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THE PRACTICAL SIGNIFICANCE OF THE LEGAL NATURE OF THE LIMITATION PERIOD WITH REFERENCE TO THE CLAIM FOR DAMAGE COMPENSATION**

Summary

The subject of this paper is the legal institute of limitation of claims, which has its roots in Roman law, and developed in English law in the period between the 12th and 13th centuries, on the same grounds, reasons and needs as in Roman law. By applying historical, comparative, and dogmatic legal research method, the question of the legal nature of statute of limitations is comprehensively analyzed, which in continental laws is understood as an institute of substantive law, while in Anglo-Saxon laws it is an institute of procedural law. This theoretical distinction has great practical importance in cases where a foreign element is present because it depends on the applicable law whether the creditor's claim is time-barred, in which case he will practically be unable to realize it. The paper states that differences in the legal nature of the statute of limitations create legal uncertainty in practice, which is why the causes for such a situation are analyzed as well as whether, and to what extent is that distinction justified. In the conclusion, it is stated that this is more a reflection of the division of legal norms into substantive and procedural rather than essential differences in the legal nature of statute of limitations between Anglo-Saxon and continental laws.

Keywords: *Time as a Legal Fact, Limitation Period as an Institute of Substantive Law, Limitation Period as an Institute of Procedural Law, Legal Uncertainty, Applicable Law.*

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1. Introduction

The right to claim damages is a legally guaranteed right of every individual who suffers harm due to the wrongful act of another person. The injured party can achieve the right to compensate on the condition that he proves the existence of a causal relationship between the harmful act and the resulting damage, and additionally, it is necessary that the debtor fail to release himself of contractual liability.[1] Damage that a responsible party refuses to compensate voluntarily can be enforced through a court's final and enforceable decision that accepts the injured party's claim for damages.[2] Whether the injured party will use the right to judicial protection is a matter he can decide freely, with the risk of losing the ability to demand fulfillment of the obligation if he does not use this right for a long time, that is, if the claim for compensation becomes time-barred during that period.

The statute of limitations can be determined as an institute of the law of obligations according to which the creditor, due to passive attitude towards his right within a legally specified period, loses protection of that right when the debtor expresses the will to use a right arises for him from such a creditor's attitude.[3] The purpose of the statute of limitations is to

[1] Art. 154, para. 1, Law of Contract and Torts, *Official Gazette of the SFRY*, No. 29/78, 39/85, 45/89, 57/89, *Official Gazette of the FR Yugoslavia*, No. 31/93, *Official Gazette of the RS*, No. 18/20; Anyone whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault. Additionally, it is stipulated that liability for harm caused by dangerous objects of property exists regardless of fault (Art.154, para. 2 Law of Contract and Torts), and that liability without fault also applies in other cases provided by law (Art. 154, para. 3 Law of Contract and Torts). The right to compensation for damages is a legally guaranteed right and cannot be excluded based on the will of the contractual parties (such a contractual provision would be void). See K. Jovičić, S. Vukadinović, *Neizvršenje ugovora, odgovornost i naknada štete,* Institut za uporedno pravo, Beograd 2023, 151–156.

[2] In our law, compensation for damage is, as a rule, achieved by restoring the state that existed before the harmful act, that is, by paying the appropriate amount of money in case the damage is not completely removed in that way. Monetary compensation is also applied when establishing the previous state is not possible or if the court so determines, either because it considers that it is not necessary for the responsible person to establish the previous state, or because the injured party has requested the payment of monetary damages (except when, in the judgment of the court, the circumstances justify the establishment of an earlier state). See Art. 185. of the Law of Contract and Torts.

[3] J. Studin, "Član 360", in: *Komentar Zakona o obligacionim odnosima* (eds. Borislav Blagovijević, Vrleta Krulj), Savremena administracija, Beograd 1983, 1117. As a rule, all claims (all obligation relationships, regardless of the source of the obligation)

motivate, that is encourage, the creditor in the obligational relationship to attempt to realize his claim without unnecessary delay. It is not only in his interest but also in the interest of the debtor because the position of the debtor becomes more and more difficult over time because he must be ready to fulfill a debt obligation at any time in the future (even in the distant future), and to be able to do that, he has to dispose of the amount of money equivalent to the fulfillment of his obligation. In other words, he cannot use that money until the claim is paid off, so if it takes longer, the chances increase that he will suffer harm because he did not use the money in a way that would benefit him and his family, or if the value of the money decreases in the meantime. Additionally, over time, it becomes increasingly difficult for the debtor to secure and preserve evidence that could be used to challenge the creditor's lawsuit because, as the years go by, documents and evidence are lost, and witnesses' memories fade.

The fact that the debtor position becomes more challenging over time is not the only reason why the right to judicial protection might be denied to the injured party,[4] although it is not disputed that the debtor has a legitimate interest in being provided with certainty regarding the period in which he can be called upon to fulfill his obligation. This is also in the interest of society because it contributes to legal certainty by transforming a long-standing factual relationship into a legal one.[5] This change is socially justified because it is in human nature to interpret a creditor's lack of interest in enforcing his rights over a long period as a lack of intention to exercise those rights. If the creditor suddenly changes his mind after a long time and demands that the

expire, unlike real rights, which, as a rule, do not expire.

[4] The obligation still exists because it has not been terminated in any of the ways provided by law for the termination of the obligation (by fulfillment, impossibility of fulfillment, death of the debtor, discharge of debt, compensation, novation, merger). Some obligations can be extinguished based on the passage of time, and these are obligations from permanent debt relationships with a certain duration, which cease when that period expires and on the condition that it has not been validly extended. Sight. Art. 295-359, Law of Contract and Torts.

[5] B. Vizner, *Komentar Zakona o obveznim (obligacionim) odnosima*, Zagreb 1978, 1287. In the same place, Wizner points out that this is also justified because the creditor, with his passive attitude, shows carelessness to realize the claim and that society rightly considers that he and does not care about the thing that is actually held and used by another person, so further supporting that factual situation would be to the detriment of the debtor, who is convinced that he owns a certain right for many years and that, despite this, his factual authority would not be given to him could be recognized by objective law as his subjectively protected right.

debtor fulfill the obligation, it introduces disturbance and uncertainty into social relationships, leading to disputes with uncertain outcomes that can persist for a long time.[6]

2. Roots and Development of the Statute of Limitations Institute

In legal literature, it is undisputed that the statute of limitations originates from the institute of Roman law known as *Longi Temporis Praescriptio*, which prescribed that a person could acquire a certain right based on the passage of time.[7] The word "*praescriptio*" in this context signifies something that comes first or precedes, and it was used in civil litigation to denote the so-called "above written" statement drafted by the praetor or other authorized magistrate. *Praescriptio* formally constituted a part of the plaintiff's claim (*declaratio*), and its specificity lay in a particular form of presentation that required this part of the claim to be explicitly stated above or preceding the main claim drafted by the plaintiff.[8] The aim of this mode of presentation was to acquaint the person resolving the disputed issue with the facts that needed consideration before proceeding to resolve the main issue.[9] The defense of *longi temporis praescriptio* was initially used in disputes where the owner of an object (thing) sought the return of it from the defendant, who had been using that object for a long period during which the owner (here, the plaintiff) did not request return or otherwise assert his ownership rights over it. Accordingly, the plea in the form of *praescriptio* is considered, according to the formal and logical course of proceedings, prior to considering the plaintiff's claim (as a preliminary issue). Based on this plea, it is decided whether there is even a basis to discuss the plaintiff's claim.[10]

[6] J. Studin, 1119. See R. Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription*, Cambridge University Press, Cambridge 2004, 62–65.

[7] R. Zimmermann, 69. See: M. P. Opala, "Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law", *Tulsa Law Review* 2/1971, 112; A. Triggiano, "Some Remarks on Extinctive Prescription in Legal History", *Civil Procedure Review* 13 1/2022, 101; R. Domingo, "The Law of Property in Ancient Roman Law", 2017, 16–17, available at: SSRN: https://ssrn.com/abstract=2984869, last visited 15. 6. 2024.

[8] C. P. Sherman, "Acquisitive Prescription Its Existing World-Wide Uniformity", *Yale Law Journal* 2/1911-1912, 147.

[9] *Gaius' Institutions*, Book IV, & 132, available (in English translation) at: https://droitromain.univ-grenoble-alpes.fr/Anglica/gai4_Poste.htm, last visited 06. 05. 2024.

[10] *Ea res agatur, cuius non est longi temporis posesio* (proceed to determine the main issue if you find that the defendant was not in long possession). T. C. Sandars, *The*

Longi temporis praesrceptio is a legal institute that allows a person to acquire a specific right to an object through the passage of time, in a situation where that object has been in his possession continuously for a long period (10 or 20 years), and provided that he use it as his own (*animus rem sibi habendi*).[11] It was considered fair to recognize a right to the object for a person who peacefully uses it, as well as being natural when such use persists over a long period during which the rightful owner shows no interest in the object.[12] The reason behind recognizing the effect of time on legal relationships dates back to Roman law, where new situations arose in practice. Situations where the person who uses the object under the specified conditions refuses to return it upon the owner's request, leading to numerous disputes and legal uncertainty due to uncertain outcomes. To overcome this undesirable situation, the contentious issue was legally regulated by a rule allowing long-term possession of a specific object to transform into ownership, under prescribed conditions.[13]

Over time, the application of this legal institute expanded, acquiring additional meanings, In the final stage of the development of Roman law (in the post-classical period), *longi temporis praescriptio* began to be applied as a basis for limiting legal actions due to the passage of time.[14] In this way, the same legal institute (*longi temporis praescriptio*) was used both as a basis for acquiring rights (acquiring real rights over property) and also as a basis for losing rights (loss of the right to legal remedies). In other words, within one legal institute, certain issues were regulated by different rules, so that legal scholars studying the institute of *longi temporis praescriptio* regularly pointed out its two distinguished meanings. Thus, when it comes to the basis for acquiring rights, *longi temporis praescriptio* has a positive meaning, that is, it is determined as an *acquisition prescription* in common law systems, while in situations where it comes to the basis for losing rights, this legal institute has a negative meaning, it is determined as an *extinctive prescription* in common law systems.[15]

Institutes of Justinian 208, 1876, cited according to M. Opala, 112.

[11] J. E. Jansen, "Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law", *European Property Law Journal* 1/2012, 155.

[12] C. P. Sherman, 148

[13] G. S. Blázquez, "Praescriptio Longi Temporis", *Revista Quaestio Iuris, Rio de Janeiro* 4/ 2023, 2338, 2345–2349.

[14] C. P. Sherman, 148; R. Zimmermann, 69.

[15] R. Zimmermann, 69. The difference between the two mentioned forms lies in their effect: the positive meaning of the expression promotes the existing factual situation into a right, while the negative meaning of the expression terminates (terminates) one's

The Civil Code of France (hereafter: CC)[16] and the Civil Code of Austria (hereafter: ABGB)[17] in their initial versions followed the aforementioned concept, where prescription encompassed as a unified legal institute both meanings.[18] The same principles regulated this issue in the Serbian Civil Code of 1844 (§§ 922 – 950).[19] Over time, however, that approach proved to be impractical and outdated, which is why it was finally abandoned. Although both codes had a significant impact on civil law in Europe, this was not reflected in this issue, that is, in other civil codifications in which the limitation of claims and the acquisition of rights through long possession, from the beginning have been regulated as separate legal institutes.[20]

right or a legal action by which that right can be maintained. E. Jansen, 154.

[16] The French Code Civil (Le Code civil des Français de 1804) was promulgated in March 1804 (hereinafter: CC).

[17] Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchi*) was proclaimed on June 1, 1811 and entered into force on January 1, 1812 (hereinafter: ABGB). § 1451 ABGB contains a general rule on limitation as a legal institute according to which it is (in the free translation) the way in which a certain right is lost that has not been exercised (was not exercised) within a period of time determined by law. (*Die Verjährung ist der Verlust eines Rechts, welches während der von dem Gesetze bestimten Zeit nicht ausgeübt worden ist*).

[18] §§ 1478. ABGB (in the version until 2015); Art. 2219 of the CC (in the version up to 2008). In addition, positive and negative prescriptions are distinction by the Scottish law from 1973 (*Prescription and Limitation (Scotland) Act)*, which is still in force today. R. Zimmermann, 69.

[19] The general definition of statute of limitations was prescribed in § 922 of the Serbian Civil Code (hereinafter: SGZ), which reads: "The statute of limitations is a special provision of the law, according to which one loses the right due to non-use for a long period of time, and the other acquires and acquires it with the use itself."
The text of the SGZ is available online at: https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf, last visited 14. 6. 2014.

[20] Thus: German, Italian and Dutch civil codes (cited according to R. Zimmermann, 70). The ABGB, with amendments from 2015, demarcated (regulated within separate chapters) positive and negative statute of limitations (§1489 ABGB regulates the statute of limitations for claims), while in the French Civil Code this was done in 2008 (Art. 2219 CC regulates the statute of limitations for claims). For more on the statute of limitations in European civil codes, see.: R. Kovačević Kuštrimović, "Zastarelost i subjektivno pravo", *Zbornik Pravnog fakulteta u Nišu* 30/1990, 130-131.
On the impact of European codifications on the introduction and development of the statute of limitations in domestic law. N. Zupan, "Konstantinovićeva koncepcija uređenja zastarelosti: da li su ideje o uticaju vremena u pravu izdržale uticaj vremena

In English law, which followed its own path of development, the impact of time on the creation, alteration, and termination of rights due to the passage of time has also been recognized as a legal fact. This understanding originated in the practice of equity courts (12th-13th century)[21] and initially applied only to land ownership.[22] Over time, the influence of the passage of time in English law also extended to claim rights, and the issue of the impact of time on the creation, alteration, and termination of legal relationships was formally regulated by the Limitation Act of 1623.[23] In current English law, both forms of limitation period (prescription) are regulated by the Limitation Act 1980, which remains in force today.[24] The specificity of English law, as well as other common law systems influenced by it, lies in the fact that the same statute regulates rules regarding the impact of time on land rights and claim rights. However, unlike continental law, this does not pose a hindrance in practice because the limitation periods in this statute have always been harmonized. Professor Cartwright notes that this reflects the fact that English law, unlike continental laws, does not have a separate vindicatory action to protect property rights from third parties; rather, it achieves protection through appropriate claims under non-contractual, hence, obligational law.[25] In addition, in English law, it has never been questioned that the onset of limitation leads to the creditor or

na pravo?", *Anali Pravnog fakulteta u Beogradu*, Poseban broj u čast profesora Mihaila Konstantinovića, Vol. 70, 2022, 329-333.

[21] D. Minor, "Limitation of Actions", in: *American and English Encyclopedia of Law* (ed. D. Garland), Nortport,, N.Y., Edward Thompson Co., 146.

[22] Equity law or the so-called the right of equity was originally created by the action of the courts headed by the chancellor (Lord Chancellor), who decided on the basis of justice and fairness (mercy), unlike the king's courts, which decided on the basis of the rules of common law. Š. M. Čerkić, "Koncept pravičnosti kao univerzalni model usklađivanja prava i stvarnosti", *Anali Pravnog fakulteta Univerziteta u Zenici* 6/2013, 209–213.

[23] Common law prior to that had already established terms of 30, 50, and 60 years within which the owner of the land could recover his rights, so that in 1623 the first regulation was adopted (the Statute of Limitations) which regulated the time limits relating to legal remedies in connection with requests for the realization of claims (*Limitation Act*, 1623). Cartwright, "Reforming the French Law of Prescription: An English Perspective", in: *Reforming the French Law of Obligations*, (eds. J. Cartwright, S. Wogenauer, S. Whittaker) Hart Publishing, Oxford, and Portland, Oregon 2009, 365–366.

[24] *The Limitation Act* from 1980 has been amended several times in the meantime and supplemented (the last amendments are from November 2023). The refined version of the text of this regulation is available at: https://www.legislation.gov.uk/ukpga/1980/58, last visited 06. 06. 2024.

[25] J. Cartwright, 369.

owner of the property losing the right to legal remedy, whereas in continental law systems, this issue has been a subject of debate.

The subject under consideration in this study is prescription as a legal institute that originates from Roman law's *longi temporis praescriptio*, which regulates the termination of the right to legal recourse for the enforcement of claims (including claims for damages) due to the passage of time.

3. The Legal Nature of Prescription of Claims in Comparative Law

Rules regarding the institute of prescription in comparative legal systems are not uniform and generally differ in two aspects: firstly, the legal nature of prescription, and secondly, the prescription periods. When discussing the nature of this legal institute, the fundamental difference lies in whether it is considered a substantive law institute in some legal systems, or a procedural law institute in others. This distinction largely aligns with the division between continental law and common law systems in the way that presrciption in the continental legal systems is generally considered a substantive law institute, whereas in common law systems, it is considered a procedural law institute.

3.1. Key Differences in the Regulation and Effects of Prescription of Claims in Comparative Law

In continental legal systems until the second half of the 20th century, there was no consensus on the legal nature of prescription of claims. One of the factors that contributed to it was the fact that this legal institute in the French Civil Code of 1804, the first codification of civil law, was modeled after Roman law, where prescription was regulated as a unified legal institute.[26] Because the rules on prescription were unified (the same rules applied to both positive and negative prescription), formulating them was not a simple task and it is not surprising that the statutory rules on this legal institute in the French Civil Code were insufficiently detailed, and these two distinct institutes were not consistently delineated.[27] This issue was only resolved in 2008 when a reform of the

[26] Art. 2219. CC from 1804 reads (in a free translation): Prescription is a method of acquisition or release in a certain period of time, under the conditions established by law (*La prescription est un moyen d'acquirer ou de se libéraire par un certain laps de temps, et sous les conditions déterminées par la loi.*) The statute of limitations was standardized within Title XX of Book III CC (*Titre XX du livre III - De la prescription et de la possession, art. 2219-2281*).

[27] Over time, it became clear that the regulation of statute of limitations within

French Civil Code's prescription provisions (*la prescription*) divided the institute into two separate parts: 1. Prescription of claims (negative prescription, extinctive prescription, or so-called extinctive limitation[28]), which was systematized under Title XX book III of the French CC titled "*de la prescription extinctive*" (Art. 2219-2254) and 2. acquisition of property or rights based on long time (positive prescription, prescription acquisitive, i.e., the so-called beneficial prescription), which was systematized under Title XXI book III French CC titled , "*de la possession et de la prescription acquisitive*" (Art. 2255-2279).[29]

French CC did not exert a decisive influence on the regulation of this legal institute in German and Swiss law, where the prescription of claims (negative prescription) has always been governed by specific rules separate from positive prescription (acquisition of rights over time). Additionally, neither German[30] nor Swiss law[31] disputed that prescription affects only the right to the legal remedy, not the right itself.[32]

one (unique) legal institute is not adequate because the statute of limitations was not well balanced, that is, it was not elaborated in accordance with the needs of practice. That problem has been solved for years by the legislator intervening ad hoc, but not in the text of the CC but within the framework of other laws and regulations, and judicial practice has also formed certain positions regarding statutes of limitations for certain issues. In those circumstances, it became clear that there is a need to reform the legal institute of statute of limitations, and how serious the problem was is confirmed by the fact that in 2008 the French Parliament decided to reform only the part of the CC that governs the issue of statute of limitations, i.e. not to wait for a broader reform CC (which even then was certain had to be implemented) in order to do so. Amendments were adopted by Law no. 2008-561 of June 17, 2008. Sight. J. S. Borghetti, "France", In: *Prescription in Tort Law* (eds. Israel Gilead, Bjarte Askeland), Cambridge University Press, online edition published 22 December 2020, 309.

[28] The terms "negative" prescription and "positive" prescription are taken from J. Studin, 1117.

[29] In the current version of the French CC (after the reform of contract and obligation law carried out in 2016), this issue is regulated under Art. 2258-2277.

[30] §§ 194-225 BGB in the original version from 1912, i.e. §§ 194-218 of the current version of the BGB.

[31] The rules on limitation of claims are contained in Art. 127-141. of the Code of Obligations (*Code des obligations*), which was promulgated on March 30, 1911, and entered into force on January 1, 1912 (hereinafter: CO). Art. is also important for the statute of limitations on damages claims. 60, which specifies the deadlines in which compensation for damages can be demanded from the harmed person.

[32] In this regard, Zimmermann states that this view prevailed due to the influence of Bernard Windscheid and his monographic study entitled: *Die Actio des römischen*

This concept was already introduced into our legal system by the Law on Limitation of Claims from 1953, whose creator was Professor Mihailo Konstantinović.[33] The rules from this Act were incorporated into the Serbian Law on Contract and Torts with minor adjustments and appropriate amendments. According to the law, prescription extinguishes the right to demand fulfillment of an obligation (Article 360, paragraph 1 of Law of Contract and Torts), and the court cannot consider prescription if the debtor has not invoked it (Article 360, paragraph 3 of Law of Contract and Torts).[34] In

Civilrechts vom Standpunkte des heutigen Rechts from 1856 on legal authors of the 19th century. Cited according to Zimmermann, 70-71; "Windscheid most consistently implemented the distinction from the Roman *actio* and was the first to formulate the notion of material legal demand ("*Anspruch*"), which implies the subject's right to demand a specific act, permission or omission from another. It is not that the Roman *actio* was at its core an exclusively procedural institute, but that Roman law existed as a system of lawsuits - from every lawsuit that the praetor allowed, the plaintiff's right arose; today's law constitutes a system of rights and their legal protection (substantive) requirements, while their procedural realization is a completely separate issue (Baldus 2011, 7). If in today's law *actio* is understood as a procedural right to a lawsuit that does not say anything about its substantive legal basis, the request represents a substantive legal right to demand the realization of a fundamental right (Storme 1995, 5)." Taken from N. Zupan, 328, fn. 11. R. Wintgam, "Reforming the French Law of Prescription: A French Perspective", in: *Reforming the French Law of Obligations*, (eds. John Cartwright, Stefan Vogenauer, Simon Whittaker) Hart Publishing 2009, 356; J. Cartwright, 367–368. Both regulations (BGB and Swiss CO) stipulate by express legal rules that the statute of limitations applies exclusively to the right to a legal remedy (the right to a request for enforcement of a claim). For German first sight. §222 BGB, and for Swiss law see Art. 127. CO.

[33] With the entry into force of the Law on Limitation of Claims, the provisions of the SGZ from 1844, which regulate the issue of limitation (which was regulated in that Code in accordance with the ABGB), ceased to be valid. According to Professor Zupan, the Law on Limitation of Claims surpassed the ABGB because it followed the modern discussions of German authors in the area of determining the effect of limitation (which also determines the legal nature of limitation). The rules of the Claims Limitation Act, with minor changes and certain additions, were taken over by the Law of Contract and Torts and are in force today. On the arrangement of this legal institute in Serbian law until the adoption of Law of Contract and Torts, see. N. Zupan, 326–333.

[34] Wisner believes that not taking into account the statute of limitations *ex officio* is correctly prescribed because the statute of limitations is not one of the regular forms of the occurrence of obligations, as is the case with fulfilment, impossibility of fulfilment, compensation, etc. This is actually an exceptional case that is not treated as the termination of an existing claim, but as the loss of the possibility of its realization through the court. In addition, according to Wisner, if the court were to do the opposite (if it

Serbian law, upon the occurrence of prescription, the creditor loses the right to legal remedy, while their right to the claim still exists, but is no longer enforceable through court action.

In common law systems, the functional equivalent of prescription of claims is the institute known as "*limitation of actions*."[35] The word implies that creditor's entitlement to judicial protection ends when the limitation period expires.[36] This indicates that limitation of actions are regarded as a procedural law institute. Accordingly, English courts *ex officio* consider whether a right to action has been time-barred, and if so, the action is not permitted. Upon the occurrence of limitation of actions, the creditor loses not just the right to judicial protection but the right itself.[37]

3.2. Circumstances Defining Prescription of Claims as an Institute of Substantive or Procedural Law and the Legal Significance of That Distinction

In Roman law until the 19th century, it was believed that "negative *praescription*" only prevented the right to legal recourse (the right to sue), without affecting the primary right of the creditor.[38] This understanding was significantly influenced by the works of Windscheid, who pointed out that Roman law did not make a strict distinction between procedural and substantive law; this conclusion was drawn based on the fact that in the earliest phase of Roman procedural law, the formal litigation process was referred to as "*legis actiones*". He argued that the term "*actio*" did not refer to a specific moment marking the creation of the right to take legal action, distinct from the creditor's right to a specific action. Instead, it emphasized that the right to legal recourse was

were to take into account the statute of limitations *ex officio*) it is possible that it would be against the will of the debtor if he wants to fulfil the obligation. B. Wisner, 1294.

[35] In English law, the statute of limitations first arose in connection with the acquisition of rights to immovable property due to the passage of time, and it is considered that this right was established by court precedents already in the 12th or 13th century. Opala, 113. Subsequently, the statute of limitations began to be applied to the statute of limitations of claims, which was formally regulated by the Statute of Limitations from 1623.

[36] R. Zimmermann, 70.

[37] On the institute of limitation of claims in English and American law and other Anglo-Saxon laws see. The Harvard Law Review Association, "Developments in the Law: Statutes of Limitations", *Harvard Law Review* 7/1950, 1179–1181; M. Opala, 1971, 107 et seq.

[38] R. Zimmermann, 70.

inseparably linked to substantive law itself . [...] Today, it is commonplace in Roman law to speak of the cessation of the right to sue rather than the cessation of the right to claim. However, this merely reproduces the terminology used by the Romans without fully capturing the essence of the concept or expression. In other words, the term "*actio*" in Roman law encompassed both the procedural activity of the plaintiff and their right to succeed in litigation.[39] It was due to the principles of pandect law that the Roman lawsuit ("*actio*") acquires the character of a procedural means used to protect subjective rights, granting the holder of such rights the authority to demand specific actions from the obligor under the threat of coercion, known as "Ansrpuch".[40]

Specifically, when discussing a lawsuit as the means to initiate litigation procedure, a distinction is made between the right to lawsuit and the right authorize to enforce a specific subjective right coercively in favor of the plaintiff. The right to lawsuit encompasses the authorization of a citizen towards the state in the sense that the lawsuit is directed towards the court as a state organ, seeking legal protection for the citizen's endangered or violated civil right or legal authorization.[41] On this basis, a lawsuit as a procedural act is designated as a formal lawsuit. In contrast, the right authorize to enforce a specific subjective right coercively in favor of the plaintiff represents a lawsuit in a substantive sense.[42] A lawsuit in a substantive sense typically seeks

[39] B. Windscheid, *Lehrbuch des Pandektenrechts* (2nd ed, Verlagshandlung von Julius Buddeus, Düsseldorf, 1867), 273, cited in D. Huser, "Determining the Relevant Limitation Period for International Sales Contracts before International Arbitral Tribunals", *ASA Bulletin* 4/2015, 828. On those grounds, an understanding of the material nature of the statute of limitations developed among German authors, according to which the statute of limitations affects only the "substantive legal claim", i.e. the "enforceability" of the claim, and not the right to file a lawsuit arising from J. Brozović, "Mogućnost podnošenje tužbe na utvrđenje zastare u domaćem i poredbenom pravu", *Zbornik Pravnog fakulteta u Zagrebu* 5/2016, 696.

[40] R. Kovačević Kuštrimović, 129.

[41] M. Živković, "O tužbi u parnici", *Pravni život* 11/71, cited according to: V. Dabetić Trogrlić, M. Tomić, *Pravna dijagnoza*, Beograd 2020, 120–121. In connection with this, it is necessary to bear in mind that as long as the debtor's obligation has not reached fulfillment, but also as long as he has not violated the creditor's right to that action, the creditor does not have a compelling claim for the performance of the action (he has no right to sue), although he has the right to the action. Sight N. Gavella, "O odnosu materijalnog i procesnog građanskog prava u parnicama - pogled sa stajališta privatnog (građanskog) prava", *Zbornik Pravnog fakulteta u Zagrebu* 3-4/2013, 549.

[42] B. Vizner, 1284; The public authority is obliged to respect the subjective rights of

protection for a subjective civil right that the norms of objective civil law recognize for an individual in a specific civil law relationship.[43] Conversely, if there is no right, then there is no legal protection.[44]

Lawsuit in the formal sense does not become statute-limitation and can be filed even after the claim has become statute-barred (a lawsuit as a civil action is always allowed). However, the lawsuit in the material sense, i.e. the legally recognized right of the creditor from the obligation relationship (his authority to enforce that subjective right) may expire,[45] but without affecting the right itself (for example, the right to claim) because it does not cease, nor can it cease due to prescription.[46] However, with the onset of the statute of limitations, the right of claim loses its enforceability and becomes a natural obligation.[47] However, the debtor of the time-barred claim receives nothing in the substantive sense; he only gets the opportunity to protect himself from the creditor's attempt to exercise his basic substantive right in court.[48] Based on this, it is concluded that the limitation of claims is an institute of substantive law.

In contrast, the main focus in English law is not on the lawsuit or claim but on the enforcement of the claim. That this is so is also concluded on the basis of the fact that the original limitation periods in English law were not prescribed with regard to the action (*actio*), but referred to the "*writ*", that is, the written

all persons as well as to facilitate their realization in society, and precisely for this reason judicial mechanisms have been established in legally regulated societies to ensure the protection of subjective rights in accordance with the norms of substantive law. N. Gavella, 540.

[43] V. Dabetić Trogrlić, M. Tomić, 121; B. Vizner, 1284.

[44] Based on these considerations, the term "limitation of claims" is used in the civil codes of the 19th century instead of "limitation of claims", which also contributed to determining the limitation of claims as an institute of substantive law. D. Husser, 828.

[45] Exceptionally, on the basis of explicit legal regulation, the right to maintenance determined by law does not expire (Art. 373, paragraph 3, Law of Contract and Torts).

[46] See in detail B. Wiesner, 1284–1285. See also: N. Gavella, 541.

[47] Even in 1856, Windscheid (Windscheid) most consistently implemented the distinction from the Roman actio, and in Roman law there was a system of lawsuits and ..."from every lawsuit that the praetor allowed, the plaintiff's right arose; today's law consists of a system of rights and their legal protection (substantive legal) requirements, while their procedural realization is a completely separate issue." F. Stanković, *Zastara potraživanja*, Zagreb 1969, 7–8, cited according to N. Zupan, 328–329.

[48] N. Zupan, 328. If the debtor fulfills an outdated claim, he does not have the right to demand from the creditor that he return what he received from him in the name of fulfilling the obligation, because the right to claim has not ended.

order of the king to the sheriff or other magistrate to take certain actions, as a rule, to implement a court decision or a decision of another competent authority.[49] Consequently, even in modern English law, statutes of limitations refer to the right to sue (*actio*), and not to the claim, cause of action. This is also confirmed by Article 1, Paragraph 1. of the Limitation Act of 1980, which expressly states that the Law determines the time limits for filing a lawsuit.[50] Accordingly, the statute of limitations in English law is an institute of procedural law.

This point of view was not questioned in English law until 1984, when a special law came into force regulating the issue of limitation of claims in cases where a foreign element is present.[51] The need to adopt special rules for limitation periods in those cases was evident due to the fact that in a large number of legal systems the limitation of claims is considered a matter of substantive law, and the English courts did not at all take into account the possibility of applying foreign law to the issue of limitation of claims.[52] This was not questioned even in cases in which the parties agreed that the contract was governed by some foreign law (which would also include the question of limitation of claims), given that it is a question of procedural law under English law, and the courts on procedural questions, as a rule, apply their own law (*lex fori*).

3.3. The Practical Significance of Distinguishing the Legal Nature of Prescription

The extent to which the difference in the legal nature of the statute of limitations affects the final resolution of the disputed legal issue is adequately illustrated by the example of the settlement of the dispute due to the violation of the contract on the international sale of goods, in a situation where a claim for damages was filed in an English court (assuming that the English court declared itself internationally competent in that subject). The English

[49] K. Zweigert, H. Katz, *Einfuihrung in die Rechtsvergleichung,* 3rd ed, J.C.B. Mohr, Tibingen, 1996, 183, cited according to: D. Huser, 829.

[50] Art. 1. para. 1. Limitation Act reads: "*This Part of this Act gives the ordinary time limits for bringing actions of the various classes mentioned in the following provisions of this Part*." And in English law, a lawsuit is distinguished as a civil action by which a civil proceeding (*actio*) is initiated from a claim (*cause of action*).

[51] The Foreign Limitation Periods Act came into force on May 24, 1984. The revised text of this regulation is available at: https://www.legislation.gov.uk/ukpga/1984/16, last visited 14. 6. 2024.

[52] B. Markesinis, H. Unberath, A. C. Johnston, *The German Law of Contract - A Comparative Treatise*, Bloomsbury Academic, 2006, 488.

court, as part of the examination of the existence of procedural assumptions for conducting the dispute, will *ex officio* examine whether the lawsuit is time-barred, it goes without saying, applying the rules of its own (procedural) law.[53] When it determines that the lawsuit is time-barred, the court will not even discuss the claim because the statute of limitations is a procedural obstacle to the initiation of court proceedings. In the event that the contracting parties have expressed their will that their contract is governed by, for example, French law (or another law according to which statute of limitations is an institute of substantive law) the court will not even consider this because under English law (as the law of the court) that contractual disposition of the parties is not valid in relation to the issue of limitation of claims. In other words, the court will ignore the will of the contracting parties to determine the applicable law for their contractual relationship, which is their right, which even the English courts do not question, except when it comes to procedural issues for which English procedural law is exclusively applicable. However, even in that situation (the court does not apply the chosen applicable law) the problem will not arise if the statutes of limitation for a given issue are the same in English and French law; the problem arises only when these terms differ from each other. So, for example, if under French law the statute of limitations is longer than under English law, then the plaintiff will not have the opportunity to realize his right in court proceedings (despite the fact that the application of French law is contracted).[54] However, if the same dispute were to be resolved in a French court and, assuming that court found that the contract was governed by English law, the French court would not even be able to rule on the statute of limitations because it has no statute of limitations to apply. This is because even the French court does not apply foreign procedural law in court proceedings, and the question of limitation of claims is in English law a question that is resolved by procedural law.[55]

Professor Briggs confirms that the position of the English courts was complicated in cases where the court found that the statute of limitations had

[53] Courts always apply the rules of their own procedural law (*lex fori*), given that the rules on court proceedings are part of public law, and the legal norms that regulate court proceedings are, as a rule, of an imperative nature and their application cannot be ruled out.

[54] The example is inspired by the example in: K. Sono, "Unification of Limitation Period In the International Sale of Goods", *Louisiana Law Review* 5/1975, 1128.

[55] This legal gap can be a source of legal uncertainty if the defendant objects that the plaintiff's claim is time-barred because the issue would then be decided on a case-by-case basis. *Ibidem*.

expired (the court determines the statute of limitations *ex officio*), because in that case it is not even possible to initiate court proceedings. In order to preserve their reputation and influence in the resolution of international trade disputes, before whose courts a huge number of disputes in the field of international trade are traditionally resolved,[56] English courts have developed the practice of cumulatively applying English and foreign applicable law in such situations, in order to finally decide the question of the (non)applicability of the statute of limitations according to the law that establishes a shorter statute of limitations.[57] A further step in the solution of this issue was made in 1984 with the adoption of a special law regulating the application of the rules of foreign law regarding the limitation of claims (the law is applied in England and Wales).[58] The purpose of that regulation is to enable the English courts to, in cases in which, on the basis of domestic, that is, English conflict of law rules, determine that foreign law is applicable for resolving the disputed issue, to the question of limitation of claims, the provisions of that foreign law should be applied (instead of the rules of the Statute of Limitations from in 1980).[59] In this way, English law has accepted that, in cases of claims for damages in which a foreign element is present, the statute of limitations is a part of substantive and not procedural law.[60]

The need for a solution to this issue through an international instrument has long been recognized and in 1974 the Convention on the Limitation

[56] The English courts acquired that position over time thanks to the fact that England has always been, if not the first, then certainly among the first trading powers in the world, and it holds that position constantly to this day. The ranking of the 25 largest trading powers in the world in the period from 1978-2020 is available at: https://unctad.org/topic/trade-analysis/chart-10-may-2021, last visited 23. 6. 2024.

[57] A. Briggs, *The Confllict of Laws*, Oxford University Press 2002, 38.

[58] Foreign Limitation Periods Act. The revised text of the law is available at https://www.legislation.gov.uk/ukpga/1984/16, last visited 23. 6. 2024.

[59] In this way, the law enables the courts to recognize the right of the contracting parties to choose the applicable law for their contractual relationship if that choice is valid (and it is valid if under English law, as *lex fori*, the contracting parties have the right to choose the applicable law) and that right is applied and not a solution to the question of limitation of claims. Exceptionally, a foreign law does not apply if it would be contrary to the rules of that law on the limitations of its application to the actions of the armed forces abroad as well as the limitation periods in certain cases (as governed by the Overseas Operations (Service Personnel and Veterans) Act 2021). *Overseas Operations* (*Service Personnel and Veterans*) Act.

[60] Freedom of contract is very important for contractual relations in general, and for commercial contracts in particular, and if it is not respected then it could negatively affect the development of international trade exchange.

of Claims in the Field of International Sales of Goods was adopted.[61] Article 24 of the Convention stipulates that the court shall pay attention to the statute of limitations of claims exclusively upon the objection of the party in dispute,[62] which is more in line with the concept of limitation as a matter of substantive law.[63] However, with only 30 signatories (not including England), the Convention failed to live up to expectations.

The issue of conflict of laws regarding the limitation of claims is successfully resolved in EU law by the regulations known as Rome I[64] and Rome II.[65] According to Art. 12 paragraph 1st point. d) of the Rome I Regulation, it is expressly prescribed that the applicable law for the contract regulates the issue of limitation, and according to Art. 15th paragraph 1. point. h) Rome II Regulation also stipulates that the law applicable to non-contractual relations regulates the question of limitation of obligations, including the rules related to the beginning, termination and suspension of the limitation period

4. Conclusion

The creditor who fails to timely initiate judicial proceedings to enforce a claim that the debtor has not voluntarily fulfilled may be barred forever from realizing that right due to the expiration of the limitation period. Although it is one of the oldest legal institutes regulated by all modern legal systems, rules

[61] Convention on the Statute of Limitations of Claims from Contracts for the International Sale of Goods, *Official Gazette of the SFRY* - International Contracts, no. 5/78 (hereinafter: Convention). This convention was adopted on June 13, 1974, and entered into force in 1988, and so far there are 30 signatory states (in which it is applied) which is information available at https://uncitral.un.org/en/texts/salegoods/conventions/limitation_period_international_sale_of_goods/status, last visited 23. 6. 2024.

[62] However, due to the sensitivity of this issue, the possibility is allowed for the signatory states to place a reservation on the application of this article, which is a concession to countries where statute of limitations has a procedural nature.

[63] However, Art. 36. enables reservation on the application of the rules of Art. 24 of the Convention.

[64] Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at: https://eur-lex.europa.eu/legal-content/HR/TXT/ ?uri=CELEX:32008R0593, last visited 25. 6. 2024.

[65] Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), available at: https://eur-lex.europa.eu/legal-content/HR/ TXT/?uri=CELEX%3A32007R0864, last visited 25. 6. 2024.

regarding limitation periods for certain claims, as well as the legal nature of prescription, vary in comparative law. This fact constitutes a source of legal uncertainty in cases involving a foreign element to the extent that it necessitates the application of rules of private international law.

Rules of international private law are inherently complex to apply, and when it comes to the institute of prescription of claims, it is even more challenging due to the complexity of this legal institute, which is governed by norms that are both substantive and procedural in nature. Specifically, the right to claim that the plaintiff refers to in the lawsuit originates from some substantive law and is regulated by legal rules that are material by legal nature, while the right to lawsuit (legal remedy) for the realization of that claim rests on the legal rules of procedural law. The right of claim and the right to a legal remedy are inseparably linked because without a right, there is practically no legal remedy; that is, a right without a legal remedy effectively does not exist.[66] Nevertheless, there exists a boundary between procedural and substantive rules, although it is fluid and has not been entirely clear for a long time.[67] In the 20th century, this question attracted significant attention of authors and it contributed to the definitive demarcation between Anglo-Saxon and continental laws in connection with the legal nature of statute of limitations.[68]

The differences in the legal nature of prescription (statute of limitations) have been a cause of legal uncertainty, and resolving this issue has required reaching certain compromises. Based on current solutions in comparative law, it is concluded that the compromise has been achieved on the basis of understanding the substantive nature of prescription. Arguments justifying this approach are that it is fair to leave the question of the admissibility of legal remedies for enforcing a particular claim to the law under which the claim arose.[69] This also prevents the formation of negative practices such as forum shopping,[70] where creditors might have an interest in initiating proceedings before a court applying rules that are more favorable to them, and these are the rules whose limitation period is longer than the limitation period determined by the applicable material law.

[66] R. Leflar *American Conflicts Law*, Indianapolis 1986, 304, D. Huser, 827, fn. 11; C. Chamberlayne, *A treatise on the modern law of evidence*, London 1919, para. 171, citated according to D. Huser, 829.

[67] C. Chamberlayne, *Ibidem*.

[68] D. Huser, 827–828.

[69] Cheshire & North's, *Private International Law*, 13th, edn, 1999, 73, citated according to B. Markesinis, H. Unberath, A. C. Johnston, 489.

[70] *Ibidem*.

* * *

PRAKTIČNI ZNAČAJ PRAVNE PRIRODE ZASTARELOSTI POTRAŽIVANJA SA OSVRTOM NA PITANJE POTRAŽIVANJA NAKNADE ŠTETE

Apstrakt

Predmet ovog rada je pravni institut zastarelosti potraživanja, koji je nastao još u rimskom pravu, a razvio se i u engleskom pravu u periodu između XII i XIII veka, na istim osnovama, razlozima i potrebama kao u rimskom pravu. Primenom istorijskopravnog, uporednopravnog i dogmatskopravnog metoda istraživanja se sveobuhvatno analizira pitanje pravne prirode zastarelosti, koja se u kontinentalnim pravima shvata kao institut materijalnog prava, dok je u anglosaksonskim pravima to institut procesnog prava. Ovo teorijsko razlikovanje ima veliki praktični značaj u predmetima u kojima je prisutan strani element zato što od merodavnog prava zavisi da li je poveriočevo potraživanje zastarelo, u kom slučaju on praktično neće moći da ga realizuje. U radu se konstatuje da razlikovanje pravne prirode zastarelosti u praksi stvara pravnu nesigurnost, zbog čega se analiziraju uzroci takvog stanja i ispituje se da li je i u kojoj meri to opravdano. U zaključku se konstatuje da je to više odraz podele pravnih normi na materijalne i procesne a ne suštinskih razlika u pravnoj prirodi zastarelosti između anglosaksonskih i kontinentalnih prava.

Ključne reči: vreme kao pravna činjenica, zastarelost kao institut materijalnog prava, zastarelost kao institut procesnog prava, pravna nesigurnost, merodavno pravo.

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