorities have, in the past years, adopted different soft law legal documents in the area of environment and climate change, such as the Resolution on the Slovenian Climate Long-term Strategy 2050 (Resolution, 2021) and the Integrated National Energy and Climate Plan (Plan, 2023). At the same time, politicians in the incumbent governments have been full of words and promises of how they will propel the green transition. Beyond normative frameworks, protecting a healthy and clean environment meets daily challenges in practice.

Early this year, the Special Rapporteur for Human Rights and Environment published a report from his visit to Slovenia (Boyd, 2023). Like other regional and international organizations, the report found a profound discrepancy between normative commitments and legal obligations and their implementation in practice (ibid). Nonetheless, Boyd's report goes further. It, for example, informs that almost a thousand persons prematurely die annually due to the adverse impacts of climate change (ibid, para. 48). It explains how the state authorities have been captured by political and economic interests, which have gained precedence before the right to a healthy, safe, and clean environment (ibid). It tells the story of how state authorities need to catch up in coordinating mitigation and adaptation measures to combat climate change (ibid). It explains how the Slovenian capital has been one of the

European cities with the lowest air quality (IQAir, 2023). Boyd also highlights that the country is one of the Member States with the lowest percentage of renewable energy in the European Union (Boyd, 2023, para 38). He concludes, » Slovenia deserves credit for leading the world in recognizing the right to a healthy environment. However, it is essential that all States breathe life into these inspiring words by enacting and implementing strong, rights-based environmental laws, policies and programmes« (para. 99). He calls the Slovenian authorities to address »...some of the urgent challenges identified in the present report related to cleaning up pollution hotspots and ensuring safe drinking water, clean air and a safe climate« (ibid).

As the Slovenian authorities have failed to comply fully with the climate change commitments, it is one of the states against which Portuguese children and young adults have brought applications before the European Court of Human Rights under the European Convention on Human Rights (Duarte Agostinho and Others v. Portugal and Others). On the other hand, some parts of the private sector have taken leadership in conducting human rights and environmental due diligence. Conversely, many businesses oppose further regulations protecting human rights and climate change.

The floods in August shocked Slovenian society but did not bring about positive change in ensuring a clean and healthy environment. Measures adopted so far have been scattered and piecemeal. In practice, state and public authorities need to take a more coherent and efficient approach towards environmental protection. Environment protection relates to the rule of law, the presence of corruption, and the presence of a conflict of interest. The Boyd's report does not reveal anything new for those who have highlighted the Slovenian state's failure to implement the commitment to the Paris Climate Change Agreement (2015). Respect for and internalization of the right to a safe, healthy, and clean environment are internal for the survival of Slovenia's current and subsequent generations. They condition the enjoyment of civil, political, and socio-economic rights on respect for the environment and fight against climate change. A paradigm change is needed in state and public administration, business, and society. Companies should be encouraged and lead by example in redefining business models. Individuals should prioritize the protection of the

environment through human dignity by changes in daily practices. There is a necessity for a paradigm change at all levels of society, not only in state and public institutions. Nonetheless, state and public authorities should lead by example in all areas of environmental protection.

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On the discursive nature of Law

*Zlatan Dežman**

ABSTRACT

The article deals with the concept of discourse in legal methodology from the point of view of discursive theory. As its starting point, this theory asks the question of under what conditions the meanings of social phenomena, social reality can become subjectively perceived, and on what knowledge, rules, statements, ideas, beliefs, values, norms, practices, and procedures their reality is based. Law is a linguistic phenomenon, and language is the core of every discourse. Therefore, the findings of this theory, transferred to the field of procedural law, illustrate how the structure of procedural discourse with its compulsive logic influences the constitution of the identity of not only discursive objects but also the constitution of discursive subjects as participants in procedural discourse as a communication process. For such phenomena, it is typical that they represent a value-neutral category from an ontological point of view. Therefore, their social and legal meaning is not given to us in advance and directly, but they acquire such meaning only in the process of intersubjective evaluation embedded in the system of assumptions according to which it is determined which statements in the discourse can influence the determination of the identity of its objects and subjects. In such a procedure, discourse is an analytical tool that resolves its internal contradictions through argumentation to reach a decision on controversial issues in accordance with its normative structure. The object of study of discursive theory is a complex and elusive phenomenon, which is translated by a series of concepts such as discourse, discourse structure, discursive thinking, discursive prac-

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tice, analytical discourse, discourse analysis, discursive objects, discursive subjects, ideology and discourse, discursive dislocation, and truth as a normative and discursive category. Therefore, the presentation of these concepts is the subject of this paper.

Key words: discourse, discursive thinking, structure, methodology of law, judicial procedure, social facts, legal facts, objects and subjects of discourse, rationality, truth

O diskurzivni naravi prava

POVZETEK

Članek obravnava koncept diskurza v pravni metodologiji z vidika diskurzivne teorije. Ta teorija kot izhodišče postavlja vprašanje, pod kakšnimi pogoji postanejo socialni pojavi subjektivno zaznavni in na katerem znanju, pravilih, izjavah, idejah, prepričanjih, vrednotah, normah, praksah in postopkih temelji njihova realnost. Pravo je jezikovni pojav in jezik je jedro vsakega diskurza. Zato ugotovitve te teorije, prenesene na področje procesnega prava, ilustrirajo, kako struktura procesnega diskurza s svojo prisilno logiko vpliva na identiteto ne le diskurzivnih objektov, temveč tudi diskurzivnih subjektov kot udeležencev v procesnem diskurzu kot komunikacijskem procesu. Za take pojave je značilno, da predstavljajo vrednostno nevtralno kategorijo z ontološkega vidika. Zato njihov družbeni in pravni pomen ni vnaprej in neposredno dan, temveč tak pomen pridobijo šele v procesu intersubjektivne ocene, vgrajene v sistem predpostavk, po katerih se določa, katere izjave v diskurzu lahko vplivajo na določanje identitete objektov in subjektov. V takem postopku je diskurz analitično orodje, ki preko argumentacije razrešuje svoja notranja protislovja, da bi dosegel odločitev o spornih vprašanjih v skladu s svojo normativno strukturo. Predmet študije diskurzivne teorije je kompleksen in težko izmuzljiv pojav, ki ga udejanja niz konceptov, kot so diskurz, diskurzivna struktura, diskurzivno razmišljanje, diskurzivna praksa, analitični diskurz, analiza diskurza, diskurzivni objekti, diskurzivni subjekti, ideologija in diskurz, diskurzivna dislokacija in resnica kot normativna in diskurzivna kategorija. Zato je predstavitev teh konceptov predmet tega članka.

Ključne besede: diskurz, diskurzivno razmišljanje, struktura, metodologija prava, sodni postopek, družbena dejstva, pravna dejstva, objekti in subjekti diskurza, racionalnost, resnica

1. Introduction

The Faculty of European Legal Studies at the University of Kranj recently published its research entitled „Ideology in the Courts." The study is an analysis of the influence of the ideological profile of judges on their decisions. It starts from the viewpoint that law is primarily an ideological construct in the function of politics and not its limiting framework. Therefore, it is always subjective and ideological because the legal system is never so perfect that it can exclude the subjective attitude of judges as ideological or even political actors. Ideology, which is present everywhere, determines the chosen judicial-ideological or legal-philosophical approach and influences the decision-making of judges. In this context, ideology represents a complete worldview, a rounded system of ideas and values of an individual, with which they observe, analyze, understand and co-create themselves, the relationship between themselves and the social world that surrounds them, and perceive the social world as such.

The subjectivist conception of law is diametrically opposed to its objectivist understanding because it is grounded in legal realism. Legal realism understands law as the result of the voluntary, self-interested, and therefore subjective action of judges, for whom legal language is merely a tool for subsequent justification of their decisions, which are mostly based on extra-legal reasons. While a judge's ideology reveals their view of the world, judicial philosophy represents the way in which the judge understands and interprets the law. The emphasis on this is primarily to mitigate the politicization of law and its idealistic, objectivist conception. This means that it is necessary to recognize its subjectivist nature, make it as transparent as possible, and also subject it to careful research because this is the way to ensure that ideology remains in the function of law, but not that the latter is in function of ideologies.

The discursive conception of law is located at the *intersection of the objective and subjective conception of law.* According to this conception, law is neither entirely objective nor entirely subjec-

tive, but rather a *discourse* as an argumentative practice that takes place in accordance with special, law-specific discursive rules that frame the actions of legal decision-makers. Acknowledging its discursive nature, according to the principle of checks and balances, ensures pluralism even within the judiciary itself. Indeed, the recognition of the presence of judicial ideology strengthens the persuasiveness of argumentation in decision-making in a specific case, in line with Dworkin's, Alexey's and Habermas' conception of law. Such an approach requires, first of all, a transition from an objective to a *discursive* conception of law, because it recognizes both its objective and subjective character. Therefore, in its concluding observations, the research advocates for the promotion of a discursive approach in the formulation of judicial decisions, not only in the Constitutional Court and the Supreme Court of the Republic of Slovenia, but also in lower courts. The study proposes that the ability of judges for discursive thinking should also be taken into account when appointing them, as evidence of their professional excellence and personal integrity.[1]

The research provides an epistemological critique not only of the understanding of law, but also of social phenomena in general. It not only emphasizes the importance of discourse in the context of the jurisprudence of the Constitutional Court, but also analyzes the influence of judges' ideology on their decision-making, and therefore the influence of the broader discursive environment on their thinking. Although discourse is referred to in various senses in legal theory, it is not defined in detail. Typically, it is defined as a synonym for argumentative speech or argumentation expressed in oral or written form, and from a methodological perspective, it represents a communicative approach to the study of law at all three levels: theoretical, legislative, and practical (Visković, 1989, p. 18–25). It is also understood as a synonym for the systematic treatment of a certain topic (Vezovnik, 2009, p. 10). It is explained with the phrase that modern law justifies its legitimacy with procedural discourse and that it is „mainly based on the procedural moment" (Zupančič, 1990, p. 118). By referring to its discursive nature, modern law also emphasizes its rationality, i.e. discursive rationality, because its implementation is supposed to be permeated by the awareness of where our actions

[1] The mentioned is a summary of the key points of the research of the Faculty of European Legal Studies in Kranj. (Avbelj et al., 2021)

are led by reason and from where irrational moments take over their guidance (Cerar, 2001a, p. 125). Emotions can sway one's decision-making, but legal logic serves as a firm rein to prevent personal biases from overriding the system of rules that dictate the normative structure of procedural discourse. This discourse centers on factual and legal issues, which form the judge's procedural object or subject.

Therefore, the question arises, *what is discourse in essence*, what kind of thinking is *discursive thinking*, what defines it, what effects does it produce and how does its normative structure affect the constitution of its objects and subjects.[2] The research does not provide an answer to it, because by referring to Dworkin, Alexy and Habermas, it assumes that this concept is clear enough and that the way in which legal discourse, embedded in its normative structure, produces legal effects, as well as in legal theory, is also clear. Regardless, it is clear that the research assigns an important place to this concept in the *methodology* of *law*, and logically calls for its more precise analysis.

In the field of discursive theory, discourse is considered a very *complex* and *elusive* concept, that it is often used in a wide variety of meanings and connections, that it is so empty in terms of content that it can mean everything or nothing, and that it can be defined in different ways (Vezovnik, 2009, pp. 10 and 11). Just as discursive objects and subjects have no *ontological* status, neither does discourse itself. Its understanding has various philosophical and theoretical basis that influence its definition as well as its use in the analysis of social practices (Frank, 2013, pp. 59).[3] Discourse is a practice that shapes the objects it discusses in a systematic way, even without the awareness of its participants. The participants are often unaware of how the discourse, confined within its own structure, influences and shapes their subjective identity (Frank, 2013, pp. 61). Being aware of the effects of discourse is crucial, especially given that social sciences cannot develop independently based solely on their own cognitive heritage. Rather,

[2] In Slovenia, the Faculty of Social Sciences, which mainly performs critical analysis of media discourse, has so far shown the greatest interest in critical discourse analysis, which is already a fully established discipline internationally. See Bergoč, S., Methodološka infrastructura slovenskega jezika, primer kritične analize medijskega diskurza, (KAD), Faculty of Humanities Koper, Symposium, p. 52.
[3] The dissertation examines the influence of European culture on gender politics in Turkey, but the introductory part, in which the methodology is presented, with reference to extensive literature, is devoted to the general characteristics of the discourse. That is why this paper refers to it to such an extent.

they must also consider findings from related fields to address common and contentious issues, each within its own context and in relation to others. The interdisciplinary and transdisciplinary nature of discourse theory introduces a new theoretical and analytical paradigm that breaks down the boundaries between philosophy, linguistics, and various social disciplines. Habermas refers to this theory as the ‚theory of communicative action' (*Theorie des kommunikativen Handelns*) and sees it as the foundation of all social sciences (*Grundlegung der Sozialwissenschaft*). (Habermas, 2019, pp. 11).

Indeed, the theory of discourse poses as its fundamental question, under what conditions the *meaning of social phenomena can become subjectively* understood, social *reality*, and on what knowledge rules, statements, ideas, beliefs, values, norms, practices and procedures is based (Berger and Luckmann, 1988, pp. 11-13 and 23). It refers to the question what kind of knowledge can become socially recognized as a measure of social *reality* (Berger and Luckmann, 1988, p. 25). This provides significance to social phenomena that are shaped by cultural mediation in the form of a semantic scheme, *structure or context*. These elements determine which statements are deemed relevant in the discourse, and how social phenomena are perceived and interpreted in order to make judgments. The presence of certain assumptions allows for the assertion of their existence and, subsequently, the determination of their social significance.

1.1. About the research methodology

The research starts from the point of view that the reality of social life *is primarily political constructed, and* the truth about it the result of ideological struggles that produce knowledge and thus power. Legal institutes are the original expression of political decisions, because only then do they take legal form. Modern law refers to the democratic principle of the protection of fundamental rights, which is expressed as the principle of discursiveness (Habermas, 1996, pp. 253-267), which is watched over by both politics and law representing a *discursive environment for each other.* Both are not always in a relationship of constant mutual coordination due to the dynamics of social life. The first is implemented on an ideological basis, the second is embedded in the structure of its norma-

tive system, which is translated by the ideology of democratic law. Sometimes they complement each other and accelerate the development of legal culture[4] with human rights as its central element (Igličar, 2012, p. 220). Both also change according to changes in social needs and according to the attitude towards important, and therefore also criminally protected, social values. In this way a true democratic society is protected from political deviations. It is quite paradoxical that they most often diverge precisely because of the question of how to protect it. If the law and its discretionary power are strengthened, the idea of democracy and the rule of law are also strengthened. When the law is undermined due to excessive political activism, democracy is weakened and becomes vulnerable to the gradual, covert emergence of authoritarian power within the society.[5] In such a contradictory relationship between them, the constitutional court is a hybrid of authorities, responsible for the original (discursive) reminder of hitherto *unarticulated* contradictions of certain social interests (Zupančič, 1998, p. 211). Therefore, the research concerns not only the relationship of law to political ideology, but the very essence of its own ideological nature, which also affects its understanding (Igličar and *Štajnpihar*, 2020, p. 283 and 244).

Political behavior cannot be understood without understanding the role of ideas that political actors have in the *social construction of reality* (Šumič Riha, 1995, p. 32). Without such a meaning, it is also not possible to understand any other behavior. Without the internalization of basic moral rules, values and legal norms, especially among the officials of the legislative, executive and judicial authorities, society disintegrates into an arithmetical sum of individuals (Igličar, 2012, p. 220). This means that, above all, jurisprudence must *be aware* of the influence of the structure of

[4] Habermas presented the philosophy of modernity from the most influential philosophers (Hegel, Kant) to the postmodernists, who had a significant influence on the theory of communicative action, thus showing that subjectivity, robbed of any substantiality, represents empty activism and that the actors who speak, listen and act must have an attitude towards morality, i.e. socially established values.
[5] „Law with its normative system", as stated by Cerar, „is the form through which politics is enforced. As such, it represents an independent value or ideological phenomenon that must establish a balance vis-à-vis politics in a democratic society, which must be maintained at all times in the relationship between its static and dynamism, if excessive legal conservatism prevails, this results in excessive rigidity of the law and inhibition development, but if its development prevails, then it can fall into arbitrariness. In the final instance, both in politics and in law, the decisive human factor prevails. Therefore, the prevention of inadmissible legal arbitrariness and the intrusion of politics into law depends to a crucial extent on all those who are the bearers of legal or political decisions. Their acceptability depends on the discourse and its structure, within which the controversy about some socially important issue takes place" (Cerar, 2001c, pp. 15-21.

procedural discourse on the discursive way of thinking and thus on the judicial decision-making process itself. Legal judgment, as a specific way of legal thinking, means an informed cognitive process of legally important facts. Therefore, it presupposes the necessity of one's own awareness (*reflection)* rather than self-awareness (*auto-reflection*). (Cerar, 2001a, p. 107). Understanding in law *is not objective* and not entirely *subjective either*, but is directed, reflexive, and situational (Kaufmann, 1994, p. 240). Ever since Aristotle, it has been held that in every good legal argument three of its fundamental elements must be intertwined, namely: logic (*logos*), ethics (*ethos*) and emotions (*pathos*) (Visković, 1989, pp. 24-25). The latter refers to such a category, which also includes *legal sense* as a complementary component of modern law (Cerar, 1999, p. 27) and therefore as material source of law. For authentic and correct law (*richtiges Recht)* it is not only necessary to be aware of it, but also to feel it. When such a feeling is not present, the content of the subject of discourse is lost, and in the field of law, the meaning of the legal order is lost, because the law becomes unreliable and unpredictable and increasingly turns into (dis)order (Igličar, 2012, pp. 219-220). The crucial question regarding the effectiveness and validity of law concerns its conceptual foundations, which serve as the basis for recognizing what constitutes true law. This makes it a subject of study for discursive theory, given its complexity and elusiveness. To fully understand the nature of law, one must consider all its dimensions and effects on both the objects and subjects of discourse, particularly within the context of legal proceedings. Discursive theory addresses this complex phenomenon through a series of concepts, including discourse, discourse structure, discursive thinking, discursive practice, analytical discourse, discourse analysis, discursive objects, discursive subjects, ideology and discourse, discursive dislocation, and truth as a normative and discursive category. This paper aims to present and analyze these concepts, along with their ideological and philosophical foundations, within the context of the research mentioned above.

1.2. The ideological and philosophical basis of the research

Although the research does not explicitly state it, it is evident from the analysis that the ideology of judges and the discur-

siveness of their way of thinking are based on the conceptual foundations of structuralism and social constructivism. These two theories are among the most significant ones of the second half of the 20th century, and they serve as the meta-theoretical background of discursive theory in the context under consideration. Structuralism introduced the linguistic analysis of social phenomena by considering them as objective structures of semantic signs. Its focus was on the actual use of language and the psychological, sociological, and historical origins and circumstances that affect the concrete use of language signs, sentences, and discourse (Stres, 2018, pp. 847-848). Using the method of intercontextual treatment of social phenomena, F. de Saussure introduced into the analysis of social phenomena: semiotics as a science of signs and the relationship between the signifier and the signified, which in dependence on each other retain their meaning only in this dependence and connection; semantics, which explains the meaning of individual words, and pragmatics, which, in addition to these two branches of the philosophy of language and linguistics, is the third most important branch in this field. Pragmatics (Gr. pragma, correct behavior) studies the use of language in relation to concrete circumstances that affect the meaning and sense of a certain statement and creates an intercontextual basis for an empirical approach to the theory of communication from the perspective of psychoanalysis, logic, and philosophy.[6] In the structure of language, each component has its own meaning and role, which none of the other parts has, even though they are all functionally connected. From a linguistic point of view, a word is the product of a reciprocal relationship between the speaker and the listener, between the communicator and the addressee, and the utterance is understood as the result of an individual action that is given meaning in the context of certain social interactions. As such, it is an expression of the inner experience of an individual. Based on this conceptual design, structuralism creates the conditions for understanding social phenomena, their structures, discourses and identities. Such social phenomena, in which the characteristics just mentioned come to the fore, include especially such legal phenomena as represented by a criminal act.

[6] Pragmatism, in the sense of everyday language, is synonymous with the attitude of someone who adapts to circumstances and knows how to use them to his advantage (Stres, 2018, p. 678).

1.3. Legal language

Law is a linguistic phenomenon. Therefore, language is the core of legal discourse and legal terminology (Pavčnik, 2019, pp. 330-345). The language of law is by its very nature ideological because it is determined by a system of professional norms that enable at least the relative objectivity of law (Vezovnik, 2009, pp. 38-40). As a specific subsystem of language, legal language is expressed on several of its levels, namely as: 1. the discourse of the legislator, as the speech of the creator of general legal norms; 2. the discourse of legal science from a dogmatic and theoretical point of view and 3. the discourse of judicial practice as a discursive practice (Visković, 1989, p. 40). In legal theory, the question of which speech should represent the criterion of legality. For *natural law doctrine* it is the discourse of legal science, for *legal positivism* it is the discourse of the legislator, and for *legal realism* it is the discourse of jurisprudence. The study of law is also approached from the standpoint of social relations, which are the source of legal norms, social values, which are reflected in legal norms and from the point of view of studying legal norms as a special technique - *nomotechnics*, the social meaning of which is evaluated with sanctions as a way of their enforcement and protection. According to such a classification, law is perceived in three ways, namely: 1. relational, 2. value-based and 3. normative. The relational method belongs to the field of sociology of law, the value method belongs to the philosophy of law, and the normative method is the subject of legal theory. While the legal language is the most solid guarantee of the *objectivity of the law*, the notion *of values is the* one that has the strongest irrational, ideological and philosophical charge as a philosophical category, in which the legal feeling as a material source of law is based. All these approaches are still characteristic of postmodern law. Their importance lies in opposing scientism, positivism and mechanistic materialism in law. Therefore, legal language is of key importance for understanding discourse and the effects of discursive thinking, for the very nature of law and thus also the relationship between its objective and subjective conception. This is a condition for shaking the myth of the pure objectivity of the law and its *positivism*, based on the belief that the judge derives his or her decision only by interpreting legal provisions (Bergoč, 2009, pp. 51-52).

1.4. Social constructivism and discursive theory

Based on the findings of structuralism, social constructivism (Latin *constructio,* composition, classification, construction) developed and became characteristic of many modern philosophical and scientific theories. Its specialty is that it is not limited to *what is known*, but *how it is known and thought, and in what context* the idea of social reality or the *reality* of its manifestations is created (Frank, 2013, p. 50). Therefore, even for truth itself, the harmony between thought and the object of thought is no longer important, as assumed by the correspondence theory of truth. Instead, for social constructivism, only the correctness of thinking is essential. Social constructivism is based on the premise that social reality is a construction and emphasizes the importance of the role of ideas, beliefs, and values, requiring a critical approach to knowledge. The material world is not given to us directly but is only accessible to us through language or a system of representations that construct the meaning of social phenomena. In other words, we only perceive it through interpretation. Therefore, both structuralism and social constructivism highlight the importance of a critical approach to knowledge and an understanding of their (non)existence, as their interpretation depends on knowledge. Knowledge is not only created on a rational basis but is also influenced by an individual's physiological and emotional characteristics, as well as their placement in a certain social environment. Therefore, social constructivism is interested not only in scientific or academic knowledge but also in human knowledge, which guides individuals in their daily lives in society, including prejudices, which are essentially micro-ideologies of our daily life. Knowledge about social phenomena, or knowledge about them, depends on social processes and social action, which determine which categories of knowledge are „right" and which are „wrong." Court proceedings are initiated to clarify who has more *rational arguments* in a dispute. They differ from each other in terms of factual and legal issues, and their autonomy and exclusivity are emphasized by the fact that only the statements of the fundamental procedural subjects, such as courts and parties, can be relevant. Discourses that take place alongside judicial discourse have no legal effects. This divergence in discourse structures explains different views, not only on the process of

judicial decision-making but also on differences in understanding and contextual conception of the same subject on which the discourse takes place.

Discursive theory has gained ground as a way of analyzing public, typed, institutionalized, legally regulated procedures and therefore controlled discourses (Berger and Luckmann, 1988, pp. 56-58), which are studied from the perspective of their normative structure or *context,* in which these discourses are created (Vezovnik, 2009, pp. 12-14). Discursive theory represents social constructivism in the *narrower* sense of the word, namely as a theory within *various social science disciplines.* Among these is also the law that is famous especially through its well-regulated judicial procedures, which justify its legitimacy through explanation and defense (Berger and Luckmann, 1988, p. 63). Due to their autonomy, they differ from each other in the normative structure on the basis of which the court assesses the relevance of the procedural statements of both parties on factual and legal issues. All three fundamental procedural subjects, with their procedural actions, which they perform with their statements, influence the beginning, duration and end of the legal proceedings (Frank, 2013, p. 50). The emphasis on the discursiveness of the concept of a criminal act in the context under consideration is mainly because it can be assumed that the *ideological and philosophical* "*cliché"* of criminal law in particular is more pronounced than it is in other legal areas (Pavčnik, 2019, p. 31), because criminal law is public law and in view of such its nature a tangible instrument of power, tied to knowledge.

The foundation of power is knowledge, that is, the willingness to learn the truth about a social phenomenon that is subject to authoritative judgment (Flander, 2012, pp. 157-158 and 214-226). Therefore, every authority is inseparably bound to truth as an ethical category. By referring to it, it justifies *moral justification*. That is why the judicial authority is so closely tied to the truth, and especially the judicial authority, which is exercised in criminal proceedings, in which it assesses the question of which statements can be accepted as true. This function of authority comes to the fore precisely in the field of criminal procedural law more than in any other legal field. The issue of evidence, especially the determination of a criminal act, raises the question of which legal rules should enforce the attitude of the authorities in order

to produce a discourse of truth about the existence of legally important facts, or what type of authority is capable of producing a discourse of truth in a certain judicial procedure and according to which rules (Foucault, 2008, pp. 12-13, 111-142). Therefore, one cannot do without the truth in either philosophy or social science (Hribar, 1961, p. 165), and therefore not even in criminal law. The findings of the discursive theory, transferred to *individual legal fields,* reveal the way in which the normative structure of procedural discourse with its system of *coercive* regulations affects not only the relevance of procedural statements and the *construction* of basic assumptions for deciding on a disputed matter, but also the *identity* of the discursive objects themselves and subjects. As a modern way of thinking, social constructivism directs its focus on the way in which a person or a society forms its concepts and meanings in its cognition, knowledge and thinking. Unlike the empirical sciences, the study of social phenomena is characterized by the fact that they are not given to us *substantially, directly and in the future* as physical objects *in the ontological* sense of the word, but rather represent primarily a value, *normative category*. A criminal act can also be understood in this sense.

1.5. Social phenomena as a cognitive problem

From *an ontological* point of view, social phenomena represent a real social phenomenon in the external world and as such a value-neutral category. Every legal phenomenon is, from a substantive legal point of view, a system of normative assumptions *in abstracto* and at the same time a highly developed *scientific* concept, especially if we have in mind the general concept of a criminal act, to which each specific and individual concept of a criminal act must correspond. As such, in relation to any particular concept of crime, it is an *abstraction of an abstraction*. From a procedural point of view, it represents an event from the past, which in the process of its determination must be clarified using the method *of retrograde analysis* to such an extent that it is possible to reliably conclude whether all the circumstances exist to which the substantive and procedural law binds their consequences. In such a procedure, Habermas‘ definition applies that in law discourse is an intermediary, a *mediator* between facts and norms on the one hand and norms and values on the other

(Berger and Luckmann, 1988, p. 63). Therefore, in the context of this paper, the focus is on the crime as a procedural, institutionalized, typified and controlled public discourse, which represents a special cognitive problem in the sense mentioned above (*Škerlep*, 2001, pp. 543-559).

These phenomena are characterized by the fact that they do not have their own „*essences*", their prior meaning, because their meaning is not given to us *in advance and directly,* but is acquired only in *discursive practice*, that is to say subsequently. According to such a conception, empirical reality is not inherently meaningful, but rather acquires meaning through the process of interpretation and construction that is influenced by social factors and knowledge. This construction involves both a priori components (such as pre-existing beliefs and values) and posterior components (such as later analytical knowledge about the existence of some socially important phenomenon) (Nastran Ule, 2000, pp. 63-66, 363 and 401). Therefore, the subject of legal evaluation is not substance, but only relations according to which the legal significance of the event in question should be determined. Social reality and the way it is discursively constructed have an impact on the perception and understanding of social phenomena. It is not that a „lost object" exists in a pre-determined way that can be found as it was lost, but rather its reality is constructed through the process of argumentation in court proceedings, according to the normative structure of the discourse in that particular context (Kaufmann, 1994, p. 239). Therefore, the key question is what is the *status of being* or the reality of the social world created by the discourse (Šumič Riha, 1995, pp. 7-9). An answer can be given from the standpoint of social constructivism in a way that summarizes four fundamental premises. These explain the key problem of the perception of such social phenomena as legally significant facts. From a cognitive point of view, they are characterized by the following:

1. They exist independently of our interpretations, but this affects their perception and justification of their existence.

2. Structures do not determine, but encourage and limit the perception of social phenomena and in this way enable action, while reflective actors interpret structures and change them.

3. Science and knowledge about social reality are fallible and under the influence of theories as frameworks through which we

learn about such reality.

4. Social changes are the result of changes in structures as a result of changes in discourses that change historically, within which the possibility of acting and influencing it and its changes is given (Frank, 2013, p. 57).

These four premises explain the key problem of judging such events, which should correspond to certain legal concepts. Therefore, the judicial procedure is the field in which legal phenomena come to expression in an illustrative way as a normative and discursive category (Habermas, 1996, pp. 8-9).[7] So, from this point of view one might ask the question in what sense the insights of structuralism and social constructivism complement the understanding of legal phenomena. Before we limit our attention to the fundamental features of discourse theory, let's first look at some interesting thoughts of the American judge Posner about how, according to his idea, American judges should think about their legal reasoning. Both the research on ideology in the courts and Posner's monography concern the same question, namely how the subjective characteristics of judges, including their ideological profile, affect their judicial decisions. Both studies reveal the essential characteristics of law as a normative and discursive category.

2. Judicial thinking and discourse theory

Richard A. Posner, a member of the US Court of Appeals, analyzes the way judges think in his monography „How Judges Think". His work is interesting because, like the research on ideology in the courts, it refers to the subjectivist aspect of the conception of law. Indeed, Posner revealed a series of characteristics of legal discourse, without explicitly mentioning this concept and analyzing it in more detail. In the introduction to his extensive study, he wrote that there is a popular belief that judges rule the nation more than the law itself. Therefore, it is not clear what law is. According to Posner, the secrecy of the judges' deliberations is „an example of professional *mystification*" (Posner, 2010, p. 3). Professions like law and medicine provide vital services to society, but their work can be difficult for

[7] Habermas defines law as a social mediator between facts and norms, and that it therefore has its own tension between reality and validity, which is the driving force of its development.

outsiders to objectively understand and evaluate. This is particularly true when considering that intuition, judges‘ mentality, and their political identity all play a significant role in judicial discretion. In the United States, for example, these factors are further complicated by the ideological conflict between Democrats and Republicans. A conservative judge may not even consider how a politician like Bush would rule in a given case and genuinely believe that their decisions are not influenced in the slightest by their political beliefs or by either of the two dominant political ideologies (Posner, 2010, p. 369). Such a widespread belief, however, contradicts the evidence of Bayes‘ theorem. This shows that judges‘ decisions are often influenced by their resistance, subconscious experiences and prejudices (Posner, 2010, pp. 11-12). In particular, judges who decide in uncertainty do not decide gradually, that is, from premise to premise, but resort to pragmatism. Pragmatism in the judiciary, however, is at odds with trust in the law. According to Posner, judges are aware of this. Therefore, they take advantage of the public‘s lack of interest and ignorance of the law, and thus also ignorance of the secrets of the judicial profession, with which they deceive even their fellow lawyers, professors and lawyers who were not judges. With such exaggerations, judges *mystify their* professional abilities because, like doctors, such *mystification* of their profession suits them. It allows them to maintain their privileged status. At the same time, they are also aware that they must overcome the lay public‘s distrust of the judiciary. Therefore, they believe that with *esoteric* means and techniques, they could self-critically build a *doctrine* that should convince many and even themselves that they are not arbitrary, politically dependent or ignorant of the demands made by the law. Based on Posner‘s views on the freedom of judicial decision-making and the potential influence of personal beliefs and values, he questions the limits of this freedom and how it can be limited to uphold the rule of law and ensure objectivity in judicial decisions. His metaphors and reflections on how judges think have drawn criticism from some individuals (Green, 2010, pp. 464-466).

In his critical response to Posner‘s thoughts, law professor C. Green responded with a rhetorical question: Do judges actually think this way, or is it only Posner himself who thinks about how judges think? That is why he wonders „is Posner a hero or a her-

etic". Despite Green's criticism, such Posner's thoughts are not without theoretical and practical basis. This is especially true if it is taken into account that the progressive development of law takes place in accordance with the creation of judicial law, which is deeply rooted in the legal tradition of Anglo-American procedural law (*well entrenched and necessary part of legal tradition).*[8] In Anglo-American law the judicial decision-making process is less restricted by legal formalism (*judicial law-making*) than it is in continental law. Therefore, Posner is by no means alone in this way of thinking (Dworkin, 2003, pp. 392 and 413). A similar thought was already expressed by Dworkin with his judicial Hercules, as a parable. He illustrated the great intellectual effort of a judge, who in difficult cases (*hard cases)* , especially in disputes between the state and citizens, has to formulate his own *political theory,* that he can judge how the constitution protects some social relationship when it comes to a conflict between individual and wider social interest.

Posner's thinking about the thinking of judges asks as the first question what the doctrine should be, which should *demystify* the function of the judge and create confidence in his or her decisions and thereby strengthen the reputation of the judiciary in the wider society. Such a doctrine, as the American judges are supposed to „build", does not have to be invented, because it already exists, and Posner indicates its fundamental elements clearly enough. In Posner's analysis, a „neurotic" problem is recognized, which is created by process discourse, which is the subject of study in discourse theory. Posner ,s *esotericism* of judicial thinking corresponds to *the exclusivity of discursive practice*. Even discourse is not without its own *mimicry,* because it „pretends" to *merely establish something*, while at the same time *concealing* the fact that by assigning meaning to the object of discourse, it is essentially *constructing* or creating it in this way. Posner is therefore neither a hero nor a heretic, but rather an *apologist for the* nature of law, which is otherwise always expected to ensure the objectivity, reliability and predictability of judicial decisions regardless of the pluralism of social interests and their conflict. With such thoughts as those presented by Judge Posner, a rhetorical question arises: So what is in a crisis? Is there *law in crisis* or is the *crisis of law es-*

[8] For example, in the decisions of the Constitutional Court of Croatia UI-448/2009, UI-602/2009, UI-1710/2009, UI-18153/2009, UI-5813/2010 and UI-2871/11, 19.5. 2012.

sentially a crisis of its (mis)understanding?[9] Therefore, in the following, the paper deals with the conceptual philosophical basis of the discursive theory, which explains the methodology of law in general, and thus also the methodology of judging a criminal act as a normative and discursive phenomenon in the context of the discursive theory.

3. Basic notions of discursive theories

The insights of discursive theory are also important for legal theory. They confirm its fundamental premise, according to which law is not only used in judicial practice but also created by it (Pavčnik, 2019, pp. 27-33). According to this theory, discourse is understood in accordance *with the legal model*, which presupposes the presence of a judge (*Šimič* Riha, 1995, p. 34)- The obligation to respect the law arises in the most obvious way precisely at the level of the judge, who is assumed to know the law and therefore to respect it. The judge recognizes the rules for recognizing the 'correct' law (*recognition norms,* (Hart, 1994, pp. 91-98) *normative Aussage* (Alexy, 1996, p. 39)). The fragmented nature of the law requires a procedure that involves a logical and systematic search for premises, their formation or adaptation to the structure of the procedural discourse, and their use for reasoned decision-making on the existence of a criminal act. This is what constitutes a judge, as he or she respects the normative structure of the procedural discourse (Šumič Riha and Riha, 1993, p. 56). Only criteria for recognizing the legality of a certain law can declare it as authentic law, as the law can only be expressed in each specific case. However, these rules alone do not guarantee the legality or appropriateness of the procedural discourse. They require the judge to act according to them and interpret them appropriately based on the specifics of the case under consideration, where the contact between the factual and the legal comes to its most direct expression. Laws are formed not only by legal norms, which are the result of legal evaluation, but also by normative statements of process participants. Each statement in discourse is a response to previous statements and is connected to the common field of communication created and directed in

[9] On the crisis of law, see e.g. Flander, 2012.

a specific context that defines a concrete speech situation. Thus, only the procedural statements of the court and the parties give the event in question legal meaning. In the decision-making process, the judge must not only imply the norms but also adequately explain, express, and justify them. This raises the question of how the judge recognizes the rules for recognition of law and according to what rules they do so.

The discursive model *(Diskursmodell)* , which was developed by procedural theories of law, occupies a special place among the various models of judicial procedure. Such a model is distinguished by discursive ethics (*Diskursetik*) (Kaufmann, 1997, p. 272).[10] Court proceedings according to this model are not only ethical because they emphasize justice as the possibility of both parties to influence the outcome to the same extent with their statements. They are ethical above all because they do not conceal that procedural content does not come only from its normative structure in accordance with its incentives and limitations, but also depends on the normative and discursive nature of social phenomena, which are considered as important facts in judicial practice (Kaufmann, 1994, pp. 277-282). Such a conception, however, goes beyond the anachronistic, *positivist* conception of law, according to which the judge derives his decision directly from the law. In this way, discourse theory affirms the function of the judge as a measure of legality (*Šumič* Riha and Riha, 1993, p. 89). This explains how the internalized, compulsive logic of the normative structure of the process discourse shapes its subjects as actors. The involvement of judges‘ thinking in this process determines how they perceive discursive objects, giving their discursive thinking a transpersonal and therefore more objective meaning. Based on the insights of this theory, the reasons for divergences between different discourses, such as political, media, legal, moral, ethical or philosophical views on the same topic, become clearer. Public discourses are often the subject of discursive analysis for this reason (Škerlep, 2001, pp. 153-169). Discursiveness, which discourse theory deals with, is a complex phenomenon that is translated by a series of concepts such as: 1. discourse; 2. structure; 3. discursive thinking; 4. discursive practice; 5. analytical discourse; 6 discourse analysis; 7. discursive ob-

[10] The concept of discursive ethics began to be developed by Habermas in the 1980s, and this is the key to understanding the political public.

jects; 8. discursive subjects; 9. ideology and discourse; 10. discursive displacement and 11. concept of truth itself.

3.1. Concept of discourse

Discourse is a process of intersubjective communication for the production of social meanings as negotiated categories. As such, it is not merely a synonym for strictly rational, logically correct, and step-by-step systematic treatment of a certain topic, consisting of certain knowledge based on evidence and logical conclusions that refer to an assessment of the meaning of the object that represents the topic of the discourse (Stres, 2018, pp. 847-848). Only the participants in the process of argumentation about the existence of legally significant facts give such discourse content and thus the topic for which the discourse is established. Due to its creativity, discourse is placed in the role of „creator", revealing how subjects understand objects (Frank, 2013, p. 61). Even if the material existence of a certain social phenomenon is not disputed, its social meaning may be.(Lukšič and Kurnik, 2000, pp. 169-171). Only the price of the reality of the existence of socially important facts implies the reality of what is happening in the discourse itself. In law, discourse mediates between facts and norms on the one hand and norms and social values on the other, thus representing a special type of normative integration (Habermas, 1996, p. 226). From the perspective of rational argumentation, discourse is a mechanism for the constant (re) production of conflicts and for directing aggressiveness towards ever-new „targets" or discursive objects and subjects (*Šumič* Riha and Riha, 1993, p. 33). Social reality is constructed, and the truth about it is the result of ideological struggles that produce knowledge to which power aspires. According to Foucault, power cannot be exercised other than through a specific way of producing truth, regardless of the social system in question (Foucault, 2008, p. 136). In democratic discourse, argumentation is a strategy for overcoming conflicts in a non-violent way (*Šumič* Riha and Riha, 1993, p. 32). thereby replacing physical force with the force of logic or representing an alternative to it (Zupančič, 1990, p. 121). Discourse is further characterized by the fact that it does not have a substantial, real object given to it in the *ontological* sense of the word *a priori*, but must be determined only in the discourse, i.e.

a *posteriori*. Even discourse itself does not have an ontological status because it does not have a fixed identity, essentially being a concept.

It is the historical *specificity* of a certain discourse that proves that these are not permanent but change depending on the circumstances. Thus, for example, a dominant, *hegemonic discourse at a given moment is* considered as such because it produces appropriate discursive effects at a certain time. However, it is dominant only as long as it is not displaced by a *superior* discourse, which thereby assumes a *hegemonic position.* Therefore, only such a discourse can be a guarantee of legality. It is the emphasis on the historical specificity of a certain discourse that testifies to the fact that discourses are not constant but change depending on the circumstances. Procedural discourse determines which interpretations have a legitimate basis. The principle of democracy recognizes only those norms that require recognition of their universal legitimacy (Škerlep, 2002, p. 159) It is characteristic of each discourse that it is embedded in a structure as a system of rules that determine which statements justify a certain meaning and by which it is distinguished from other discourses (Valčič, 1989, pp. 121-122). What will be the result of the discursive discussion, or the assessment of factual and legal issues, depends on the normative structure of the procedural discourse and on the way in which its participants use it and adapt it to their strategic interests.

The discourse plays a crucial role in forging a social bond by determining its findings based on the possibility of achieving social consensus. This allows for the homogenization of attitudes and the promotion of *consensus* within the social community. The guarantee of legality is based on rational, discursive discussions about the existence of legally significant facts. The divergence in discourse structures can explain different views not only on the process of judicial syllogism but also on other topics. Structural and cultural conditioning refers to the pre-existing temporal and spatial conditions that have formed over time as a result of previous structural-cultural interactions. Knowledge of discursive theory can reveal how the normative structure of procedural discourse affects not only the procedural statements decisive for its beginning, duration, and end but also the constitution of the identity of its objects and subjects. In legal evaluation, the subject is not the substance itself but rather the relationships and rules

that are used to attribute meaning to a particular event. As such, we can only recognize the real relevant reality based on *discursive thinking*.

3. 2. Discursive thinking

Thinking is a human conscious, mental activity. It presupposes conscious experiencing, remembering, attention, reasoning, judging, supposing, asserting, denying, asserting. Such thinking refers to facts, values and truths and is coordinated with logic, the correct understanding of concepts and with the ability of reasoning and judgement. It always refers to thinking that some fact, which is perceived as a sensory change in the external world, exists or does not exist and that it can be valued in one way or another. With such a generalized definition of the concept of thinking, the question arises as to what kind of thinking is *discursive thinking*, which is supposed to „strengthen legal argumentation". Unlike *intuitive thinking*, which is based on immediacy of understanding and insight, discursive thinking is distinctly rational. From the point of view of *hermeneutics* as the interpretation of texts, such discursiveness is an integral part of knowledge based on thinking. We speak of the discursive way of thinking when it represents a successive, gradual, logical process of reasoning from one logical element to another, and in this way gradually builds a certain rounded normative, i.e. value system, from individual parts. The translation from the Latin *discursus* also corresponds to this *way of thinking,* which means „to flow around" as a synonym for a systematic dispersion of elements, which, with the final connection and derivation of one statement from another, completes a logical whole (Stres, 2018, p. 172). That is why discourse is often equated with argumentation, but discourse is not just argumentation. In relation to discourse, argumentation *(argumentatio)* is proof, substantiation, implementation of a proof, giving reasons for certain claims supported by proof (Sruk, 1980, p. 34). Argumentation is giving reasons for certain claims. Through argumentation its actors exploit the normative structure of the discourse and adapt it to their strategic interests. The nature of controversial issues depends on how much argumentation the participants of the discourse need in order for the discourse to establish itself with its own knowledge and to raise its authority by referring to

the truth (Velčič, 1989, p. 124). Through argumentation discourse resolves its *internal contradictions* (Lukšič and Kurnik, 2000, pp. 169-171) in order to resolve the dispute due to the conflict between *antagonisms,* which originate not only from the nature of the disputed issues, but also from the contradictory nature of the law itself (Velčič, 1989, p. 121).

Judging is a practical science, the purpose of which is the argumentative justification of decisions. It is characteristic of law that its normative system is scattered in the multitude of its practices, in which it searches for its fundamental organizational principle (*Šumič* Riha and Riha, 1993, p. 33) and produces a joint decision or, through normative integration, a community (Igličar, 2012, p. 213). For this purpose, at its applicative level, law must bridge the *antinomy* between its many contradictions, which originate from its very nature. Law claims universality, but at the level of its application it is reduced to particularity. Although it refers to objectivity, in practice it also narrows down to subjectivity. Torn between the social and the individual, between law and right, between the rational and the irrational it must discover its coherence. Furthermore, the contradiction also lies in the fact that legal norms are abstract, but the real-life example is concrete, legal norms are general, the event in question is specific. Legal norms are simplified due to their abstractness, the real-life example is complex; legal norms are static, the particular case is dynamic. All these opposites require a synthesis. A judicial procedure such as a criminal procedure is also characterized by the fact that it is involved in a contradictory relationship between its protective and guarantee function. Its dynamism is fueled by argumentative pressure, which also requires the court to evaluate *contradictory* evidence and statements *in a non-contradictory* way in order to justify its decision. These opposites, however, can only be bridged by *syllogism*, that is a way of debating with reasoning and *subsumption*, by which the concrete is subordinated to the abstract, the individual to the general, and partial to the universal. In the process of legal evaluation, the *perception of the norm* determines the *perception of facts*, and the perception of facts determines the *adequate combination* of the above premise of the legal syllogism. A premise is a logical assumption before a conclusion as its basis, from which the corresponding conclusion follows (Stres, 2018, p. 696). If this is acceptable, the criteria for judging reality of legally

significant facts are also acceptable. What will be the outcome of the discussion, or the assessment of legal and factual issues depends on the weight of the arguments of the parties and the way the court assesses them. Each discourse is a historically specific system of meanings that shapes the identities of participants and topics (Vezovnik, 2009, p. 3; Berger and Luckmann, 1988, pp. 29, 122 and 160-169). Discursive thinking is characterized by the fact that it is based on practice, because the discursive rationality characteristic of judicial judgment is not only based on judging the quality of arguments, but also depends on the *structure* of the argumentation process itself (Habermas, 1996, p. 226)

3.3. The structure of (judicial) discourse

In order for discourse to achieve its political and legal effects and resolve disputes arising from conflicting positions based on incompatible premises and a joint decision (Šumič Riha and Riha, 1993, p. 33), or to institutionalize fundamental values through normative integration and produce a community (Igličar, 2012, p. 213). the *normative structure* that determines the rules by which it is judged which statements can be legally recognized as acceptable, and the asserted facts accepted as true, must be adequate. The structure, as a system of rules that determines which statements in the discourse are relevant, *reduces (over)complex reality* to only those essential parts that are the subject of discourse, namely, the facts to which the structure of the discourse assigns relevant meaning. The more complex the subject of the discourse, the more one-sided ideas it imposes. Therefore, such a social phenomenon, as represented by a criminal act, quite often leads to hasty conclusions that its actual state is given, even if all the (legal) assumptions for its existence are not fulfilled. Court proceedings are famous for their high level of reduction of reality because they „absorb“ only those aspects of *extra-cursive* reality that are important for such a decision, which should become the subject of impartial approval (Igličar and Štajnpifler, 2020, p. 179). The process of checking the arguments of discursive subjects takes place through the process of *subsumption* and *syllogism*. In the process of such logical reasoning, these are the supporting points in the structure of the process discourse, from which arguments are made, with which discursive contradictions are resolved and

through which the *antinomy should be bridged*. With their autonomy and normative regulation, judicial procedures reduce the complexity of everyday social relations in eight ways: 1) with their time-limited duration; 2) with their substantive differentiation (criminal, litigation, administrative, etc.); 3) that they begin, last, and end under certain legal conditions; 4) that they will have their own participants, process subjects, court, and clients; 5) that they will perform procedural actions with their statements and try to influence the outcome; 6) that the relevance of procedural statements will be judged from the standpoint of the normative structure of the procedural discourse, depending on the nature of the procedural object; 7) that the procedure will reliably end under certain conditions; and 8) that it is not known how it will end. The legal order provides only *a certain measure predictability,* which is based on legal provisions, harmonized jurisprudence, and above all on a generally accepted sense of justice, which is shared by the legislature and the judiciary as key *factors* of *legality*.

The structure of court proceedings is determined by a system of substantive and procedural legal norms that apply mutatis mutandis to each stage of the proceedings and influence the selection of statements and information from surrounding systems. It is characteristic of these norms that they apply to all similar discursive situations (Šumič Riha, 1989, p. 135). In a heteralgic, systemically centralized society, otherwise autonomous subsystems form the ideal sphere of its general culture, namely political, legal, economic, religious, ethical, and artistic, which are functionally connected to each other (Adam and Willke, 1996, p. 232). Therefore, they represent a *discursive environment for each other*. The essence of their coexistence is that, as relatively independent areas, they define mutual boundaries and thus a structure for each other. This structure both encourages and limits them, preventing their excessive one-sided understanding. In the field of discourse theory, such an environment is referred to as a structure or, more precisely, as a *context*. Context refers to the various elements that shape an individual‘s thinking and behavior, including processes, institutions, cultural practices, traditions, ideologies, and discourses, and depending on knowledge (Frank, 2013, p. 8). Knowledge is a dynamic and subjectively conditioned category that constantly develops, shaping our attitudes towards

reality and what we consider to be convincing evidence of social phenomena. While knowledge is powerful, it does not guarantee truth, which depends on our conceptual, linguistic, and interpretive abilities as *constitutive* elements of structure (Foucault, 2008, p. 136). Discourses that take place alongside judicial discourse, such as media, political, philosophical, psychoanalytical discourse, etc., are tied to their own structure, and have no legal effects. The concept of human rights serves as the philosophical basis for modern legal systems and is essential for the creation and application of laws. While language is a central component of any discourse, it is not limited solely to linguistic analysis. The broader social structure, encompassing cultural practices and ideals, also plays a critical role in shaping discourse.

In order for discourse to achieve its political and legal effects and resolve disputes resulting from conflicts between antagonistic positions rooted in incompatible premises, and to achieve consensus and normative integration, appropriate *normative structures* are necessary (Šumič Riha and Riha, 1993, p. 33). These structures determine the rules by which statements are judged to be legally acceptable and facts are accepted as true (Lukšič and Kurnik, 2000, pp. 169-171). Thus, the relationship between actor and structure is inextricably linked. The link between the normative structure, the structure of discourse, and the discursive statements of its actors is created through *discursive practice*.

3.4. Discursive practice

A practice becomes discursive when it gives *priority* to certain meanings, which are socially constructed and therefore subject to change as a result of discursive struggles. In these struggles, discursive subjects adapt the discourse to their strategic interests. In other words, discourse is a practice that operates as a system of statements that determines what can be said or thought, as well as who can speak and with what authority. This practice represents a typical way of acting or declaring, which is characteristic of a certain discourse (Frank, 2013, pp. 58-59 and 68). For example, discourse takes place in criminal proceedings on legally significant facts and issues as a system of statements with which courts and parties perform procedural actions. Discourses are not only defined in linguistic terms, but also as social practices that mani-

fest themselves through structure as an institutionalized, socially established, typed mode or pattern of action. They can be recognized at the individual level or at the institutional level. At the individual level, discursive effects limit the actor's awareness of their actions and ways of interpreting the environment, as they are under the influence of the limitations of the material environment of social institutions, as well as the influence of discourse and the discursive environment that affects them through symbols, ideas, and meanings. Therefore, they are not completely autonomous in their awareness of their actions and ways of interpreting the world.[11] Discourses appear in practice on multiple levels, such as the *macro level* representing the wider social environment, and the *micro level* representing everyday practices and routines. One of the important effects of discourse is that its results are also manifested in the external, *material* sense in the form of certain perceptible consequences as changes in the external world as its products. The effects of discourse are especially visible and felt in *institutional practices*, goals, routines, rules, and in the ways in which institutions interfere with life practice, including with such effects as interference with fundamental rights. Therefore, the structure of discourse determines what the subject is allowed and able to say in order to be successful with their statements. In legal jurisprudence, assessment is not merely the application of rules for adjudication, but also involves the constant explication of those rules. In this creative effort, both parties apply argumentative pressure to „force" a favorable decision that aligns with their proposed facts and legal judgment. The relationship between the actor and the structure is thus connected through practice, in which discursive objects and subjects are *constituted*.

3.5. Constituting the identity of discursive objects

Discursive practice shows how discursive subjects as actors understand the objects of discourse (Frank, 2013, p. 79). As previously stated, discourse is manifested in the material world in the form of objects, for example norms, which arise as a result of discursive results or the impact of discourse on the *extra-discursive*

[11] Foucault described such an effect of discourse as the feeling that it is not the discourse itself, but some nameless voice behind it speaking about something that already exists as something prior. (Foucault, 2008, p. 7). This thought could be supplemented with Lacan, namely that speech is the language of the subconscious. See Lacan, J., Govorim zidovom, Studia humanitas, Ljubljana, 2019.

environment. Such objects can only acquire criminal law significance as an object of discourse in criminal proceedings through a rational process of debating contested factual and legal issues. As a normative and discursive category, a procedural object is defined by its description, which is given by prosecutors as their value assessment of the event that is supposed to represent a certain criminal act. That is why such a description is crucial in judicial practice (Horvat, 2004, p. 388). The event in question is constituted as a criminal act only if it is asserted in a procedurally acceptable manner that meets all the elements of criminality. When interpreting a combination of legal provisions that corresponds to the legal characteristics of the real-life case in question, no abstract legal norm is formed, which could be an *„abstract object of proof* „ in itself (Vodinelič, 1985, pp. 994-1003). Only their legal interpretation of proven and properly assessed legally significant facts leads to the *recognition* of this type of behavior as defined by law as a specific crime. The same applies to *discursive subjects* who also rely on a rational process of debating contested factual and legal issues to understand the objects of discourse.

3.6. Constituting the identity of discursive subjects

Discursive practice privileges only certain meanings, and these are politically constructed concepts, which always depend on the context and the nature of the object of dispute. The structure and actors have a *co-constitutive* relationship (Frank, 2013, pp. 72-73). According to discursive theory, the object of discourse *is not its substance*, and neither is the *discursive subject.* Therefore, the subject therefore does not possess the discourse, but the discourse constitutes its subjects and objects, in accordance with its structure. Although the subjects are a product of the discourse, they are also active *co-creators* reproducing and even changing the discourse to adapt to their strategic interests. These structures are not fixed but depend on the temporal and spatial environment. The fundamental procedural subjects of the criminal procedure, the court, and the parties, are established only in the procedural discourse, in accordance with their procedural role as a normatively formed expectation of certain conduct (Igličar, 2012, p. 61). Therefore, it is only the discourse that constitutes the position of a certain social actor as a discursive subject (Vezovnik, 2009, pp. 23

and 65). The participants of the discourse can take their position only within the discourse, in which both their *identity* and the identity of the discursive object are constituted. Their statements influence the beginning, course, and end of the discourse and thereby determine the meaning of its object.

The structure of the discourse affects the identity of the discursive objects and also has an influence on the identity of the discursive subjects who are mentally embedded in it. The structure of the discourse, with its *compulsive logic*, „imposes" a *transpersonal*, meta subjective, or more objective assessment of the meaning of the object of discourse on their judgment. In this sense, the discursive conception of law is at the *„intersection"* of its objective and subjective conception (Avbelj et al, 2021, p. 58). Therefore, the research mentioned in the introduction rightly advocates „a shift from an objective to a discursive approach to law" (Avbelj, 2021, pp. 299-302). For the theory of discourse, which deals with the issue of cognition, the discursive subject in itself loses its independent meaning due to its involvement in the discursive way of thinking, because this theory is limited primarily to the methodology of discourse (Habermas, 1975, p. 100).

The emphasis on the impact of the structure of the discourse, transferred to the field of law, is justified mainly because the trial is oriented in a *contextual manner*. Only the participants in the process of argumentation about the (non)existence of important facts give such a discourse content or „theme" and thus its *procedural object* as a normative category (*Šumič* Riha, 1995, p. 32). Just as discursive objects and discursive subjects do not have their own *a priori* ontological status, neither does the discourse itself. According to Foucault, meaning and knowledge are produced by discourses and not by subjects (Foucault, 2008, p. 36; Foucault, 2007, p. 249). In a discourse, the action of individuals can be conscious or unconscious, but it always depends on the structure of the discourse, which promotes and limits it in accordance with the rules that form the structure. Namely, the structure affects the thinking and actions of discursive actors. Actors are influenced by discourses that determine thinking and its functioning, but at the same time they are reflexive, which means that they can act strategically and consciously influencing the course of events and changing the structure. Even though their activity is limited by the structure, it is also enabled because the influence of the struc-

ture is not absolutely dominant. It can give meaning to disputes and rebellions of discursive subjects, but they can change it by adapting it to their own interests. The dialectical relationship between the structure and the actor enables an understanding of the changes that are the result of the *mutual influence* of the subjects and the discursive practice. This ultimately changes not only the identities of the subjects but also the structure itself (Frank, 2013, p. 71). Through discursive theory it is also possible to explain the changes in the legal system, which is transformed by judicial practice under the argumentative pressure of the participants in the judicial discourse. Argumentative pressure is also pressure on the structure, on its rules, which results in changing them according to the way in which they are interpreted by the discursive subjects. However, always in such a way that the foundations of the legal system are preserved. This means that the subjects in the discourse are only *constituted* in their practice and language when they express themselves about the relationship between certain norms and values.[12] Norms and values are two sides of the same phenomenon, namely *subjective identities* (Verhaeghe, 2016, p. 41), which is consistent with the current structure of procedural discourse. Identity is a way of self-positioning in wider social events (Nastran-Ule, 2000, pp. 189-190,217-224 and 276) It is always about ethics, just as ethics is always about ideologies. Identity is an ideology. This is how actors *position* themselves when they take their subject position within the structure of such a discourse, for example inside a criminal procedure (Dežman and Erbežnik, 2003, pp. 447-455). Structures and discourses that influence the actions and thinking of discursive subjects are ultimately conditioned by their *social power*. This applies especially to the discourse in criminal proceedings, in which the defendant is in a dispute with the state as a significantly stronger party. Therefore, his or her constitutional rights are a way of compensating for this inequality, in order to maintain the ideal of a fair criminal procedure, as a dispute between two equal parties and

[12] Values, as defined by Cerar, are, in their fundamental manifestation, a rationally aware and fluctuating, dynamic attachment of a person to a certain phenomenon. In the analytical and psychological sense, a value is a (i)rationally conditioned feeling that creates a rational projection of such a phenomenon as an object towards which it gravitates (positive attachment) or repels from it (negative attachment). Just as variable values are otherwise, they are variable also legal values. They are also characterized by the fact that they are not universal, but particular, and are temporally, spatially and culturally conditioned. With their dynamic nature, they significantly influence the (dis)continuity of law. (Cerar, 2001b, pp. 5 and 24).

their possibility to have an equal influence on its outcome. It is characteristic of such a discourse that it functions as *an analytical tool before an impartial court*.

3.7. Discourse as an analytical tool

Discourse analysis is not only a method but a research perspective that includes many methods. As such, it is an analysis of practice and institutionalized rules and norms. Therefore, it is important as a method of judicial practice, which is used in identifying and analyzing factual and legal issues, namely issues of criminal substantive and procedural law. The use of law as a linguistic phenomenon presupposes a linguistic analysis of legal concepts, which should be the criterion for judging a concrete case. Such an analysis is an indispensable tool for the construction of a legally relevant reality, if it is established that all its assumptions are met for the application of the law. As an analytical tool, discourse is therefore an instrumental tool (Frank, 2013, pp. 59-60). For such phenomena as normative and discursive phenomena, it is characteristic that the determination of their wider social and legal meaning is embedded in the already repeatedly emphasized structure or *context*, which is also the subject of *discursive analysis*.

3.8. Discourse as an object of analysis

Discourse is both an analytical tool and an object of analysis, as it is *institutionalized* and typified under the control of discursive practice. Therefore, it serves as a measure of the success of a certain discourse in achieving its goals. When applied to the field of law, specifically criminal procedure, discourse is analyzed by the judge to assess the procedural effects of the parties‘ statements, and it becomes an object of analysis if the judge‘s decision is subsequently reviewed by a higher court. At the *institutional* level, discursive practice is the subject of discourse analysis, as court decisions are formed through intersubjective *procedural communication* between prosecutors, judges, and other relevant parties. Neither prosecutors nor judges learn the law in isolation, but instead through a communal engagement with discursive practice. Procedural discourse presupposes a formally logical way of thinking, which raises questions about the reality of the existence of

asserted facts in the discourse and their impact on the application of the law.

3.9. Ideology and discourse

The distinction between discourse as an analytical tool and discourse as an object of analysis is meaningful because discourse is consciously used by its participants as a tool to achieve strategic interests, common goals, and consensus. In this sense, discourse shares similarities with the concept of ideology, which assumes the existence of a particular interest presented as a universal one. While discourse is not the same as ideology, it is closely related to it. Ideology can assign different meanings to concepts within a specific discourse, which is often expressed in a socially and politically constructed environment. Therefore, discourse can be the carrier of a particular ideology, which is reproduced through discourse, and shapes the meaning of ideological presentations. The significance of ideology lies not in its inherent value, but rather in how it is expressed and in its intended purpose.

3.10. Institutional crisis or displacement

Knowledge and meaning are situated historically and contextually, and individuals internalize this knowledge through socialization, which is reproduced and transformed through language and non-verbal practices. This mechanism of *internalization* and *socialization* becomes evident during institutional crisis or *displacement*, which refers to events that break a coherent, settled, and sedimented discourse. Displacement exposes definitions, concepts, and categories to redefinitions. When a certain development of events can no longer be understood within the framework of the dominant discourse and meanings, changes become inevitable. The existing *hegemonic* discourse loses its power and prestige in defining meanings. Therefore, displacement represents a *productive moment* in a historical and temporal context, as it prevents the completeness of the discourse structure and offers the possibility of liberation from established structural forms (Frank, 2013, p. 66). The phenomenon of displacement in law is common and has led to many changes in substantive and procedural law, including criminal procedure.

3.11. Truth as a normative and discursive category

We encounter truth in everyday life as well as in politics, philosophy, science and law. Therefore, knowledge about it depends on social processes and actions, which determine which categories of knowledge are „correct“ or „wrong“. When we talk about the truth, we refer to thinking of it. And in doing so we assume that we know it, can discover it, prove it, and pass on to others. We are especially confronted with disputes over the question of what is true. These disputes involve passion, courage, efforts, intentions, and actions aimed at finding a basis for justification, proving a claim, or exposing a lie as an abuse of truth. The question of truth acquires broader social significance when it is focused on scientific or professional discourse that is defined by institutionalized rules limiting what can or cannot be said. Such discourse is directed towards knowledge of certain facts that are assumed or asserted to be true, but it can also be subject to *argumentative pressures*, particularly when operating according to the principle of authority (Ule, 2004, p. 7). This kind of discursive procedure is clearly evident in criminal proceedings where the truth has a *strategic-tactical* meaning in *persuading* the court about the truth or falsehood of statements. Despite being a fundamental concept in philosophy since ancient times, truth remains a key problem, not only in law but in general (Hribar, 1961, pp. 7-8). In the philosophical sense, truth is a criterion for practice, and practice is a criterion for truth. It is also a criterion for itself and all other truths since it is considered the „truth of all truths.“ However, it is neither dogmatic nor critical but rather a source of permanent self-criticism and criticism of everything that exists. Nevertheless, Foucault considered truth a false universality (Foucault, 2008, p. 36).

According to the teachings of classical empiricism and rationalism, truth is considered manifest (Popper, 1973, p. 13). However, according to K. Popper‘s point of view, the problem is that the truth in itself is not always obvious and needs to be discovered.[13] Popper criticized philosophical theories for neglecting the importance of *induction* and overemphasizing deduction as the main

[13] In philosophy, a number of theories have been developed in relation to the concept of truth, such as: correspondence, consensual, schematic, parsimonious, deflationary, minimalist, epistemological, James‘s, coherent theory and the theory of radical constructivism.

source of knowledge and cognition. The purpose of inductive logic is to give scientific significance to various theoretical hypotheses based on knowledge and experience in practice. On a deductive, abstract level, truth is a concept that could directly satisfy the need for justification or persuasion. However, an authority worthy of trust is needed to decide what makes the truth obvious and credible in each case. The assumption of error implies the idea of an objective truth about which disputes arise. It has been considered since antiquity that truth is the goal of philosophy and a serious philosopher is one who is concerned with truth (Zore, 1997, pp. 125 and 193-196). In philosophy there is a consistent realization that the basis of the crisis of philosophy is precisely the crisis of truth. Philosophy has developed various truth theories, such as the correspondence or realistic theory of reflection, semantic theory of truth, epistemic theories of truth, pragmatic theory, and coherence theory, which complement and build on each other, highlighting the complexity of the problem of truth (Ule, 2004, p. 3). In philosophy, three meanings of truth are distinguished: *logical*, ontic, and *transcendental-ontological*. Truth in the logical sense refers to knowledge that asserts or denies something as logically true, while in the ontic sense, it concerns the things that we would like to know, which have their own reality and are accessible to our cognition. Transcendental-ontological truth refers to the truth that being bestows on beings as unity, reality, and goodness, which is predominantly understood in a religious sense (Stres, 2018, pp. 743-744).

Philosophy and cognitive theory attempt to resolve the fundamental issues of human knowledge or cognition (Greek *epistéme*), primarily from the point of view of its culturally conditioned cognitive limitations, i.e., structure. Only within the framework of certain professional terminology can criteria be formulated that do not lead to insoluble contradictions. The premise that the truth about the truth is that there is no truth about the truth, because truth is a matter of faith, belief, and conviction, demonstrates this (Hribar, 1961, pp. 7-8 and 163-165). However, philosophy and social science cannot do without the concept of truth. Such a situation in the philosophical field convinces us that the crisis of truth is also characteristic of all other normative and discursive phenomena such as religion, politics, ethics, and law. What all these social subsystems have

in common is that they refer to the truth when consolidating their position. They represent a plural and secular society, each with its own system of norms and values based on the belief that these values and norms are universal, and that belief in them is morally binding. They must be „missionary" spread through the process of intersubjective, discursive communication with the aim of creating the widest possible social consensus with due regard to which social phenomena can acquire the meaning of social reality (Harari, 2017, pp. 214-216). If values change, the norms that reflect the social attitude towards them also change. This inevitably changes social and individual identities, the core of which originates from a certain culture, and thus also the culture itself (Verhaeghe, 2016, pp. 38-39). Truth is a normative and discursive category. By referring to it, every discourse raises or tries to raise its *authority* and thus its *persuasiveness*. For philosophy and cognitive theory, therefore, the key question is not what truth is, but above all, what represents the *criterion of truth* (Ule, 2001, p. 121). The way in which we know the truth is an integral part of the truth itself (Nahtigal, 1996, p. 234). Therefore, truth cannot be equated with a purely subjective belief, if the assertion of the existence of facts is contrary to the objective reality that we face through the world of concepts, judgments, logic, and life experiences. A clear proof of how the truth depends on such criteria are evidentiary rules for the exclusion of illegal evidence in criminal proceedings (Dežman and Erbežnik, 2013, pp. 53-69). The rules, whether experiential, professional, or scientific, that determine under what conditions something can be considered true, are *constructs*, just as constructs are concepts through which we perceive reality. And precisely because social phenomena, that is, facts, are conceptually constructed, the truth about them is also a construct, a matter of interpretation of their existence and meaning. Therefore, since the facts that we experience as sensory changes in the external world are *constructed in our conceptual sphere*, they can also be *reconstructed* (Damaška, 2001, pp. 4-5). What we ourselves have constructed in the discourse about such extra-discursive phenomena as social phenomena and, at the same time, also legally important facts, is being reconstructed.[14] That is why we can learn about

[14] The emphasis on the distinction between discursive and extra-discursive realities is due to the fact that postmodernist discursive theory, which is based on hard and radical social constructivism,

such facts, prove them, and evaluate their importance. In such a discursive context, the methodology of judging such a social phenomenon is understood, which should correspond to the concept of a specific criminal act and, at the same time, the truth about its existence.[15]

4. Conclusions

The research mentioned in the introduction justifiably draws attention to the importance of the concept of discourse in legal methodology. Its meaning presupposes an understanding of the nature of law in wider society. Dworkin already answered the still-pending question of whether the law is in books or whether judges discover or invent law (*law in books or law in action*). He emphasized that not only laypeople assume that the law is provided in advance and only needs to be determined, but even some academically educated lawyers assume so. That is why he pointed out that judges not only use the law but also create it (Dworkin, 2003, p. 16). Although the fundamental premise of the classical concept that law is not only used but also created or constructed by judges has been overcome in the field of modern legal theory, it is still asserted that law is in crisis (Pavčnik, 2019, pp. 27-33). The question posed is what the cause of this crisis is. Either law is in crisis because there are bad laws, or it is due to insufficiently reliable jurisprudence. Or the alleged crisis of law is perhaps only a crisis of *understanding of its discursive nature*. The level of (dis) trust in the judiciary as the foundation of legal culture depends on the understanding of the law, its power, and its powerlessness. The theory of discourse provides a sufficiently clear answer to this dilemma when it explains the methodology of the discursive way of perceiving those social phenomena to which the law attributes legal significance. The ability to understand the nature of law in a plural and secular democratic society, its *unpredictability*, contingency, changeability, and above all, the willingness to recognize the relativity of justice and truth itself, represent the political problem of every country. Therefore, it is not only the

acknowledges only the *interdiscursive reality* while simultaneously denying the existence of *extra--discursive reality*.

[15] The court, which may convict the accused only if convinced of their guilt according to the provision of Article 3 CPA, can therefore form such a belief only in the indicated context.

duty of legal science but also of politics to consider and explain the true nature of law. This applies especially to a country that emphatically declares itself legal and swears its allegiance to the rule of law.

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A new EU system on cross-border gathering of e-evidence – analysis and open questions

*Anže Erbežnik**

ABSTRACT

The article outlines a significant shift in the approach to international cooperation ain criminal law on electronic evidence (e-evidence). The EU's e-evidence package, proposed in 2018, introduces a framework where Member States can directly request electronic evidence from service providers in other Member States. This bypasses traditional mutual legal assistance channels and raises questions about sovereignty, territoriality, and human rights protections, especially in relation to privacy and data protection. The initial proposal of the e-evidence package was met with various amendments from the EU Council and Parliament, focusing on extra-territoriality, notification procedures, and safeguarding fundamental rights. The final legislation shows certain elements of these perspectives but largely aligns with the Commission and Council's vision. It emphasizes cooperation between public judicial authorities and private service providers, blurring the lines between public and private sectors. This raises concerns about outsourcing fundamental rights protection to the private sector. Such an approach lacks the necessary fundamentals, namely certain common standards, illustrated on the examples of data retention and admissibility of evidence. The EU Court of Justice has challenged general and indiscriminate data retention practices, advocating for targeted retention to combat serious crimes, under strict conditions to protect personal data and privacy rights. The disparity in data retention approaches reflects varying national attitudes towards privacy across the EU. The admissibility of cross-border evidence is also a complex is-

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sue, given the differing legal standards and procedures among EU Member States. The EU has not established a unified framework for this. This situation leads to potential legal conflicts and challenges in ensuring the rights of the accused are protected in cross-border cases. In conclusion, the e-evidence system marks a significant shift in cross-border legal cooperation within the EU. While it addresses the need for efficient access to electronic evidence in a digital age, it also raises profound questions about the balance between effective law enforcement and the protection of fundamental rights in an era of increasingly pervasive digital surveillance. The system's potential to undermine privacy and data protection standards, both within the EU and in international relations, warrants careful consideration and ongoing scrutiny.

Keywords: e-evidence, electronic evidence, data retention, mutual recognition in criminal law, admissibility of evidence, EU criminal law

Nov sistem EU za čezmejno zbiranje elektronskih dokazov (e-dokazov) – analiza in odprta vprašanja

POVZETEK

Članek opisuje pomemben premik v pristopu k mednarodnemu sodelovanju v kazenskem pravu glede elektronskih dokazov (e-dokazov). Paket e-dokazov EU, predlagan leta 2018, uvaja okvir, v katerem lahko države članice neposredno zahtevajo elektronske dokaze od ponudnikov storitev v drugih državah članicah. To obide tradicionalne kanale medsebojne pravne pomoči in odpira vprašanja o suverenosti, teritorialnosti in zaščiti človekovih pravic, še posebej v zvezi z zasebnostjo in zaščito osebnih podatkov. Začetni predlog paketa e-dokazov je bil deležen različnih dopolnil s strani Sveta EU in Evropskega parlamenta, ki so se osredotočili na ekstrateritorialnost, postopke obveščanja in varovanje temeljnih pravic. Končna zakonodaja obsega določene elemente teh pomislekov, vendar se v veliki meri usklajuje z vizijo Evropske komisije in Sveta EU. Poudarja sodelovanje med javnimi pravosodnimi organi in zasebnimi ponudniki storitev, kar briše mejo med

javnim in zasebnim sektorjem. Tak pristop neposrednih odredb nima potrebnih temeljev, zlasti nekaterih skupnih standardov, kar je prikazano na primerih hrambe podatkov in dopustnosti dokazov. Sodišče EU je izpodbijalo prakse splošnega in nediskriminatornega hranjenja podatkov, zagovarjajoč ciljno usmerjeno hrambo za boj proti resnim kaznivim dejanjem, pod strogimi pogoji za zaščito osebnih podatkov in pravic do zasebnosti. Raznolikost pristopov k hrambi podatkov odraža različna nacionalna stališča do zasebnosti po vsej EU. Dopustnost čezmejnih dokazov je prav tako kompleksno vprašanje, glede na različne pravne standarde in postopke med državami članicami EU. Sana EU še ni vzpostavila enotnega okvira za to. To vodi do morebitnih pravnih sporov in izzivov pri zagotavljanju pravic obdolženih v čezmejnih primerih. Skratka, sistem e-dokazov označuje pomemben premik v čezmejnem pravnem sodelovanju znotraj EU. Čeprav naslavlja potrebo po učinkovitem dostopu do elektronskih dokazov v digitalni dobi, prav tako odpira poglobljena vprašanja o ravnovesju med učinkovitim kazenskim pregonom in zaščito temeljnih pravic v dobi vseprisotnega digitalnega nadzora. Potencial sistema za spodkopavanje standardov zasebnosti in zaščite podatkov, tako znotraj EU kot v mednarodnih odnosih, zahteva skrbni premislek.

Ključne besede: e-dokazi, elektronski dokazi, hramba podatkov, medsebojno priznavanje v kazenskem pravu, sprejemljivost dokazov, kazensko pravo EU

1. Introduction

Due to the development of technology and the need for rapid cooperation, as well as the risk of electronic evidence (e-evidence) being deleted and the increasing emphasis on cross-border elements in obtaining such evidence, the Commission proposed in 2018 an instrument that radically changes the previous way of understanding mutual recognition and cooperation, namely the so-called »e-evidence« package.[1] With it, the Commission introduces a kind of all-European order that is issued by one Member State and directly addressed to a private provider of electronic services in another Member State. At the

[1] See further Carrera, 2020; Tosza, 2018, pp. 212–219; Tosza, 2020, pp. 161–183; Christakis, 2020; Bonačić, 2021, pp. 123–140; Tinoco-Pastrana, 2020, pp. 46-50; Corhay, 2021, pp. 441-471; Erbežnik, Dežman, 2022, pp. 432-441.

same time, there is an obligation to appoint a special representative for operators from third countries that do not have an establishment in the EU. The package consists of two legislative texts, namely a regulation, (Regulation (EU) 2023/1543, 2023, p. 118) which is based on mutual recognition in criminal law (Art. 82 of the Treaty on the Functioning of the European Union (TFEU)), and a directive, (Directive (EU) 2023/1544, 2023, p. 181) which harmonises provisions of laws or other regulations in Member States concerning the establishment and provision of services (Art. 53 and Art. 62 TFEU). Such logic stands for a trend in EU law allowing direct contacts between judicial authorities from one Member State and private providers from another, without the involvement of the executing/enforcing state's authority, and granting certain public powers to private providers (e.g. assessment of human rights violations).[2] At the same time, it introduces extraterritorial application of law and thus redefines national territoriality and sovereignty of Member States and third states by allowing interference with human rights without the knowledge of the state on whose territory the provider is located, and without the possibility of its objection. In some countries, there is already a trend of extending national orders to other countries.[3] In parallel, the Second additional protocol to the Council of Europe's Budapest Cybercrime Convention has been adopted[4] and an agreement with

[2] See Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online (OJ L 172, 17.5.2021, p. 79) based on Art. 114 TFEU (internal market). It introduces direct contacts between authorities in one Member State and service providers in another one to remove or disable access to terrorist content online in all Member States within one hour, with the optional possibility of subsequent review by the Member State where the hosting service provider has its main establishment or where its legal representative is located. In doing so, it is assessed whether there is a serious or manifest infringement of the regulation or of fundamental rights and freedoms guaranteed by the EU Charter of Fundamental Rights (Charter). The same logic is also applied in Regulation (EU) 2022/2065 on a Single Market For Digital Services (OJ L 277, 27. 10. 2022, p. 1).

[3] For example, consider the so-called US Cloud Act (US Clarifying Lawful Overseas Use of Data Act), which amended the Electronic Communications Privacy Act (ECPA). It was passed as a result of the *US v. Microsoft* case, 584 U.S._ (2018), concerning the question of whether the ECPA allowed US law enforcement authorities to compel a provider located in the US to disclose the contents of data stored outside the US (email stored in Ireland). See also the Belgium Skype and Yahoo cases in view of a broad interpretation of national orders – see de Hert, 2018, pp. 1-27.

[4] Second Additional Protocol to the Cybercrime Convention on enhanced co-operation and disclosure of electronic evidence (CETS No. 224). Even prior to the Protocol attempts have been made to resolve the issue of direct access through interpretation of Art. 18(1)(b) of the Cybercrime Convention with regard to the requirement for a service provider on its territory to provide data on subscribers in relation to services it provides. See Cybercrime Convention Committee, 2017. The relevant issue is also addressed to a limited extent in Art. 32 of the Cybercrime Convention, provided that the person who has valid authorisation to disclose the data agrees, or when the data is publicly accessible. See also Council Decision (EU) 2023/436 authorising Member States to ratify, in the interest of the European

the United States on the direct acquisition of electronic data is taking place.[5]

However, such a novel approach can be problematic from the perspective of extremely different standards of human rights protection (especially on the right to privacy and personal data protection) when obtaining e-evidence, both between EU Member States and as regards third states (such as signatories to the Cybercrime Convention, including Turkey, Sri Lanka, Philippines, etc.).[6] Essential differences exist, for example, in the authority that approves gathering of e-evidence, the required level of suspicion, proportionality and the types of offences for which such measures can be requested, rules on admissibility of evidence, general data retention obligations by providers, etc. Such a system also substantially interferes with fundamental rights protection obligations on one's own territory under the ECHR system.[7] At the same time, there is a difference in the application between the two proposals that form the e-evidence package. While the directive binds all Member States, this does not apply to the regulation. Consequently, the directive shows a plan for the use of the concept of legal representation more broadly, also in other instruments, as a general trend of public-private cooperation in the prosecution of criminal offences. Additionally, it underestimates the sensitivity of e-evidence in the technological age providing extensive insight into privacy of an individual (full picture of one's private life). In that regard this article will firstly, compare

Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence (OJ L 63, 28. 2. 2023, p. 48).

[5] Council decision authorising the opening of negotiations with a view to concluding an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters. Council EU, doc. 10128/19.

[6] A good example is the pending CJEU EncroChat case C-670/22, *Staatsanwaltschaft Berlin***,** whereby evidence gathered legally in France based on minimum standards is being spread to other Member States although there such evidence could not have been legally obtained due to stricter requirements.

[7] During a public hearing regarding the e-evidence proposal in the European Parliament on 27 November 2018, EctHR Judge Bošnjak highlighted that the law of the executing state does not seem relevant within the framework of the proposal. From the perspective of the Convention, this could cause problems, as the high contracting parties to the European Convention on Human Rights (ECHR), including all EU Member States, are responsible for protecting human rights on their territory. They must establish a regulatory framework and provide legal, if not judicial, protection in individual cases. If a complaint is submitted to the bodies of the executing state, they cannot refrain from investigating the complaint by merely stating that they are implementing EU legislation. This was clearly stated in the ECtHR *Avotiņš v. Latvia* judgment. According to Judge Bošnjak the proposal, in terms of ECtHR case law, created a relatively unique situation. Interferences with Art. 8 ECHR do not include the bodies of the executing state. It is questionable whether this is in line with ECHR. Legitimate expectations could arise that the law of the executing state would be applied in every case, which would affect the assessment of legality. See European Parliament, 3rd Working document, 2019.

the initial Commission e-evidence proposal with the final legislative instrument agreed; secondly, evaluate the proposal in view of extra-territoriality; thirdly, provide an assessment of such a system in view of fundamental differences on data retention; and fourthly and lastly, present the Slovenian national doctrine on evaluation and admissibility of cross-border evidence.

2. The EU e-evidence system

2.1. The original proposal and response to it

In its original proposal[8] the Commission envisaged a system whereby a judicial authority from one Member State would in criminal proceedings[9] directly turn to a provider of electronic communication services in the Union, which has an establishment or representative in another Member State, for the submission or preservation of e-evidence, without involving the executing/enforcing state.[10] This is based on two orders/certificates: the European Production Order Certificate (EPOC)[11] and the European Preservation Order Certificate (EPOC-PR),[12] which are intended for historical electronic data only and not for live (real-time) interception. The Commission proposed initially four categories of electronic data to be covered: (1) subscriber data, (2) access data, (3) transactional data, and (4) content data.[13] Un-

[8] Initial proposal of e-evidence Regulation (COM/2018/225 final).
[9] This also applies to proceedings against legal persons in the issuing state, regardless of the concept of criminal liability of legal persons in the executing state (Art. 3 of the initial proposal).
[10] E-evidence means evidence stored in electronic form by a service provider or stored on their behalf at the time of receipt of a European Production Order or European Preservation Order, including stored data on subscribers, access, transactions, and content (Art. 2(6) of the initial proposal). Unlike traditional mutual recognition under Art. 82 TFEU, the enforcing/executing state does not participate in principle. In this context, different terminology is deliberately used, as the term »executing state« is replaced by »enforcing state.« However, such an extensive interpretation of Art. 82 TFEU is questionable, as the provisions of EU Treaties on criminal law should be narrowly interpreted. This was the view of the German Federal Constitutional Court in its assessment of the Lisbon Treaty (BVerfG, 2 BvE 2/08 *et al.*, 30 June 2009), and was raised by the European parliament during negotiations on the e-evidence package (European Parliament, 2nd Working document, 2019).
[11] A binding decision of the issuing authority of a Member State, requiring the service provider offering services within the Union and established or represented in another Member State, to produce e-evidence (Art. 2, point 1, of the initial proposal).
[12] A binding decision of the issuing authority of a Member State requiring the service provider offering services in the Union and established or represented in another Member State to preserve e-evidence in view of a subsequent request for production (Art. 2, point 2, of the initial proposal).
[13] Data related to the commencement and termination of a user access session to a service, which is strictly necessary for the sole purpose of identifying the user of the service, such as the date and time of use, or the log-in to and log-off from the service, together with the IP address allocated by the internet access service provider to the user of a service, data identifying the interface used and the

like the traditional division as known in national legislations and the Cybercrime Convention (subscriber data, traffic data, content data), a new category of »access data« has been added, with an unclear distinction from traffic/transactional data. However, the division between the different data categories is essential regarding the nature of the issuing authority. A request for traffic/transactional and content data can only be issued or validated by a court, while a request for subscriber and access data as well as for the preservation of all types of data can be issued or validated by either a prosecutor or a court.[14] This division also affects the type of criminal offences for which an order can be issued. An order for the submission of transactional/traffic and content data can only be made for certain specific crimes, namely offences punishable by a penalty of more than three years and certain other specified crimes, while an order for subscriber and access data as well as for preservation can be issued for all offences.[15] The service provider, according to the initial Commission proposal, would have to provide the data within 10 days and in urgent circumstances within 6 hours, or preserve the data for 60 days with the possibility of an extension. The provider could have refused to provide the data only if the certificate was incomplete, contained obvious errors, or did not contain sufficient information, due to force majeure, because compliance is actually impossible, or because it is apparent from the information in the certificate that it violates the EU Charter or that the order is obviously abusive.[16] Only in case of non-disclosure, the issuing state turns to the enforcing state, which is supposed to force the provider to send the data.[17] A special procedure was provided in the event of conflict with third country law.[18] Such a new instrument only complements Directive 2014/41/EU (EIO Directive, 2014, p. 1) on the European Investigation Order (EIO Directive).[19]

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user ID. This includes electronic communications metadata (Art. 2, point 8, of the initial proposal). Among other things, the Commission has attempted to resolve the issue of dynamic IP addresses, which are traffic data as such, but, by their nature, if they relate to identity, are also similar to subscriber data. However, for both access data and transaction data the Commission added the same statement, namely that "[t]his includes electronic communication metadata".

[14] Art. 4 of the initial proposal.

[15] Art. 5 and Art. 6 of the initial proposal.

[16] Art. 9 and Art. 10 of the initial proposal.

[17] Art. 14 of the initial proposal.

[18] Art. 15 and Art. 16 of the initial proposal.

[19] Art. 23 of the initial proposal.

The EU Council followed suit in its general approach (General approach, 15292/18) with some amendments, expanding the scope to the execution of custodial sentences or detention orders that were not rendered *in absentia* in case the convict absconded from justice, introducing the possibility of subsequent approval by a competent authority in emergency situations, and limiting the review by service providers. (General approach, 15292/18, Art. 3(2) and 4(5)) Furthermore, it introduced a consultation procedure for traffic data in cases that are not considered domestic (non-domestic cases), (General approach, 15292/18, Art. 5(7)) and a very limited notification to the enforcing state authorities regarding content data in non-domestic cases, but without suspensive effect. (General approach, 15292/18, Art. 7a) In that regard the Council tried, at least partially, to address the issue of extra-territoriality in its general approach by distinguishing between "domestic" and "non-domestic" cases. It considered cases to be "domestic" when the suspect is in the issuing state, regardless that the data is in another state. However, the European Parliament (EP) as co-legislator tried to significantly amend the original proposal due to several legal reservations. (Draft report PR1191404SL; EP text for negotiations A9-0256/2020) It introduced in its initial position a significant substantive notification procedure with non-recognition grounds and the possibility of a response from the enforcing state, following the European Investigation Order (EIO) model. In doing so, it differentiated between different procedures for transmitting data according to their invasiveness, namely direct transmission for some data and a notification procedure for more intrusive data requests. It also strengthened the provisions regarding remedies and supplemented them with provisions on admissibility of evidence. The extremely difficult legislative negotiations in trilogues[20] took almost two years under five Council presidencies (started with Portuguese in 2021 and ended with Swedish in 2023), all together eight trilogues.

2.2. The main features of the final e-evidence system

The final e-evidence text (Regulation (EU) 2023/1543, 2023, p. 118) seems to be mainly in line with the visions of the Com-

[20] The author of this text took part during the whole negotiation procedure on e-evidence, as well as its predecessor, the European Investigation Order.

mission and Council, and much less in line with concerns expressed by the EP. Two instruments remained despite the EP's fear that the directive would be used for other purposes (the legal representative). However, through negotiations, this was clearly confirmed, showing a trend where cross-border cooperation is no longer just judicial cooperation, but includes also cooperation between public judicial authorities and private service providers, thereby blurring the lines between private and public and raising serious issues of outsourcing fundamental rights protection to private parties. Further, despite keeping the three classical categories of electronic data, a special place had to be given to IP addresses and similar identifiers called "data requested for the sole purpose of identifying the user". (Regulation (EU) 2023/1543, 2023, Art. 3, point 10 and Art. 4(1)) This means that the final text still left the final denomination of IP addresses and similar notifiers as subscriber or traffic data to national authorities. However, this also means that for such data, a prosecutorial order from the issuing State is possible to be addressed to a provider in an enforcing State where a court order is still necessary (it seems at least in the case of Germany and Slovenia and possibly others). How the national constitutional legal system will react when confronted with such a challenge can only be guessed for the moment. There is only a reference that a court might be included in the notification or enforcing stage if required by national law.[21] In that sense, a possible solution for providers from such Member States would be to oppose prosecutorial orders if a court order is required in their national system, thereby triggering the need for an enforcement procedure. There were also some improvements in view of legal remedies (Regulation (EU) 2023/1543, 2023, Art. 18) and more clarity on the third country law dispute procedure. (Regulation (EU) 2023/1543, 2023, Art. 17) However, the biggest difference of the final text in comparison with the initial proposal relates to notification and non-recognition grounds.

[21] In Recital 61 it is stated that where a notification to the enforcing authority, or enforcement, takes place in accordance with the Regulation, the enforcing State could provide under its national law that the execution of a European Production Order might require the procedural involvement of a court in the enforcing State.

2.2.1. Notification

As regards notification, the final compromise foresees a meaningful notification with refusal grounds only for traffic and content data in »non-domestic« cases. (Regulation (EU) 2023/1543, 2023, Art. 8 and Art. 12) If a case is considered "domestic", no notification takes place. A case is considered as "domestic" if: (a) the offence has been committed, is being committed or is likely to be committed in the issuing State, and (b) the person whose data are sought resides in the issuing State. In the recitals further guidance is provided what is considered "residence". The prime indicator is registration in a Member State. In the absence of such it can be also indicated by the fact that a person has manifested the intention to settle or has acquired following a stable period of presence in that Member State certain connections with that state. As possible objective criteria for assessment family ties, economic connections, registered vehicles, bank accounts are listed. However, it is added that a short visit, holiday stay, including a holiday home, should not be considered enough. (Regulation (EU) 2023/1543, 2023, Rec. 53) The agreed criteria leave certain interpretation space and a possible misuse of the term "domestic" is possible. It is neither clear if this is enough to satisfy the requirements from ECtHR case-law on foreseeability and ECHR territorial protection, even in cases of mutual recognition in EU civil and criminal matters. For example, in *Avotiņš v. Latvia* the ECtHR stated that the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient. (ECtHR, Avotiņš v. Latvia [GC], 2016, para. 114-116)[22] This applies even more so as it is not clear that the Bosphorus (ECtHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], 2005) presumption of adequacy of EU fundamental rights protection would be satisfied in view of substantial rule of law problems in some Member States amounting even to Art. 7(1) TEU proceedings and confirmed also by ECtHR case-law.[23]

[22] See also ECtHR, *Pirozzi v. Belgium*, a. no. 21055/11, judgment of 17 April 2018, para. 62–64; ECtHR; and *Romeo Castano v. Belgium*, a. no. 8351/17, judgment of 9 July 2019, para. 84. Both cases apply the *Avotiņš* test to mutual recognition in criminal matters in view of European Arrest Warrants.

[23] See ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, a. no. 4907/18, judgment of 7 May 2021, as regards

2.2.2. Fundamental rights non-recognition ground

One of the positive outcomes for the EP was the inclusion of non-recognition grounds in case of notification, whereby the it managed to salvage the most meaningful grounds from the EIO Directive, namely privileges, *ne bis in idem*, double criminality, and fundamental rights. (Regulation (EU) 2023/1543, 2023, Art. 8 and Art. 12) In trilogues, one of the main issues was the nature of certain grounds, namely the question of whether they are obligatory or facultative. Only Council Framework Decision 2002/584/JHA on the European Arrest Warrant (2002, Art. 3 and Art. 4) established such a differentiation, while subsequent mutual recognition instruments, such as EIO, introduced them only as facultative (»may« clause).[24] In the final text of Art. 12(1), the following phrase was used: »shall [...] assess the information [...] and, where appropriate, raise one or more of the following grounds for refusal«. The intention is to reflect that there are cases where the only possible decision is to use a certain ground, despite the fact that the judicial authority always makes the decision. The EP also succeeded to include a fundamental rights non-recognition grounds referring to Art. 6 TEU. Such an inclusion, as already part of the EIO, is essential in view of possible higher national constitutional standards. In view of the mediocre solution in some EU harmonisation directives on procedural rights setting very law standards (especially the right to a lawyer), this is essential. Furthermore, the EP managed to keep the classical double criminality understanding outside the category of 32 offences. The Commission wanted an expansion of the list to hate speech, which would, without a common EU definition, trigger serious issues in view of the different national understanding of the topic.

In the past one of the main questions in EU criminal law was how to formulate a fundamental rights non-recognition clause. What is clear is that the clause is broader than »flagrant denial of justice,« the ECtHR concept regarding the absence of fundamental elements of a fair trial that prevents extradition. (Guide on Art.

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the illegality of composition of the Polish Constitutional Court. See also a whole variety of CJEU judgments on the independence of judiciary in Poland – cases C-619/18, C-585/18, C-624/18 in C-625/18, C-204/21, etc. There are also proceedings based on Art. 7(1) TEU against Hungary and Poland.

[24] However, the Commission is introducing again the distinction between obligatory and facultative non-recognition grounds in Art. 13 of the Proposed regulation on the transfer of proceedings in criminal matters (COM/2023/185 final).

6 (criminal limb), 2020, pp. 101–102)[25] From the perspective of the uniform application of EU law, it is not legally sound that in different EU criminal law instruments and CJEU judgments different clauses are used. Thus, some Member States, which have introduced a special national non-recognition ground for human rights violations, refer to Art. 6 TEU, such as the Austrian law, which states, »if there are objective circumstances that the judgment was a result of the violation of fundamental rights or fundamental legal principles within the meaning of Art. 6 TEU«. (EU-JZG, 2004, Art. 40, Pt. 12) In Council Framework Decision 2005/214/JHA on mutual recognition of financial penalties, (2005, p. 16) the »reason to believe that fundamental rights or fundamental legal principles of the Treaty have been violated under Art. 6 of the Treaty« is used. (Framework Decision 2005/214/JHA 2005, At. 20(3)) In the past, the EP advocated a clause referring to Art. 6 TEU, thus stating three levels of human rights protection, namely ECHR, EU Charter, and constitutional traditions common to the Member States. The latter category is essential to prevent »Solange« conflicts between EU law and national constitutions. Through a reference to Art. 6 the EU legislature gives national judicial authorities the possibility to consider higher national constitutional standards in certain cases. Such a clause was used in the EIO Directive, stating that »there are substantial grounds to believe that the execution of the investigative measure provided for in the EIO would be incompatible with the executing state's obligations under Art. 6 TEU and the Charter«. (EIO Directive, 2014, Art. 11(1)(f))

In contrast, Regulation (EU) 2018/1805 (2018, p.1) on mutual recognition of freezing and confiscation orders uses a more restrictive version stating that »in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to an effective remedy, the right to a fair trial or the right of defence«. (Regulation (EU) 1805/2018, 2018, Art. 8(1)(f)

[25] See also ECtHR, *Soering v. United Kingdom*, a. no. 14038/88, judgment of 7 July 1989, para. 113; *Mamatkulov and Askarov v. Turkey* [GC], a. no. 46827/99 in 46951/99, judgment of 4 February 2005, para. 90 and 91; *Al-Saadoon and Mufdhi v. United Kingdom*, a. no. 61498/08, judgment of 2 March 2010, para. 149.

and Art. 19(1)(h)) Further, the CJEU has set its own standards and a two-step test in cases of *Aranyosi* (CJEU, joined cases C-404/15 and C-659/15 PPU) and *LM,* (CJEU, case C-216/18) namely "whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment" or "where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial". The displayed »cacophony« of human rights clauses could cause confusion. It is not practical, realistic and legally sound that Member States anticipate such different clauses for each instrument when transposing and applying EU law. From a practical standpoint, the fundamental question is only whether there is a risk of a violation or not. Consequently, harmonization of the different existing clauses is necessary.

2.2.3. Emergency cases

However, the EP acknowledged in view of notification a special case in "emergency cases" defined as situations in which there is threat to the life, physical integrity or safety of a person, or to a critical infrastructure, where the disruption or destruction of such critical infrastructure would result in an imminent threat to the life, physical integrity or safety of a person through a serious harm to the provision of basic supplies to the population or the exercise of the core functions of the State. (Regulation (EU) 2023/1543, 2023, Art. 3, pt. 18) In such cases, a 8-hour deadline is foreseen (in comparison with the usual 10 days) and in "non-domestic" cases for traffic and content data only an ex-post notification takes place. In that regard the enforcing state may in 96 hours object to the use of such data and demand its deletion or agree to its use under certain circumstances. (Regulation (EU) 2023/1543, 2023, Art. 10(4)) Such a solution has been inspired by

Art. 31(3)(b) of the EIO Directive dealing with cross-border wiretappings without the technical assistance of the executing state. The indicated definition of emergency cases leaves a lot or leverage to the issuing State, thus diminishing the limited meaningful notification system even further. The result is farfetched from the initial safeguards demanded by the EP. In addition, one of the main problems of operating the envisaged e-evidence system is the lack of harmonisation at EU level of basic notions on the collection and use of electronic data, such as data retention and the issue of admissibility of cross-border evidence.

3. Lack of uniformity on data retention among EU Member States

The diversity of approaches among EU Member States on data retention shows the different attitude towards privacy and protection of electronic data in the EU. Data retention refers to the mandatory retention of traffic telecommunications data for a certain period for all individuals, based on the possibility of future use in criminal proceedings. This is the logic of the so-called preventive state, which is also reflected in other EU instruments regarding the mass collection of data on individuals, profiling, and cross-linking of various data sources. Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (2006) introduced an obligation for Member States to prescribe mandatory retention of traffic telecommunications data ranging from six months to two years. However, the way to access this data was entirely left to national authorities.[26] The CJEU declared the directive invalid in the *Digital Rights Ireland* (CJEU, joined cases C-293/12 and C-594/12) case for violating Art. 7 and Art. 8 of the EU Charter, i.e., the protection of privacy and personal data. It noted that the directive applies even to persons for whom there is no indication that their conduct might have a link, even an indirect one, with serious crime, and that it is not limited to the retention of data in relation to a period and/or a particular geographic area and/or a

[26] In Slovenia, the relevant directive was transposed with the Electronic Communications Act (ZEKom-A and ZEKom-1). The legislation was annulled by the Slovenian Constitutional Court, No. U-I-65/13, 3 July 2014.

group of individuals, that might be linked in one way or another to a serious crime, or solely to data of persons who could, for other reasons, contribute, by the mere fact that their data are being retained, to the prevention, detection or prosecution of serious offenses. (CJEU, joined cases C-293/12 and C-594/12, para. 58 and 59) The absence of procedural and substantive conditions for access by national authorities was also highlighted in the *Tele2/Watson* (CJEU, joined cases C-203/15 in C-698/15) case. The CJEU declared that general national systems on data retention that remained in force after the *Digital Rights Ireland* case were incompatible with EU Treaties, Directive 2002/58/EC and the EU Charter. It thus prohibited the general and indiscriminate retention of all traffic data and location data for all subscribers and registered users of all electronic communications means, stating that such a system allowed very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the daily habits, places of permanent or temporary residence, daily or other movements, activities, social relationships and the social environments frequented by those persons. It stated that that this "is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance". (CJEU, joined cases C-203/15 in C-698/15, para. 99 and 100) However, it allowed targeted retention of traffic and location data to combat serious crime, if the retention of data regarding the categories of stored data, the communication means used, the persons involved, and the duration of the relevant retention is limited to what is strictly necessary, and if the national regulations are based on clear and precise rules that regulate the scope and use of such data retention measures and that establish minimum requirements, so that persons whose data has been retained have sufficient guarantees enabling them to effectively protect their personal data against the risks of abuse. Similarly, several national constitutional courts followed the same logic. (See Zubik et al., 2021; Fennelly, 2019, pp. 673–692)

However, at least half of Member States have maintained dana retention system and the Commission has not initiated proceedings for a violation of EU law, where appropriate. It seems that also the CJEU has succumbed to pressure from law enforcement agencies and has partly retracted from the original strict prohibition of general retention system. In the *Ministerio Fiscal* (CJEU,

case C-207/16) case, the issue was narrowed down only to access to already stored data and it was allowed to access identification data of SIM card holders activated with a stolen mobile phone, such as name, surname, and if necessary, address of the holders, for all criminal offences and not just for fighting serious crime. In the *Privacy International* (CJEU, case C-623/17) and La *Quadrature du Net et al.* (CJEU, joined cases C-511/18, C-512/18 and C-520/18) cases, the CJEU confirmed the validity of EU law on data protection in the field of national security. (CJEU, joined cases C-511/18, C-512/18 and C-520/18, para. 87–104)[27] However, it allowed for the possibility of a general retention system regarding subscriber data and IP addresses, targeted retention of location and traffic data, and for exceptions to the prohibition of general and indiscriminate retention of such data. Thus, in the case of a serious threat to national security, which proves to be real and present or foreseeable, a system was allowed whereby providers of electronic communications services are required to store data on traffic and location generally and indiscriminately, and the decision on such an order may be subject to effective supervision by a court or independent administrative body whose decision is binding to verify the existence of one of these situations and compliance with the conditions and guarantees that must be specified, and the said decision may be issued only for a period that is limited to what is strictly necessary, but in the event of the continued existence of this threat, it may be extended. (CJEU, joined cases C-511/18, C-512/18 and C-520/18, para. 134–139) With regard to the protection of national security, the fight against serious crime and the prevention of serious threats to public security, a Member State may also adopt rules for targeted retention of traffic and location data on a preventive basis, provided that such retention is limited to what is strictly necessary in terms of categories of stored data, communication means covered, persons concerned and the duration of retention. Such a limitation may be based on the category of persons as well as on a geographical criterion, where competent national authorities, based on objective and nondiscriminatory elements, consider that there is a situation characterized by a high risk of preparation or commission of serious criminal offences in one or more geographical areas. (CJEU,

[27] See also newer judgments based on the same principles referring to the German (joined cases C793/19 and C794/19, *SpaceNet and Telekom*) and Irish systems (case C140/20, *Garda Síochána*).

joined cases C-511/18, C-512/18 and C-520/18, para. 140–151)

Similarly, for the protection of national security, the fight against serious crime and the prevention of serious threats to public security, for a period limited to what is strictly necessary, general and indiscriminate retention of IP addresses assigned to the connection source, as well as general and indiscriminate retention of data on the civil identity of users of electronic communication tools, is permissible. (CJEU, joined cases C-511/18, C-512/18 and C-520/18, para. 152–159) Automated analysis and real-time collection are also allowed within certain limits. However, in that regard the CJEU touched upon admissibility rules. While acknowledging national autonomy in that regard, it nevertheless stated that EU law „requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact". ((CJEU, joined cases C-511/18, C-512/18 and C-520/18, para. 221–228) In the case of *H.K.*, (CJEU, case C-746/18) it repeated the aforementioned rules on admissibility and at the same time denied the possibility of granting direct access to traffic and location data to a prosecutor. Such a body can only be a judicial or other independent body, i.e. a body that has all the powers and guarantees necessary to reconcile the various relevant interests and rights. With regard to criminal investigations, this court or body must ensure a fair balance between the interests related to the needs of the investigation, which concern the fight against crime, on the one hand, and the fundamental rights to respect for private life and the protection of personal data of individuals, to whose data access is granted, on the other. If this review is not carried out by a court, but by an independent administrative body, that body must have a status that allows it to act objectively and impartially in the performance of its tasks, and must be protected from any external influence for this purpose. Furthermore, the body responsible for this preliminary review, first, does not participate in the investigation of the relevant criminal offences, and second, is neutral with respect to

the parties in the criminal proceedings. This does not apply to the state prosecution, which directs the investigation and, if necessary, represents the prosecution, since the task of the state prosecution is not to decide the dispute completely independently, but to submit the dispute to the competent court, as a party to the proceedings, which represents the prosecution. (CJEU, case C-746/18, para. 52–59) Such CJEU judgments can be understood as the beginning of EU law on the admissibility of evidence (*in statu nascendi*).

4. Cross-border admissibility of evidence

A complex legal question is the question of admissibility of evidence obtained abroad, which is a mirror image of the issue of foreign requests. The question of admissibility of evidence or their exclusion is directly related to the fundamental rights of the defendant in criminal proceedings. Therefore, this question is often a constitutional question. At the same time, exclusionary rules are a matter of legal culture and generations of lawyers are trained to respect these standards. Their respect is also related to the perception of the legitimacy of a particular legal system. (Erbežnik, 2014, pp. 131-152) The question of preserving national standards of admissibility of evidence, which are directly related to some fundamental constitutional guarantees (such as the requirement for judicial approval for some measures), is often a question of preserving the standards of one's own constitution in proceedings before national courts. Cross-border cooperation bears the danger of *forum shopping*, where systems with the least safeguards are sought and evidence is obtained there, which is then transferred (for example, within the framework of a joint investigation team).[28] At the same time, there is also a risk of transplanting foreign anomalies to your own system (for example, the absence of the need for a judicial order for invasive measures into privacy). In practice, the following questions are often raised: the nature of the body that obtained the evidence abroad, the territorial validity of the national constitution, the definition of fundamental constitutional and international principles of protection of the rights of the accused, and effective legal remedies.

[28] See ft. 6.

Based on the above, three different approaches to the issue of evidence obtained abroad are possible: (a) mutual recognition of evidence (goods theory), (b) adherence to the provisions of national criminal proceedings or (c) allowing evidence if they are in accordance with fundamental constitutional and international principles of protection of individual rights in criminal proceedings. (Alegrezza, 2010, pp. 569–579) Solutions (a) and (b) are unrealistic extremes and only solution (c) seems reasonable. The assessment of admissibility of evidence is currently exclusively a national jurisdiction of EU Member States, as there are no common EU rules yet.[29] Directive 2013/48/EU on the right of access to a lawyer (2013, Art. 12(2))[30] and Directive 2016/343/EU on the presumption of innocence indicate some beginnings in view of reference to "defence rights and fairness of proceedings". Therefore, the issues related to evidential rules in the sense of the *Melloni* (CJEU, case C-399/11) case are currently not arising (the issue of minimum common EU standards and the disregard of higher national constitutional standards).[31] This means that the question of admissibility of evidence is left to national constitutional and legal orders. In the original proposal for a regulation on the European Public Prosecutor's Office (Proposal COM(2013) 534 final, 2013) the European Commission attempted to introduce automatic acceptance and circulation of evidence obtained by the European Public Prosecutor's Office in another EU Member State if the fairness criteria was met and are only for criminal proceedings of the European Public Prosecutor. (Proposal COM(2013) 534 final, 2013, Art. 30(1))[32] However, this approach received nu-

[29] However, there is a proposal from the European Law Institute on a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings, 2023 (https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Proposal_for_a_Directive_on_Mutual_Admissibility_of_Evidence_and_Electronic_Evidence_in_Criminal_Proceedings_in_the_EU.pdf).

[30] "Member States, without prejudice to national rules and systems concerning the admissibility of evidence, ensure that, in the context of criminal proceedings, the rights of the defense and the fairness of the proceedings are respected when evaluating statements made by suspects or accused persons or evidence obtained in violation of their right to a lawyer or in cases where derogation from that right was permitted in accordance with Art. 3(6)."

[31] It seems that first steps in view of EU admissibility rules stem from CJEU judgments- see case C-746/18, *H.K.*, *supra,* where the court emphasizes the importance of adversarial proceedings in challenging evidence. Further, it also required in principle a court authorisation for traffic data.

[32] "Evidence presented by the European Public Prosecutor's Office to the trial court, where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence as enshrined in Art. 47 and Art. 48 of the Charter of Fundamental Rights of the European Union, shall be admitted in the trial without any validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence."

merous criticisms and was not adopted in the final version of Regulation (EU) 2017/1939.[33]

4.1. Nature of the authority that orders investigative measures

The issue of asymmetry between ordering authorities is one of the fundamental questions in the implementation of mutual legal assistance and mutual recognition, and the question arises in view of requesting authorities that are not judicial authorities. Instruments at the level of the Council of Europe and the EU left the determination of the »judicial authority« to the discretion of each state.[34] However, newer EU mutual recognition instruments are moving towards introducing a special validation procedure by a prosecutor or court in the ordering state in case of non-judicial authorities, while also problematizing the asymmetry between Member States regarding the role of the prosecutors. Judicial review of certain criminal law measures is the result of an important recognition of the potential danger of abuses by law enforcement. As a result, in a vast majority of democratic states measures such as house searches or other intrusions into privacy require in principle a judicial authorisation. In the era of modern technology, the internet, and consequently new modern technological possibilities available to law enforcement agencies, the demand for judicial authorisation is becoming increasingly important and even essential for the effective protection of reasonably expected privacy.

But judicial control should not be merely a formality, but a substantive critical evaluation within a reasonable time frame. As already mentioned, there has been a question of different attitudes towards judicial review. Thus, the definition of »judicial authority« was left to issuing Member States, some of which consider ministries and police to be judicial authorities, as shown in relation to the European Arrest Warrant.[35] Certain harmonisation has recent-

[33] The proposed standard of »fairness of proceedings« might have been too low compared to ECtHR case-law regarding evidence obtained through torture, inhuman or degrading treatment (Art. 3 ECHR), for example, ECtHR, *Gäfgen v. Germany*, *Othman (Abu Qatada) v. United Kingdom*, and *El Haski v. Belgium*. Regarding admissibility of evidence and EPPO, the European Parliament proposed in its report a different approach, namely a clause referring to Art. 6 TEU (similar to Directive 2014/41/EU). See European Parliament, Interim Report of 24 February 2014 on the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, P7_*TA(2014)0234.*

[34] *For example, Art. 24 of the CoE 1959 MLA Convention or Art. 6 of Framework Decision 2002/584/JHA on the European Arrest Warrant.*

[35] *For example, CJEU, case C-452/16 PPU, Poltorak, judgment of 10 November 2016; CJEU, case*

ly emerged from CJEU as regards data retention as mentioned before. The problem of granting judicial powers to the police in certain Member States was first addressed in Framework Decision 2008/978/JHA on the European Evidence Warrant, (2008) by establishing a specific refusal ground (see Art. 11(4) and (5) in conjunction with Art. 13 of Framework Decision 2008/978/JHA). This was more comprehensively addressed and resolved in the aforementioned EIO Directive by introducing a validation procedure in the issuing state. (2014, Art. 2(c)(ii))[36] In addition, the mentioned Directive introduced also the possibility of judicial approval in the executing state to prevent asymmetrical situations as regards prosecutors. (Art. 2, pt. d)[37] The aim was to prevent, for example, a state prosecutor from the issuing state, where a search warrant can be issued by him or her, from directly addressing a request to the police in the executing state, where a court order is required. Therefore, the aim was to prevent a conflict between mutual recognition on the one hand and national (constitutional) standards on the other hand in terms of protecting higher national (constitutional) standards. This issue is also mirrored in relation to the admissibility of evidence obtained in another state, although the EIO Directive does not address the admissibility of evidence issue. However, the e-evidence system disregards this solution and provides for a possibility of prosecutors requesting data on a territory of a Members State where a court order is necessary for such data. An automatic acceptance of requests submitted by a non-judicial body, without a prior judicial order in the issuing country, could be problematic if the national constitution requires court approval. This is because court approval can be a fundamental part of a national constitutional arrangement in

C-453/16, Özcelik, *judgment of 10 November 2016; CJEU, case C-477/16 PPU, Kovalkovas, judgment of 10 November 2016.*

[36] "Issuing authority' means: (i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or (ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Art. 6(1), by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO."

[37] "'executing authority' means an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law."

criminal proceedings, based on past experiences and recognition of possible abuses.

4.2. Fundamental rights of the accused in criminal proceedings and a 4-step theory to assess admissibility of cross-border evidence

Based on a similar approach of the Slovenian Supreme Court[38] and the Constitutional Court[39] the author of this article proposes that admissibility of evidence obtained abroad should be assessed at four levels of cascading verification: - respect for the rules in the country of acquisition; - minimum ECHR rules ;[40] - minimum EU rules (EU Charter of Fundamental Rights and directives on the rights of the suspect or accused);[41] - possible higher national con-

[38] For example, Slovenian Supreme Court, No. Kp 16/2007, 30 May 2008.

[39] Cross-border evidence is admissible in Slovenia if it has been obtained in accordance with foreign procedural law and if it has not been obtained in violation of constitutionally guaranteed human rights and fundamental freedoms. The Constitutional Court held that when an individual claims that evidence obtained abroad is unconstitutional and should therefore be excluded from the case, the court must first clearly define the upper premise of the evaluation of the alleged accusations. Only when this legal basis is established, can the court assess the admissibility and usability of evidence obtained abroad and make a further assessment of whether the ruling may rely on such evidence. This means comparing the foreign legal system from the perspective of the ECHR as well as the Slovenian Constitution. However, it seems that in later case-law the court is limiting the assessment only to certain procedural safeguards of the Slovenian Constitution, not necessarily including the right to privacy. See Slovenian Constitutional Court, No. Up-519/12, 18 September 2014; Slovenian Constitutional Court, No. Up-995/15, 12 July 2018 and Slovenian Constitutional Court, No. Up-899/16, Up-900/16 and Up-901/16, 5 May 2022.

[40] Evidence that violates Art. 3 ECHR shall be prohibited and there shall be a strong presumption of inadmissibility of evidence obtained by violating essential elements of Art. 6 and Art. 8 ECHR. For example, in the ECtHR cases of Heino v. Finland (no. 56720/09) and Harju v. Finland (no. 56716/09) regarding safeguards for house searches. This should also apply to the collection of criminal data by intelligence services without appropriate safeguards, especially if there is ECtHR case law against the relevant state (for example, Ekimdzhiev v. Bulgaria, no. 62540/00, judgment of 28 June 2007, on the legislation for implementing special measures), denial of the right to a lawyer during police interrogations (for example, Salduz v. Turkey [GC], no. 36391/02, judgment of 27 November 2008, on the right to a lawyer during police interrogations, which also triggered legislative changes in EU countries, or Panovits v. Cyprus, no. 4268/04, judgment of 11 December 2008, on the need to be informed about the right to a lawyer in certain circumstances), and violations of the right to remain silent (for example, Heaney and McGuinness v. Ireland or Saunders v. United Kingdom). The criminal procedure is an organic entity, and allowing evidence that does not meet even the minimum standard of the ECHR contaminates the entire chain of evidence (especially if the remaining evidence directly relies on such evidence, but also more broadly - it is not clear, for example, whether someone testifies because the inadmissible evidence is already in the file, or independently of it). In that regard also the exclusionary rule should be respected (including the fruit of the poisonous tree doctrine).

[41] If this is not met, then there should be at least a strong presumption that such evidence is not admissible. See, for example, directives from the so-called Roadmap on the fundamental rights of the accused in criminal proceedings. These acts establish a »federal minimum« within the EU in relation to the catalogue of rights from the EU Charter of Fundamental Rights. It is interesting to compare this with the United States, where achieving the federal minimum from the Bill of Rights does not prevent stricter procedural rules in the states. This means that evidence that does not meet the federal minimum is always inadmissible. The admissibility of evidence that meets the federal minimum in one state but not in another with stricter rules depends on its assessment, and is therefore not auto-

stitutional standards. However, the last criterion is the most problematic and requires more caution as it is not possible to impose the national procedural safeguards and standards automatically on other countries.[42] For example, the requirement for the presence of two witnesses during an investigative act does not mean that only evidence from countries that also require the presence of two witnesses is admissible, but the essence is that the other system also prevents arbitrariness. The assessment of proportionality through a limitation to catalogue criminal offences should be understood in a similar way. It is not necessary for the same acts to be listed in both countries if both take proportionality into account when ordering such measures. At the same time, it is necessary to distinguish between the constitutional core and the statutory extension of a particular interpretation of a right.

5. Conclusions

The EU e-evidence system was proposed and adopted based on a new ideology of cross-border orders disregarding the classical limits in view of national sovereignty. To a certain extent, this is understandable in view of cases where it is not clear where data is. However, pretending in clear-cut cases that the data is "domestic" stretches established legal concepts and safeguards in cross-border cooperation immensely. As one of the authors correctly put it, we would need a new international "Lotus"[43] case providing clear international guidance on cross-border encroachments of another's sovereignty. This is even more so in an age where e-evidence is becoming the main evidence, and all our lives are stored or can be traced electronically. Consequently, it seems that the executive branches, legislators, and many judges are underestimating the seriousness of this new approach. It also shows a certain decline in general political and legal sensitivity

matic. See Ouwerkerk,, 2011, pp. 206-210. Similarly, within the EU, national constitutions can provide for higher standards than those at the common level, and the question of the primacy of EU law over national constitutions has never been fully resolved, see the "Solange doctrine", taking into account Art. 4 TEU (respect for national identity).

[42] See also the on-going project of the European Law Institute on Fundamental Constitutional Principles to identify and articulate the fundamental constitutional principles which form the foundations of European constitutionalism.

[43] De Hert, ft. 3. The Lotus refers to a landmark case in front of Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice (ICJ), decided in 1927. The case arose from a collision between two ships in the high seas. It established the principle that a state may act as it wishes so long as it does not contravene an explicit prohibition.

to privacy and data protection in the technological age. Direct orders are problematic also inside the EU as a kind of "race to the bottom", with the lowest common denominators prevailing, and considering rule of law problems in several EU Member States. At least for EU Member States it might have been easier to use a more evolutionary approach amending the European Investigation Order, adding a new chapter on e-evidence.[44] They are even more problematic from an international perspective, whereby the EU is conducting negotiations with third states despite significant differences in data protection rules, understanding of privacy, the problems with death penalty, etc. Time will tell if the critical reservations towards a new system were justified However, if they were, it will be very difficult to »put the genie back into the bottle« as shown in similar cases in the past, e.g., data retention.

Keywords: e-evidence, electronic evidence, data retention, mutual recognition in criminal law, admissibility of evidence, EU criminal law

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[44] *Whereby Ireland is* not participating in the EIO but is participating in e-evidence.

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Construction Contract

Marko Brus

ABSTRACT

The article describes the construction contract in Slovenian law (Articles 649 – 665 Obligations Code). A construction contract is a version of a contract to produce a work whose rules also apply to the construction contract. The provisions, valid only for a construction contract, refer to definition of a construction contract, the unforeseen works and change in prices if the basis for the calculation of prices has changed. Both the definition of a construction contract and details on change in prices are deemed unclear and ambiguous. Rules on material defects, warranty periods, the customer's duties to examine and notify material defects but also customer's rights in a case of a material defect described in detail. The customer's rights are deemed imbalanced to the detriment of the customer.

Keywords: Slovenian law – construction contract – contract to produce a work – unforeseen works – change in prices of elements on which the price was based – material defects – apparent and concealed material defects – warranty period – examination and notification of material defects - customer's rights in the case of defects – remedy of the defect – abatement of price – rescission of a contract – claim for damages

Gradbena pogodba

POVZETEK

Članek opisuje gradbeno pogodbo po slovenskem pravu (649. do 665. Člen Obligacijskega zakonika). Gradbena pogodba je varianta podjemne pogodbe, katere pravila se uporabljajo tudi za

gradbeno pogodbo. Določbe, veljavne le za gradbeno pogodbo, se nanašajo na opredelitev gradbene pogodbe, nepredvidena dela in spremembo cen, če se je spremenil temelj za kalkulacijo cen. Tako definicija gradbene pogodbe kot tudi podrobnosti o spremembi cen so nejasni in dvoumni. Pravila o stvarnih napakah, jamčevalnih rokih, naročnikovih dolžnosti pregleda in notifikacije stvarnih napak, vendar tudi naročnikove pravice v primeru stvarne napake so opisane podrobno. Naročnikove pravice v primerjavi s podjemnikovimi pravicami so urejene neuravnoteženo v naročnikovo škodo.

Ključne besede: slovensko pravo – gradbena pogodba – podjemna pogodba – nepredvidena dela – sprememba cene elementov, na katerih temelji cena – stvarne napake – očitna in skrita stvarna napaka – jamčevalni rok – pregled in notifikacija stvarnih napak – naročnikove pravice v primeru napak – odprava napake – znižanje cene – odstop od pogodbe – zahtevek za povrnitev škode

The purpose of this article is to describe the main features of the construction contract in Slovenian law. The provisions on construction contract and the related contract to produce a work are basically unaltered since 1978. On the one hand, literature on the construction contract is scarce. On the other hand, the number of court decisions is sizeable, which shows the great significance of the construction contract.

A construction contract is defined as a contract to produce a work whereby the contractor undertakes to construct, according to a specified plan and within an agreed time limit, a specific construction on a specific piece of land or to carry out other construction work on such land or on an existing building. The contractor undertakes to pay him a specified price (Article 649(1) Obligations Code).

A construction is deemed a construction work only if it requires major and complex works. Examples of constructions are buildings, dams, bridges, tunnels, waterworks, sewers, roads, railways, and wells (Article 650(1) Obligations Code). Other construction works are works on land.

The construction contract itself is a contract to produce a work. The rules on contract to produce a work therefore also apply to the construction contract. Article 660 specifically, but unnecessar-

ily, provides for this regarding the rules on liability for material defects under a contract to produce a work.

The basic law on contracts is the Obligations Code. The construction contract is regulated in Chapter 12 of the Special Part of the Obligations Code, Articles 649 to 665.

The contract to produce a work is regulated in Chapter 11 of the Special Part of the Obligations Code. Its regulation is relatively comprehensive. It covers all possible aspects that could arise in connection with this type of contract. The chapter on the construction contract, however, is structured differently. It deals only with all the ways in which a construction contract differs from a contract to produce a work.

For the sake of simplicity, it can be said that the focus of the regulation of the construction contract is on its definition, the rules on change in prices and the rules on liability for defects.

All references to articles in the following will therefore refer to the Obligations Code. As all references to articles refer to the Obligations Code, the specific references to it will be omitted, as they are not necessary for understanding of this article.

1. Characteristics of the construction contract

The contractor undertakes in the Construction Contract »to carry out ... the construction works«. He owes performance, i.e., success. The risk of failure is normally borne by the contractor. This is settled case-law e.g., CA VSL I Cpg 1444/2010, CA VSL I Cp 761/2009. There is no difference in principle in this respect compared to a contract to produce a work.

The contractor shall not be bound to use any particular means or method to achieve success, unless otherwise agreed. The choice of means and method is his unless he has bound himself by the contract to use a particular means or methods. This affects both the performance of the works and the claim for remedy of defects.

It is typical of a construction contract that the contractor will have to carry out several different works. The Obligations Code mentions this in several places. Article 650, in defining structures, provides that a construction must require major and complex works. In regulating the price, the Obligations Code (Articles 654

and 659) assumes that the contractor will carry out the »agreed works«, i.e., not just one work, and specifies certain ways of agreeing on the price. The construction contract is therefore a complex contract in its content.

The contractor must build »according to the plan«. It is not the contractor's duty to provide a plan; it is the obligation of the customer. The Obligations Code does not otherwise provide for anything with respect to a plan. It can therefore be notified orally or in writing, and it can be very general or precise.

The contractor undertakes to build »within a time limit«. The works are carried out over a period of time, in exceptional cases years or even longer. The conclusion of a construction contract establishes a continuing obligation which is limited by a time limit. While this conclusion may be drawn directly from the definition of the construction contract itself, no further norms of the Obligations code have been provided for this specific situation. So, for example, if a party decides to rescind a construction contract, the contract becomes invalid ex tunc which is highly impractical, and not ex nunc.

There are two real difficulties in applying the rules on construction contracts. The first is how to distinguish a construction contract from a contract to produce a work? The second is how to interpret the requirement for a construction contract to be in writing.

A construction contract is merely a type of contract to produce a work. The definition of a construction contract already says so. After all, any construction work is - a work. The similarity between both types of contracts is apparent.

For a construction contract, the contractor must carry out the construction work. If the construction work is »construction«, such construction work must be »major and complex«. This is where a contract to produce a work differs from a construction contract.

However, such a criterion of distinction is unclear. The delimitation between a contract to produce a work and a construction contract is therefore often only uncertain and inconclusive. In only one case to date has the Supreme Court of the Republic of Slovenia attempted to distinguish a contract to produce a work from a construction contract in a general and abstract way. A construction contract is characterised by larger and more complex

works requiring a greater number of contractors, preparations, a building permit, a project (SC VSRS III Ips 11/93). However, even this attempt at delimitation does not lead to a conclusive delimitation of the two types of contracts.

However, there are several court decisions on the question of whether a contract to produce a work or a construction contract should have been concluded.

For example, if the contractor owes to renovate the roof (CA VSL I Cpg 13/2013) or reconstruct the building and carry out maintenance work, e. g. on mechanical installations (CA VSL I Cp 3442/2010), the contract is not a construction contract. However, it is still not a construction contract if the contractor is obliged to install equipment in an existing building (CA VS VSL I Cpg 796/2012), to build a porch (CA VSM I Cp 1170/2009), to transport and install asphalt (CA VSL I Cpg 733/2011), to lay out an access road and yard (CA VSL II Cp 2526/2009), to lay an in-ground water pipeline (CA VSK Cpg 165/2012), and to asphalt the yard (CA VSL II Cp 105/2012). In some of these decisions, the court's decision is relatively understandable. Both the transport and installation of asphalt and the asphalting of the yard are not particularly complex works. However, in some of the other decisions cited here, it is not so clear why a contract to produce a work rather than construction contract was concluded.

Performing a construction work can be challenging because it might be interdependent with the other works and there may be many of them. These works need to be coordinated with each other. Even though individual works may be simple in themselves, their coordination can be challenging both technically and in terms of time. Installing screed is not particularly difficult, but before that, for example, electrical wiring, plumbing and central heating must be laid. In such cases, the question naturally arises as to whether the contract is a construction contract or a contract to produce a work.

The courts generally rule that it is not a construction contract, but they have not gone into the question if the complexity of the works does not qualify a contract as a construction contract either. In one case, the court held that there was no construction contract even when a series of construction works had to be carried out: laying boards on the existing roof, replacing the roofing, building up the porch, insulating the slab with screed, install-

ing windows, extending the roof over the porch, building an air bridge over the entire roof, replacing gutters, wind and chimney trimmings and building a carport (CA VSM I Cpg 345/2012; similarly in CA VSL II Cp 195/2012).

Article 649(2) expressly provides that a construction contract must be in writing. This is a second fundamental problem with the definition of a construction contract. However, the legal consequences are not specified. It could be inferred from the wording that a construction contract not concluded in writing is null and void. However, there are already court decisions which have ruled that such a contract is valid (SC VSRS, III Ips 15/2015, CA VSL I Cp 481/2014). The justifications of what is actually a quite important interpretation of one of the features of a construction contract is extremely short. The Supreme Court believes that the written form is provided "for the sake of protection of interest of parties and for ease of evidence". No further justifications were provided. In CA VSL I Cp 481/2014 the court stated that the written form is not a prerequisite for validity and that its purpose is solely to keep the evidence of conclusion of the contract and its provisions. Again, no further, more elaborate justification has been provided.

2. The customer's instructions and the unforeseen works

The customer may give instructions to the contractor (Article 622). While Article 622 uses the term »instructions«, Article 664(1) uses the term »request of the customer«. There is no substantive difference between the two terms. The right to give instructions does not entitle the customer to modify the construction contract unilaterally. He may, by means of its instructions, merely give more precise information on how the contractor must carry out the works unless otherwise provided for by a construction contract itself.

The type and quantity of work due is determined by the contract. However, it is common in construction to add some works that should be carried out by the contractor or omit the others. In addition, there are almost inevitable deviations from the quantity of work carried out from the plan which is submitted by the customer.

The reasons for this are manifold. During construction, it often becomes apparent that a work needs to be carried out which was not foreseen in the construction contract. This may be because a particular type of work was inadvertently omitted when the construction contract was drawn up. Such work is necessary but has been overlooked.

It is also possible that, during construction, additional work may have become necessary due to unforeseen circumstances. For example, when excavating a construction pit, the walls of the pit start to slide unexpectedly. As the plan did not foresee this, the construction contract did not provide for any work that should be done to consolidate the pit, nor the price for such a work. Therefore, since the circumstances are different from those envisaged in the construction contract, the walls of the construction pit must be consolidated. This is then additional work.

It may also be necessary to increase the quantity of the work which is stipulated in the contract. For example, in the case of construction, it may be necessary to build a substantially more massive foundation due to the nature of the land. For example, the use of concrete and concrete reinforcement will be greater.

The scope of the work due may also be altered by subsequent orders from the customer to carry out work that was not stipulated in the construction contract itself nor were such works overseen or necessary.

All additional works have a common characteristic: they were not stipulated in the contract. They have not been foreseen in it.

There are several issues to be addressed in relation to unforeseen works. Firstly, it must be settled whether the customer's consent is required. Then it must be settled whether the contractor is entitled to additional payment. If he is entitled to additional payment, the price for such work should also be determined.

For any unforeseen work, the contractor shall have the written consent of the customer. If he carries out the work without written consent, he cannot claim an increase in the agreed price (Art. 652). However, the law does not specify what price the contractor may ask the customer to pay. Obviously, he can ask for an agreed price if it was provided in the contract. However, this is unlikely. If the price was not agreed in advance, the provisions on the contract to produce a work are applicable (Art. 649(1) since there are no specific rules on this in the chapter of the Obligations Code

on the construction contract and a construction contract is only a version of a contract to produce a work. The contractor may therefore demand a reasonable remuneration (Article 642(1) and (2)).

However, there is an important exception to the rule in Article 652. The contractor does not need consent for unforeseen works if they are urgent. Urgent works are the works caused by an extraordinary and unexpected event. Such events are, for example, the unexpected difficult nature of the land and the unexpected occurrence of water. However, the contractor may carry out such works only if they are necessary to ensure the stability of the structure or to avoid damage. Finally, the circumstances must be such that the contractor has not been able to secure the customer's consent (Article 653(1) and (2)). However, the contractor must immediately inform the customer of the unexpected event and of the work carried out (Article 653(3)).

Urgent and unforeseen work must, of course, be remunerated. The contractor may claim fair payment (Article 653(4)). The price for it cannot be fixed by the contract in advance. Obviously, the price will have to be determined according to the circumstances of the case. The determination of the fair remuneration will certainly be influenced by the normal remuneration for the type of work (Article 642(2)). This is in line with the regime in the contract to produce a work.

The whole set of rules for urgent and unforeseen work is in fact just a special case of agency of necessity (Article 199 et seq.). Its rules supplement the provisions of Article 654 if necessary.

3. Price of works

3.1. Method of fixing the price of the works

There are two basic ways of fixing the price, which are merely defined in Article 654. The parties may freely choose between these two methods, combine them, or choose any other method they may consider appropriate to them.

The price of the works may be determined for a unit of measurement for the agreed works. Such a price is also called a unit price. This means that a list of the agreed works is made and for

each of the works the price and the estimated quantity are fixed. When the works have been completed, the completed works shall be examined. The purpose of this examination is to determine the quantity of work carried out. Only the quantity of work completed shall be paid for. This is the consensus view in the literature (Koršič Potočnik, Furlan and Sodja, 2019, p. 151; Plavšak, 2004, p. 996; Plavšak and Furlan, 2020, p. 821).

The price of the work may also be fixed as a total amount for the entire structure, i. e. as a lump sum. The quantities provided for the contractually stipulated works are not relevant. There is only one price for all of them, and this price is a lump sum. It is therefore not possible to determine how much each work costs. Even if the price for specific works is defined, it is irrelevant.

Neither of the two basic pricing methods refers to unforeseen works. These must therefore be paid for separately.

A variant of the price fixed as a total amount for the entire structure is a "turnkey clause" (Plavšak and Furlan, 2020, p. 823). The definition of a turnkey construction contract is important for the understanding of the turnkey clause. A construction contract with a 'turnkey' clause is one in which the contractor undertakes to carry out all the works necessary for the construction and use of the building.

In the case of a turnkey price clause, the price shall include the value of all unforeseen works but also the excess quantity of the works. The impact of missing works on the price set in a contract is excluded (Article 659(2); SC VSRS III Ips 135/2015). Thus, the contractor cannot request an increase in the price if he must carry out unforeseen works, even if they are necessary. Nor can the contractor claim payment for all those works which exceed the foreseen quantity; conversely, the customer cannot claim a reduction in the price if any work does not need to be carried out (SC VSRS III Ips 52/2010). The contractor is, however, entitled to payment for subsequently ordered works, as they exceed the obligations of the contractor assumed by the contract itself (CA VSL I Cpg 784/94).

In two separate cases courts of appeal have interpreted the clause in the contract that the price is fixed as a clause having the same meaning as a turnkey price clause (CA VSM I Cp 230/2023 and CA VSL II Cp 1672/2012).

3.2. Change in prices

The contractor may request an increase in the price for the works if, between the conclusion of the contract and its performance, the prices of the elements on which it was based have increased. However, he may request an increase in the price only if that price should have been increased by more than two per cent. If the contractor can request a price increase, he can only request a price difference exceeding two per cent (Article 655(1) and (3)). The provision itself is not clearly worded. It is already unclear what is meant by »price per element«. Does it refer to the price of a certain work that must be performed as a part of the construction contract? Or does it refer to the calculation basis for a single work, provided that not only a single work has to be performed? In this case a price per element would refer to the calculation basis, e. g. for material, machines or workforce which are necessary to perform a work. Not a single decision of any court addressed this question until now.

But that is not all. On the one hand, Art. 655(1) and (3) speaks of an increase in the price of elements as a cause, and on the other hand of an increase in the price of works as a consequence. It seems that it wants to stipulate that the price can only be increased if the increase in the prices of the elements would be such that the final price for all the works combined would be higher. There is also a different view, but it refers only to the price of the works for a unit of measurement of agreed works. This view holds that the price may already be increased if the price of at least one element is increased by 2% (Juhart in Juhart et al., 2022, p. 107). However, it is not even clear whether such a view refers to a price increase (exceeding 2%) for an individual element or to a price increase for a unit of measurement based on that.

Indeed, all the provisions on price increases and decreases link the change in prices to the change in the prices of the elements on the basis of which it was fixed. This means that a change in prices cannot be requested if there is only a change in the general level of prices. A price increase cannot be requested because of inflation, e. g. in consumer prices, but specifically because of an increase in the prices of what is used in the execution of the specific works. Price increases are, of course, easier to calculate for unit prices. The unit price is the element which

is one of the basis for the total price of the works. It is difficult to implement the provision on a price increase when a price is set as a total amount for the entire structure as the unit prices are not known.

The situation is even more complex if the contractor is in default. He can ask for a price increase, but only if the prices for the items have increased by the time the work should have been completed under the contract. He can only request an increase exceeding 5%, but he cannot request an increase in the prices of the elements if the prices have increased after he has been in delay (Article 655(2) to (4)). It is logical that he cannot request an increase in the price which occurs during the delay. If he had not been in default, there would have been no price increase during the default either.

However, no specific reason can be found for threshold of 5 % instead of 2 % for a change in prices for a contractor during a period when he was not yet in default compared to a contractor who was not in default at all.

The parties may agree that prices will be fixed. However, such an agreement leads only to the contractor being able to claim a price increase if prices rise by more than 10 %. In such a case, he may claim, in addition to the agreed price itself, the difference exceeding the 10 % increase (Article 656). The problems of interpretation are like those of Art. 655(1) and (3). Similarly, not a single decision of any court addressed the interpretation issues until now.

Only the provisions on price increases are of practical relevance. Similar arrangements apply in the case of price reductions for elements. The thresholds are also the same, at 2% and 10%.

4. The contractor's duties

The contractor has a duty to warn the customer about any defects and to any circumstances which may be relevant to the work ordered or to the timely performance of the work (Article 625(3). The contractor has also a duty to warn the customer about defects in materials, if they were provided by the customer (CA VSL I Cpg 539/2019, CA VSL II Cp 2207/2011) and about unsuitability of the material (Plavšak, 2004, p. 775).

Even if the architect warns about a defect, the contractor re-

mains liable if it did not warn about the same defect himself (CA VSL I Cpg 424/2018).

The liability of the contractor is limited by the provision of Article 625(3). The contractor has a duty to warn only if he knew or should have known of the defect or circumstances. Such a limitation is reasonable and necessary. The main duty of the contractor is to carry out the work, not to carry out a detailed examination. He is not qualified to do that. He must warn about a deficiency in the instructions in the plans or in the customer's subsequent declaration of will, if it was obvious to the contractor (Plavšak, 2004, p. 1047) regarding project documentation (with further references).

The contractor must allow the customer to supervise the works and the materials used at all times (Article 651).

5. Definition of the material defect and warranty periods

The work must be performed in such a way as to comply with the agreement and must be in accordance with the rules of the craft (Art. 626(1)). The agreement and the rules of the craft therefore also determine the qualities owed.

The rules of the craft should be rules which are recognised by science as theoretically correct and which, on the basis of practical experience, are also recognised as correct in the professional circle of people of same profession (Plavšak, 2004, pp. 791-792; Ratnik, 2001, p. II). Rules of the craft mean that the contractor must act in accordance with the rules that are considered to be correct at the time of the performance of the work in the performance of the same type of work. E.g., a carpenter must act in accordance with the rules of the craft of carpenters. The rules are not static; they do change in the course of time.

A defect exists if the work carried out does not have the characteristics due. This includes not only the characteristics that the work must have when it is used, but also its general safety and safety in case of emergencies.

There is a general warranty period for material defects. This is 2 years (Art. 634(2)). Liability for the stability of the construction is specifically regulated by law. The construction must be built in a way that is stable. The warranty period is 10 years (Article 662(1)).

Stability means that something is free from defects because it has the desired quality. Court decisions understand the concept quite broadly. They include all those defects in all works which should have performed their function within the 10-year period without the defects caused by the normal use of the construction having begun to show. So, for example, in a decision of court of appeal VSL I Cpg 55/2020. Such a definition seems reasonable. However, it is too vague to allow a reliable distinction to be made between defects in the stability of construction and other defects. Other material defects are those that do not relate to the stability of the construction, i. e. the material defects for which the warranty period is two years.

The case law on what constitutes defects affecting the stability of a construction is not very diverse. As a rule, leaking and seeping of water is considered a defect in the stability of the construction (all the judgements have been taken by the courts of appeal: VSL I Cpg 316/2016, VSL I Cpg 83/2014, VSL I Cpg 3192/2015, VSL I Cpg 26/2020, VSL I Cpg 923/2017, VSL I Cpg 166/2016, VSL II Cpg 2132/2018. However, in the decision of the court of appeal VSL I Cpg 166/2016, the court held that, given the circumstances of the case, this was not the case. Other types of defects in the stability of construction are rarely addressed in court decisions. For example, in one case the court held that defects affecting the solidity of the construction are cracks in the ceiling, in particular in the ceiling above the living room, which affect the static stability of the building (CA VSK Cp 503/2013).

The Obligations Code also specifically mentions »defects in the land" (Art. 662(1) and (2)). The warranty period for these defects is 10 years. The wording of the provision on liability for defects in the land does not refer to defects which appear in the construction and are caused by defects in the land. The provision expressly refers to defects in the land. No intelligible explanation can be found for holding the contractor liable for something which is not even his contractual duty, namely, to provide land.

However, Furlan (2018, p. 36) believes that Article 662(1) and (2) govern liability for defects in the construction caused by defects in the land even though Furlan makes observation that its text refers only to defects in land. Even such interpretation does not make much sense. Since the land must be provided by the customer, it is the customer who must bear all the consequences

of the unsuitability of the land for construction, and certainly not the contractor.

The Obligations Code provides reduction or of full exemption from liability if an expert opinion assessed that the land was suitable for construction and no events during the construction triggered any doubt over the justification of the expert opinion (Article 662(1). However, this might attenuate the situation of the constructor but does not justify the liability.

6. Apparent and concealed defect

The distinction between apparent and concealed defects is crucial. They are subject to different rules for the exercise of the customer's rights.

A defect is apparent if it could have been spotted by a diligent person with average knowledge and average experience during a normal examination. If the contractor changes the location of the car park and the number of parking spaces and resurfaces the old car park instead of building a new one, it is an apparent defect (CA VSL I Cpg 894/2014). It is also an apparent defect if there are minor unevennesses in the base slab (CA VSM I Cp 421/2011) or if the floor slab is located 10 cm away from the position provided by the contract (CA VSK Cp 824/2008).

All other defects are concealed. A defect may become visible if special circumstances are given. This defect is a concealed defect. For example, rainwater infiltration into the façade only occurs during rainfall (CA VSL I Cp 83/2014).

7. Examination and notification of material defects

7.1 Examination, acceptance, and notification of an apparent defect

The work performed must be examined by the customer as soon as this is possible in the ordinary course of things (Article 633, paragraph 1).

If there is any apparent defect, it may be notified by the customer. This means that the customer must describe the defect and inform the constructor of it. The description of the defect must

be specific (e.g., SC VSRS III Ips 71/2009, CA VSL I Cpg 746/2020). This applies to any defect, even concealed ones. The customer is not obliged to investigate the cause of the defect which is now a settled case law supported by Plavšak (2004, p. 848). A description such as a non-expert can give is sufficient. The customer must notify without delay (Article 633(1)).

If the work carried out is has an apparent defect, a customer may refuse to approve the work carried out and refuse to pay for it (Article 642(1)).

The approval of the work is called acceptance. The customer's acceptance has two consequences. The first is that the customer must make the agreed payment (Article 642(3)). The second consequence is that the contractor is, as a rule, no longer liable for apparent defects (Article 633(3). Exceptions exist based on Articles 636 and 663(3).

While the contractor usually has a considerable amount of time to carry out the work, the customer has little time to examine it. Namely, the customer may not trigger the reproach that he has failed to examine the work in the ordinary course of things (Article 633(1)). This would give rise to a fictitious acceptance which will be discussed later in the article. There is an apparent and, overall, unjustified benefit for the contractor since the customer can only notify apparent defects up to the end of the examination and acceptance. After acceptance, liability for apparent defects ceases.

This imbalance to the detriment of the customer was partially addressed in the now abolished Consumer Protection Act of 1998 (Article 38(2)) in favour of the customer if he was a consumer. However, the new Consumer Protection Act (of 2022) does not provide any specific rules on inspection or acceptance (see Articles 99 to 101) so that the general rules of the Obligations Code are applicable.

After an acceptance, the contractor must pay the agreed price (Article 642(3)). He may, however, reasonably expect that concealed defects will be discovered later as this is frequent the case with any construction simply due to the characteristics of construction works.

Notwithstanding the substantial likelihood that defects will be discovered later, the customer must pay the full price. Although the contractor is obliged to remedy the defects, the customer is nevertheless in a difficult position. The contractor's interest to

remedy the defects will normally be low or non-existent as he cannot expect any additional remuneration for this. The customer has therefore no guarantee that the contractor will fulfil his obligation although there is no doubt that it exists.

In addition, during the entire interim period until the concealed defects are discovered and remedied, there will be a risk that the contractor will become insolvent. If the contractor becomes insolvent or ceases to exist by reason of liquidation, the loss due to the concealed defect shall be borne by the customer.

None of both acts on consumer protection (Consumer Protection Act of 1998 and of 2022) provided any specific norms on payment that would alleviate the position of a customer who is a consumer.

Any avoiding of examination in due time or acceptance by the customer shall lead to a fictitious acceptance (Article 633(2)). Acceptance shall be deemed to have taken place even if it has not actually taken place.

After the notification, the customer has one year from the date of notification to assert his rights in court as a plaintiff (Article 635(1)). After the expiry of one year this right ceases to exist. Afterwards the customer may abate the price or claim damages, but he can use only these two rights and only as a defence. If the customer raises either of the two warranty defences, he bears the burden of proof (VS RS III Ips 14/2009). He must state specifically and with certainty what the defect was, when it was discovered and when it was notified (CA VSL I Cpg 1073/2011 and CA VSL I Cpg 1303/2010). These provisions apply to apparent and concealed defects.

In the two cases which are exceptions to the rule, the customer is not limited by Articles 633 to 635 in exercising his rights. These rules apply to apparent and concealed defects equally. The first of the two cases is that the defect relates to facts which could not have remained unknown to the contractor or were known to him. The second is that he has, by his conduct, deceived the customer into not exercising his rights in time (Article 636).

7.2 Notification of a concealed defect

If a concealed defect becomes apparent within two years of acceptance, the contractor may still exercise the rights which he has

because of the defect (Art. 634(2)). In any event, he must notify the contractor of the concealed defect within one month of the discovery of the defect at the latest (Art. 634(1)).

7.3 Notification of a concealed defect in the stability of the construction and defect in land

As regards defects in the stability of the work, the contractor may give notice of the defect within six months of discovering the defect (Article 663(1)) and if the defectiveness becomes apparent within 10 years of acceptance. There are no specific provisions on the details of notification. The general provisions on contract to produce a work must apply. The same rules apply to defects in land.

8. The customer's rights in a case of material defect before the expiry of the period agreed for the performance of the works

As a rule, the contractor may not be held to be in breach of the contract before the time limit for performance has expired.

An exception to the rule described above is in Article 627, namely that the customer may already rescind the contract before the expiry of the time limit during the performance of the work and, after rescission, claim damages. He may do so if the contractor breaches the terms of the contract, "does not work at all as he should" and the work performed is expected to be defective. Rescission of the contract is therefore possible, but only in the case of serious breaches of contract which the contractor cannot remedy by the expiry of the time limit.

The practical significance of this norm has so far been negligible.

9. The customer's request for remedy of defects before the expiry of the time limit for performance of the works

The customer may demand remedy for defects (Articles 639). It may be inferred from these provisions that the customer may

not claim damages in lieu of remedy of the defect. This does not mean that the contractor cannot claim damages at all. He can therefore claim both remedy and damages, but not damages in lieu of remedy.

The contractor may, as a rule, claim remedy of defects after the contractor has invited him to examine and accept the work and if the customer refused to accept the work for a good reason (Article 633(2)). There are two exceptions to this rule.

The customer may immediately rescind the contract if the work performed is either useless or contrary to the express terms of the contract (Art. 638). This is the first exception.

The second exception is governed by Article 637(3). The contractor may refuse the customer's request to remedy the defect if remedying the defect would entail excessive costs. Even if the contractor refuses to remedy the defect, the customer retains the other rights he has under Articles 637(2) and 639(3).

The contractor has a right to require the customer to allow him to remedy the defect (Article 639(1)). If the customer does not allow the contractor to remedy the defect, he is in breach of his duty owed to the contractor. The consequence is that the customer's warranty claims are extinguished (CA VSL I Cpg 335/2010).

The customer requires the defect to be remedied by notifying the contractor that he must remedy the defect. The customer may also seek remedy of the defect in court (CA VSL I Cpg 816/2011).

As a rule, the customer cannot contractually require the contractor to perform the work in a certain way, unless otherwise agreed. If the work performed is defective, the situation for the contractor may not and does not change. He still owes (only) to perform the same work and in the same way as he has owed all along, so that the customer cannot demand that the defects be remedied in a particular way (CA VSL II Cp 1789/2021; Plavšak, 2004, p. 868).

The customer may set a reasonable time limit for the remedy of the defect (Article 637(1) and Article 639(2)), which it must set himself. During this period, the customer may not exercise any rights which he would otherwise have under Article 639(3) or (5). The costs of remedying the defect must be borne by the contractor (CA VSM I Cpg 196/2013).

The contractor may again request examination and acceptance after the defect has allegedly been remedied. The customer is in

the same legal position as if the contractor had offered defect-free work at a prior attempted acceptance. The customer has the duty of examination and notification of any defects (CA VSL I Cpg 436/2012).

10. The customer's rights in the event of failure to remedy defects

In addition to the claim for remedy of the defect, the customer shall have other rights. These rights are described in more detail below. The customer may exercise these rights if the following conditions are met (Article 639(3) and (5)):

(a) the customer has set a time limit for the remedy of the defect,

(b) the time limit has expired,

(c) the work is still defective,

(d) the period of one year from the date of notification has not yet expired.

After the expiry of the time limit for remedy of the defect, the customer may remedy the defect himself, he may abate the price, or he may rescind the contract (CA VSL II Cp 1644/2017).

The purpose of these rights is to compensate the customer for the loss suffered because of the contractor's breach of contract. The purpose of exercising each of these rights is to achieve equivalence of the mutual performances of the two contracting parties.

The rights conferred by Article 639(3) are alternative (CA VSL II Cp 1040/2021). The customer may exercise any of them, but not two or even three at the same time. This is also the case-law: the customer may choose one of them, but not two (CA VSL I Cpg 1240/2010) or even all three at the same time.

If the defect has been notified and remedied, the customer may also claim compensation for the damage caused to him. After the expiry of the time limit without result, he may claim additional damages too. However, the customer may not claim damages for diminished value of the work resulting from the defect. He can only claim any of the three alternative rights of the customer (Article 639(3)) and compensation for other damages caused by the defect.

The rights which the customer may exercise under Article 639(3) and (5) are therefore:

(a) remedy of the defect at the contractor's expense and a claim for damages,

(b) abatement of the price and claim for damages,

(c) rescission of the contract and claim for damages.

After the notification, the customer has one year from the date of notification to assert his rights in court as a plaintiff (Article 635(1)). The one-year time limit is a preclusive period. It starts from the date on which the customer should have known of the defect or from the date on which he knew of it. That is when he had the information about the existence of the defect. It can be inferred from the decision of the Supreme Court VSRS II Ips 241/2016 that this is the position of the Supreme Court of Slovenia. The decisive moment is therefore when the customer could claim rights for defects.

Exceptionally, the one-year time limit does not apply if the contractor (Art. 636 and Art. 663(3)):

(a) knows or ought to have known the facts relating to the defects and has not communicated them to the customer; or

(b) has misled the customer by his conduct into not exercising the rights in time.

There is extensive and settled case law on both exceptions.

The first exception relates to fraudulent concealment and related cases of concealment of the facts (Supreme Court decisions VSRS II Ips 329/99 and VSRS II Ips 162/2010).

The second exception relates to misrepresentation. Misrepresentation includes conduct from which the customer may infer that the contractor intends to remedy the defect voluntarily, as well as a failed attempt to remedy the defect (see decisions of the Supreme Court VSRS II Ips 658/2006, VSRS III Ips 69/92, VSRS II Ips 309/2005 and VSRS II Ips 29/2006). The contractor's failure to respond does not constitute misrepresentation. That was the decision of court of appeal VSL I Cp 2413/2017.

If the contractor starts to remedy the defects, the claim for remedy is subject to a general limitation period of five years (SC VSRS II Ips 7/2011). If a commercial contract has been concluded, a limitation period of three years applies.

The same time limit of one year is laid down in respect of a defect in a solidity of a construction and for a »defect in the land« (Article 663(2)).

10.1 Remedy of the defect at the contractor's expense

The contractor has the right to remedy the defect (Article 639, paragraph 1) until the expiry of the time limit for remedy of defects.

The customer may decide to remedy the defect himself. This option is provided for in the first of the three alternatives set out in Article 639(3). He may claim reimbursement of the costs incurred in doing so from the contractor.

The customer either claims reimbursement of the actual expenditure incurred to remedy the defect or the estimated expenditure to remedy the defect (CA VSL II Cp 1040/2021 and Plavšak, 2004, p. 871).

The exercise of such a right does not lead to the rescission of the contract. The contract does remain valid.

10.2 Abatement of price

It is the customer who may abate the price after an attempt to remedy a defect has failed. This is provided for in Article 639(3); see also the decision of the Supreme Court in a case concerning a contract of sale (SC VSRS II Ips 38/2012). The customer may also exercise this right outside the court proceedings by making a declaration of will.

An abatement of price is possible even after the expiry of the one-year time limit for judicial enforcement by way of an action (Art. 635(1)). It can only be enforced in any court proceedings by way of an objection (Art. 635(2)).

In abating the price, the payment is to be reduced in the ratio of the value that the defect-free work would have had to its actual value at the time the contract was concluded (Article 640).

This method fails if the defective work is not available on the market. For example, what is the value of a building with a leaking roof on the market? There is simply no market for such buildings and therefore no values to compare with. The implementation is impossible. Case law in such cases considers the valuation carried out by an expert. Very informative was the description of the difficulties the court faced when it had to decide on an abatement of price and how it dealt with (CA VSL I Cp 3015/2012): »The expert did not give the market value of the flat, and supported this by stating that it was not possible to estimate it at all,

because no buyer would have bought a flat with such defects. He therefore determined the technical value of the apartment, which he estimated to be at least 60 % lower because of the defects and lack of usability ...".

If the defect is remedied, the customer is no longer entitled to an abatement of price (CA VSC Cpg 195/2012).

The customer must notify the contractor by how much the price is abated (SC VSRS III Ips 6/2010). After the customer has abated the price by a declaration of will, the payment is reduced.

10.3 Rescission of a contract

The customer may also rescind the contract if the defect has not been remedied and is not insignificant (Art. 639(4)). What has been received is to be returned (Art. 111).

In exercising the rights resulting from the rescission from the contract, the customer is not bound by the time limit laid down in Article 635(1) (CA VSL I Cpg 1240/2010).

10.4 The customer's claim for damages for defects under Article 639(5)

The customer has »in any event« a further right to damages (Article 639(5)). The customer can only claim damages in conjunction with any of the rights he has under Article 639(3). Damages cannot therefore be claimed to make good the disadvantage suffered by the customer as a direct result of the defect. The disadvantage is rectified by remedying the defect at the contractor's expense, by reducing the price, etc. A claim for damages may consequently only seek compensation for other disadvantages (CA VSC Cp 460/2011). Only damages that are closely and directly related to the defect and its remedy, such as costs for failed acceptance, costs for technical or legal assistance, etc., are considered.

Of course, claims for damages may also arise on other legal grounds because of the defective performance of construction work. These claims are not subject to the one-year preclusive period (Article 635).

11. Conclusions

A contract whereby a contractor undertakes to carry out construction work is quite different from a contract to produce a work. The legislator's decision to regulate the construction contract as a special type of contract was a reasonable one; the same may be said for the choice of the norms of contract to produce a work as the basis for the construction contract. The same technique is, for instance, applied in the German Civil Code. See insofar Title 9 Subtitle 1 of the Special Part and sections 631 and 650a of the German Civil Code).

Nevertheless, the provisions on the construction contract in Slovenian law leave a lot to be desired. There is no clear delimitation between a contract to produce a work and a construction contract. The provisions on price changes are too ambiguous and unclear. Provisions on the warranty for defects favour the contractor; they are in a complete imbalance with the rights of the customer without proper justification. The decision to set two different warranty periods is difficult to implement. The liability for defects of the land is contrary to the fundamental obligations of the contractor.

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Human Rights Law Challenges in Yemen

Sanja Roković

ABSTRACT

The objective of this article is to identify the human rights violations that have occurred during the 8-year-long war in Yemen. The basis for this analysis is the 2021 Report, which is the latest official report on Yemen given the ongoing turbulent events in the region. The introduction of the article will underscore the significance of the Universal Declaration of Human Rights. The central section will delve into an analysis of human rights violations through case studies. In the conclusion, potential solutions will be proposed to address the crisis in Yemen. The primary research question guiding this study is: Which human rights have been violated in Yemen?

Key words : Yemen, violation of human rights, Universal Declaration of Human Rights.

Izzivi prava človekovih pravic v Jemnu

POVZETEK

Namen tega članka je opredeliti katere človekove pravice so kršene v Jemnu v 8 let trajajoči vojni. Ker je dogajanje v Jemnu zelo turbulentno, bo članek temeljil na poročilu iz leta 2021, ki je zadnje uradno poročilo o Jemnu. V uvodnem delu članka bo opredeljena pomembnost Splošne deklaracije o človekovih pravicah in svoboščinah, osrednjem delu, pa na študijah primera analiza kršitev človekovih pravic. V zaključku bodo predlagane rešitve spopada z jemensko krizo. Raziskovalno vprašanje se torej glasi: Katere človekove pravice so bile kršene v Jemnu?

Ključne besede: Jemen, kršitev človekovih pravic, deklaracija o človekovih pravicah in svoboščinah.

1. Introduction

"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman and child seek equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." *(Branch, 2016, e-source)* Eleanor Roosevelt[1], 1958

And where, after all do the universal human rights end? In same places but like a virus it takes root strongly into the human soul, infects it, which is difficult to get over, to overcome. It is the most dangerous virus for human kind, the virus of hatred, xenophobia, which turns into pure malice towards one's fellow man, one's brother, one's own nation. A virus that destroys human dignity and the basic essence of human existence. It is a virus that can destroy the humanity.

One of the poorest and most violent countries in the Middle East, Yemen, holds strategic importance for regional players and the world's most dangerous terrorist groups. The war began when Saudi Arabia initiated a military intervention against the Houthi rebels.

The territory within Yemen's borders is one of the oldest cradles of civilization in the Middle East. This land was among the most fertile in the Arabian Peninsula when rainfall was more frequent due to the high mountains. However, with the decline of natural resources, including oil, Yemen and its people became impoverished (Burrowes, Wenner, 2023, e-source).

[1] Eleanor Roosevelt was one of the co-founders of the Universal declaration of human rights. Her struggle in this field has moved many milestones in ensuring equality, justice and dignity without discrimination. Therefore, her thoughts, actions and struggle are the main gude for the preservation of the Human Rights Law.

On the other hand the country holds an important strategic position at the top of southwestern Arabia. It is situated along the main sea route that leads from Europe to Asia, close to the busiest shiping line.

Millions of barrels of oil passed through daily in both directions – from the Mediterranean through the Suez Canal and from oil refineries in Saudi Arabia to the Asian market. The Yemeni port of Aden was one of the busiest in the world in the 20th century (Burrowes, Wenner, 2023, e-source).

Yemen, as we know it today, was formed during the process of unification of the northern and southern parts of the country. This unification process took place from May 1988 through the signing of the unification agreement in November 1989. The agreement was signed by Ali Abdullah Saleh, the president of North Yemen, and Ali Salim al Bidh on behalf of South Yemen. The official announcement of unification was made on May 22, 1990 (Yemeni Comunity Association in Sandwell Limited, e-source).

Historically, North Yemen[2], which managed to perserve its sovereignty and never became a possession of the European power, was a Shiite monarchy. (Yemeni Comunity Association in Sandwell Limited, e-source) However, South Yemen[3] was British territory, whose fate was determined for centuries by its exceptional strategic position on the route connecting British India with the metropolis (Yemeni Comunity Association in Sandwell Limited, e-source).

Even after the unification of the country in May 1990 the deep division between former North and South Yemen was not overcome (Burrowes, Wenner, 2023, e-source). The territorial distribution of two Islamic Groups largely corresponds to the former division into the northern and southern parts of the country, in fact it is more about the northwest and southeast (Burrowes, Wenner, 2023, e-source).

Outside Yemen's major cities, there are number of tribal areas that have their own self- government. (Crisis group 2022, e-source) With a large number of civilians owning guns, believed to outnumber citizens, local tribal militias often suppress the national army and enforce their laws based on tradition rather than the state's constitution (Crisis group 2022, e-source).

[2] Sanaa.
[3] Aden.

Yemen is a predominantly Islamic society, but divided into Sunnis, estimated to be 55%, and Shiites, making up the rest of the population (Burrowes, Wenner, 2023, e-source). The divisions between Sunnis and Shiites are based on long-standing religious conflicts that began as a dispute over the succession of the Prophet Muhammad. (Burrowes, Wenner, 2023, e-source) While Shiites belive his cousin was meant to fill the role of Muhammad, Sunnis support Muhammad's close friend and adviser, Abu Bakr,the first caliph of the Islamic nation (Burrowes, Wenner, 2023, e-source).

Likewise, over the past decades, strict and puritanical Salafis and Wahhabis have become increasingly influential in Yemen (Al Maqtari, 2017, e-source). The Houthis represent the Zeidi branch, a branch of Shia Islam from the far north of Yemen, near border with Saudi Arabia. (Wilson Center, 2022, e-source) Their leader, Hussein Badreddin al- Houthi, is accused by the government of organizing the rebellion, including violent anti- Israel and anti American demonstrations in 2004. (Wilson Center, 2022, e-source) The regime conducted a search for him, resulting in the arrest of hundreds of people and the death of the leader, who was killed along with a dozen of his supporters (Wilson Center, 2022, e-source).

Since then, the Houthis have been actively fighting the central government, seeking greater political influence and accusing the government of aligning itself with Saudi Arabia while neglecting national development and the needs of the traditional Zeidi tribe. (Wilson Center, 2022, e-source)

The responsibility for the Yemeni crisis, in addition to the weak mechanisms of UN action, can also be attributed to Saudi Arabia. On March 26, 2015, as the leader of a coalition of nine countries from Western Asia and North Africa, it launched an intervention in the Yemeni civil and military conflict in response to the calls of the President of Yemen, Abdrabbuh Mansur Hadi, for military support after he was deposed by the Houthi movement (Middle East Eye, 2020, e-source).

The civil war began in September 2014, when Houthi forces captured the capital of Sana'a, followed by a quick takeover of the Houthi governement (Ghobari, 2014, e-source). The leaders of Saudi Arabia supported Hadi for several reasons. The main concerns revolved around the rise of the Houthis on the southern border of Saudi Arabia, who, in their opinion, were supported

by Saudi Arabia's main regional rival, Iran (Yaakoubi, Kalin, Barrington, 2019, e-source).

With several forces fighting in the country, including official authorities, Yemen's chaos has become a breeding ground for extremism. Exstemist groups linked to the Islamic State are now operating in Yemen, waging war against the military and civilians, while disregarding the minimum standards of human rights.

2. Methodology

This research work requires the application of various social science research methods as they are essential for obtaining objective answers to the research question posed. The central research question is: Which human rights were violated in Yemen?

The initial step involves acquiring and carefully selecting relevant literature, articles, online sources, reports, legislation, and other materials. Special attention will be given to audio and video sources, as they provide a suitable basis for understanding the current situation in Yemen. Sources will be systematically gathered through scientific databases, the web, the library, and other appropriate channels.

Throughout the article, masculine terms will be used in a neutral sense unless explicitly stated otherwise.

The introductory section of the article will employ the descriptive method. Using this method, which is based on the analysis and interpretation of primary and secondary sources in the field of human rights violations, the study's framework will be established. This framework will be complemented by the explanatory method, as it aims to elucidate specific facts and justify the circumstances surrounding the actions under examination.

Given that the subject of study is the 8-year war in Yemen, the historical method will be incorporated into the research. This will be complemented by case studies, facilitating a more precise analysis and interpretation of the facts, and providing answers to the research question.

The research will involve describing and justifying the circumstances in which specific human rights violations occurred and assessing their consequences on individuals and society.

Following the case study analysis, the research will proceed with intercomparisons, synthesis, and the extraction of key find-

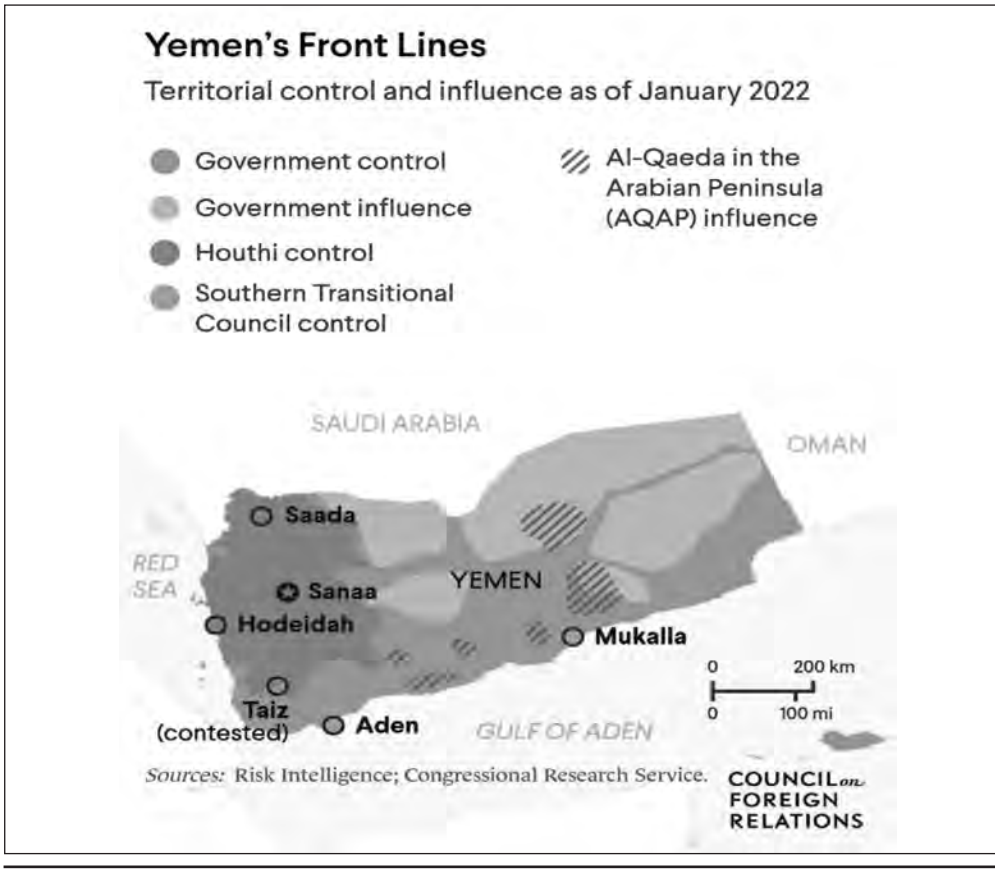
ings. This will be followed by interpretation, concluding with a general assessment of the research and its findings.

Therefore, the article will encompass a meticulous selection of material, the study and filtering of data, the utilization of descriptive, explanatory, historical methods, methods of examples and comparisons, analysis, synthesis, commentary, and methods of providing evaluations and conclusions.

3. Current situation

The eight-year-long crisis in Yemen and the military division of the territory have resulted in an intractable military, political, and humanitarian crisis. The war is between the internationally recognized government of Yemen (the military troops of Yemen's gov-

Figure 1: Current territorial control and influece in Yemen (Robinson, 2022, e-source)



ernment), which is supported by Saudi Arabia, and Yemen's Houthi rebels, who are supported by Iran (Robinson, 2022, e-source).

The military security crisis, often referred to as Yemen's Chaos, has also been exploited by Jihadist Al Qaeda fighters. They joined the fighting, primarily carrying out suicide attacks in Aden and its surrounding areas, and launched a ballistic missile at the Saudi capital, Riyadh. In response, Saudi Arabia further tightened the blockade of Yemen (Ahlin, 2022, e-source).

Figure 1 illustrates the current situation in Yemen. The majority of the territory is under the control of government security forces, which are under the influence of Saudi Arabia (Robinson, 2022, e-source). The Houthis control the eastern parts of the territory, while the South is in transition. Additionally, inside Yemen, there are parts that are under the control of jihadist members of Al Qaeda (Robinson, 2022, e-source).

Yemen is thus divided according to religious beliefs into the Sunni north and the Shiite South, which are in clonflict with each other.

The country has faced numerous emergencies, including:

- Violent conflicts and war
- Economic blockade,
- The crash of its currency,
- Natural disasters (IFRC.ORG, 2022, e- source) (flodds),
- The COVID19 pandemic,
- Only half of the medical facilities are funcioning,
- The war between Russia and Ukraine, which diverted public interest to another continent[4].

Yemen is experiencing the largest humanitarian crisis in history. Twelve million children need food, water, shelter, and medicine. Children are grappling with an epidemic, famine, and war all at the same time (IFRC.ORG, 2022, e- source).

The responsibility for the Yemeni crisis, in addition to the inadequate mechanisms of the UN, can also be attributed to Saudi Arabia. On March 26, 2015, as the leader of a coalition of nine countries from Western Asia and North Africa, it began to intervene in the Yemeni civil war in response to the calls by the President of Yemen, Abdrabbuh Mansur Hadi, for military support after he was ousted by the Houthi movement (Middle East Eye, 2020, e-source).

[4] However, the current public attention is now focused on what is happening between Israel and Gaza.

The civil war began in September 2014 when Houthi forces captured the capital Sanaa, followed by a takeover od the Houthi government (Ghobari, 2014, e-source).

Saudi Arabia's leaders supported Hadi for several reasons. However, the main ones should definitely be looked for becasuse of concerns about the rise of the Houthis on the southern border of Saudi Arabia, who, in their opinion, are supported by Saudi Arabia's main regional rival, Iran (Yaakoubi, Kalin, Barrington, 2019, e-source).

4. Which human rights have been violated

The conflict in Yemen has resulted in widespread human rights violations, affecting the civilian population and leading to a humanitarian crisis. Here are some of the reported human rights violations that have been reported during the eight-year war in Yemen:

• *Right to Life*: The conflict has led to the deaths of thousands of Yemeni civilians, including women and children. The war has also caused massive displacement, with millions of people forced to flee their homes (Human Rights Watch, 2022, e-source).

• *Right to Food and Water*: The conflict has caused a severe humanitarian crisis, with millions of Yemenis facing food and water shortages. (Human Rights Watch, 2022, e-source) The blockade of ports and airports by the Saudi-led coalition has also prevented the delivery of essential humanitarian aid (Human Rights Watch .2022, e-source).

• *Right to Health:* The conflict has damaged Yemen's healthcare system, making it difficult for people to access essential medical care. Many hospitals and clinics have been damaged or destroyed in the fighting, and the Houthi authorities prevented vaccinations against Covid-19 (Amnesty International ,2021, e-source).

• *Right to Education:* The war has disrupted the education system, with many schools and universities being damaged or closed. Millions of children have been unable to attend school, and many have been forced to flee their homes (Amnesty International, 2021, e-source).

• *Right to Freedom of Expression*: The conflict has resulted in the detention and harassment of journalists, activists, and human rights defenders who have spoken out against the war (Amnesty International, 2021, e-source).

• *Right to Freedom of Movement*: The blockade has restricted the movement of people and goods in and out of Yemen, making it difficult for Yemenis to travel or seek refuge in other countries (Human Rights Watch, 2022, e-source).

• *Right of Equality and Non-discrimination*: All sides have practiced gender-based violence and discrimination. The warring parties carried out harassment, arbitrary detentions, forced abductions, torture, and other ill-treatment, as well as unfair trials based on political, religious, or peaceful belief and action, professional affiliation, and gender (Amnesty International, 2021, e-source).

• *Right to Healthy and Sustainable Environment*: Environmental degradation has threatened many protected species. All sides in the Yemeni conflict are responsible for environmental degradation due to mismanagement of canceled programs, neglect of legally protected areas, mismanagement of oil infrastructure, and economic pressure on civilians (Human Rights Watch, e-source).

The multifaceted human rights violations underscore the urgent need for international attention and concerted efforts to address the crisis in Yemen.

More than 4 million people have been displaced by the conflict, and the COVID 19 pandemic has exacerbated the humanitarian crisis (Human Rights Watch, 2022, e-source).

The people of Yemen are enduring unsustainable economic conditions and a lack of basic services throughout the country. In South Yemen, protests have erupted due to deteriorating economic conditions and basic services. (Human Rights Watch, 2022, e-source)

The most significant challenge for the Yemeni people, beyond the war and the supply of food, water, and fuel, is that more than 2 million Yemeni children under the age of 5 are acutely malnourished (International Medical Corps, e-source). Every 10 minutes one child under the age of 5 dies from malnutrition. (Unicef, e-source).

The situation highlights the critical need for urgent and comprehensive humanitarian intervention in Yemen.

The symbolic representation of Figure 2 is poignant and clear. It underscores that in Yemen, the most vulnerable groups are children and women. The image, with Selma holding her six-year-old son, Abdullah Musabih, in her arms, serves as a powerful visual

Figure 2: A mother with her son in the intensive care unit in the Red Sea port of Hodaidah. Photographer: Abduljabbar Zeyad, Reuters (Graham Harrison, 2016, e-source).

testament to the impact of the crisis on families, particularly on mothers and their young children (Graham Harrison, 2016, e-source). It conveys the human side of the conflict, emphasizing the urgent need for humanitarian support and international intervention to address the plight of the vulnerable populations in Yemen.

The impact of the conflict in Yemen on healthcare is severe, with many hospitals having been destroyed due to military attacks. Even those that are still functioning are operating at the edge of their capacity. Official figures of child deaths caused by starvation vary widely, ranging from 85,000 to 400,000 (Bahashwan, 2022, e-source). Additionally, certain reports indicate that as many as 6 million children under the age of 5 are at risk of starvation (IFRC, 2022, e-source). These figures underscore the urgent need for international assistance and humanitarian efforts to address the escalating crisis and provide essential support to the vulnerable population in Yemen.

The impact of the conflict in Yemen has been exacerbated

by blockades on the supply of fuel, food, and water, particularly by Saudi Arabian soldiers. Prior to these blockades, Ukraine and Russia were the main importers of grain for Yemen, supplying up to 40% of their grain. Reports suggest that Russian intervention in Ukraine interrupted this flow, but the overall import of food into Yemen has been blocked for seven years, leading to numerous deaths, especially among children, due to malnutrition. The price of food in Yemen has increased by 60% compared to the previous year, and the warring parties have impeded the flow of food, medicine, fuel, and humanitarian aid. Experts warn that inflation in developed countries can have deadly consequences in poor countries (Bahashwan, 2022, e-source; OCHA, 2022, e-source).

Peter Salsbury, an expert on Yemen at the International Crisis Group, highlighted the triple damage caused by the war between Ukraine and Russia on Yemen. The loss of food supplies from Ukraine and higher prices on international markets, along with increased fuel prices and a shift in international focus to another continent, contribute to the prolonged suffering of the Yemeni people (Salisbury, Hana, 2022, e-source).

In summary, the circumstances surrounding Yemen indicate that the suffering of the people is unlikely to end soon. Human rights violations are rampant, particularly in relation to the right to food and the right to education. Children are suffering from hunger, and the destruction of schools (over 2,900 destroyed) is hindering their education. The war has also resulted in a lack of freedom for the people in Yemen (Al Jazeera, 2022, e-source). The situation in Yemen remains dire, requiring urgent international attention and humanitarian intervention.

The Amnesty International 2021 report highlights that all parties involved in the conflict in Yemen violated international humanitarian and human rights law with impunity. The Saudi-led coalition supporting the internationally recognized Yemeni government and Houthi forces both engaged in attacks that unlawfully killed and wounded civilians, as well as destroyed civilian facilities, including essential infrastructure like food facilities (Amnesty International, 2021, e-source). Additionally, forces of the Southern Transitional Council (SCT[5]) were reported to have

[5] The southern Transitional Council is a separatist orgnazation in southern Yemen. The 26 members of the STC include five governors of Southern provinces and two govenment ministers

carried out summary executions. (Amnesty International, 2021, e-source)

Furthermore, the report notes that Saudi Arabia and Bahrain actively lobbied member states of the UN Human Rights Council (HRC) against the restoration of the United Nations Group of Eminent Experts on Yemen (UN GEE). This lobbying resulted in the termination of the only international impartial investigative mechanism for Yemen, further complicating efforts to hold parties accountable for their actions (Amnesty International, 2021, e-source). The report also highlights the contributions of all parties in the conflict to environmental degradation, the pronouncement of death sentences, and the execution of those sentences. These findings underscore the widespread and systematic nature of human rights abuses and violations of international law in Yemen, emphasizing the urgent need for accountability and a comprehensive resolution to the conflict.

The Amnesty International 2021 report highlights the environmentally damaging coping mechanisms employed by Yemenis, which include a dependence on charcoal, unsustainable fishing, and unsustainable development. These practices have resulted in increased pollution, deforestation, soil erosion, and loss of biodiversity, negatively impacting the enjoyment of the rights to health, food, and water (Amnesty International, 2021, e-source).

The report also details instances of mismanagement of oil infrastructure contributing to environmental degradation. At the Bir Ali oil terminal in Shabwa province, mismanagement led to a pipeline leaking oil into the sea for four days, close to a protected coastal area. Additionally, Houthi authorities refused UN technical assistance for the *FSO Safer tanker*, a vessel, which posed a significant risk and was stranded off the coast of Hodeidah. The tanker carried a cargo of 1.14 million barrels of oil, and the potential consequences included devastating effects on the Red Sea's biodiversity, water scarcity, human health risks, and food security for millions of Yemenis and Eritreans dependent on Red Sea fisheries (Amnesty International, 2021, e-source). These environmental issues further compound the humanitarian crisis in Yemen, adding to the challenges faced by the population.

The highlighted examples underscore the grave human rights violations and the devastating impact of the conflict on the civil-

ian population in Yemen. The situation calls for urgent attention, intervention, and concerted efforts to address these violations and protect the human rights of all Yemenis. International cooperation and advocacy are crucial in working towards a resolution to the conflict and providing much-needed humanitarian assistance to alleviate the suffering of the people in Yemen. The human rights situation in Yemen emphasizes the need for a comprehensive and sustainable approach to bring about positive change and ensure the well-being of the population.

5. Possible solutions

The outlined steps provide a comprehensive and well-considered approach to address the complex situation in Yemen. These measures consider not only the immediate humanitarian needs but also the underlying causes of the conflict. Here's a summary:

• *Negotiate a Political Solution*: Advocating for a negotiated political settlement is crucial to addressing the root causes of the conflict. The involvement of all parties, including the Houthis, is essential for a sustainable resolution.

• *Provide Humanitarian Aid*: Acknowledging the dire humanitarian situation and increasing support for aid efforts can provide essential relief to the millions of Yemenis in need of food, water, and medical assistance.

• *End the Blockade*: Lifting the blockade on Yemen's ports and airports is vital for enabling the unrestricted flow of goods and humanitarian aid. This step can significantly contribute to alleviating the crisis.

• *Address the Economic Crisis*: Recognizing the economic impact of the conflict, providing economic support to stabilize the Yemeni economy and create job opportunities is a crucial aspect of long-term recovery.

• *Address Human Rights Abuses:* Holding all parties accountable for human rights abuses is an essential step towards justice and reconciliation. Establishing an independent commission of inquiry can help investigate violations and ensure accountability.

These steps, when implemented collectively and with international cooperation, have the potential to address both the immediate humanitarian crisis and the underlying factors contributing to the conflict in Yemen.

If you were to describe what is happening in Yemen in one word, it would be a genocide[6]. The starvation of millions of Yemenis due to the conflict between Sunnis and Shiites, or any political, religious, or ideological strife, is unacceptable in today's world. What is even more horrifying is the realization that this suffering continues to persist day by day, year by year, and is on the brink of extending into a decade. It represents one of the most egregious forms of genocide witnessed by humanity - the mass starvation and displacement of millions of people. Regrettably, it is the most vulnerable groups who bear the brunt of this suffering - children, the elderly, and women - those who lack the most necessities for survival, such as food, healthcare, and a secure home.[7]

The United Nations, founded with the objective of maintaining peace, stability, and upholding basic human rights, should promptly assemble teams comprising doctors, humanitarians, and volunteers to enhance the daily lives of Yemen's residents. Immediate action is crucial to eradicate hunger, enhance healthcare, and, foremost, establish peace and stability.

It is imperative to engage all relevant parties in the pursuit of peace and commence the collaborative construction of a new, more stable nation that adheres to, at the very least, minimum standards of human rights and freedoms.

It's essential to recognize that Sharia beliefs cannot be eradicated overnight, but efforts can be made to soften them to a degree where the minimum standard of human dignity is upheld, irrespective of religious belief, gender, race, or other divisions. Achieving this requires substantial work in the field of education, particularly for the most vulnerable groups, aiming to gradually loosen harsh measures within Sharia law, aligning more closely

[6] Jeffery Bachman, a professor of human rights and the director of the Master's program in Ethics, Peace, and Human Rights at American University in Washington, categorizes the comprehensive design of genocide within the military campaign of the Saudi-led coalition in his article *»A 'synchronized attack' on life: the Saudi-led coalition's 'hidden and holistic' genocide in Yemen and the shared responsibility of the US and UK,«* published in the academic journal *»Third World Quarterly«.* He utilizes literature on genocide studies to analyze the coalition's actions, concluding that they are executing a sustained genocide campaign involving a *»synchronized attack«* on all aspects of life in Yemen, made possible only through the complicity of the United States and the United Kingdom.

[7] Donna E. Arzt, the late professor of law at Syracuse University College of Law, analyzed the state of human rights in Islamic states in her article »The Application of International Human Rights Law in Islamic States,« published in the journal »Human Rights Quarterly.« She concluded that it is a very complex issue influenced by various factors, such as radical Islam, pan-Arabism, the Palestinian struggle for self-determination, and political-economic relations with the West. The most vulnerable groups are women and children, who become even more susceptible during times of war.

with principles of human rights as recognized in the Western world.

This strategy could be undertaken similarly to what was done decades ago in the case of Turkey.[8]

Yemen, in addition to its highly complex geopolitical and security challenges, grapples with the lack of political participation from its citizens, namely civil society. Beyond issues like poverty, hunger, and insufficient access to medicine, the population also faces the challenge of being unable to choose an effective political authority that can lead the country towards improvement and swift recovery. A significant hurdle lies in the public's lack of trust in the central government and skepticism about the potential for finding viable solutions. Here, the involvement of the international community is both necessary and invaluable.

Despite the failure of previous efforts to secure a mutual agreement for peace or a compromise among warring factions, it is essential to sustain ongoing efforts and maintain international pressure to find a resolution between the conflicting groups.

Ensuring the most basic living conditions for the people of Yemen, including guaranteed peace, sustainable economic conditions, sufficient food, energy resources for survival, and the establishment of a robust health and education system, is paramount. Once these fundamental needs are met, people can move beyond the struggle for survival and engage in political inclusion and other forms of activism. The current unbearable conditions in Yemen are unacceptable in today's human society.

These proposed steps are just a beginning, and ultimately, a sustainable solution demands the commitment of all parties involved in the conflict. Ending the fighting, addressing the root causes of the conflict, and prioritizing the well-being of the Yemeni people are crucial aspects of a comprehensive and lasting resolution[9].

[8] Turkey is a member of the Council of Europe, which means that it has committed itself to respecting a minimum standard of human rights and freedoms. It also experienced an economic boom in the previous decade, which has a beneficial effect on the lifestyle of the residents. It is an example of good practice, how human rights and freedoms can also be enforced in the Islamic world.

[9] Since March of this year, China has been making diplomatic efforts to influence the establishment of a ceasefire between Iran and Saudi Arabia and to establish a ceasefire in Yemen. However, it is realistic to expect that the animosity that has spread and entrenched itself among the people in Yemen will not come to an end overnight. Besides interest and effort, time is also required for changes.

6. Conclusion

The conflict in Yemen has been ongoing since 2014 and has resulted in a devastating humanitarian crisis, with millions of people in need of humanitarian assistance. While there have been efforts to find a political solution to the conflict, progress has been slow, and the situation remains fragile.

One possible scenario for Yemen in 2023 is that the conflict continues, with sporadic fighting between the Yemeni government and the Houthi rebels, as well as ongoing attacks by extremist groups such as Al-Qaeda in the Arabian Peninsula (AQAP) and the Islamic State (IS). In this scenario, the humanitarian situation in Yemen is likely to remain dire, with many people continuing to face food and water shortages, displacement, and limited access to healthcare.

Another possible scenario is that a political settlement is reached between the Yemeni government and the Houthi rebels, possibly with the help of the international community. This could lead to a ceasefire and a reduction in violence, allowing for the delivery of humanitarian aid and the gradual rebuilding of Yemen's infrastructure. However, achieving a political settlement in Yemen is a complex and difficult process, and it is not clear whether this scenario will come to pass.

Overall, the situation in Yemen remains uncertain and difficult to predict. The conflict has had a devastating impact on the Yemeni people, and it is important that the international community continues to support efforts to find a political solution to the conflict and provide humanitarian assistance to those in need.

Eleanor Roosevelt, the former First Lady of the United States and human rights activist, made many powerful statements about war during her lifetime.

One of her most famous quotes on war is:

»It isn't enough to talk about peace. One must believe in it. And it isn't enough to believe in it. One must work at it.« (Pettinger, 2019, e-source)

This quote emphasizes the importance of taking action to achieve peace, rather than just talking about it or hoping for it. It also implies that peace is something that requires effort and commitment to achieve, and that it cannot be achieved without work and dedication.

While this quote does not directly reference war, it is often interpreted as a call to action for those who want to prevent war and promote peace. It suggests that peace is not a passive state, but rather an active pursuit that requires ongoing effort and dedication.

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The role of the appeal procedure within the Ministry of the Interior in terms of fair trial rules

Dejan Pavlović

ABSTRACT

In performing their work, police officers infringe on human rights and fundamental freedoms, so they must perform their work professionally and legally. If police officers violate the human rights and fundamental freedoms of an individual, the individual must complain about such an act. The complaint procedure is carried out on two levels. The first is the conciliation procedure, which takes place at the police station between the complainant and the offending police officer. In case of a serious violation of human rights, the complaint procedure takes place immediately at a session of the Appeals Chamber. The number of complaints about the work of police officers in Slovenia is small.

Keywords: police authorities, professionalism, human rights, access to justice, Slovenia

Vloga pritožbenega postopka v Ministrstvu za notranje zadeve z vidika pravil poštenega sojenja

POVZETEK

Policisti pri svojem delu posegajo v človekove pravice in temeljne svoboščine, zato morajo svoje delo opravljati strokovno in zakonito. Če policist posamezniku krši človekove pravice in temeljne svoboščine, se mora posameznik zoper takšno dejanje pritožiti. Pritožbeni postopek poteka na dveh ravneh. Prvi je spravni postopek, ki poteka na policijski postaji med pritožnikom in policistom kršiteljem. V primeru hujše kršitve človekovih pravic

se pritožbeni postopek izvede takoj na seji pritožbenega senata. Pritožb na delo policistov v Sloveniji je malo.

Ključne besede: policijski organi, strokovnost, človekove pravice, dostop do pravnega varstva, Slovenija

List of abbreviations and acronyms

ZDT-1: State Prosecution Service Act
ZNPPol: Police Tasks and Powers Act
ZODPol: Organisation and Work of the Police Act

1. Introduction

Security can be understood as a state in which the physical, spiritual and mental existence of the individual and society is guaranteed. Security threats are all those phenomena that reduce the existence and development of a given object (Prezelj, 2001, p. 131). There are various security organisations that prevent security threats. The police is such an example, protecting people's lives, personal safety and property (ZNPPol., 2013, Article 4). When police officers perform their duties, they must follow the general principles for the performance of police duties. In performing their work, police officers must respect and protect the right to life, human personality and dignity, as well as other human rights and fundamental freedoms (ZNPPol., 2013, Article 13). Police officers must be especially careful to treat everyone equally during procedures and to ensure that everyone's rights are equally protected (ZNPPol., 2013, Article 14). Police officers must be lawful in the performance of their duties and exercise their powers on the basis and to the extent provided by law (ZNPPol., 2013, Article 15).

That peace, justice and freedom are connected with human rights is also stated in the preamble of the Universal Declaration of Human Rights, where it is stated that the recognition of human rights, which are equal for all, is the foundation of freedom, justice and peace in the world. Human rights must be protected by the rule of law, so that there is no contempt and denial of rights, which leads to barbaric acts (Universal Declaration of Human Rights, 2018, p. 2).

The judicial system also fights for justice and the protection of rights in our society. The district court is a first-instance court that, based on Article 99 of the Courts Act, is competent to try criminal offences for which a fine or imprisonment of up to three years is prescribed, except for offences of defamation and besmirching honour committed through the media. The district court is also competent to decide on disputes due to disturbance of property, noise and real burdens, as well as disputes regarding rental and lease relationships. Circuit courts decide on situations where it is necessary to decide on allowing an infringement on human rights and fundamental freedoms. The next court is the High Court, which allows appeals against first-instance courts. The highest court is the Supreme Court, which decides on regular legal remedies against decisions of second-instance courts and on all other matters stipulated by Article 106 of the Courts Act (Judicial System, Slovenian Courts, e-source). The Constitutional Court deals with constitutional complaints due to violations of human rights and fundamental freedoms by individual acts (Jurisdictions, Constitutional Court of the Republic of Slovenia, e-source).

In 1998, Aleksander Matko filed a complaint against the Republic of Slovenia based on Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, because he claimed that the police had mistreated him and that the verification of his statements was not effective. He argued that the police had treated him inhumanly and humiliatingly during the proceedings, citing Article 3 of the European Convention for the Protection of Human Rights. He claimed that he had been illegally detained by the police, referring to Article 5 of the Convention, which states that everyone has the right to liberty and security and that no one may be unlawfully deprived of their liberty. Matko also claimed that the criminal proceedings had taken too long and were unfair, citing Article 6 of the Convention, which states that everyone has the right to a fair trial. The Appeals Chamber considered the complaint admissible and proceeded with the case (ECtHR *Matko vs the Republic of Slovenia*, 12/10/2006, p. 1). The European Court of Human Rights ruled that Article 3 of the Convention was violated because the state authorities had not conducted a thorough investigation into the complainant's statements and that the police had mistreated him (ECtHR *Matko vs the Republic of Slovenia*, 12/10/2006, p. 26).

The Court ruled that Articles 5 and 6 of the Convention had not been violated. The Republic of Slovenia had to pay the applicant EUR 10,000 for non-property damage and EUR 1,000 for costs and expenses and any payable taxes, within three months of the judgement becoming final (ECtHR *Matko vs the Republic of Slovenia*, 12/10/2006, p. 26).

If an individual believes that his/her human rights and freedoms have been violated during police procedures, he/she should be able to complain about such an action. In the complaint procedure, all the facts and circumstances of the event itself are clarified, and in the case of an established violation, the injured party is provided with fair compensation, and appropriate action is taken against the offending police officer.

1.1. Problem, subject and hypotheses

In police procedures, the human rights and fundamental freedoms of the individual are often violated, so police officers must respect rights, as this is the basis for their professional conduct.[1] In view of the above, it is important that an effective and professional supervisory and complaint system has been developed over the work of police officers, which will also be the subject of our research. However, problems arise when police officers violate an individual's human rights and freedoms in the police procedure, and that individual is not allowed to complain about such an act.

As part of the article itself, we tested the following hypotheses:

Hypothesis 1: "The complaint procedure regarding the work of police officers in Slovenia operates independently and impartially".

Hypothesis 2: "The number of cases of police misconduct is decreasing over the years".

Hypothesis 3: "In Slovenia, the number of complaints about the work of police officers is small".

1.2. Research purpose and objectives

The purpose of the article is to present in detail the complaints and monitoring system for police work. We also analysed reports

[1] We pay a lot of attention to protecting human rights in the police. (Police, 2009, e-source)

with statistics on complaints about the work of police officers and thus obtained a realistic picture of the subject matter in practice. Based on the analysis itself, we then verified the hypotheses, which is also the main objective of our research.

2. Research methods

In order to present the complaint and monitoring system for police work, we have reviewed and analysed the current legal sources that regulate the subject matter. We also used the method of review and analysis when studying reports, where we paid attention to the statistics of complaints about the work of police officers in Slovenia. Using the method of comparison, we then compared the findings with each other and combined them into a whole, and verified the hypotheses.

3. Complaint and monitoring system for police work

Anyone can initiate a complaint procedure about the work of a police officer. The Ministry of the Interior (hereinafter referred to as the Ministry) is responsible for monitoring and supervising the resolution of complaints. Complaints that are heard in the chambers are handled by civil servants within the Ministry, who are responsible for resolving complaints. Complaints are handled by the police in the conciliation procedure (ZNPPol, Article 137).

In the complaint, the individual exercises his/her right to disagree with an act or omission of an act of the police officer during the performance of police work, which may constitute a violation of human rights and fundamental freedoms. The aim of the complaint procedure is to establish all the circumstances, the implementation of the police procedure and the use of police powers (ZNPPol, Article 138). The Police Tasks And Powers Act states that the Ministry receives and handles complaints in the complaint procedure, appoints a reporter who determines the actual status of complaints, issues notices related to the complaint procedure, proposes measures to the director general of the police to eliminate irregularities, initiates disciplinary proceedings or other measures against a police officer, cooperates with the authorities

for the protection of human rights and fundamental freedoms, issues reports on complaint procedures and informs the public about established circumstances related to complaints (ZNPPol, Article 141 (1)).

It adds that the parties involved in the complaint procedure are the complainant and the police officer, the head of the police unit to which the police officer is assigned, the reporter, the minister's representative (hereinafter referred to as the minister), the Head of the Chamber, a representative of the public and any witnesses, experts or interpreters (ZNPPol, Article 142 (2)). The Act states that a complaint can be filed by an individual within 45 days from the day on which a police officer allegedly violated his/her human rights and fundamental freedoms through an act or omission in exercising police powers (ZNPPol, Article 146). It adds that the complaint can be heard in conciliation proceedings or before the Chamber (ZNPPol, Article 148 (1)). It notes that the Chamber is appointed by the Minister and consists of the Minister's representative as the Head of the Chamber and two representatives of the public as members of the Chamber. The Chamber assesses the merits of the complaint about the police officer and acts in the area of the police department where the incident is said to have taken place (ZNPPol, Article 151). When the Head of the Chamber receives from the reporter a report on the findings regarding the complaint, he/she orders a hearing in the Chamber and further conducts the session of the Chamber. The Head of the Chamber sends the complainant and the police officer a summons and a report on the findings of the complaint. At the end, the Chamber decides on the merits of the complaint by voting based on all the collected facts of the circumstances. The Head of the Chamber informs those present about the Chamber's decision, which is final (ZNPPol, Article 152). The conciliation procedure is concluded with a written reply to the complainant, in which the decision of the Chamber is explained. As a general rule, the proceedings before the Chamber must be concluded within 90 days of the receipt of the complaint case, unless this is not possible for understandable reasons (ZNPPol, Article 153).

Supervision of police work takes place within the police station. The police officer must record each use of police powers in writing within 24 hours of the police officer using the powers

(ZNPPol, Article 130). If the powers are a means of coercion, the police officer must report in writing in the form of an official note as soon as possible, but no later than by the end of working hours. If a firearm is used or physical or property damage has occurred due to the use of coercive means, the police officer must notify the head of the police unit immediately after use (ZNPPol, Article 131). The head of the police unit then assesses the legality and professionalism of the use of coercive means, unless a commission has been established for this purpose (ZNPPol, Article 132). In the event that a police officer fires a warning shot, uses an electric stun gun, or coercive means are used against five people and a light physical injury occurs, a three-member commission must be formed to verify the legality and professionalism and write a report on this. If a firearm is used, or severe bodily injury or particularly severe bodily injury occurs, the commission is appointed by the Director-General of Police (ZNPPol, Article 133). The commission is composed of an odd number of police officers not connected to the case (ZNPPol, Article 134).

The Organisation and Work of the Police Act states that the police is a body within the Ministry of the Interior (ZODPol, Article 2). The Ministry performs comprehensive, systematic and planned supervision over the implementation of police tasks and powers. In this manner, professionalism, legality and respect for human rights and fundamental freedoms are assessed. Supervision is carried out by direct inspection of documents at police units, by talking to police officers and by direct observation of the implementation of police duties in the field. Finally, a report is drawn up (ZODPol, Article 5). Supervision is ordered by the minister, who appoints the head of supervision and other officials (ZODPol, Article 6). Supervision of police work is the responsibility of officials employed in the internal organisational unit of the Ministry, who are responsible for direction and oversight (ZODPol, Article 7). During supervision, officials can request information from records kept and maintained by the police, request an inspection of records and documents obtained, prepared or issued by the police in accordance with their powers, invite police officers to an interview, enter all premises that the police use for their work, request data on technical means used by police officers, be present when police duties are being carried out

and request the provision of other data that is important for police supervision (ZODPol, Article 8). If during supervision it is established that police officers are violating human rights and freedoms, the head of supervision requests the head of the unit being supervised to immediately implement measures to remedy the unlawfulness. Other measures are determined in the supervision report (ZODPol, Article 10). There are several types of police work supervision, regular and extraordinary inspections (Guidance and Supervision of the Police Division, Ministry of the Interior, 2022, e-source). The department for complaints about the police handles complaints about the work of police officers independently, impartially and professionally, and also determines whether or not a police officer has violated human rights and fundamental freedoms in a specific police procedure (Complaints About the Police Division, Ministry of the Interior, 2021, e-source).

In the event that a police officer has committed a crime by abusing his/her powers, a special department within the State Prosecutor's Office, which is responsible for criminal offences committed by officials, will take over the case (ZDT-1, Article 199).

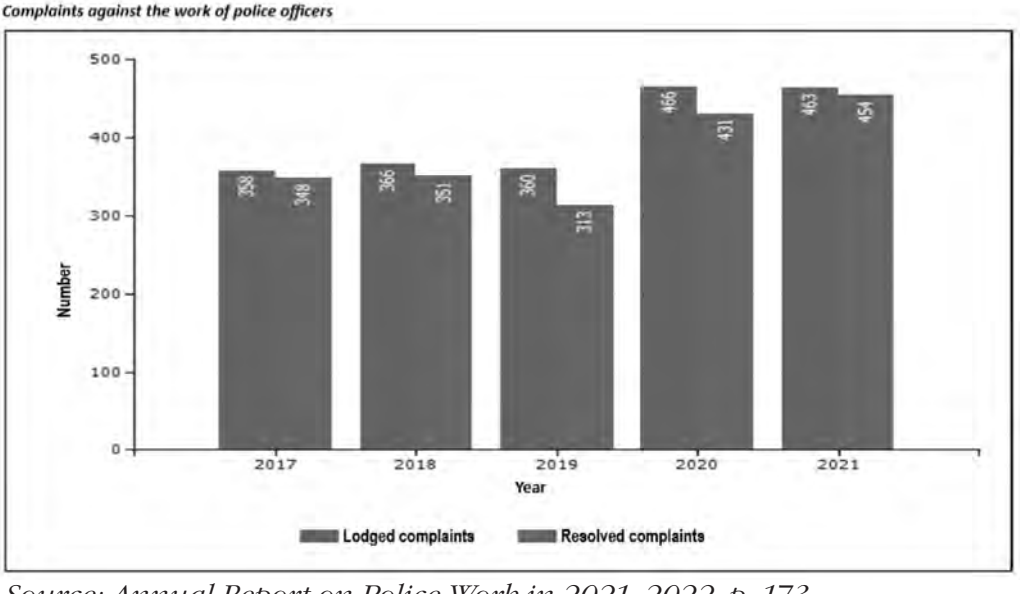
However, we must not forget the Ombudsman, which is an independent body and can act in case of any violation of human rights and fundamental freedoms by authorities. The findings are then recorded in reports (The Ombudsman in detail, Ombudsman, e-source).

Human rights and fundamental freedoms must be respected and must not be violated, which is also explained in more detail in the European Convention on the Protection of Human Rights under Article 17 »Prohibition of abuse of rights«. (European Convention on the Protection of Human Rights, Article 17). As we already noted in our introduction, the Universal Declaration of Human Rights states that human rights are equal for all and that this represents the basis for world peace. The Constitution of the Republic of Slovenia also states that the state must protect human rights and fundamental freedoms on the territory of the Republic of Slovenia (Constitution of the Republic of Slovenia, Article 5). Human rights and fundamental freedoms must also be guaranteed and protected in police procedures and in the appeals procedures, both in the conciliation part as well as before the Senate. An analysis of annual reports regarding violations of human rights in police procedures is presented below.

4. Analysis of annual reports on violations of rights in police procedures

just like the Ministry and the police, the Ombudsman also publishes the number of complaint procedures against the work of police officers in annual reports. We will analyse the reports on police work for the period of the last five years, then we will analyse the reports of the Ombudsman.

Diagram 1: Complaints filed and resolved from 2017 to 2021



Source: Annual Report on Police Work in 2021, 2022, p. 173.

We analysed how many complaints about the work of police officers were filed and resolved from 2017 to 2021, as we do not yet have statistical data for 2022, because the year is not yet over. In 2017, 358 complaints were lodged about the work of police officers, of which 348 were resolved. In 2018, 366 complaints were lodged about the work of police officers, of which 351 were resolved. In 2019, 360 complaints were lodged about the work of police officers, of which 313 were resolved. In 2020, 466 complaints were lodged about the work of police officers, of which 431 were resolved. In 2021, statistics show that 463 complaints were lodged about the work of police officers, of which 454 were resolved (Annual report on police work in 2021, 2022, p. 173–

175). It can be observed that the number of lodged complaints and resolved complaints from 2017 to 2019 are fairly consistent. The number of lodged and resolved complaints increased in 2020 and 2021, when the numbers exceeded 400.

Figure 1: Resolved complaints according to the resolution method

Type of procedure	Numbers				
	2017	2018	2019	2020	2021
Conciliation procedure	112	131	106	139	140
-successfully concluded [150/5 ZNPPol]	70	85	69	83	76
-unsuccessfully concluded [148/3 ZNPPol]	42	46	37	56	64
-conduct of police officers according to regulations	97	112	83	102	108
-conduct of police officers inconsistent with regulations	13	11	12	14	13
Senates	72	73	56	59	65
-unsuccessfully concluded conciliation procedures [148/3 ZNPPol]	28	35	18	27	28
-direct hearing before the Senate [148/3 ZNPPol]	44	38	38	32	37
-substantiated complaints addressed before the Senate	17	10	7	10	13
Conclusion of the hearing	164	147	151	233	249
Total resolved complaints	348	351	313	431	454

Source: Annual Report on Police Work in 2021, 2022, p. 173.

In 2017, 112 complaints were considered in the conciliation procedure, of which 70 complaints were successfully resolved. A total of 72 complaints were examined at a Chamber's session. In 2018, 131 complaints were considered in the conciliation procedure, of which 85 complaints were successfully resolved. A total of 73 complaints were examined before the Chamber. In 2019, 106 complaints were lodged, of which 69 were successfully resolved; 56 complaints were examined before the Chamber. In 2020, 139 complaints were considered in the conciliation procedure, of which 83 complaints were successfully resolved; 59 complaints were examined at a Chamber's session. In 2021, 140 complaints were considered in the conciliation procedure, of which 76 were successfully resolved. A total of 65 complaints were examined at a Chamber's session. In 2017, there were 13 cases of police misconduct, 11 cases in 2018, 12 in 2019, 14 in 2020, and 13 cases in 2021 (Annual report on police work in 2021, 2022, p. 173–175). We can see that the number of cases of misconduct by police officers varied between 11 and 14 over the years, which means that the situation in this area has not significantly improved over the years.

Figure 2: Consequences of complaint procedures

Type of complaint	Number of complaints				
	2017	2018	2019	2020	2021
Recommendation to initiate a disciplinary procedure	1	1	0	0	0
Report submitted to the State Supreme Court [147/3 ZKP]	3	3	0	2	0
Warning and interview	29	16	17	20	15
Warning before regular termination of employment	0	1	0	0	0
Total	33	21	17	22	15

Source: Annual Report on Police Work in 2021, 2022, p. 175.

In 2017, 33 actions were taken as a result of complaint procedures, of which the most common action was a warning. In 2017, as an action, a report was sent three times to the Supreme State Prosecutor's Office and one proposal was made to initiate a disciplinary procedure. In 2018, 21 actions were taken as a result of complaint procedures, of which 16 were warnings, one was a proposal to initiate disciplinary proceedings and three were reports sent to the Supreme State Prosecutor's Office. In 2019, 17 actions were taken as a result of complaint procedures, which were all warnings. In 2020, 22 actions were taken due to complaint procedures, of which 20 were warnings and two were reports sent to the Supreme State Prosecutor's Office. In 2021, 15 warnings were issued due to complaint procedures (Annual report on police work in 2021, 2022, p. 173–175)

Figure 3: Number of complaints related to human rights

Basis	Number of complaints				
	2017	2018	2019	2020	2021
Children, minors and/or other persons from a **vulnerable group** were involved **in the procedure**	7	10	5	4	7
Complaint against the head of the police unit or its internal **organisational units**	2	3	2	1	2
Complaint lodged by a foreigner not residing in Slovenia	15	13	17	17	14
Complaint with other allegations of severe interference with human rights and fundamental freedoms	20	12	14	10	13
Total	44	38	38	32	36

Source: Annual Report on Police Work in 2021, 2022, p. 175.

Due to severe infringements of human rights and fundamental freedoms, 20 complaints were processed in 2017, 12 complaints

were processed for the same reason in 2018, 14 complaints in 2019 and 13 complaints in 2021 (Annual report on police work in 2021, 2022, p. 173–175)

In 2017, the Ombudsman dealt with 97 complaints, which mainly related to police procedures. (Annual Report of the Ombudsman of the Republic of Slovenia for 2017, 2018, page 235) In 2018, the Ombudsman dealt with 83 complaints, which mainly related to police procedures, which is less than in 2017 (Annual Report of the Ombudsman of the Republic of Slovenia for 2018, 2019, p. 339). In 2019, the Ombudsman dealt with 95 complaints related to police procedures, (Annual Report of the Ombudsman of the Republic of Slovenia for 2019, 2020, page 218) 71 complaints in 2020, (Annual Report of the Ombudsman of the Republic of Slovenia for 2020, 2021, page 357) and 51 complaints related to police procedures in 2021 (Annual Report of the Ombudsman of the Republic of Slovenia for 2021, 2022, page 302). On average, the number of complaints related to police procedures is declining. In 2019, the number of complaints increased slightly, but this number decreased again in the following two years, with the lowest number in 2021, namely 51.

The Complaints Division states in its report that, in practice, given the number of police procedures, few complaints are lodged, which shows that police officers are generally professional and within legal boundaries. In most cases of substantiated complaints, a warning interview was conducted with the officers involved (Resolving Complaints About the Police – Annual Report for 2021, 2022, p. 12 -13).

5. Conclusion

In performing their work, police officers infringe on human rights and fundamental freedoms, so it is important that they perform their work professionally and legally. In the event that police officers violate the human rights and fundamental freedoms of an individual, it is important that the individual has the possibility to lodge a complaint about such an act. The complaint procedure is carried out on two levels. The first is the conciliation procedure, which takes place at the police station between the complainant and the offending police officer. In the violation of human rights, the complaint procedure takes

place immediately at a session of the Appeals Chamber, which is composed of a representative of the minister, as the Head of the Chamber, and of two members of the public. We established that the complaint procedure regarding the work of police officers in Slovenia operates independently and impartially. We may therefore confirm hypothesis 1 "The complaint procedure regarding the work of police officers in Slovenia operates independently and impartially".

We also found out that the Ministry performs comprehensive, systematic and planned supervision over the implementation of police tasks and powers. In this manner, professionalism, legality and respect for human rights and fundamental freedoms are assessed.

In the analysis, we found that the number of lodged complaints and resolved complaints from 2017 to 2019 are fairly consistent. The number of lodged and resolved complaints increased from 2020 to 2021, when the number of complaints exceeded 400. The reason for such statistics can be attributed to the coronavirus, since in the last two years, in addition to the laws, special safety measures had to be taken into account to curb the spread of the new coronavirus. During this time, people were even more sensitive, which may have led to a higher number of complaints about police work in 2020–2021. We found that in 2017 there were 13 cases of police misconduct, 11 cases in 2018, 12 in 2019, 14 in 2020, and 13 cases in 2021. We also found that the number of cases of misconduct by police officers varied between 11 and 14 over the years, which means that the situation in this area has not significantly improved over the years. On the basis of the above, hypothesis 2: "The number of cases of police misconduct has been decreasing over the years" was rejected.

This could be changed by making police officers more aware of the practice where they acted inconsistently with the regulations and of the correct procedures to follow in the given cases. Such practice could also be transferred to the police academy.

In most cases, a warning interview was conducted with the police officers involved. Police officers carry out police procedures on a daily basis, all year round, so we can say that the number of complaints about police work is still low and that police officers

perform their work professionally and legally. Hypothesis 3 "In Slovenia, the number of complaints about the work of police officers is small" can be confirmed.

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1. DEL
Človekove pravice in temeljne svoboščine, 720 str.

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Državna ureditev, 516 str.

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